Injunctions Through the Lens of Nuisance

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Courts have jurisdiction to award injunctions at their discretion in a seemingly limitless variety of substantive fields, straddling private and public law. This chapter focuses on nuisance, where injunctions are the primary remedy. Most nuisance actions take the form of an on-going interference with the enjoyment of land, which the perpetrator either refuses to recognise as harmful or to stop.[1] For many years the legal position has been clear, namely, that an injunction preventing an actionable nuisance will be granted on the application of the victim as a matter of course, subject to narrow exceptions. That is the effect of the 'good working rule' of Smith LJ in the case of *Shelfer*,[2] which has been followed for over a century. However, *Shelfer* is now in some doubt, given the criticisms directed at it and/or its rigid application by members of the Supreme Court in *Coventry v Lawrence*.[3] 'What is the law?' is thus a legitimate focus of inquiry in this chapter, looking at doctrine and some evidence of the practical impact of injunction. Another aspect to consider is the Law Commission's draft Rights to Light (Injunctions) Bill, which contains proposals for law reform, altering the procedure by which victims of a nuisance (in the field of light) go about seeking an injunction, and also the criteria on which an injunction are awarded (or withheld).[4]

The analysis begins by situating current law in its historical context. Injunctions originated in medieval times, as a means of coercing powerful proprietors into complying speedily with property law at a time (during and after the 'black death') when the economy could not afford uncertainty in this area. They came to particular prominence in the setting of nuisance in nineteenth century, during the industrial revolution. This was when civil procedure was reformed to make it possible for victims of nuisance to obtain both damages and injunctions in one court, rather than having to bring separate proceedings. Defendants who operated utilities and factories which caused nuisance without obvious practical remedy sought to persuade the courts to allow for the payment of future damages rather than putting an end to the activity through an injunction. The courts were generally unsympathetic, as encapsulated towards the close of the century in the *Shelfer* working rules. Opinion about the adequacy of the law at this time differs from commentator to commentator. As is explained, some are of the view that the law was unclear (or lacked consistency of application), whilst others take the view that it was too harsh on the defendants and the wider public whose interests benefited from the continuation of the activity at the centre of the nuisance. We consider that the courts generally struck the right balance, by awarding injunctions that facilitated the abatement of nuisance but on flexible terms that accommodated the interests of the defendant and the public at large.

Next attention is given to *Coventry* and the nuisance cases in its aftermath. *Shelfer* in *Coventry* came in for radical criticism from Lord Sumption (with support from Lord Clarke), who saw the nineteenth century reasoning as 'unduly moralistic' and imposing excessive costs on third parties. He proposed reversing the presumption in favour of an injunction to a position where damages instead of an injunction would become the norm. Lord Mance, on the other hand,

[1] Most, but not all. For pure past nuisance cases, see *Thomas v Merthyrn Tydill Car Auction Ltd* [2012] EWHC 2654 (QB) and *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312. The level of damages is tiny compared to the costs of proceedings, as the courts acknowledged in each of these cases (questioning the failure to settle).
[2] *Shelfer v City of London Electrict Lighting Co* (1895) 1 Ch 287
[3] [2014] UKSC 13 (hereafter *Coventry*).
[4] Law Commission, *Rights to Light*, Paper No 356 (Stationery Office 2014) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc356_rights_to_light.pdf>

considered *Shelfer* particularly appropriate in situations where the claimant was 'defending' a home, which is the case much of the time. Lords Neuberger and Carnwath seemed more concerned with the danger of an over-rigid application of nineteenth century jurisprudence in recent times. Looking at the recent case law, the impression is that *Shelfer* and its wider Victorian era ethos of a presumption in favour of an injunction subject to unfettered discretion to substitute damages for an injunction remains the dominant approach.

Consideration is then given to the Law Commission's study of injunctions in regard to interference with the right to light. The Law Commission made some significant recommendations aimed at strengthening the hand of the defendant, including a new procedure that would protect the defendant from a claimant who used the opportunity to delay bringing proceeding for extort a higher settlement once a development has been completed. Another important proposal is the replacement of the *Shelfer* approach for awarding damages instead of an injunction with a criterion of proportionality. We do not agree with the premise that nuisance in the setting of light is significantly distinctive, such that reform to it can be made piecemeal, without regard to nuisance more generally. However, nor do we consider there to be a case for legislative reform, whether specific or more general, on the current evidence. The case law suggests that the position is clean enough and compelling, and injunctions not as harsh in practice as they may appear. Also the consultation underpinning the Law Commission's recommendation was too narrow to support reform.

