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NEIGHBOURS AT WAR: ANALYSING THE BOUNDARIES OF LAW AND RETHINKING THE DISPUTE RESOLUTION PROCESS

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Table of Contents

Abstract

This paper analyses the strict law governing common neighbour disputes in New Zealand, using examples. The author claims the current scheme for resolving neighbour disputes in the Disputes Tribunal and in civil courts is problematic as relationships are not preserved. Reforms are suggested using education, mediation and a dedicated tribunal for resolving neighbour disputes and this is applied to relevant examples. While similar reforms have been implemented for other disputing parties in close relationships such as employee-employer and tenant-landlord, the same has not yet been implemented for neighbours. The paper suggests, in light of increasingly frequent neighbour disputes, the need for better community education coupled with mediation as an alternative dispute resolution scheme. This scheme must identify underlying issues in neighbour disputes where present and must have a focus on preserving relationships. A specialised neighbour tribunal should also be set up which will make it more difficult for parties to enforce their strict legal rights in certain situations, despite the need to uphold fundamental property rights. This tribunal must give effect to the substantial merits and justice of each case by exercising greater discretion when enforcing strict legal rights which have long term consequences. This is intended to disincentivise parties from bringing claims and to incentivise parties to settle at mediation, in order to preserve relationships. Two additional specific areas of reform are also suggested, dealing with Airbnb and trees. These reforms will significantly reduce the ability to litigate neighbour disputes and aim to improve neighbour relations throughout New Zealand, as its population grows and neighbours increasingly live in closer proximity.

Keywords

neighbour – relation – law – dispute – resolution – mediation – tribunal – litigation

I Introduction

"Love thy neighbour".[1] A maxim dating back to 1300 BC, cited by Lord Atkin in the seminal private law case concerning ginger beer, yet relevant today more than ever before. An abundance of neighbourhood legal disputes have been publicised in recent years, compounded by the rise in urbanisation and fall in social unity.[2] On occasion, tensions build until one neighbour flares, like one who took a chainsaw to his neighbour's fence.[3] Often however, litigation is the result; something often heralded as the last resort for dispute resolution. One must wonder how parties end up here, litigating with those so close to them.

Having a good neighbour relationship is not merely beneficial for neighbours, but for society in general. It fosters "the sharing of resources, keeping an eye out for another's safety and wellbeing, and creating a sense of community".[4] Neighbours form the basis of community and community forms society. If all neighbours acted like parties in *Aitchison v Walmsley* or *Macken v Jervis*, significant divides in the community would be seen.[5] The courts would be overloaded and the benefits of an ongoing relationship with a neighbour would be lost.[6] Neighbours should not be "intrusive busybodies", but neither should they be "distance-keeping nobodies"; yet, the current law encourages the latter, failing to maintain an adequate balance.[7]

Part II identifies the strict law governing common neighbour disputes in New Zealand, using several examples. Part III details present law surrounding neighbour dispute resolution. Part IV outlines necessary reform for neighbour dispute resolution and Part V applies suggested reforms to examples from Part II. Lastly, two additional areas of reform are advanced in Part VI.

The paper suggests, in light of increasingly frequent neighbour disputes, the need for better community education coupled with mediation as an alternative dispute resolution scheme. This scheme must identify underlying issues in neighbour disputes where present and must have a focus on preserving relationships. A specialised neighbour tribunal should also be set

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1 *Donoghue v Stevenson* [1932] UKHL 100 per Lord Atkin.

2 See links in attached article: Stuff.co.nz "Being a bad neighbour: Why Kiwi neighbours go to war" (31 July 2018) Stuff.co.nz <www.stuff.co.nz/national>.

3 Catherine Groenestein "Neighbours at War: Man Attacked Boundary Fence with Chainsaw" (12 June 2018) Stuff.co.nz <www.stuff.co.nz/taranaki-daily-news>.

4 Victorian Law Reform Commission, *Neighbourhood Tree Disputes*, Consultation Paper (2017) at 2.

5 *Aitchison v Walmsley* [2016] NZEnvC 13; *Macken v Jervis* [2014] NZHC 3408; see also Part II.

6 Courts are *already* overloaded: see Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 163–168.

7 Crow, Allan and Summers "Neither Busybodies nor Nobodies: Managing Proximity and Distance in Neighbourly Relations" (2002) 36(1) Sociology 127 at 128.

up which will make it more difficult for parties to enforce their strict legal rights in certain situations, despite the need to uphold fundamental property rights. These reforms will significantly reduce the ability to litigate neighbour disputes and aim to improve neighbour relations throughout New Zealand, as its population grows and neighbours increasingly live in closer proximity.[8]

II Common Neighbour Disputes

A Fencing

Fences – being the sole physical barrier between neighbours – are often "the focal point of unneighbourly conduct".[9] Here, litigious neighbours bring claims in two main situations. Firstly, where neighbours cannot agree on construction and maintenance of boundary fences. Secondly, where one neighbour erects a fence which affects the view or sunlight of an adjoining landowner.

Governing legislation is primarily the Fencing Act 1978 (Fencing Act) which covers the first situation and the Property Law Act 2007 (Property Law Act) which covers the second.[10] The Fencing Act sought to solve many of the issues with the earlier Fencing Act 1908 – in particular – spite fences.[11] Spite fences describe fences erected effectively to spite the adjoining landowner by blocking their view, although ostensibly constructed for privacy concerns.[12] In *Buckleigh v Brown*, the defendant's six-foot concrete wall constructed for privacy after the plaintiff refused to contribute to the boundary fence, had the unfortunate side-effect of blocking the plaintiff's view of Lake Taupō.[13]

The Fencing Act now requires a neighbour to obtain consent from adjoining landowners to construct a boundary fence which *encroaches* on neighbouring land, even if the cost is solely borne by the fence builder.[14] The Act also affirms that adjoining landowners must equally share the cost of work on a boundary fence, unless agreement is reached otherwise.[15] If an

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8 Statistics New Zealand "Dwelling and Household Estimates: September 2017 quarter" (table, 30 September 2017); see also William Cochrane and David Maré "Urban Influence and Population Change in New Zealand" (2017) 13 PQ 61.

9 JF Corkery "The Fencing Act 1978 and Related Matters" (1977) 4 Otago LR 269 at 269.

10 Fencing Act 1978, ss 9 and 22; Property Law Act 2007, s 331–338.

11 Fencing Act 1908.

12 JF Corkery, above n 9, at 275.

13 *Buckleigh v Brown* [1968] NZLR 647 (SC), at 650 and 651.

14 Fencing Act 1978, s 8.

15 Section 4.

adjoining landowner withholds consent, a court can exercise its wide discretion to nevertheless permit the fence.[16]

For the second situation, the Property Law Act has provisions allowing a court to exercise discretion to order removal or alteration of structures which cause an undue obstruction of a view or access to light.[17] Importantly however, this provision can only be used where no council building consent was issued for the structure.[18]

Spite fences are notable as they now invoke both the Fencing Act and Property Law Act provisions. Recourse can first be had by claiming breach of the consent provision in the Fencing Act,[19] then to the Property Law Act provisions.[20]

1 Consent and spite fences

Despite comprehensive legislation in the Fencing Act and Property Law Act, there are still cases where litigants test the boundaries of law by taking their neighbour to court such as in *Gosney v Ngai Tahu Property Ltd* and *Aitchison v Walmsley*.[21]

Gosney v Ngai Tahu Property Ltd concerned a plaintiff who brought an action for breach of the Fencing Act, after the defendant built a fence without the plaintiff's consent.[22] The defendant claimed no consent was necessary since the boundary fence simply straddled the boundary line and did not actually encroach on neighbouring land.[23] The Court rejected this argument as the Fencing Act specifies the middle of boundary fences must be on the boundary line, meaning half of the fence will inevitably encroach on neighbouring land, thus invoking the consent provisions.[24]

However, a different view of this dispute can be taken. It started in 2014 when the defendant surveyed the land and began construction of the fence, without consulting the plaintiff.[25] The plaintiff was aggrieved at the lack of consultation and removed all the fence posts.[26] The defendant successfully obtained an injunction because of this, but the plaintiff appealed

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16 Fencing Act 1978, s 24.

