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DAMAGES IN LIEU OF AN INJUNCTION IN NEW ZEALAND: CLOSING YOUR EARS TO THE PUBLIC INTEREST?

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Abstract:

An award of damages in lieu of an injunction can have vast and far-reaching consequences. It can undermine legal rights by permitting an offensive activity.. On the other hand, that activity may benefit society through employment or public utility, and awarding damages in lieu would allow society to be better off than if an injunction was awarded.

For over a century, the court's discretion to award damages in lieu was restricted in *Shelfer v City of London Electric*. The UK Supreme Court in *Lawrence v Fen Tigers* did away with the restrictions around the discretion, opening up the area to an endless range of considerations. This essay examines the position of damages in lieu in New Zealand. A range of different jurisdictions are examined, leading to the conclusion that New Zealand will adopt that law shift in *Fen Tigers*. A range of non-exclusive considerations are formulated. Finally, the quantum of a damages in lieu award is examined with reference to 'wrongful use' damages.

Key words:

Remedy, Injunction, Damages in Lieu of an Injunction, Nuisance, Court Discretion.

Contents

I Introduction

In Civil Remedies in New Zealand, Sir Peter Blanchard observed:[1]

> How many times is a case won on liability but lost on remedy because a legal advisor has given no or inadequate thought to where the finding of liability might lead? Unfortunately, all too often.

Before the UK Supreme Court case of *Lawrence v Fen Tigers*, damages in lieu of an injunction were only awarded under strict circumstances, and mostly seen as an afterthought. [2] This was even though an injunction may have far-reaching consequences, both on individuals and the community at large. The fact that an activity contributed to the community was perceived as irrelevant, potentially leaving society as a whole worse off after an injunction was awarded.

The UK Supreme Court ushered in a new approach that takes account of all considerations. However, it is yet to be seen what approach the New Zealand courts will take. This essay examines the law in New Zealand and abroad. It argues that New Zealand will follow the UK Supreme Court, and proposes a framework that should be used to inform the decision that a court will make on whether to grant damages in lieu. Finally, the potential quantum of a damages in lieu award is discussed.

II Damages in lieu of an injunction

As noted by Blanchard above, the remedy can be just as important as liability itself. There is a range of remedies available to the plaintiff. A court may issue an injunction to stop a continuing wrong, or award damages in lieu to compensate for a future wrong occurring.[3]

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[1] Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2011).

[2] *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] AC 822, [2014] 2 WLR 433. Formerly referred to as *Coventry v Lawrence*.

[3] Judicature Act 1908, s 16A.

Legal damages under tort aim to put a person in the same position as if the wrong had not occurred.[4] An injunction aims to prevent future wrongs. By awarding damages in lieu of the injunction, the High Court compensates the plaintiff for future harm. This is fundamentally different to legal damages. As such, these damages are categorised as 'equitable damages'. Equitable damages are awarded in certain circumstances where legal damages are inappropriate or inadequate. These damages do not follow the same formulaic approach of legal damages. Damages in lieu is one of the main areas where equitable damages are awarded.[5]

The basic structure of awarding damages in lieu of an injunction under s 16A of the Judicature Act 1908[6] is stated in *Cockburn v CS Development*.[7] Although the considerations around awarding damages in lieu and damages in lieu of specific performance are fundamentally different, the exercise of discretion follows a uniform process. Section 16A requires:[8]

1) Jurisdiction to obtain specific performance or an injunction; and
2) As the award is discretionary, the court must decide whether the case is appropriate for damages in lieu.

The main question around awarding damages in lieu revolves around the courts' discretion.

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[4] Geoff McLay & David Neild "Torts" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2011) at 91.

[5] ICF Spry *The Principles of Equitable Remedies* (9th ed, Lawbook Co, Sydney, 2014), at 650.

[6] The Judicature Modernisation Bill 2013 (178-2) is awaiting its third reading at the time of writing. If passed, it will repeal the Judicature Act 1908 and replace it with a new Senior Courts Act. Clause 12 is the equivalent provision, and although the wording is changed, there is no substantive change to the discretion. Also see *J C Williamson Ltd v Lukey* [1931] VLR 221 (HCA) for authority that a wording change does not change the discretion to award damages in lieu.

[7] *Cockburn v CS Development No 2 Ltd* [2013] NZCA 78.

[8] Adapted from [26].

III Origin of the discretion

The law around damages in lieu has a historical basis in the separation of Common Law and Equity. As Wilde noted, problems arose for those who sought compensation for past harm as well as prevention of future harm.[9] A Common Law court could compensate for past harms, but could not stop ongoing harm. The Chancery could award the equitable remedy of an injunction, but if this argument was rejected, the court could not award compensation. This led to unfair results.[10]

For this reason, the Chancery Amendment Act 1858 (known as Lord Cairns' Act) became law.[11] Section 2 allowed for damages to be given in substitution of, or in addition to, an injunction (or specific performance).[12] Procedurally, this was superfluous after the merging of the courts in 1873.[13] Lord Cairns' Act was repealed in 1883.[14] Despite the repeal, the use of the discretion continued. The existence of the discretion in law was confirmed in *Leeds Industrial Co-operative Society Ltd v Slack (Leeds)*.[15]

Ryder v Hall (*Ryder*) imported this discretion into New Zealand.[16] This was an appeal from a judgment giving nominal damages for the blocking of a waterway. The Court affirmed the discretion of the Supreme Court (now High Court) to award damages in lieu. However, it did not conclude on the method of importation of the power. Stout CJ stated that a statutory basis was unnecessary due to the fusion of law and equity,[17] while Edwards J reasoned that the authority came from the Supreme Court Act 1860 which gave equitable and common law jurisdiction to the Supreme Court.[18] Following cases have tended to quote

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[9] Mark Wilde "Nuisance Law and Damages in Lieu of an Injunction: Challenging the Orthodoxy of the *Shelfer* Criteria" in Stephen Pitel, Jason Neyers, and Erika Chamberlain (eds) *Tort Law: Challenging Orthodoxy* (Hart Publishing, Portland (OR), 2013) at 357.

[10] At 357.

[11] Chancery Amendment Act 1858 (UK) 21 & 22 Vict c 27.

[12] Section 2.

[13] Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vict c 66.

[14] Statute Law Revision and Civil Procedure Act 1883 (UK) 46 & 47 Vict c 49.

[15] [1924] AC 851 at 863.

[16] *Ryder v Hall* (1908) 27 NZLR 385 (CA).