It is concluded that injunctions are a fascinating and important case study of the workings of remedies in a 'common law world'. Statute has played a part here and there, and a decisive one above all in the procedural reforms of the Victorian era. But substantive law regarding the exercise of discretion, shaped by case law, remains sound. If the government is minded to sponsor legislation to implement the Law Commission recommendations, or something more general that addresses remedies in relation to nuisance as a whole, it will need to consult more widely than the large property developer-oriented profile of consultees underlying the Law Commission report, and it will need evidence that there is a serious practical problem to address.

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1. The Historical Development of Injunctions

Injunctions originated in the fourteenth-century, during a period of substantial innovation in all aspects of the law (and the institutions that supported the legal system which started with the centralisation of justice under Henry II in the twelfth-century).[5] Much innovation was directed at preserving traditional society in the aftermath of the black plague, which accounted for the death between 1348-1350 of something in the range of a third to a half of the population. Significantly, the death toll included a quarter of the country's gentry, known as 'tenants in chief', who occupied the upper classes.[6] Their deaths created uncertainty in the tenure of estates which, in turn, created economic uncertainty. In this moment of extraordinarily great need the courts devised injunctions that coerced the upper classes into enforcing property law.[7] The use

[5] See generally SFC Milsom, *Historical Foundations of the Common Law* (Butterworth & Co 1981) 11-36.
[6] RC Palmer, *English Law in the Age of the Black Death* (The University of North Carolina Press 1993) 59. See also WM Ormrod, *The Reign of Edward II: Crown and Political Society in England, 1327-1377* (Yale University Press 1990) 77.
[7] *Black Death*, ibid 60. Lower classes in contrast were coerced through punishment and penalty, rather than injunction.

of injunctions in the context of the most powerful echelons, for whom financial penalties do not have much coercive effect, has continued to the present day.

In terms of remedies for nuisance, early victims seeking to prevent wrongdoing could sue in the assizes or by the writ of *quod permittat prosternere* for abatement of the nuisance. However, these medieval actions fell into disuse in the early modern period, and were replaced by Action on the Case. Here the remedy was exclusively damages.[8] The effect was that the victim of a nuisance proceeding by way of Case had to bring a separate action in the Court of Chancery if they sought abatement of the nuisance. Blackstone, in his *Commentaries*,[9] thought that exemplary (punitive) damages filled the gap left by the absence of an injunction, but the essence of an injunction as it had then evolved in Britain was to coerce rather than punish – a consideration that resurfaces throughout the analysis below.

Injunctions became available in the law courts in 1854 following the Second Common Law Procedure Act.[10] However, it took time for claimants and practitioners (and judges) to become accustomed to the change. Claimants continued to use the dual system. When Mr Tipping won his case in *St Helen's Smelting Co v Tipping*[11] he brought separate proceedings for an injunction. A second and complementary procedural reform was the Court of Chancery Amendment Act 1858, more commonly known as Lord Cairns' Act, which allowed damages to be awarded by the Chancery Courts.[12] Among the first to use the new procedure was Sir Charles Bowyer Adderley, who in *Attorney General v Birmingham Corporation* obtained from Vice Chancellor Page Wood a variety of remedies: damages for past nuisance, damages for future nuisance; an injunction preventing continuation of the nuisance, suspended for a period of time to enable the tortfeasor to devise a means of compliance.

Injunctions in the cases above were awarded in favour of powerful landlords against powerful private (*Tipping*) and public (*Birmingham Corporation*) enterprises. Abating a nuisance in these circumstances, which is what the victims sought, could be very expensive, and defendants had a financial incentive to pay damages for continuing the nuisance rather than the alternatives. Defence counsel in *Birmingham Corporation* left little to the imagination in anticipating dire consequences:

> The evil that must ensue if the court should [find for the claimant on the injunction] would be incalculable. Birmingham will be converted into one vast cesspool…the deluge of filth will cause a plague, which will not be confined to the inhabitants of Birmingham, but will spread over the entire valley to become a national calamity. [13]