17 Property Law Act 2007, ss 333–335 and 337.

18 Section 332(a).

19 Fencing Act 1978, s 8.

20 Property Law Act 2007, ss 333–335.

21 *Gosney v Ngai Tahu Property Ltd* [2015] NZHC 515; *Aitchison v Walmsley*, above n 5.

22 *Gosney v Ngai Tahu Property Ltd*, above n 21, at [3] and [4].

23 At [18].

24 At [18] and [19]; see also Fencing Act 1978, ss 8, 22 and 24.

25 *Gosney v Ngai Tahu Property Ltd*, above n 21, at [7].

26 At [4].

to the High Court in 2015.[27] Notably, the High Court concluded "the legal position… favours the [plaintiff]" but simply ordered the defendant and plaintiff to engage with each other to reach an agreement regarding the fence, by consent.[28]

The plaintiff exercised their strict legal rights under the Fencing Act and tort (trespass to land resulting from the building contractors) and litigated. This is despite the fencing being constructed at no cost to the plaintiff and being in the correct position, since the defendant had the land surveyed.[29] It seems this dispute could have been resolved without litigation – without one party asserting their strict rights – had the parties been forced to communicate with each other first. In *Gosney,* this turned out to be the High Court conclusion anyway, albeit after considerable expenses, time and stress were incurred by both parties.[30]

Strict legal rights can be asserted by both the plaintiff or defendant. *Aitchison v Walmsley* is a prime example of a modern-day spite fence.[31] The defendant obtained council building consent in 2014 to build a children's play-fort.[32] However, the play-fort effectively blocked the entire view the plaintiff had of Wellington harbour.[33] Being a play-fort, this was not captured by the Fencing Act and Property Law Act provisions were also inapplicable due to the presence of council building consent. Despite appearing as a fence from the plaintiff's point of view, prima facie the defendant was able to assert his strict legal right to having his council consented structure and the plaintiff had to sue the council for incorrectly issuing the consent.[34]

Notably, this case stemmed from an underlying issue 20 years ago when the plaintiff's property developers removed the defendant's previous fence.[35] This led to four years of litigation – 20 years after the original dispute – between the plaintiff, defendant and the city council, moving from the Environment Court all the way to the Court of Appeal on various

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27 *Gosney v Ngai Tahu Property Ltd*, above n 21, at [1] and [2].

28 At [36].

29 At [4] and [7].

30 At [36].

31 *Aitchison v Walmsley*, above n 5.

32 At [11].

33 At [7] and [30].

34 *Aitchison v Wellington City Council* [2015] NZEnvC 163.

35 At [3].

points.[36] This saga led to over $100,000 in legal costs for the plaintiff and over $41,000 for ratepayers in Wellington.[37]

The issue was eventually decided by the Environment Court and the outcome could have been predicted from the start.[38] The Court noted the "construction of the play structure was a contrivance undertaken to get around rules which prevented the construction of a fence".[39] The fence had to be removed, using a wide interpretation of s 17 of the Resource Management Act 1991 (Resource Management Act).[40]

These two cases show if parties had not asserted their strict legal rights, the time, expense and stress of litigation could have been avoided, for the same result that litigation eventually produced.

B Trespass

Neighbour disputes are inevitably not limited to fencing disputes which are largely governed by statute; strict legal rights exist at common law for many other disputes. Neighbour disputes are often litigated using the well-known tort of trespass to land. The tort of trespass prohibits "an unjustified direct interference with land in possession of another".[41] This is consistent with fundamental common law property rights such as the right to possession of property and the right to exclude all others, which are important to uphold.[42]

While neighbours can also bring claims of criminal trespass under the Trespass Act 1980, this is uncommon.[43] This is because trespass claims are often litigated along with other issues, such as fencing, nuisance and easements in a *civil* court. In order to bring a claim of criminal trespass, a separate claim in a criminal court would normally be required, using up

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36 See *Aitchison v Wellington City Council*, above n 34; *Wellington City Council v Aitchison* [2016] NZHC 167; *Aitchison v Walmsley*, above n 5; *Aitchison v Walmsley* [2016] NZEnvC 114; *Wellington City Council v Aitchison* [2017] NZHC 1264; *Walmsley Enterprises Ltd v Aitchison* [2017] NZHC 1504; *Aitchison v Wellington City Council* [2017] NZEnvC 176; *Walmsley v Aitchison* [2017] NZCA 500; *Aitchison v Walmsley* [2018] NZEnvC 4; *Aitchison v Walmsley* [2018] NZEnvC 7; *Aitchison v Wellington City Council* [2018] NZHC 1674.

37 Matt Stewart "Ratepayers to fork out $41,000 over Wellington view-blocking fence saga" (11 July 2018) Stuff.co.nz <www.stuff.co.nz/business>

38 *Aitchison v Walmsley*, above n 5.

39 At [72].

40 Resource Management Act 1991, s 17.

41 *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215 at [115].

42 AM Honoré "Ownership" in Patricia Smith *The Nature and Process of Law: An Introduction to Legal Philosophy* (1st ed, Oxford, New York, 1993) at 370.

43 Trespass Act 1980.

more time and expense.[44] As noted in *Hikurangi Forest Farms Ltd v Negara Developments Ltd*:[45]

> Courts have traditionally proceeded with great caution when exercising the discretion to issue declarations on whether certain conduct amounts or will amount to the commission of a criminal offence or not. This is because to make such a declaration risks usurping the function of the criminal court… Accordingly, the discretion is sparingly exercised.

A litigant must show a "well-reasoned argument" to show the tort of trespass to land is not sufficient to deal with the trespass.[46]

Where neighbours litigate against adjoining landowners, civil trespass allows a claim of damages, whereas criminal trespass is merely a fine to the state.[47] The desire to spite one's neighbour in these disputes usually incentivise the use of civil trespass. Further, civil trespass is actionable per se (without proof of damage) and damages can be awarded even where there is no physical damage (albeit nominal).[48] Civil trespass can be claimed against a person or object and can be claimed even where there is no personal entry, but where one has initiated a force which directly causes projectiles to be cast on or over another's property.[49] Owners can also be liable for their animals (excluding cats) trespassing; this is largely governed by the Dog Control Act 1996,[50] and the Impounding Act 1955.[51]

However, in a shifting property landscape where urbanisation is steadily increasing and proximity between neighbours is ever-increasing,[52] it is often inevitable or even necessary, that adjoining landowners will pass over each-other's land at some point. Therefore, any reform needs to strike a balance between upholding strict property rights versus flexibility and tolerance which is needed to be a good neighbour.

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44 *Hikurangi Forest Farms Ltd v Negara Developments Ltd* [2018] NZHC 607 at [214].

45 At [206].

46 At [208].

47 Trespass Act 1980, s 11.

48 *Robson v Hallett* [1967] 2 QB 939.

49 Carolyn Sappideen and Prue Vines *Fleming's Law of* Torts (10th ed, Thomson Reuters, Australia, 2011) at [3.10]; see also *Rigby v Chief Constable* [1985] 1 WLR 1242 where a gas canister was fired by police.