[17] At 411.

[18] At 424.

Ryder as authority for the discretion, rather than to resolve this disagreement of origin.[19] The discretion was ultimately codified.[20]

Lord Cairns' Act granted more than just procedural powers. In *Isenberg v East India House Estate Ltd* (*Isenberg*), the Court held that Lord Cairns' Act gave a discretion to choose between remedies.[21] From that moment, the current law around the judicial discretion to award damages in lieu was formed, and the courts have grappled with how to control it.

IV Shelfer *and the discretion before* Fen Tigers

A The test from Shelfer

Before the UK Supreme Court clarified the law in *Lawrence v Fen Tigers* (*Fen Tigers*),[22] the authority around the use of the discretion (both in the United Kingdom and New Zealand) was *Shelfer v City of London Electric Lighting Company* (*Shelfer*).[23]

Electricity generators, through noise and vibrations, caused physical damage and an interference in the use and enjoyment of Shelfer's public house. The lower court found that there was a nuisance, but held that Shelfer was entitled to damages in lieu. The Court of Appeal overturned this ruling. Lindley LJ refused to accept that Lord Cairns' Act had turned the Court into a "tribunal for legalizing wrongful acts", arguing that it ought not to allow a wrong to occur simply because the wrongdoer was willing to pay for it.[24] The fact that the wrongdoer was a public benefactor was irrelevant.[25]

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[19] Geoff McLay "Equitable Damages" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2011) at 196.

[20] Judicature Act 1908, s 16A.

[21] *Isenberg v East India House Estate Co* (1863) 3 De GJ & S 263, 46 ER 637 (Ch).

[22] *Lawrence v Fen Tigers*, above n 2.

[23] *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287 (CA).

[24] At 315-316.

[25] At 316.

The most influential statement of law came from AL Smith LJ. The four step "working rule" stood as the cornerstone of the discretion for over a century. It stated that: [26]

1) If the injury to the plaintiff's legal rights is small
2) And is one which is capable of being estimated in money
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 - then damages in substitution for an injunction may be given.

Each limb of this test was to be decided upon its own facts.[27] This working rule was not intended to be exhaustive, but it came to be seen as the definitive law in some jurisdictions.

B UK Authority

The UK position forms the authority that New Zealand courts have tended to follow.[28] The first case of note is *Leeds.*[29] The plaintiff brought an action due to a threatened obstruction to ancient lights. A quia timet injunction (for an imminent threat not commenced) was sought. It was held that damages in lieu could be awarded, and the quantum was calculated with reference to the future harm to the party.[30]

Lord Denning was a major proponent of awarding damages in lieu for public utility reasons. In *Miller v Jackson* (*Miller*), a claim of nuisance was brought against a cricket club by a neighbouring family tired of cricket balls being hit into their property. [31] The property was newly developed, with the land previously being used for farming. The Court established (Lord Denning dissenting) liability under nuisance, but by a different majority (including Lord Denning), the Court held that damages should be awarded in lieu. In

[26] At 322-323.

[27] At 323.

[28] This essay is a brief summation of what is a rich history. For a more detailed historical account, see JA Jolowicz "Damages in Equity – A Study of Lord Cairns' Act" (1975) 34 CLJ 224. For a modern account, see *Lawrence v Fen Tigers*, above n 2.

[29] *Leeds Industrial Co-operative Society Ltd v Slack*, above n 15.

[30] At 859.

[31] [1977] QB 966 (CA).

particular focus was the public interest in the continuation of the cricket grounds,[32] as well as the hostility shown by the plaintiff towards the cricket club.[33]

In *Kennaway v Thompson* (*Kennaway*), the Court of Appeal rejected the idea of public interests overcoming private interests.[34] Motor boat racing had caused a nuisance to the plaintiff's property. Lawton LJ refused to apply *Miller*, and instead moved back to a pure *Shelfer* analysis.[35] The Court held that it could factor the public interest into the form of the injunction, but not whether an injunction should be awarded at all.[36]

The Court of Appeal judgment in *Allen v Gulf Oil Refining Ltd* (Allen) was a further indication of Lord Denning's view.[37]. In dealing with the finding of a nuisance, Lord Denning stated that it may be troubling to stop a beneficial enterprise, but this may be overcome by granting damages in lieu.[38]

On appeal in *Allen*, this position was not looked upon kindly. Lord Wilberforce stated that when a nuisance is established, a plaintiff is entitled to an injunction "subject only to a precarious appeal to Lord Cairns' Act".[39] This 'precarious' view of the law suggested that Lord Wilberforce viewed *Kennaway* as the correct approach.

In *Jaggard v Sawyer* (*Jaggard*), an action was brought in trespass and a restrictive covenant on the ability of the defendants to build a dwelling in an adjacent property. The claim succeeded, and attention went to remedy. [40] The Court was persuaded by *Shelfer*, but did not apply the test as stringently as other historic cases. Millett LJ noted that it was "only a working rule" and not "an exhaustive statement of the circumstances in which damages

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[32] At 982.
[33] At 989.
[34] *Kennaway v Thompson* [1981] QB 88 (CA).
[35] At 93.
[36] At 94.
[37] *Allen v Gulf Oil Refining Ltd* [1980] QB 156 (CA).
[38] At 169.
[39] *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 (HL) at 1013.
[40] *Jaggard v Sawyer* [1995] 1 WLR 269 (CA).

may be awarded instead of an injunction."[41] The remedy is discretionary, and so no case is truly binding on the court's ability to use its discretion.[42] The real test is one of oppression (the fourth element of the *Shelfer* test). Finally, it was established that the refusal of injunctive relief has the practical effect of licensing a wrong. The court has the ability to award damages "once and for all in respect of future damages."[43]

Recent (pre-*Fen Tigers*) case law in the UK higher courts has tended to follow *Shelfer* very strictly. The Queens's Bench[44] and Court of Appeal[45] judgments in *Watson v Croft Promo-Sport Ltd (Watson)* show the different perspectives of the discretion that a court may take. *Watson* concerned a motor racing circuit very close to the homes of the plaintiffs. The plaintiffs successfully claimed that the noise created by the circuit was a nuisance. In the High Court, the remedy was damages in lieu. Simon J stated that "the *Shelfer* case is not a forensic straight-jacket for what is ultimately a matter of judgment and discretion".[46] The delay, the willingness of the parties to accept damages, the overall public benefit of the racing, and the limited range of alternative venues were considered in order to conclude that an injunction would not be appropriate.[47] This type of analysis would not be out of place after *Fen Tigers*.