[8] For an interesting discussion regarding cases where self-help was utilised to abate nuisances on occasions see Milton, ibid, 103-6. He cites a selection of cases during the seventeenth-century but it would seem owing to the decision by Coke CJ in *Baten's Case* ((1610) 9 Co Rep 53b; 77 E R 810) that if the option of self-help to abate a nuisance was taken then an action on the case would not be available; thus neither would damages for the nuisance.
[9] Blackstone stated: 'Indeed every continuance of a nuisance is held to be a fresh one (2 Leon pl. 129; Cro. Eliz. 402); and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it (3 W Blackstone, *Commentaries on the Laws of England*, (OUP 1765-9) Ch. 13, 220-2).
[10] The Common Law Procedure Act, 1854 (2nd June) 17 Vict. Ch. 125; see 19th Century House of Commons Sessional Papers vol. 1.473 in the House of Commons Parliamentary Papers (Bill 123 of 1854), particularly paras. LXXX-LXXXIII, pages 18-19. Now governed by the Supreme Court Act 1981, Ch. 54, section 37.
[11] See (n 1).
[12] Now governed by the Supreme Court Act 1981, Ch. 54, section 50.
[13] Quoted in B Pontin, *Nuisance Law and Environmental Protection: A Study of Injunctions in Practice* (Lawtext Publishing 2013) 42.

Nonetheless an injunction was granted, but on terms that allowed the town to continue to be drained while a cleaner infrastructure was invented (the injunction was suspended for 5 years).

The courts were consistently unsympathetic to arguments that damages should be permanently awarded instead of an injunction, for reasons encapsulated towards the end of the century in *Shelfer* v *City of London Electric Lighting Co*. The claimant was a publican – not all cases were brought by the 'upper orders' - who commenced an action in private nuisance against an electricity company following vibrations from equipment in a power station causing structural damage to the house and discomfort to the occupier. In seeking payment of damages instead of an injunction, the defendant argued that there was no known means of these works operating so as not to cause a nuisance, and that the mischief to the public of the works' closure would be great. The trial judge (Kekewich J) agreed, awarding damages for past loss and for future loss, instead of an injunction.

The Court of Appeal overturned the decision and awarded the injunction. As Lindley LJ said:

> Ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalising wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (e.g. a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed.[14]

Smith LJ echoed Lindley LJ's remarks, before setting out what has become the influential 'good working rule'.[15] Assuming a case can be made out, or that a claimant has not disentitled himself to equitable relief,[16] the appropriate remedy may be damages in lieu of an injunction when the injury to the claimant's legal rights is (1) small; (2) capable of being estimated in money; (3) can be adequately compensated by a small money payment; and (4) that the granting of an injunction would be oppressive to the defendant. Smith LJ said this about the need for flexibility:

> It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant.[17]

Even so, Smith LJ's 'good working rule' had the clear message that damages instead of an injunction would not normally be awarded permanently.

Some have doubted that the courts' approach on this matter was as consistent as the dicta in *Shelfer* imply.[18] However the more pertinent criticism for present purposes is that the

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[14] *Shelfer* (n 2), 315-6
[15] Ibid.
[16] Ibid, 'There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction' (as per Smith LJ in *Shelfer* (n 3), 323). Conversely delay in mounting proceedings may also adversely affect a plaintiff (*The Imperial Gas Light and Coke Company v Broadbent* (1859) House of Lords Cases (Clark's) 600, 611 (also 11 ER 239)).
[17] Ibid 323.
[18] J Brenner, 'Nuisance Law and the Industrial Revolution (1974) 3 *Journal of Legal Studies* 403.

presumption in favour of an injunction was consistently harsh on the defendant and the wider public in its interest in the defendant's land use. Horsey and Rackley comment critically on the injunction being awarded 'even though doing so would inevitably deprive many people in the London area of electricity'.[19] The injunction awarded in *Shelfer* required the defendant to abate the nuisance arising from excessive vibration. The level of acceptable vibration was not defined quantitatively. The injunction was suspended to allow the defendant time to work out the best way forward *for it* to comply with the victim's entitlement. Thus the criticism makes a number of assumptions about what happened after the injunction was granted. Perhaps the enterprise *did* close down, yet the injunction did not require it to. The expectation of the judge was that the defendant would conduct research into a feasible vibration abatement technology, or it would acquire the claimant's entitlement so that unmitigated vibration was no longer a nuisance, or some other mode of compliance falling short of the drastic option of outright closure (it might relocate to a more suitable site).