50 Dog Control Act 1996, s 53.

51 Impounding Act 1955, ss 2, 26 and 31; notably cats are excluded from the definition of poultry and stock, which include any horse, cattle, deer, ass, mule, sheep, pig, goat, turkeys, geese, ducks, and domestic fowls.

See Statistics New Zealand "Dwelling and Household Estimates: September 2017 quarter" and William Cochrane and David Maré "Urban Influence and Population Change in New Zealand", above n 8.

Parliament has recognised the need for limiting strict legal rights in trespass through the Property Law Act, allowing a court to permit access to adjoining land in order to repair, demolish or erect any structure on the applicant's land.[53] This is particularly useful where utilities, such as water pipes, are situated on neighbouring land. However, without this provision, an adjoining land owner could presumably assert their strict legal rights over their land and prevent any encroachment by the neighbour which could become problematic where access is a necessity.

1 Person or object

Ogle v Aitken concerned a continuing trespass where the defendant's contractor mistakenly placed a mound of dirt on the plaintiff's property.[54] The defendant offered to remove it immediately upon discovery but the plaintiff insisted on his strict rights and litigated.[55] Nominal damages of $1000 were awarded for the trespass; this was upheld on appeal.[56]

It is also possible to apply the tort of trespass to other common neighbour disputes, such as rights of way, easements and landlocked land. In the recent case of *McInness v Jones*, three properties shared a large driveway, of which A could use the left and middle portion of driveway, B could use the middle section of the driveway and C could use the far right section of the driveway.[57] During construction on A's property, the plaintiff's (C) claimed that construction trucks were using their portion of the driveway, as the driveway was only 2.68 metres wide and A's share of the driveway was not wide enough for trucks to access the site without trespassing.[58] C asserted his strict rights over his portion of the driveway which the Court accepted, but the Court held damages in lieu of the claimed permanent injunction would be an adequate remedy.[59] Therefore, the Court effectively allowed a reasonable use fee for the breach of C's strict legal right. This appears to be a reasonable approach.

However, exercising judicial discretion to order damages in lieu of an injunction merely alters the remedy but still acknowledges the enforceability of the strict legal right. This does not disincentivise litigation. Any reform to this area must disincentivise litigation in order to promote ongoing relationships between the parties.

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53 Property Law Act 2007, ss 319 and 320.

54 *Ogle v Aitken* [2017] NZHC 1799.

55 At [45].

56 At [2] and [83].

57 *McInness v Jones* [2018] NZHC 1499.

58 At [3].

59 At [18].

C Tort of Rylands v Fletcher

The tort of *Rylands v Fletcher* holds that a person who brings onto his land and collects and keeps anything likely to do mischief (including animals), must keep it at his peril and is answerable for any damage which is a natural consequence of its escape.[60] In *Rylands,* the defendant housed a water reservoir on their land.[61] This was a non-natural use of land.[62] One day, the reservoir burst, flooding the adjoining land which was a mine.[63] The defendant asserted their strict legal rights against the plaintiff and was awarded a substantial amount of damages for the harm caused.[64]

D Nuisance

Although nuisance cases are traditionally governed by common law, there has been considerable legislative intervention with the Resource Management Act, along with the Property Law Act, Dog Control Act 1996 and Health Act 1956.[65] In saying this, legislation does not bar the application of the tort of private nuisance.[66] Together, these give land owners many legal rights to assert against adjoining landowners.

The tort of private nuisance is an unreasonable interference with a person's right to the use or enjoyment of an interest in land.[67] Clerk and Lindsell on Torts has categorised private nuisance into three categories of actionable harm:[68]

1. Causing an encroachment on his neighbour's land, when it closely resembles trespass;
2. Causing physical damage to his neighbour's land or building or works or vegetation upon it; or
3. Unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.

Parliament has recognised that the assertion of strict legal rights in nuisance can create unfairness and has legislated for it; ss 333–338 of the Property Law Act gives a court discretion to order alteration or removal of trees and structures that cause an undue obstruction of a view, access to light or even an undue interference with use and enjoyment

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60 *Rylands v Fletcher* [1868] UKHL 1.

61 At 1.

62 At 2.

63 At 3.

64 At 3.

65 Resource Management Act 1991; Property Law Act 2007; Dog Control Act 1996; Health Act 1956.

66 The Resource Management Act 1991 explicitly states this at s 23.

67 Bill Atkin "Nuisance" in Stephen Todd *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [10.2.01].

68 Richard Buckley "Nuisance and Rylands v Fletcher" in Michael Jones *Clerk & Lindsell on Torts* (22nd ed, Sweet & Maxwell, London, 2018) at [20-06]; see also *Hawkes Bay Protein Ltd v Davidson* [2003] 1 NZLR 536 (HC) at [15].

of land.[69] Such undue interference could be from the fall of leaves, flowers and root system of a tree, or even – as recently held – from obstruction of wifi signals.[70] In effect, this modifies the common law where there is no general right to a view or right to light (or wifi, as it seems).[71]

Furthermore, s 17 of the Resource Management Act also specifies every person has a duty to avoid, remedy or mitigate *adverse effects*, which include noxious, dangerous, offensive or objectionable effects.[72] This is sufficiently broad to capture common private nuisance complaints such as odour and smoke, as well as earlier mentioned, obstructions of view.[73] The is somewhat analogous to the United Kingdom statutory nuisance provisions in the Environmental Protection Act 1990.[74]

Neighbours can also enforce their strict legal rights to prevent their adjoining land-owner's animals from causing a nuisance. The Dog Control Act has specific provisions stating well known obligations for dog owners, such as keeping the dog under control, taking reasonable steps to ensure the dog does not cause a nuisance and ensuring the dog does not injure any person.[75] However, other animals can cause a nuisance which is also actionable against the owner, either at common law or under ss 29–33 of the Health Act 1956.[76]

Like trespass, nuisance claims are undoubtedly correlated to the increase in urbanisation and closer proximity of neighbours. These claims will only increase in frequency unless reform occurs.

1 Trees

Semple v Wilson is a recent example of a plaintiff asserting their strict legal rights using the tort of nuisance.[77] The defendant had ten boundary trees one metre from the common boundary.[78] The plaintiff claimed branches and roots from the trees constituted a nuisance, causing physical damage and interference with use and enjoyment of land, including blocking the pool filter, blocking the internal guttering of the house causing water leaks and

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69 Property Law Act 2007, ss 333–338.

70 Property Law Act 2007, s 335; *Vickery v Thoroughgood* [2018] NZHC 2303 at [34].

71 *Earl Putnam Organization Ltd v MacDonald* (1979) 21 OR (2d) 815 (ONCA).

72 Resource Management Act 1991, s 17.

73 *Te Aroha Air Quality Protection Appeal Group v Waikato Region* (No 2) [1993] 2 NZRMA 574 (PT); see also *Aitchison v Walmsley*, above n 5.

74 Environment Protection Act 1990 (UK), s 79.

75 Dog Control Act 1996, s 5.

76 Health Act 1956, ss 29–33.

77 *Semple v Wilson* [2018] NZHC 992.