The Court of Appeal took a dim view of this approach, holding that, in very marginal cases, the public interest could be considered, but that it alone could not negate the oppression test that was "clearly required" in cases using this discretion.[48] This was a strict return to the *Shelfer* rule, and echoed similar recent case law.[49]

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[41] At 287.

[42] At 288.

[43] At 285-286.

[44] [2008] EWHC 759, [2008] 3 ALL ER 1171 (QB).

[45] [2009] EWCA Civ 15 (CA).

[46] *Watson v Croft Promo-Sport Ltd* (QB), above n 44, at [86].

[47] At [87]-[88].

[48] *Watson v Croft Promo-Sport Ltd* (CA), above n 45, at [51].

[49] See *Regan v Paul Properties Ltd* [2006] EWCA Civ 1391, [2007] Ch 135.

C New Zealand Authority

Ryder is authority for the proposition that the *Shelfer* test is good law in New Zealand.[50] However, as far back as 1940, New Zealand questioned the strictness of the *Shelfer* test. In *Eaton v Dalgleish,* the Court held that the *Shelfer* criteria was "not intended to be an exhaustive statement of the grounds upon which the Court may exercise its discretion".[51] The Court took into account the actions of both parties,[52] as well as the cost to the defendant, to conclude that an injunction was warranted.[53]

In *Attorney-General v Abraham and Williams Ltd*, the Court rejected an appeal for damages in lieu from a stockyard, saying that the public interest was not a ground for refusing an injunction.[54] In *Blakely and Anderson v De Lambert (De Lambert)*, the Court of Appeal attempted to distinguish *Shelfer* by saying that *Shelfer* was not applicable in the enforcement of negative covenants.[55] *Disher v Farnworth* granted damages in lieu without citing *Shelfer*.[56] The Court based its decision on the disproportionate harm in removing part of a dwelling, as well as the fact that Mrs Disher was entitled to sue only due to the mistakes of other parties.[57]

Bank of New Zealand v Greenwood (*BNZ*) is the most notable case regarding damages in lieu in New Zealand.[58] A custom-built veranda reflected light into neighbouring office buildings. With regards to public interest arguments, Hardie Boys J stated that:[59]

> 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.

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[50] *Ryder v Hall*, above n 16, at 415-416.
[51] *Eaton v Dalgleish* [1940] NZLR 702 (HC) at 718.
[52] At 718-719.
[53] At 720.
[54] *Attorney-General v Abraham and Williams* Ltd [1949] NZLR 461 (CA) at 498.
[55] *Blakely and Anderson v De Lambert* [1959] NZLR 356 (HC) at 379.
[56] *Disher v Farnworth* [1993] 3 NZLR 390 (CA).
[57] At 401.
[58] *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 (HC).
[59] At 535.

The Court also stated that the relative costs between the parties were also irrelevant: "If one creates an actionable nuisance, he must eliminate it, whatever the cost."[60] The possibility of awarding damages in lieu was rejected, rather the order of the court was for the defendants to supply blinds to the plaintiffs. This award is curious, as noted by Beever.[61] He suggested that the award was actually one of damages in lieu (despite Hardie Boys J stating otherwise) as it is a provision of money to the plaintiff, as opposed to an order to cease the nuisance. On further analysis of the judgment, by stating that "It would achieve these results at what is likely to be a much lower cost to the defendants, both in terms of money and detrimental effect", the relative costs were also taken into account. These statements leave the law from the case in a confused state.

Day v Black is evidence that recent New Zealand courts have not followed *Shelfer* as strictly as in the UK.[62] The case centred on a restrictive covenant around the building of a house. Rodney Hansen J held that the working rule in *Shelfer* was relevant but not decisive (citing *Jaggard*).[63] The 'hardship' test, formulated by *Spry on Equitable Remedies,* was to be the overriding principle.[64] This test is that:[65]

> … only when the hardship caused to the defendant through specific enforcement would so far outweigh the hardship caused to the plaintiff if specific enforcement were denied that it would be unjust in all the circumstances to do more than to award damages.

It should be observed that Spry is very critical of the *Shelfer* rule, and this test was formulated on the premise that *Shelfer* is not good law.

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[60] At 534.

[61] Alan Beever *The Law of Private Nuisance* (Hart Publishing, Portland (OR), 2013) at 151.

[62] *Day v Black* (2004) 6 NZCPR 169 (HC).

[63] At [33]-[34].

[64] At [34].

[65] Spry, above n 5, at 665.

The Employment Court[66] and the Māori Appellate Court[67] have cited *Shelfer* as good authority, though neither used the four step test as truly decisive.

To summarise, the New Zealand courts, much like the UK courts, have considered the rule in *Shelfer* to be very persuasive. However, New Zealand courts have also been more likely to use it as a working rule, rather than a strict rule.

V Lawrence v Fen Tigers

A Facts

Fen Tigers[68] is one of the most influential nuisance cases since the turn of the century. The facts are similar to both *Kennaway*[69] and *Watson*[70]. The defendants had been using the land for motorsport since the 1970s, when planning permission for the stadium was granted. In 2006, the plaintiffs bought and inhabited nearby housing. Immediately, they took action against the noise, first by a complaint to the council, followed by an action in private nuisance.

B The Shelfer *Test and the Legal Burden*

Fen Tigers represented a clear shift in the place of the *Shelfer* criteria in UK law. Lord Neuberger summarised the shift by stating:[71]

> The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered … as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good.

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[66] *Cox v Pae* EmpC Wellington WEC13/97, 26 March 1997 at 25-26.

[67] *Te Hokowhitu v Proprietors of Matauri X - Matauri X* (2010) 2010 Maori Appellate Court MB 566.

[68] *Lawrence v Fen Tigers*, above n 2.

[69] *Kennaway v Thompson*, above n 34.

[70] *Watson v Promo-sport Ltd*, above n 44 and n 45.

[71] *Lawrence v Fen Tigers*, above n 2, at [120].

Any mechanical application of the four-step test is to be rejected.[72] While technically the test remains law, three caveats undermine its significance:[73]

> First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted.