The flexibility we suggest is embedded in nineteenth and early twentieth century practice based in part on what judges are reported as ordering (awarding injunctions abating nuisance rather than requiring outright cessation of the offending land use, and doing so on a suspended basis), together with empirical research into the actual consequences of superficially stark examples of judicial indifference to public misery. Among the cases of injunctions studied empirically are *Birmingham Corporation* and *Farnworth v Manchester Corporation*.[20] In the first of these the injunction was granted to restrain nuisance from a large sewage undertaking, which has been described in the commentary as drastic.[21] Yet it was suspended to allow for a period of time to research modes of sewage treatment system sufficient to comply with the victim's entitlements. The suspension was periodically renewed to the point that a practical remedy for the nuisance was invented, installed, operated and honed over a 37 year period. The costs to the wrongdoer were immense (circa £500,000), but its pockets were deep. Crucially, at no point was the town unable to be drained. Furthermore, the improvement in the quality of the river Tame brought with it positive externalities. The cleaner river provided a lasting amenity for large numbers of people, whilst there is also the matter of 'technology transfer' – other sewage undertakings learned from the Birmingham experience. In defending the injunction in this case, we acknowledge (as Lunney et al point out) that the positive slant on the case is controversial.[22] What seems beyond doubt is that the catastrophe predicted by the defendant on being injuncted did not materialise. The harshness of the injunction was greatly exaggerated, if indeed it was harsh at all.

In *Manchester Corporation*, the court in first awarding the injunction (Jenny Steele writes) 'said it would disregard the effect of the injunction on Manchester's electricity supply' in deciding whether to exercise its discretion in favour of the victim. [23] On the other hand, it did expect the injunction to place pressure on the wrongdoer to give thought to the victim's entitlements and the scope for a cleaner mode of electricity generation that would work more respectfully alongside neighbours. In the event, the injunction was refined by the Law Lords to be subject to a condition in the defendant's favour: the defendant could have it dissolved

[19] K Horsey and E Rackley, *Tort Law*, 5th edn (OUP 2017) 553. On the meaning of 'inevitable' in a nuisance context, see M Wilde, 'All the queen's Horses: Statutory Authority and HS2' (2017) 37 *Legal Studies* 765.
[20] [1930] AC 171. Pontin, ibid (Ch 4)
[21] S Tromans, 'Nuisance – Prevention or Payment' (1982) 41 CLJ 87.
[22] M Lunney, D Nolan and K Oliphant, *Tort Law: Text and Materials*, 5th edn (OUP 2017) 698 (citing L Rosenthal, *River Pollution Dilemma in Victorian England* (Ashgate 2014), which questions the value for money of investment in sewage purification here and elsewhere The money could have been better spent on other public goods, like affordable housing).
[23] J Steele, *Tort Law: Text Cases and Materials*, 3rd ed (OUP 2014) 641.

should the corporation establish ('if it not be admitted') that 'they have exhausted all reasonable modes of preventing the mischief'.[24] The case ended tragically for the victim, who died shortly after surrendering his tenancy to the Corporation for a large sum of money. But the Corporation also took some steps to mitigate pollution of the neighbourhood, in the knowledge that thousands of local residents had urged the claimant to bring the case and had wanted the air in the region cleaned up. Once again, an ostensibly harsh injunction from the perspective of the defendant and third parties on closer view appears flexible and positively so regarding the wider public.

These affirmative stories of compliance with injunctions may or may not be typical. Only further empirical research will tell. Regardless, they can never capture the full picture, because sometimes nuisance law throws up disputes over land uses that are irreconcilable. In these cases the practical effect of an injunction is inevitably drastic, in the sense of bringing an end to the defendant's interest in the site bar a Coaseian bargain. Damages instead of an injunction ought to be looked by the court especially closely in these circumstances, whether within the narrow parameters of the *Shelfer* working rule or more broadly. And so it proves. This is illustrated by the cases of *Miller v Jackson*[25] and *Regan v Paul Properties*.[26]

Beginning with *Miller v Jackson*, in this case about twice a year for the three years that the claimants had occupied a new build next to an old cricket ground, a cricket ball escaped causing serious distress to one of the residents and injuring the enjoyment of the residence (as well as some minor material injury to the house). The defendant took steps to minimise the risk of escape (erecting a very high fence), but the victims wanted the threat eliminated. The injunction they sought was categorical and rigid: that 'cricket shall not be played on this particular ground'.[27] At first instance they got this.