78 At [13].

damage to decking around the pool through the roots.[79] The defendant accepted there was an encroachment by some branches and tree roots, but claimed they were not an actionable nuisance.[80]

The Court held the natural distribution of leaves and other natural debris associated with trees and their branches cannot give rise to an actionable nuisance *in the absence of encroachment*.[81] For the leaves attributable to encroaching branches, the Court simply found encroaching branches did deposit leaves to "a sufficient extent" to cause damage, especially since those encroaching branches are closer to the house so would contribute to a greater extent.[82] An actionable nuisance was found for blocking the guttering and causing water leaks, shade causing a "less appealing" living area, blocking the pool pump and leaf fall generally.[83]

Despite considering the duty to mitigate the loss, the Court held this duty was met through fixing the blocked gutters, despite the plaintiff failing to exercise his right of abatement by trimming the trees, which would have avoided the damage in the first place.[84] The Court awarded $21,462 damages to the plaintiff and a mandatory injunction to ensure the defendant kept the trees trimmed to the boundary.[85]

By enforcing the strict legal rights of the plaintiff, this seems unfair on the defendant. The defendant had no say in planting the trees which were there long before the property was purchased and they had trimmed the trees when requested. Further, removal of the trees would be a substantial loss of privacy to the defendant. It is questionable whether the law here has *really* resolved a dispute, or simply exacerbated it further. Notably, despite Parliament creating the Property Law Act provisions to make it more difficult for litigants to assert their strict legal rights in this area to get compensatory damages, plaintiffs are still able to circumvent this by claiming the common law tort of nuisance, for which damages can be awarded. This was noted in *Blakesfield v Foote.*[86]

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79 *Semple v Wilson*, above n 77, at [2].

80 At [5].

81 At [57] and [79], citing *Blakesfield Ltd v Foote* [2015] NZHC 1325.

82 *Semple v Wilson*, above n 77, at [81].

83 At [81]–[83], [90] and [91].

84 At [155].

85 At [189].

86 *Blakesfield Ltd v Foote*, above n 81, at [17].

2 Noise

Along with trees, noise complaints are high on the list of neighbour disputes.[87] Local authorities enforce noise complaints through the Resource Management Act.[88] Sections 327 and 328 gives powers to local authority enforcement officers to require occupiers of places emitting excessive noise to reduce the noise to a reasonable level.[89]

The Resource Management Act requires a subjective investigation of the noise by the noise control officer in order for there to be enforcement action.[90] This can be problematic as the subjectivity can lead to disputes as to what level of noise constitutes an unreasonable interference with peace, comfort and convenience.[91] In practice, when litigated, the courts have tended to apply a reasonable standard similar to that applied in the tort of private nuisance, examining the locality and permitted activities.[92]

In *Rolleston v Christchurch City Council,* the plaintiff failed in suing the local authority for excessive noise. The Court held band practice undertaken on the local authority's premises was not excessive, in light of the locality (especially traffic noise).[93] Nevertheless, it is commonplace for adjoining landowners to assert their strict rights against their neighbours and complain about excessive noise to the local authority.

If reform is going to restrict the ability to assert strict legal rights, it must also allow for a principled way to assert these strict rights when necessary. Noise complaints are a good example of where it may be just to assert these rights, since in reality, alternative dispute resolution processes will not work for any short term noise complaint where noise requires urgent cessation. However, where noise is inherent, the assertion of strict rights could become problematic on the noise-maker who presumably will suffer long term consequences from an injunction abating the noise. Here, reform must be able to adapt to these differing situations.

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87 Brad Flahive "New Zealand's worst neighbour disputes" (6 October 2017) Stuff.co.nz <www.stuff.co.nz/national>.

88 Resource Management Act 1991, s 38.

89 Sections 327 and 328.

90 Section 327(1)(b).

91 For example, see Joanne Carroll "Noise control called after constant classical music irks neighbours" (28 February 2016) Stuff.co.nz <www.stuff.co.nz/national>.

92 *Rolleston v Christchurch City Council* NZEnvC Christchurch ENV-2008-CHC-308, 25 May 2009.

93 At [44]–[48].

E Rights of Way, Easements and Landlocked Land

The final type of common neighbour dispute discussed in this paper is access to land. Access to land can often be restricted on technicalities and courts are often forced to yield to strict legal rights due to the importance of upholding indefeasibility of title, rather than exercising discretion and using a pragmatic approach to determining disputes.[94]

1 Driveways

In *Macken v Jervis*, an accidental omission in the subdivision plan meant the plaintiff was only entitled to use the left side of the driveway, while the defendant was able to use both the left and right side.[95] This meant the plaintiff was unable to park her car in her garage because although the driveway was wide enough for a car, it was not wide enough by itself for the turning manoeuvre needed to swing her car into her garage. The plaintiff brought a claim for landlocked land but failed.[96] The Court found bicycle, pedestrian and motorcycle access adequate.[97]

The defendant successfully asserted their strict legal rights to the driveway and the plaintiff lost. As a result, the plaintiff cannot access her garage with her vehicle. As earlier mentioned, with many of these neighbour disputes, there is an underlying issue that fails to be addressed through litigation. Here, the plaintiff refused to allow the defendant to place a gate at the end of the driveway; it appears the subsequent refusal to allow the driveway access was to spite the plaintiff.[98] Any reform must also incorporate an alternative dispute resolution scheme which can address these underlying issues to prevent litigation.

III Present Law for Resolving Neighbour Disputes

Currently, neighbours who are unable to resolve disputes between themselves have only three options, two of which are court-based and not conducive to maintaining ongoing relationships and one which is limited to disputes about noise.

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94 See *Frazer v Walker* [1966] NZPC 2, [1967] 1 AC 569.

95 *Macken v Jervis*, above n 5, at [3].

96 At [40].

97 At [30].

98 At [10]. See also Nick Reed "Remuera driveway spat returns to High Court" (6 May 2015) New Zealand Herald <www.nzherald.co.nz/business>.

A Local Authority

Councils have limited authority under the Resource Management Act to deal with noise control complaints.[99] While agreement between the parties would be preferable without escalating the complaint to the local authority, the reality is an adjoining landowner has no option but to get the local authority to enforce their strict legal rights to quiet enjoyment for most noise complaints, which have an element of urgency. Because the effect on the defendant is short-lived – the maximum length of the order is only 72 hours – there is little impact on the relationship between the parties, especially since a complaint is anonymous.[100] This is therefore an effective regime for noise complaints.

B Disputes Tribunal

The Disputes Tribunal is often seen as the first step for neighbours embroiled in a dispute. The Disputes Tribunal sits between self-agreement (between the neighbours) and litigation. However, while the Disputes Tribunal "isn't like a formal court", can determine disputes according to the "substantial merits and justice of each case" and "shall not be bound to give effect to strict legal rights",[101] it is unhelpful for resolving most neighbour disputes; it is too formal as the first avenue of dispute resolution, only has limited jurisdiction to decide disputes and is not mandatory.

Firstly, the referee adjudicates the dispute after parties have presented evidence and determines the dispute with a binding outcome. The process is not about the parties nor their underlying issues; determinations have been made ex parte before.[102] Rather the hearing is to determine the legal issues in dispute and there is often one winning party and one losing party.[103] This does not aid the parties in maintaining an ongoing relationship and instead may simply serve to exacerbate disputes; as the first avenue of dispute resolution this is unsuitable.

Secondly, the jurisdiction of the Disputes Tribunal is extremely limited for types of neighbour disputes. The Tribunal can only hear neighbour dispute claims regarding damage or destruction to property.[104] This means the majority of nuisance disputes (such as noise, tree disputes) cannot be heard as no actual damage is caused; parties are forced to litigate in the courts. Further, any dispute about land (such as easements, rights of way) is expressly

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99 Resource Management Act 1991, ss 38, 327 and 328.