The legal burden, according to Lord Neuberger, remains with the defendant to show that damages should be awarded in lieu. The prima facie position in the law is an injunction.[74]

According to these caveats, the *Shelfer* criteria should be applied at the initial stages of the remedy question. If the *Shelfer* test is not satisfied, the legal burden remains on the defendant to prove that damages in lieu would be more suitable. If the *Shelfer* test is fulfilled, an evidentiary burden shifts. The plaintiff must raise additional relevant circumstances that suggest an injunction is more suitable. This is not to fetter the court's discretion, as the court may depart from this if the circumstances require it.

Lord Sumption went further in reforming the area, by saying that "damages are ordinarily an adequate remedy" and that there should be a presumption against an injunction where conflicted interests are engaged.[75] This reflects the need for damages to be treated as an acceptable remedy, but it goes too far. By the time a remedy is discussed, a right has been breached (through the establishment of liability), so an injunction should be given unless it can be shown that damages would be more beneficial to society as a whole. The majority disagreed with Lord Sumption's proposition.[76]

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[72] At [119].
[73] At [123].
[74] At [121].
[75] At [161].
[76] For example, see Lord Mance at [168].

C Public Interest

The public interest has always been a debatable consideration in damages in lieu, as well as the law of nuisance more generally. The position taken by the Supreme Court is ground-breaking, but not completely innovative. Already mentioned are the cases of *Miller*, *Kennaway*, and *Watson* which all take opposing views.

Dennis v Ministry of Defence (*Dennis*) is an example where the Court took into account the public interest in making a decision.[77] The noise from RAF jets created a nuisance for the neighbours. When it came to award, the Court took into account arguments around the 'defence of the realm'. It concluded that:[78]

> … where there is a real public interest in a particular use of land, I can see no objection in principle to taking that public interest into account, in one way or another, in deciding what is best to be done.

An analogy was drawn with the defence of statutory authority, which was also seen to consider the public interest.[79] Beever has been critical of this view: the basis of statutory authority was the statute itself rather than the public interest attached to it.[80]

Fen Tigers sided with *Miller*, *Dennis* and *Watson* (QB) to say that public interest considerations are relevant to remedy. Lord Neuberger cast the net of possible public interest wide, saying:[81]

> … of public interest, I find it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor.

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[77] *Dennis v Ministry of Defence* [2003] EWHC 793, [2003] Env LR 34 (QB).

[78] At [45].

[79] At [45].

[80] Beever, above n 61, at 149.

[81] *Lawrence v Fen Tigers*, above n 2, at [124].

The loss of the employees' livelihoods, as well as the number of neighbours affected by the nuisance, were given as examples of relevant factors. Lord Neuberger criticised the Court of Appeal in *Watson* for its view on the public interest. In principle, it was "very strange" to relegate the public interest to marginal cases, as it should either be relevant or not relevant at all.[82]

The rest of the Court agreed with this result, bar two differences of opinion. Lord Mance hesitated on the idea of the public interest outweighing the private (and that compensation would be an adequate remedy) as "the right to enjoy one's home without disturbance is one … people value for reasons largely if not entirely independent of money." Lord Sumption criticised the "unduly moralistic approach to disputes".[83] By moving the legal burden of proof, Lord Sumption would allow a greater scope of public interest arguments.

On the whole, Lord Neuberger's approach is the most persuasive. Lord Mance raised a valuable point around the right of enjoyment, but this is unlikely to be forgotten in a jurisdiction that, for over a century, regarded this consideration as close to determinative. Lord Sumption went too far when putting the public interest ahead of the private. Lord Neuberger's approach allows for a practical assessment of all the circumstances around a case, without favouring one true approach. This is appropriate for a jurisdiction which will face an unlimited variety of circumstances.

D Planning Permission

Planning permission and nuisance law occupy a similar position in the law, both in New Zealand and abroad. Both regulate the rights of parties compared to those in the community. However, the overlap between the two has caused problems. It is an anomaly in the law that a party has to go through the regulatory process of approving an activity, and yet still be beholden to nuisance law. For a layperson, it is a confusing situation, and for a person versed in resource management law, it is not much clearer.

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[82] At [118].

[83] At [160].

Although this essay focuses on remedy, it is important to note the movement of the law in terms of liability.[84] In summary, planning permission is not a defence to an allegation of nuisance (unless it amounts to statutory authority) but it may be evidence as to what is reasonable in the area,[85] or, in exceptional cases, it can lead to changing the character of the neighbourhood.[86]

Planning permission plays a more definitive role in the remedy. As quoted by Lord Carnwath: "The continued strength of private nuisance in a regulatory state probably depends on a more flexible approach to remedies".[87] As noted by Howarth, the Law Lords were influenced by the 'hole' in planning law, where private rights could be breached without compensation.[88]

The majority in *Fen Tigers* was persuaded by the usefulness of planning permission in cases of nuisance, but not to the point that they were determinative. An award of planning permission "may provide strong support for the contention that the activity is of benefit to the public".[89] The view of the majority suggested a spectrum of planning permissions. Where the public benefits have been reasonably considered, and the probability of nuisance is clearly identified, the planning permission will have "real force" in persuading the court.[90] When the permission either does not consider the nuisance, or does not reasonably judge the public benefit, it will not be persuasive. However, even the most persuasive planning permissions will only be one of many considerations.[91]

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[84] For more information, see Maria Lee "Private Nuisance in the Supreme Court: *Coventry v Lawrence*" [2014] JPL 705. For a New Zealand perspective, see Quentin Davies and David Neild "Nuisance and resource management" [2014] NZLJ 250.

[85] *Lawrence v Fen Tigers*, above n 2, at [96].

[86] At [223].

[87] At [240].

[88] David Howarth "Noise and Nuisance" [2014] CLJ 247 at 249.

[89] *Lawrence v Fen Tigers*, above n 2, at [125].

[90] At [125].

[91] At [125].

Lord Sumption, on the other hand, saw the award of planning permission as determinative. Under this view, public interest evaluations should be left to planning bodies.[92] As a matter of principle, an injunction should not be granted in cases where planning permission has contemplated the use of land that is being challenged.[93] This approach is seemingly based on the concern around the overlapping jurisdictions. Lord Carnwath rejected this approach, saying that planning permissions "differ so much as to make it unwise as to lay down any general propositions."[94]

VI Other Considerations

A The Canadian Approach

The Canadian courts, formerly willing to show flexibility in awarding damages in lieu, have moved towards an approach based on *Shelfer*.

In *Black v Canadian Copper Co*, the Court sided with a factory over farmers, pointing to the position of importance of the factory in the city, and stating "there are circumstances in which it is impossible for the individual to assert his individual rights as to inflict a substantial injury upon the whole community."[95] However, in *Canadian Paper Company v Brown*, a case with similar considerations, the Supreme Court put greater emphasis on the private rights of the plaintiff, and it was held that the benefit to the community could not subsume the plaintiff's rights.[96] The Court was split as to whether public interest considerations should be taken into account at all.[97]

In *Duchman v Oakland Dairy Co* (*Duchman*), the *Shelfer* rule was "unhesitatingly followed" by the majority.[98] It held that the Canadian courts were not "more free", but

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[92] At [158].

[93] At [161].

[94] At [246].

[95] *Black v Canadian Copper Co* (1917) 12 OWN 243 (SC).

[96] *Canadian Paper Company v Brown* (1922) 63 SCR 248.

[97] At [15]-[19], Idington J rejected any idea that the plaintiff's rights may be bought due to public interest concerns. At [36], Duff J rejected the argument that public interest considerations are irrelevant.

[98] *Duchman v Oakland Dairy Co* [1929] 1 DLR 9 (ONCA), as per Middleton JA.

rather had the same strict principles as the UK courts.[99] This was not followed in *Bottom v Ontario Leaf Tobacco,* where the 200 jobs that would be lost with the granting of an injunction were said to outweigh the harm caused to the plaintiff. [100] The ultimate test was to balance the advantages and disadvantages of an injunction,[101] an approach consistent with modern principles.

Walker v Pioneer Construction Co resolved this conflict in the case law.[102] *Duchman* was cited as the defining authority in the area,[103] and other public interest cases mentioned were narrowed as exceptional cases of "widespread public hardship".[104] The *Shelfer* test was strictly applied.[105] Recent cases have cited this as authority.[106] Leading Canadian texts still refer to *Shelfer* as the guiding authority.[107]

B United States Authority

The United States has taken a much wider view of awarding damages in lieu. In the Second Restatement of Torts, at § 936, a range of factors are considered in the appropriateness of awarding an injunction:[108]

> (a) the nature of the interest to be protected,
> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
> (c) any unreasonable delay by the plaintiff in bringing suit,
> (d) any related misconduct on the part of the plaintiff,
> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,

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[99] As per Middleton JA.

[100] *Bottom v Ontario Leaf Tobacco* [1935] OR 205 (CA).

[101] At [15].

[102] *Walker v Pioneer Construction Co* (1975) 8 OR (2d) 35 (SC).

[103] At [50].

[104] At [51].

[105] At [52].

[106] Such as *Balmain Hotel Group LP v 1547648 Ontario Ltd* (2009) 60 MPLR (4th) 262 (SC).

[107] See Lewis Klar *Tort Law* (4th ed, Thompson Carswell, Toronto, 2008); Allen Linden and Bruce Feldthusen *Canadian Tort Law* (8th ed, Canada, 2006).

[108] American Law Institute *Restatement of The Law - Torts* (2nd ed, Philadelphia, Pennsylvania, 1979) § 936.

(f) the interests of third persons and of the public, and

(g) the practicability of framing and enforcing the order or judgment.

This is often framed as a utility versus gravity of harm balance.[109] The approach is most commonly explained with reference to *Boomer v Atlantic Cement Company* (*Boomer*).[110] *Boomer* involved a factory that polluted a nearby residence, but had cost $45 million to create, and also employed more than 300 people. The Court held that the utility of the jobs and the harm to the defendant by granting an injunction far outweighed the harm to the plaintiff. The public interest has also been considered in sewage systems,[111] generic drugs,[112] sporting contracts,[113] and water use,[114] showing that there is no limit to the consideration of the public interest in this jurisdiction.

This is a rich body of law with many different considerations, mostly consistent with the position of the law after *Fen Tigers*. It should be observed that, while Commonwealth jurisdictions tend to favour awarding an injunction more than the United States, the US jurisdiction is still persuasive, due to the range of circumstances it has analysed.

C Law and Economics

The idea of damages in lieu of an injunction is a mainstay in the field of law and economics. The idea of a stereotypical nuisance (polluter and resident) has been the subject of many experiments in the area.[115]

The foundational paper in this analysis is "The Problem of Social Cost" by Ronald Coase.[116] It suggested that, in cases of externalities (such as nuisance), the allocation of property does not matter as bargaining will lead to an efficient outcome. The party who

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[109] *Rebel v Big Tarkio Drainage Dist* 602 SW 2d 787 (MO 1980).

[110] 257 NE 2d 870 (1970).

[111] *Krebiozen Research Fdn v Beacon Press Inc* 334 Mass 86, 134 NE 2d 1 (1956).

[112] *Pennwalt Corp v Zenith Labs Inc* 472 FSupp 413 (ED Mich 1979).

[113] *Cincinnati Bengals Inc v Bergey* 453 FSupp 129 (SD Ohio 1974).

[114] *Wasserburger v Coffee* 180 Neb 149, 141 NW 2d 738 (1966).

[115] See Robert Cooter and Thomas Ulen *Law & Economics* (5th ed, Pearson Education, Boston, MA, 2008).

[116] RH Coase "The Problem of Social Cost" (1960) 3 JLE 1.

values the rights the most will pay the most to secure them, and so rights will be transferred until there is no one more willing than the owner to possess those rights. This is widely known as the "Coase theorem". This assumes no transaction costs (the costs of bargaining), which in reality can be very high in cases involving potential nuisances. Coase noted this, and suggested that a different property right allocation system should be used to combat the high transaction costs of an injunction.[117] This is often cited in support of a wider ability to award damages in lieu.[118]

This theorem was built upon by Calabresi and Melamed, where a polluter/resident model was used to create four 'rules' around the remedies to a nuisance:[119]

1) An award of an injunction
2) An award where damages are awarded in lieu of an injunction
3) The pollution is not a nuisance
4) The pollution may continue unless the resident pays damages

These are awarded according to the levels of transaction costs, and the party who can reduce the cost the most efficiently. An injunction is awarded where the transaction costs are low and the polluter is more able to reduce the pollution. Likewise, if transaction costs are low and the resident is more able to avoid the pollution, there will be a finding of no nuisance. These are cases where the Coase theorem is appropriate. Under rule one for example, if the polluter values pollution more than the resident values clean air, a settlement could be bargained for. Rule three applies to a high transaction cost situation where the polluter is in a better position to reduce the pollution, and rule four applies in the same situation but with the resident in a better position. It should be observed that this model applies solely to economic efficiency, and the authors do not factor in distributional effects.[120]

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[117] At 851.