100 Resource Management Act 1991, s 327.

101 Disputes Tribunal Act 1988, s 18(6).

102 See *ABU v ZYI* [2012] NZDT 83 at [9].

103 See for example *EN v UM* [2017] NZDT 997.

104 Disputes Tribunal Act 1988, s 10(1)(c).

excluded from jurisdiction.[105] The Ministry of Justice considered allowing these other civil claims to be heard in the Disputes Tribunal as a way to increase accessibility to the Tribunal, but had insufficient time to "fully analyse" it.[106]

A search of the Disputes Tribunal online database confirms the lack of accessibility.[107] Although the Disputes Tribunal only publishes approximately two per cent of all decisions (234 out of 13,109),[108] out of the published decisions, there were only seven cases (three per cent) which contained the keyword "neighbour", suggesting the Disputes Tribunal has not been used frequently for neighbour disputes.[109] Further, out of those seven cases, only three were successful at hearing; the other four failed for lack of jurisdiction.[110]

Further, the Disputes Tribunal is an opt-in process for disputing neighbours. If there is an ability to skip the "substantial merits and justice" Tribunal and take the dispute to a "real" court and enforce strict legal rights, there is little incentive to use the Disputes Tribunal – bar the expense – where one is looking to spite their neighbour. This is evidently the case with many of these neighbour disputes.

C Litigation

Currently, no real alternatives exist to court-based dispute resolution, so neighbour dispute cases are often litigated at the District Court and High Court. Here, the adversarial process is again detrimental to ongoing relationships. Parties bring claims and either the plaintiff or defendant assert their strict rights. Courts currently have little discretion when applying the law, with discretion only arising during consideration of remedies (for example, damages in lieu of an injunction).[111] Therefore, parties are incentivised to bring claims enforcing their strict legal rights over their neighbour, despite the negative effects of enforcement.

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105 Section 11(5).

106 Warren Fraser *Regulatory Impact Statement: Increasing the maximum claim level in Disputes Tribunals* (Ministry of Justice, November 2013) at 6.

107 Accessible at: Disputes Tribunal "Decisions Finder" (7 October 2018) Ministry of Justice <www.disputestribunal.govt.nz>.

108 Disputes Tribunal "Keyword neighbour" (7 October 2018) Ministry of Justice <www.disputestribunal.govt.nz>.

109 See *EN v UM*, above n 103; *DC v WX* [2015] NZDT 830; *CD v XY Limited* [2014] NZDT 695; *AP v ZK* [2014] NZDT 565; *ABE v ZYZ* [2013] NZDT 86; *ABU v ZYI*, above n 102; *AED v ZVR* [2010] NZDT 287.

110 Three successful claims were: *CD v XY Limited*, above n 109; *AP v ZK*, above n 109; *AED v ZVR*, above n 109.

111 For example, see *McInness v Jones*, above n 57.

These strict legal rights enforced over adjoining land owners often irreversibly damage the relationship between parties, unnecessarily restricts the adjoining landowner who is bound to follow the judgment (despite often trivial disputes) and exacerbates the dispute even further.[112] Notably, the time, expense and stress in bringing and defending a claim means there is no silver bullet here for either party, who at the end of the day must go home to live next to each other. Litigation is simply not a desirable solution for these types of disputes.

IV Suggested Reform for Resolving Neighbour Disputes

Currently, neighbours who are in a dispute with each other are forced to litigate if they cannot settle their issues outside of the court system. This leads to significant expense, time and stress invested in these disputes, for an outcome often causing more animosity.

Neighbours fit into an interesting category of relationships. Neighbours can be best friends, family, acquaintances or total strangers. Neighbours are not often chosen and are forced to live next to each other, yet the law imposes strict obligations governing their obligations and actions between each other, which either party can enforce.[113] This is unlike ordinary legal disputes where parties have chosen to enter into a bargain. The law should be flexible in light of this, to find mutually agreeable solutions to disputes that prioritise the ongoing relationship. This would undoubtedly be a net benefit to society, freeing up court time, improving social unity and improving the outcome for both parties.

A Education and Mediation

This paper suggests a comprehensive compulsory mediation scheme for neighbour disputes should be implemented as the first avenue for resolving neighbour disputes, except in the case of noise complaints where the local authority has jurisdiction.[114] This should be supported by a community education programme which outlines rights and obligations, avenues for dispute resolution and how to be a good neighbour. Similar schemes have been widely implemented successfully in most Australian states and have shown high success rates for resolving neighbour disputes. The Dispute Settlement Centre of Victoria runs a mediation service solely for neighbour disputes.[115] The Australian Capital Territory has the

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112 For example, see *Aitchison v Walmsley*, above n 5.

113 See Part II.

114 See Part III.

115 State of Victoria "Mediation" (7 October 2018) Dispute Settlement Centre of Victoria <www.disputes.vic.gov.au>.

Conflict Resolution Service to mediate neighbour disputes.[116] Queensland offers phone mediation through QCAT, a scheme set up through the Neighbour Disputes Act 2011.[117] New South Wales has Community Justice Centres.[118]

While the ability to assert strict legal rights in litigation is appropriate for commercial parties, it is often problematic where an ongoing relationship is necessary, like in tenant-landlord relationships, family relationships, employee-employer relationships and neighbour relationships.[119] New Zealand already has mediation schemes for disputes for tenant-landlord and employee-employer relationships – both of which feature ongoing relationships – but is lacking in the same thing for neighbour disputes.[120]

The New South Wales Community Justice Centres are set up for these types of disputes which need preservation of ongoing relationships. It is a free service in a safe and neutral environment.[121] The majority of disputes heard through Community Justice Centres have been disputes between neighbours.[122] Agreement has been reached in 80 per cent of cases and 97 per cent of parties felt the mediation was helpful or very helpful.[123] Agreements are not binding which encourages parties to enter the mediation with an open mind, rather than having a bottom-line ready and not open to negotiation and compromise.[124] The New South Wales Law Reform Commission has recognised that it is lengthy and costly for parties to go to Court and there is a need for a flexible, quick, inexpensive and appropriate set of resolution procedures that exist.[125] This is evidently an effective regime, so it is striking that New Zealand has not already implemented such a system.

While this paper has dealt with many cases which have gone to litigation, undoubtedly, many of these disputes never make it to litigation, either because parties settle their differences or because parties do not know how – or do not have the means – to enforce their rights over an overbearing neighbour. A community education programme would help both

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116 Conflict Resolution Service "Effective Dispute Resolution" (7 October 2018) Conflict Resolution Service <www.crs.org.au>.

117 Neighbourhood Disputes (Dividing Fences and Trees) Act 2011, s 61.

118 New South Wales Government "What is mediation?" (7 October 2018) Community Justice Centres <www.cjc.nsw.gov.au>.

119 Natasha Mann *Community Justice Centres: Year in Review Report 2011/2012* (Attorney General and Justice, 2012) at 11.

120 Employment Relations Act 2001, ss 144–155; Residential Tenancies Act 1986, s 88.

121 Natasha Mann *Community Justice Centres: Year in Review Report 2011/2012*, above n 119, at 16.

122 At 11.

123 At 16 and 18.

124 Roger Fisher and William Ury *Getting to Yes: Negotiating an agreement without giving in* (2nd ed, Random House, London, 2012) at 50–51.

125 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Discussion Paper No 22 (1991) at 58–62.

sides of this issue, informing one party of their rights and the other of their obligations. It also helps inform both parties of the (presumably low cost) mediation scheme available to enable those neighbours who would ordinarily not be able to afford litigation or where there is a power balance, to still have an effective avenue to resolve neighbour disputes.