[118] Wilde, above n 9, at 387.

[119] Guido Calabresi and A Douglas Melamed "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv L Rev 1089.

[120] At 1118.

All of these rules have been applied in litigation. While rules one, two and three are typical in nuisance litigation, rule four is rarely applied. However, in the United States case of *Spur Industries v Del E Webb Development* (*Spur Industries*), the Court awarded an injunction, but also awarded damages to the defendant to indemnify the cost of moving (a rule 4 situation).[121] The court was influenced by the fact that the developers had consciously developed this area for residential housing before selling it on to the residents of the development, causing the activity to become a nuisance where it had not been before.

The New Zealand (and UK) courts are unlikely to allow this award to occur. First, s 16A only allows for damages "in addition to, or substitution for" an injunction, whereas *Spur Industries* granted it as compensation for an injunction.[122] Secondly, if the defence of coming to the nuisance is accepted by New Zealand courts, it would likely apply to this situation.[123] The Court in *Spur Industries* held that the defence could not apply as the purchasers of the property were third parties. This would be unlikely to be accepted in New Zealand. The third parties purchased the land off developers who 'came to the nuisance'. It would be an anomaly in nuisance law if this possible defence could be defeated by on-selling the property. A more fundamental point is that New Zealand law has been much more protective of individual rights. A jurisdiction based on the *Shelfer* idea of not legalising wrongful acts is unlikely to allow an award that effectively gifts the other party the rights in question before selling those rights back. For these reasons, a 'rule four' award is unlikely to be applied in New Zealand.

It is often assumed that the high transaction costs associated with court action lead to the conclusion that an award of damages may be more efficient than an injunction. There is great concern that an injunction will allow the plaintiff to extort the defendant. This concern

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[121] *Spur Industries v Del E Webb Development* 494 P 2d 700 (AZ, 1972).

[122] Judicature Act 1908, s 16A.

[123] As a general rule, it is no defence that the plaintiff came to the nuisance (see *Sturges v Bridgman* (1879) 11 Ch D 852 (CA)). However, Lord Neuberger in *Lawrence v Fen Tigers*, above n 2, suggested, in obiter, that an exception may exist (at [56]) in restricted circumstances where the plaintiff changed the use of the land. It is not yet known if this defence will be accepted in New Zealand.

was summarised in *Isenberg*, with the suggestion that, by granting an injunction, the Court would be delivering the Defendant to the Plaintiff bound hand and foot.[124]

This assumption has been recently challenged by Pontin in a contextual study of historical injunctions.[125] The study concluded that the *Shelfer* criteria have been broadly successful in doing justice, often due to the suspension of injunctions until a later date, or allowing an activity up to a specified level.[126] The extortion may be an academic concern, rather than a problem in practice. However, other studies have tended to be inconclusive on this point. In the case of externalities, Kaplow and Shavell found that, where bargaining had completely broken down, a liability rule (damages in lieu) was preferable to a property rule (an injunction).[127] Where bargaining was possible, the results were inconclusive. With takings, the situation was different, and a property rule was preferable. These two different studies show the need for a case-by-case approach to remedy.

Cooter and Ulen pointed to the 'error cost' in awarding damages in lieu.[128] The actual cost of future damage cannot be estimated with certainty, which must be factored into any award. An injunction is certain, so may be preferable in this regard.

Boomer acknowledged the changing of incentives after a grant of permanent damages.[129] Jasen J (dissenting) suggested that granting of damages in lieu would result in there being no incentive to abate the nuisance.[130] Bergan J, for the majority, stated that the factory had already tried to mitigate the pollution, and it was unlikely that more could be done.[131] The fact that the parties could negotiate a settlement without mitigation also spoke against the

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[124] *Isenberg v East India House Estate Ltd*, above n 21, at 641.

[125] Ben Pontin *Nuisance Law and Environmental Protection* (Lawtext publishing, Whitney, UK, 2013).

[126] Ben Pontin "Nuisance injunctions after *Coventry v Lawrence*: revisiting the question of 'prevention or payment'?" (2013) 25 ELM 209.

[127] Louis Kaplow and Steven Shavell "Property Rules versus Liability Rules: An Economic Analysis"(1996) 109 Harv L Rev 713.

[128] Cooter and Ulen, above n 115, at 177.

[129] *Boomer v Atlantic Cement Company*, above n 110.

[130] At 876.

[131] At 873.

injunction.[132] The possible incentives around a grant of damages deserve great consideration, as mitigation of the offending action is likely to be of some value.

VII Applicability of Fen Tigers *to a New Zealand context*

A The Shelfer test

New Zealand is already roughly in line with *Fen Tigers* regarding the applicability of the *Shelfer* test. Rotherham noted that the test is yet to be accepted into New Zealand law.[133] This position is incorrect in the strictest sense, as decisions have been based around the four-step test.[134] It is more likely that Rotherham was indicating that the courts are not bound as strictly as in the United Kingdom, a statement that is consistent with authority. The courts are still likely to retain the *Shelfer* test as a working rule. This is due to the importance that past case law has put on the test, and reflects the fact that it still remains a good guide to where damages in lieu are suitable, barring other considerations. As such, New Zealand is likely to accept *Fen Tigers* as the authority in the area.

B Public Interest

The unambiguous words of Hardie Boys J in *BNZ* were a clear indication that the courts, at the time, did not favour factoring in the public interest. However, this mirrors the English position before *Fen Tigers*. *Watson*, although allowing for a marginal consideration of the public interest, did not entertain the proposition that it could be of general use.[135]

New Zealand academics are mixed as to the position of the public interest. McLay noted that "flexibility is more desirable than dogma" and that, especially in the case of mandatory injunctions (injunctions requiring the defendant to take a positive action), the public interest should play a part. However, it was harder to argue that public interest should play

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[132] At 873.

[133] Craig Rotherham "The allocation of remedies in private nuisance: an evaluation of the judicial approach to awarding damages in lieu of an injunction" (1989) 4 Canta LR 185 at 197.

[134] For example, see *Ryder v Hall*, above n 16; *Ellis v Rasmussen* (1910) 30 NZLR 316 (CA).

[135] *Watson v Croft Promo-Sport Ltd* (CA), above n 45.

a part in other actions.[136] Beever was strictly against the consideration, saying that the ability for the public to supersede private rights is unjust.[137] Both Rotherham[138] and Stewart[139] were broadly in agreement with public interest considerations.