The New South Wales Law Reform Commission determined community awareness programmes were the best solution for preventing litigation.[126] Suggested vehicles for creating awareness were "schools, community meetings, local newspapers, leaflets, neighbourhood watch bulletins and local councils".[127] Programmes would outline how to be a good neighbour; information such as what trees are unsuitable for small suburban blocks and likely to cause damage, where trees should be located on the property to prevent harm to fences, how to trim trees to avoid overhang, particularly suitable trees for small blocks and where advice can be sought for tree planting. Programmes would also encourage people to create a quieter environment and tell people where they can seek advice to resolve problems.[128] This has since been implemented with the New South Wales Guide "Neighbours and the Law", something New Zealand is again lacking.[129]

B New Theory: Tribunal

If mediation is exhausted and does not lead to settlement, a mandatory tribunal should be the next avenue for resolution. This balances the need to uphold fundamental property rights (where one needs to assert their strict rights) with the need for tolerance and leniency which comes with being a good neighbour, in order to maintain amicable neighbour relations.[130]

In order to strike a balance, it is worth considering a qualification to enforcing strict legal rights; a distinction between enforcing strict legal rights for a breach with short term consequences and enforcing strict legal rights for a breach with long term consequences. It may be necessary to restrict the ability to enforce strict legal rights where there are long term consequences to enforcement, but to still allow full enforcement of strict legal rights where there are only short term consequences to enforcement. It is hoped the greater discretion disincentivises parties from bringing claims in the first place, since strict rights are less likely

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126 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998) at 5–7.

127 At 63.

128 At 62.

129 Nadine Behan *Neighbours and the law* (2nd ed, Legal Information Access Centre, New South Wales, 2017).

130 See Part I.

to be enforced. This incentivises parties to make a greater effort at mediation to come to a mutual settlement, upholding good neighbour relationships.

This theory will be demonstrated using examples earlier mentioned to show how it could function in practice. Principles which should act to guide this discretion are expanded in the examples. The theory has similarities to the current approach at the Disputes Tribunal, where substantial merits and justice must be given effect, rather than simply strict rights.[131] However, the theory also allows for the full enforcement of strict legal rights where the consequences of that enforcement are only short term. This strikes a better balance between need to uphold and give effect to fundamental property rights and the flexibility needed for good neighbour relations.

However, there is an inherent difficulty with implementing this broadly across all areas of neighbour disputes. Some areas of dispute are in statute, such as the Fencing Act and Property Law Act.[132] Other areas have their source in common law, such as private nuisance. It would be overly burdensome on Parliament to modify these vast areas of private law to support this new theory.

Like the Tenancy Tribunal and Employment Relations Authority, a tribunal must be set up by statute which can adjudicate disputes on the substantial merits and justice of the case, rather than on strict legal rights or – as the Employment Relations Authority calls it – technicalities.[133] Therefore, the strict rights still lie in the background for the Tribunal to refer to, but the substantial merits and justice of the case (heavily guided by the above theory) is the main concern, to preserve relationships. Because of this discretion, it means appeals, like at the Disputes Tribunal, cannot be for an error of law, but only for the wrongful exercise of discretion. This would include the failure to consider relevant factors, the consideration of irrelevant factors or a decision which is plainly wrong.[134] The Disputes Tribunal Act has legislated to limit appeals in this manner and it is likely why very few cases are appealed from the Disputes Tribunal to the courts.[135]

Of course, New Zealand already has a Disputes Tribunal which has precisely the same mandate, to decide on the substantial merits and justice of each case. However, as earlier mentioned, the Disputes Tribunal has proven problematic for resolving neighbour disputes; it is inadequate as the first avenue of dispute resolution which should be mediation, lacks jurisdiction to resolve many neighbour disputes and is not mandatory so can be

131 Disputes Tribunal Act 1988, s 18(6).

132 Fencing Act 1978; Property Law Act 2007.

133 Ministry of Justice "Home" (7 October 2018) Employment Relations Authority <www.era.govt.nz>.

134 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

135 Disputes Tribunal Act 1988, s 50.

circumvented.[136] In order to implement this variable system of adjudicating neighbour disputes, either the jurisdiction of the Disputes Tribunal needs to be widened to all types of neighbour disputes, or – the preferred approach – that a specialised neighbour tribunal is set up. Adjudicators should be experts in the field of neighbour relations and they should be guided by the theory above, which balances strict rights with the need for leniency and tolerance to maintain good neighbour relations.

This tribunal must be mandatory so it cannot be circumvented by parties. This means all neighbour disputes will be *funnelled* into this scheme, much like the Tenancy Tribunal and Employment Relations Authority. Because of the limited avenues for appeal and the mandatory nature of the tribunal, litigation will largely be avoided.

Lastly, the tribunal – like the Tenancy Tribunal – should only apply to residential neighbours. Commercial neighbours do not attract the same policy reasons for upholding good neighbour relations and are often zoned apart from each other. Further, commercial parties have greater means to take disputes to court and bargaining powers are less likely to be unequal.

C Litigation

Because of the mandatory mediation scheme and mandatory neighbour tribunal, litigation for neighbours will largely become a thing of the past. Only limited appeals can be brought from the tribunal, where there was a failure to consider relevant factors, a consideration of irrelevant factors or where the decision was plainly wrong.[137]

It may be worth retaining an exception to mandatory tribunal adjudication, where the monetary sum of the dispute exceeds a certain amount. The Tenancy Tribunal has a limit of $50,000; a claim greater than this is transferred to the District Court or High Court.[138] Since tenancy disputes and neighbour disputes are both inherently related to property, this is likely a reasonable limit for any neighbour tribunal as well. Where claims greater than $50,000 are involved, it may well be necessary to fall back on strict rights (litigation) in order to retain certainty. It may be necessary to increase this threshold for claims relating to rights of way however, as property rights can be quite costly. Care will need to be taken to ensure parties do not artificially inflate claims or delay tribunal proceedings until damage is exacerbated to meet the threshold (although presumably the duty to mitigate will be applicable here).

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136 See Part III.

137 *Kacem v Bashir*, above n 134.

138 Residential Tenancies Act 1986, s 77(5).

Any precedent set at litigation will need to be considered by the tribunal when deciding later decisions, although again, adjudicators will have discretionary powers to decide on the substantial merits and justice of each case.

V Application of New Theory

A Fences

In *Gosney v Ngai Tahu Property Ltd*, the plaintiff asserted their strict legal rights to have the fence removed.[139] The consequences of this are long term; the defendant is unable to have the privacy and safety associated with the boundary fence as long as this right is enforced. Therefore, prima facie using the suggested theory, the tribunal should give less weight to plaintiff's strict legal rights when considering the substantial merits and justice of the case. However, such a restriction arising from long term consequences should not become a blanket ban. Factors must be given to guide adjudicators, to ensure their exercise of discretion is principled.

Factors which could guide the tribunal's exercise of discretion where one party attempts to enforce their strict legal rights should include:

(a) whether the consequences of enforcement are short term or long term;
(b) underlying issues to the dispute;
(c) conduct of the parties (including malice);
(d) length and seriousness of the infringement;
(e) any settlement offers made;
(f) bargaining position of parties;
(g) cost to remedy the breach compared to damage suffered;
(h) public interest in enforcing strict rights; and
(i) the need to resolve disputes as inexpensively, simply, and speedily as is consistent with justice.

A sound decision after consideration of the factors and the overall justice of the case, could be to allow the fence to stay. The defendant innocently constructed the fence on the property after having the land surveyed to ensure it was in the right position.[140] The fence is being erected at no cost to the plaintiff and is not obstructing any view. Instead of acknowledging the strict legal rights of the plaintiff as the Court did and giving a discretionary remedy, the tribunal applying this theory could simply refuse to uphold the right in the first place, after

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139 *Gosney v Ngai Tahu Property Ltd*, above n 21.

140 At [4] and [7].

considering the substantial merits and justice of the case. Because of the discretion afforded to the adjudicator, such outcome would be difficult to successfully appeal.[141]

In *Aitchison v Walmsley*, the Court took an instrumentalist interpretation of the Resource Management Act to prevent the defendant asserting his strict rights.[142] A more principled approach is possible using the new theory, which would lead to a more robust outcome. The adjudicator could assess the consequences of the defendant asserting his strict legal rights. Here, it is effectively a fence blocking the view and sunlight of the plaintiff.[143] There is a long term consequence for as long as the defendant asserts his strict right to have a play-fort. Therefore, discretion should be exercised, taking into account the underlying issue regarding the original fence, the obstruction to the plaintiff and conduct of both parties. This would likely lead an adjudicator to reasonably conclude in favour of the plaintiff.