In this author's view, public utility arguments are a welcome addition to the law, so long as they are tempered. Injunctions have a vital role in reinforcing rights. However, an injunction can have detrimental effects to the economy as a whole, and it is an anomaly that this effect cannot be considered. A structured approach to liability, and a flexible approach to remedy, is a much-needed compromise between these two values. An award of an injunction (or damages in lieu thereof) should be a balance between private rights and the public interest, as it can equally affect both. The nuanced approach by Lord Neuberger allows for this, and should be adopted in New Zealand.

C Planning Permission

According to Besier, the tort of nuisance is becoming redundant in the face of planning laws.[140] Although the Resource Management Act does not affect liability under nuisance,[141] many concepts such as "reverse sensitivity" may change the liability of a person.[142] Furthermore, enforcement techniques reduce reliance on the common law.[143]

A flexible approach towards planning permissions in cases of nuisances (and other torts) will allow for a more coherent legal structure. Awarding damages in lieu will allow for the recognition of property rights without going against the resource consent that allowed the

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[136] McLay, above n 19, at 3.9.4(4).

[137] Beever, above n 61, at 148.

[138] Rotherham, above n 133, at 200.

[139] Isaac Stewart "Reverse Sensitivity: An Environmental Concept to Avoid the Undesirable Effects of Nuisance Remedies" (2006) 12 Canta LR 1.

[140] Antoinette Besier, "Leaving at all to the Resource Management Act 1991: The Demise of the Tort of Private Nuisance" (2004) 35 VUWLR 563 at 590.

[141] Resource Management Act 1993, s 23.

[142] For more information, see Besier, above n 139, and Stewart, above n 138.

[143] Besier, above n 144.

tortious activity. It avoids the pitfalls of statutory authority (as it allows for recognition of rights without compensation) while not overriding resource consents.

Resources consents are not granted with an omniscient view over all circumstances. If a resource consent has considered all the circumstances around the nuisance, it should be given a lot of deference. As noted by Lord Sumption, the planning board is in a better position than the courts to weigh up the different interests. However, it should never be determinative, as it is unlikely that a resource consent can capture the full picture in any circumstance.

VIII Considerations in the New Zealand Context

This essay proposes a list of non-exclusive criteria designed to inform, rather than fetter, the discretion to award damages in lieu. They are relevant after the *Shelfer* criteria have been applied. Cases following *Fen Tigers* have favoured this multifaceted approach.[144]

A Form of the Injunction

Both mandatory restorative injunctions and preventative injunctions are awarded according to the same principles.[145] However, as noted by Barker, mandatory restorative injunctions are less readily made due to considerations around hardship, conduct, and compliance.[146] Both a mandatory and a preventative injunction may be set aside under the court's discretion. However, in principle, enforcing a positive act puts a greater burden on the defendant than a negative duty to refrain from an action. As such, damages in lieu will more likely be awarded where the injunction is mandatory.

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[144] See *Comic Enterprises Limited v Twentieth Century Fox Film Corporation* [2014] EWHC 2286 (Ch), at [15]; *Prophet Plc v Huggett* [2014] EWHC 615 (Ch).

[145] However, the court will be less willing to make an award of an quia timet mandatory injunction: see *Redland Bricks Ltd v Morris* [1970] AC 652 (HL).

[146] Andrew Barker "Permanent Injunctions" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2011) at 236.

B Public Interest in the Activity and in the Injunction

The public interest should form part of the considerations. This should not simply be limited to looking at the activity itself. There are almost unlimited possibilities on what public interest could be. Classic examples, as given in *Fen Tigers*, are employment and widespread harm.[147] The public interest is not limited to arguments about society at large. Although there may be a social benefit to an activity, private property rights themselves have a public benefit worth protecting.

C Planning Permission

A spectrum analysis of planning permissions allows for the diversity of situations that can arise. Where a permission encompasses the situation in question, a court should be reluctant to stray from it, noting Lord Sumption's concerns around the ability of the court to judge the public interest.[148] Where the planning permission deals with situations different to those arising in the litigation, it should be considered cautiously, and only to the extent that relevant issues are analysed.

D Relative Hardship for the Plaintiff or Defendant

A consideration of the relative hardships is a key consideration in the *Shelfer* test, and it is likely to continue to guide the discretion. The 'oppression' test in *Shelfer* and *Jaggard* involves a fundamental look at the harm to the defendant, and to a lesser extent the plaintiff. In New Zealand, this balance of hardships has been fully adopted by *Day v Black*,[149] and although the test should not be decisive, it should continue to inform the judgment of the courts. Attached to this consideration is the likelihood that the offending action will reoccur and cause harm. *Prophet Plc v Huggett* involved a restrictive covenant in an employment contract, in a case heard after *Fen Tigers* was decided.[150] The likelihood of confidential information being leaked, and the possible harm from a leak, led to the injunction being upheld.[151]

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[147] *Lawrence v Fen Tigers*, above n 2, at [124].

[148] At [158].

[149] *Day v Black*, above n 62.

[150] *Prophet Plc v Huggett*, above n 143.

[151] At [45].

E Conduct of the Parties

The award of an injunction, as well as damages in lieu of the award, are equitable remedies. As such, laches, acquiescence, or other breaches of equitable principles by either party are relevant to the remedy.[152] Deliberate wrongdoing by the defendant may justify an award of an injunction.[153] Courts are reluctant to sanction deliberate wrongdoing by either party,[154] and will also try and combat "gold-digging in respect of unimportant rights."[155] Conversely, in *Jaggard*, the fact that the defendants had acted in good faith was a factor in the Court awarding damages.[156] A party cannot complain of hardship caused by a previous agreement, if that hardship was foreseeable at the time the agreement was entered into.[157]

Coming to the nuisance may also play a role in awarding damages in lieu. If a plaintiff came to the land knowing that it was subject to a nuisance, and this was reflected in the purchase price paid, then an award of damages in lieu may be appropriate. To award an injunction would allow a situation tantamount to double recovery, as the purchaser would gain a nuisance-free property for the cost of a property subject to the nuisance. [158]

F Possibility of Abatement

An award of damages removes the incentive to abate the harm. If the action could be easily abated, an injunction will be preferred. If the activity is difficult to abate, damages should be awarded. Various factors to consider include the cost of mitigation, the level of technology (both current and in the foreseeable future), and the level of mitigation already attempted.