B Trespass

In *Ogle v Aitken*, the defendant trespassed when his contractor placed a mound of dirt on the plaintiff's property.[144] The Court ordered nominal damages.[145] Applying the new theory, because an enforcement of strict legal rights here (tort of trespass) leads to only short term consequences – the consequences end as soon as the trespass is stopped by removing the dirt and there are no lasting effects – the plaintiff should be entitled to assert his strict legal rights if he wishes. This is so even though this may irreparably damage neighbourly relations. This is consistent with any property owner asserting their strict legal rights when a member of the public trespasses on their property and helps to balance out the need to still give effect to fundamental property rights. The tribunal should give effect to his strict legal right; this has merit (upholding fundamental property rights) and is just (does not greatly impact the defendant).

In *McInness v Jones*, the neighbour was unable to use the full driveway for construction trucks.[146] The Court held a reasonable use fee would be just.[147] Applying the theory to the facts of *McInness v Jones*, the consequence of enforcing strict legal rights here could be considered a long term consequence since the need to use neighbouring land is not a one-

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141 See *NZI Insurance New Zealand Ltd v Auckland District Court* [1993] 3 NZLR 453 (HC) at 17 and 18.

142 *Aitchison v Walmsley,* above n 5; Resource Management Act 1991, s 17.

143 *Aitchison v Walmsley*, above n 5, at [7] and [30].

144 *Ogle v Aitken*, above n 54.

145 At [2] and [83].

146 *McInness v Jones*, above n 57.

147 At [18].

off occurrence like *Ogle v Aitken*;[148] the defendant will be unable to complete the construction with an injunction. The tribunal should be able to exercise discretion and restrict application of strict legal rights after a consideration of factors and the overall need to maintain amicable neighbour relations in the interests of society. The final outcome could be the same as what was reached in the case, to effectively order the defendant to pay a reasonable use fee, or it would also be in the realm of possibilities to order no remedy and entirely decline to give effect to the strict rights.

Notably, exercising judicial discretion to order damages in lieu of an injunction merely alters the remedy but still acknowledges the enforceability of the strict legal right. The new theory here disincentivises claims by reducing the enforceability of the strict right, thereby incentivising settlement by mediation.

C Tort of Rylands v Fletcher

Rylands v Fletcher could also be determined using the new theory.[149] Where something escapes from the defendant's land and goes on to the plaintiff's land causing damage, the plaintiff can assert their strict legal rights against the defendant for damages.[150] Here, the consequences are minimal besides the compensation the defendant will need to pay. There are no lasting effects on the defendant's use and enjoyment of land like other cases. Thus, there should be no reason why the strict legal right here cannot be enforced by the tribunal when considering the substantial merits and justice of the case.

D Nuisance

1 Trees

Here, using the new theory raises an issue. Firstly, what is a short term consequence and what is a long term consequence? In *Ogle v Aitken*, it seems obvious the consequence of being ordered to remove the dirt is short term; once the dirt has been removed, there are no lasting effects.[151] In *Aitchison v Walmsley*, a permanent fence would be a long term consequence; it permanently blocks the plaintiff's view.[152]

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148 *Ogle v Aitken*, above n 54.

149 *Rylands v Fletcher*, above n 60.

150 At 3.

151 *Ogle v Aitken*, above n 54.

152 *Aitchison v Walmsley*, above n 5.

In *Semple v Wilson*, the consequence of the plaintiff asserting the tort of nuisance is that the trees will need to be removed.[153] This is a long term consequence affecting the defendant as the privacy and enjoyment afforded by those trees will be permanently lost. Applying the theory, as the consequence of asserting strict rights is long term, the tribunal should restrict the ability for the plaintiff to assert their strict legal rights for removal of trees.

The tribunal must consider the conduct of the parties, underlying issues (wanting sunlight) and extent of the intrusion. No doubt this would include the fact the plaintiff who is complaining about the defendant's trees, was in possession of their land prior to the defendant purchasing their property with the 20-year old trees already present.[154] The plaintiff had poor conduct from the outset and continually pressed the defendant to trim the trees (which the defendant agreed to do at their cost).[155] The plaintiff eventually asked for the removal of the trees, with a 30-day notice but failed to exercise his right of abatement because he wanted to await the outcome of this case which could require removal of the trees.[156] The defendant was also understandably hesitant to trim the trees since the trees were "on death row" due to the litigation.[157]

A reasonable conclusion here could therefore be an order simply requiring the defendant to keep the trees from encroaching, instead of the $21,462 damages that were awarded to the plaintiff. Notably, this conclusion is surely in the realm of possibilities of what the parties would have come up with, had they gone to mediation. Law prior to this reform means significant time, money and stress will be invested in litigation, causing further detriment to the neighbour relationship. At the end of the day, the Semples and the Wilsons must still go home to live next to each other. This can hardly be a happy and desirable outcome for either party, nor in the interests of the public who are all affected by the strict precedent regarding trees.

This case also brings up the question of malice. In Australia, the New South Wales Law Reform Commission recommended malice (in planting a tree) to be one factor when determining whether a tree unreasonably interferes with a person's enjoyment of their land.[158] The Property Law Act has not listed malice as a "further" relevant consideration under s 336.[159] This paper suggests it must be one factor for the tribunal to consider when

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153 *Semple v Wilson*, above n 77, at [3].

154 *Semple v Wilson*, above n 77, at [8] and [10].

155 At [16]–[20].

156 At [26].

157 At [27].

158 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, above n 126, at 34.

159 Property Law Act 2007, s 336.

determining whether to allow enforcement of strict legal rights where there are long term consequences.

Allowing this claim as the Court did also raises public policy questions. The existence of the trees would have no doubt impacted the plaintiff's buying decision and perhaps even affected the purchasing price, as neighbouring trees would impact any other diligent home purchaser. Recovering over this nuisance therefore may allow double recovery – that is, a cheaper property purchase because of the trees and recovery for damages in the tort for nuisance. This can hardly be just, so should be something else for the tribunal to consider.

2 Noise

In *Rolleston v Christchurch City Council*, there was no strict legal right to enforce at all as the band practice did not create an actionable nuisance, so the new theory would not need to be used.[160] However, if the band practice did turn out to be an actionable nuisance, then a determination would need to be made of whether consequences of enforcing strict rights is short term or long term. Here, there could be a permanent injunction so this would be a long term consequence preventing band practice, so greater discretion would be required of the tribunal when choosing whether to give effect to the strict rights or come to a compromise.

However, ordinarily a plaintiff asserting their strict legal right to quiet enjoyment of their property under the Resource Management Act noise control provisions only effects short term consequences on the infringer.[161] This is the most common avenue for resolving short term noise problems. The defendant is only barred from making noise for 72 hours per the Resource Management Act.[162] Therefore, this should point to – under the theory – the ability for the plaintiff to assert their strict legal rights. This also accords with what any reasonable person would likely consider fair – it would be absurd to restrict one's ability to enforce their rights to abate the noise and ask that they try mediation first, when the noise is only occurring for a brief period, is not inherent and needs immediate cessation.