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[152] *Shaw v Applegate* [1977] 1 WLR 970 (CA).

[153] *William Sindell plc v Cambridgeshire CC* [1994] 1 WLR 1016 (CA).

[154] McLay, above n 19, at 3.9.3(3).

[155] RP Meagher, JD Heydon and MJ Leeming *Equity: Doctrines and Remedies* (4th ed, Butterworths LexisNexis, Australia, 2002) at [23-055].

[156] *Jaggard v Sawyer*, above n 40, at 288-289.

[157] See *Prophet Plc v Huggett*, above n 143, where the fact that the defendant would lose his job was not taken into account, as the covenant specifically restricted his ability to work in the industry.

[158] There would be some gain in the award of damages in lieu, but the net gain would be smaller. The lack of an injunctive remedy would diminish the ability to hold out for a higher price, and it would be less disruptive to the activity. A lower quantum of damages may also be awarded, to mitigate against this double-counting.

G Likelihood of Successful Bargaining

Studies are divided as to the success of an injunction at promoting bargaining between parties. However, most studies tend to agree that damages are more efficient where bargaining has completely broken down, whereas an injunction suits parties where bargaining is possible. As Pontin notes, the public interest may be served just as well (or even more so) if parties come to an amicable solution after the grant of an injunction.[159] Damages should be preferred where bargaining has broken down, but if parties are reasonably cooperative, an injunction should be preferred.

H Practicality of the Remedy

The practicality of the remedy must be considered. As the Restatement of Torts notes: "If drafting and enforcing are found to be impracticable, the injunction should not be granted".[160] Likewise, an award of damages may come with a high error cost, especially where damages are not easily estimated. There are likely to be extremely few cases where damages can be estimated easily, but where estimation is largely impossible, an injunction may be preferred.[161]

IX Quantum of Damages

Once damages in lieu have been awarded, the amount awarded needs to be quantified. The Court in *Fen Tigers* was split as to how damages in lieu should be calculated, but all agreed that further argument was needed.[162] Lord Neuberger noted that it is arguable that "damages should not always be limited to the consequent reduction in value of the plaintiff's property".[163] Lord Clarke agreed, and suggested that there is no reason in principle to differentiate between trespass (in which gain-based damages are allowed) and nuisance.[164] Lord Carnwath, on the other hand, was more reluctant to consider gain-based

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[159] Pontin "Nuisance injunctions after *Coventry v Lawrence*: revisiting the question of 'prevention or payment'?", above n 126.

[160] American Law Institute, above n 108, § 943.

[161] For example, see *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373; [2015] I.C.R. 272, at [53].

[162] *Lawrence v Fen Tigers*, above n 2.

[163] At [128].

[164] At [173].

approaches, due to the less specific injury, and the large number of potential plaintiffs in a nuisance claim.[165]

Jaggard confirmed the discretion to award damages under Lord Cairns' Act on the basis of the 'nominal licence' approach in respect of a restrictive covenant.[166] *Attorney-General v Blake* stands for the proposition that, in both tort and contract, there are exceptional circumstances where the calculation of damages may be measured by the benefit received by the defendant.[167]

New Zealand has adopted a similar approach with regards to trespass. In *Roberts v Rodney District Council* (*Roberts*), Barker J affirmed that right of the plaintiff to 'wrongful use' damages.[168] These damages are prospectively awarded under s 16A.[169] The starting point of this calculation is the reasonable price which a person would pay for a right to commit the activity.[170] Other factors, such as the plaintiff's actual loss, the defendant's actual gain, and the comparative bargaining power between the parties, can then be factored in. These factors will be more significant where there is no readily definable market.[171] *Waugh v Attorney-General* approved this approach, although it was partially distinguished as the Waughs were also due compensation under the Land Valuation Tribunal.[172] Cooper J only allowed damages to be granted for the limited period before the compensation was due. The case stands for the proposition that wrongful use damages should not allow double-recovery.[173]

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[165] At [248].

[166] *Jaggard v Sawyer*, above n 40. This approves the approach in *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798 (QB).

[167] *Attorney-General v Blake* [2001] 1 AC 268 (HL).

[168] *Roberts v Rodney District Council (No 2)* [2001] 2 NZLR 402 (HC).

[169] At [20].

[170] At [31].

[171] At [31].

[172] *Waugh v Attorney-General (No 2)* [2006] 2 NZLR 812 (HC).

[173] At [65].

This type of approach is suitable for all cases where Lord Cairns' Act is invoked. An injunction is to protect against the taking of a right. If damages in lieu are awarded, the rights have been involuntarily taken, and compensation must address this. This is as true of nuisance as it is of a restrictive covenant or trespass. The concerns of Lord Carnwath are valid, and favour granting an injunction. If damages are still granted in lieu, a figure may be calculated according to the benefits accrued by the defendants and the losses suffered by the neighbours. This can be apportioned according to the severity of the infringement. Although more difficult, it is not impossible, and justice should not be foregone due to difficulties around quantification.

If awarded under s 16A, the *Rodney* approach of allowing the plaintiff only one type of damages is incorrect.[174] Under s 16A, damages stand in place of the injunction itself. An injunction and compensatory damages may co-exist, so damages in lieu should be awarded on top of compensatory damages. For example, in *Halsey v Esso Petroleum*, an injunction did not preclude the plaintiff gaining damages for soiled linen.[175] It would not make principled sense to say that, if damages in lieu were awarded, the linen could not be replaced. The *Rodney* approach may remove some issues of double-counting in trespass cases, but the damages are awarded for two fundamentally different considerations. Compensation for future harms should not preclude the ability to recover for past harm.

X *Conclusion*

Fen Tigers should (and likely will) be followed in New Zealand. The decision to extend the court's discretion is not one that should be taken lightly, but society as a whole will benefit. The extension of the discretion to consider a range of circumstances is crucial in doing complete justice when determining remedy. However, injunctions should remain the default remedy unless proven otherwise. Any other outcome risks the weakening of personal rights by allowing the public interest to overcome it. The balance between enforcing rights and protecting the public interest is a crucial balance, and one that needs to be constantly monitored going forward.

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[174] *Roberts v Rodney District Council*, above n 168, at [15].

[175] *Halsey v Esso Petroleum* Co Ltd [1961] 1 WLR 683 (QB).

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The word count for this essay, excluding the bibliography, abstract, table of contents, and bibliographic footnotes (but including substantive footnotes) is 7,994 words. The word count in the main body of text is 7,641 words.