On the other hand, where there is an activity on the land that is inherently noisy – such as the raceway in *Lawrence v Fen Tigers*, asserting strict rights could become problematic.[163] If the noise is inherent, preventing it by asserting strict rights leads to a long term consequence for the infringer, similar to the situation in *Rolleston.* Therefore, obtaining an injunction for quiet enjoyment of neighbouring land should be more discretionary, as per the suggestion for reform. Of course, such as situation could lead to neighbours setting up inherently noisy activities to spite the neighbour, knowing the neighbour – under the new

160 *Rolleston v Christchurch City Council*, above n 92.
161 Resource Management Act 1991, ss 327 and 328.
162 Section 327.
163 *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 WLR 433.

theory – will find it difficult to enforce their strict rights. This is why one of the considerations of the tribunal must be malice, when deciding the substantial merits and justice of the case.

3 Animals

Because enforcing rights against owners of animals causing a nuisance is most often a short term consequence (the owner can stop the nuisance and there are no lasting effects – assuming it is not an inherent nuisance like a chicken farm), the ability to assert strict rights here should not be restricted. Again, this accords with what a reasonable person would think the law should be.

E Easements and Rights of Way

Macken v Jervis, concerned a plaintiff who claimed her house was landlocked. She had no vehicle access to her garage due to the defendant asserting their strict legal rights.[164] The new theory will likely prevent the defendant obtaining an injunction; the consequences of enforcing strict rights have long term consequences leaving the plaintiff unable to have car access into her garage for the foreseeable future. The tribunal should restrict the ability of the defendant to assert the strict legal right and make a decision based on all considerations. Such decision could be to allow the plaintiff to access the garage subject to paying a fee. This would be a fairer decision than what the Court held by upholding the defendant's strict rights and barring the plaintiff from accessing her garage with her car.[165]

Although this outcome may not help or improve the relationship between the plaintiff and defendant, it is hoped the greater discretion at tribunal disincentivises parties from bringing claims in the first place, since strict rights are less likely to be enforced. This incentivises parties to make a greater effort at mediation to come to a mutual settlement, upholding good neighbour relationships. Such settlement could simply be allowing the driveway gate and allowing access to the garage; a win-win for both parties and certainly better than the expense, time and stress related to litigation.

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164 *Macken v Jervis*, above n 5.
165 At [40].

VI Additional Reform

A Regulation for Airbnb

The recent uptake of on-demand services website Airbnb has led to a host of complaints from landowners neighbouring Airbnb accommodation.[166] The law has evidently failed to catch up to these modern types of short term leases. Under the new theory, the ability for a neighbour to assert their strict legal rights, like most noise complaints, should be unrestricted as the consequences are not long lasting on the defendants. This is especially important where short term lessees are present since alternative dispute resolution processes are simply unrealistic.

However, any reform in this area should also consider new regulations covering short term letting. New legislation passed in New South Wales in August 2018 now limits – where the host is not present – short term letting to 180 days a year and a mandatory code of conduct.[167] The Act prevents any owner from letting out their property for five years if they receive two strikes for breaches of the code of conduct.[168] This code includes any conduct which unreasonably interferes with a neighbour's quiet and peaceful enjoyment of their home.[169]

Such legislation would alleviate neighbour disputes where the lessee is constantly changing (like in Airbnb situations) since the Resource Management Act noise control provisions are directed personally to the person receiving the order, rather than the address itself.[170]

B Regulations for Trees

Because trees make up the majority of neighbour disputes, it is worth noting a few other areas of possible reform. Parliament could implement greater regulation for tree planting administered by the council, such as limiting the number of trees, height, type and location (for example, away from the boundary line) could be considered. Such a scheme could be administered similar to the building consent regime, by the local council. This was

166 For example, see: Otago Daily Times "Noise wars: Queenstown resident sick of constant 'doof doof' from Airbnb houses" (7 September 2018) New Zealand Herald <www.nzherald.co.nz>.

167 Fair Trading Amendment (Short-term Rental Accommodation) Act 2018 (New South Wales).

168 Fair Trading "New short-term holiday letting regulations" (15 August 2018) New South Wales Government <www.fairtrading.nsw.gov.au>.

169 Fair Trading "New short-term holiday letting regulations", above n 168.

170 Resource Management Act 1991, s 327(3).

something considered by the New South Wales Law Reform Commission although ultimately rejected as being too restrictive and burdensome. [171]

However, another approach is to give local authorities power to determine disputes regarding trees.[172] Local authorities already administer noise complaints so it would be sensible to add tree complaints into this. This would mean mediation remains a first step, as suggested, but if that fails, either party can get the local council to come to the premises to determine whether a tree should be trimmed, removed, whether damage is attributable to the tree or whether there is a health and safety hazard (subject to the Resource Management Act s 76(4A)).[173] This alleviates the time, expense and stress that often exacerbates neighbour disputes, avoiding litigation which would not achieve this. It would also have the advantage of being region dependant, so more built-up regions may have stricter tolerances than rural areas.

Lastly, the common law surrounding the right of abatement is currently "totally out of touch".[174] It allows a property owner to trim overhanging branches from adjoining landowners without fear of repercussions, but because the branches belong to the adjoining landowner, the common law requires the property owner to return the branches to the neighbour. As noted by the NSW Law Commission, this is likely to escalate disputes.[175] The law here must also be reformed.

VII Conclusion

This paper has brought to light problems with New Zealand's current private law system for resolving disputes with neighbours. Neighbour relationships arguably require more protection than tenant-landlord and employee-employer relationships; parties have not chosen to enter into a bargain with one another, yet each party wields strict legal rights against each other and must live in close proximity to each other.

The Disputes Tribunal in its current form is inadequate for resolving these disputes due to lack of jurisdiction and its ability to be circumvented. Litigation often exacerbates neighbour disputes more and fails to preserve relationships – effecting time, expense and stress to both

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171 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, above n 126, at 25.

172 At 30–32.

173 Resource Management Act 1991, s 76(4A): this provision concerns trees which have been protected under a local authority District Plan.

174 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, above n 126, at 22.

175 At 22.

neighbours – often to receive the same outcome as what would be reached by private agreement or mediation; litigation simply deepens the lawyer's pockets.

Suggested reforms which have ongoing relationships at the forefront mean the ability to litigate between neighbours will become heavily restricted. Reforms should firstly – through community awareness programmes – encourage settlement of disputes in private through communication with one another. This should resolve the majority of disputes, but mediation must be there as a fall-back where it is not possible. This mediation should mirror the New South Wales Community Justice Centre's approach, which have proven high rates of settlement and satisfaction. Mediation can address issues which are often underlying the dispute, leading to a more robust and long-lasting solution.

A mandatory specialised neighbour tribunal should be the next step. Where it is used, a balance must be struck between upholding strict legal rights and the need to have leniency and tolerance in order to maintain good neighbour relations. For disputes where asserting strict legal rights only lead to short term consequences (which are often noise complaints), strict enforcement is desirable. However, where enforcement of strict legal rights leads to long term consequences, the tribunal should be more hesitant to enforce these strict legal rights, because to do so will often simply exacerbate neighbour disputes and incentivise litigation. Instead, principled discretion is required to adjudicate the dispute on its substantial merits and justice. Notably, some uncertainty surrounding discretion is required to disincentivise claims and encourage settlement at mediation, to preserve ongoing relationships.

Lastly, more specific areas of reform should target modern short term leases such as Airbnb, modelled off New South Wales legislation to give two strikes to hosts. Local authorities may also need to play a greater role in alleviating the most common neighbour disputes – trees – modelled off the role they currently play in noise complaints. Together, these reforms will overhaul the way neighbours in New Zealand view and resolve their disputes, while preserving neighbour relations. Appropriate systems will then be in place to deal with the increasing frequency of claims associated with the rise in urbanisation and increase in physical proximity between neighbours.

Word count

The text of this paper (excluding table of contents, abstract, non-substantive footnotes, and bibliography) comprises approximately 9500 words.

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