The Court of Appeal overturned the injunction in the exercise of discretion, pointing to the public interest. As Lord Denning said, in one of the most cited passages in common law history, the injunction would destroy the village:

> I suppose that the cricket ground will disappear. The cricket ground will be turned to some other use. I expect more houses or a factory. The young men will turn to other things instead of cricket. *The whole village will be much the poorer*.[28]

This is not so much a case of judicial fondness for cricket, as village life. Cumming Bruce LJ agreed with Denning, adding an authority for the public interest being a factor in the exercise of discretion to withhold and injunction.[29] How can the judges identify a public interest? [30] Experience and intuition seem to be at work in this case.

Yet our argument is that the public interest is, if not explicit, implicit in all the cases mentioned above and considered below. The courts are using injunctions to resolve situations of neighbours in conflict in a wider societal context, by framing them where possible (as in most cases) in flexible terms that reflect the law's given and take ethic. Where (largely exceptionally) reconciliation is not realistic, the courts will look more closely at damages, as a way of righting a wrong proportionally. The one area of nuisance where this is particularly apposite is

[24] *Manchester Corporation* 185
[25] (1977) QB 966
[26] [2006] EWCA Civ 1391
[27] *Miller* 973.
[28] Ibid 976 [emphasis added].
[29] Ibid.
[30] See the concern of Lord Sumption in *Coventry* [160]

interference with light. The *Miller* scenario of irreconcilable land uses comes into play quite commonly in this setting, although there is once again scope for the defendant to exaggerate the drastic impact of the established law.

At common law a neighbour has a right to 'necessary' light, and sometimes this is provided for in terms of easements that spell out a specific entitlement between dominant and servient tenements. Either way, the exact practical content of the right is defined on a case by case basis, much as any other area of nuisance. Defendants have seemingly fewer opportunities to reorganise their affairs short of removing the physical fabric of the defendant enterprise (whether a storey or two or the whole building). In other words, they are in the position of the cricket club in *Miller*, being asked to do what they want to do (or have done) on a different site. In this situation the case law suggests that the defendant can expect greater sympathy in their application to pay equitable damages rather than be injuncted, all things being equal.

An early example of the courts being prepared to grant damages instead of an injunction at the request of defendant in regard to interference with light includes *Colls v Colonial Store Ltd*.[31] In this case the defendant ultimately won on liability, but in Lord Mcnaghten's opinion they would otherwise have succeeded in an application to compensate for the loss rather than being injuncted. He said that where the nuisance is marginal injury - and where the defendant has generally acted in a 'neighbourly spirit' (an important caveat):

> I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money. Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the Court to protect some ancient lights, which they have never before considered of any great value, as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises.[32]

The reference to the judge's personal experience is significant.[33]

Consider in this vein *Regan*. Here the loss of light was considered significant enough to establish liability, thus the case was the other side of the line to that in *Colls*. The trial judge found that the tortious loss of light caused depreciation in value as £5500, making it small for purposes of Smith LJ in *Shelfer*. The defendant had been generous in offering to settle the claim without proceedings for £15,500. More importantly, the defendant had shown respect for their neighbour in the design and construction of the building, taking advice on light - including ways to mitigate any obstruction - and acting on it. There was nothing much more the defendant could do to the height and design of the offending penthouse apartment, which would have to go were an injunction granted. That would be oppressive. The trial judge thus considered the

[31] [1904] AC 179
[32] Ibid 193.
[33] We return to the factual basis on which a judge can identify the consequences of an injunction or its withholding briefly below, in section 3.

Shelfer exception to be satisfied and awarded damages instead of an injunction, which the Court of Appeal upheld.

Yet not all right to light cases are zero sum, and sometimes they can be addressed much as other nuisances – by modifying defendant behaviour. This is illustrated by *HKRUKII (CRC) Ltd v Heaney*.[34] Mr Heaney (unusually the defendant but also the victim of the loss of light) owned a grade II listed Victorian-era bank that he acquired to renovate for offices and, on the upper floors, residential units. He had the benefit of an easement protecting the light of the building against neighbouring land recently acquired by HKRUKII (CRC) Ltd (the claimant). All parties were aware of the easement and that it would be infringed by the development the owner of the servient land had obtained planning permission for. Nevertheless, planning permission was implemented and the owner sought a declaration from the court that the actionable injury with the defendant's right to light should be compensated by damages and not an injunction. They had a budget set aside for that. An injunction, it was reasoned, would be oppressive to the claimant, and all the other *Shelfer* criteria (small injury and so on) were engaged. The defendant counter-claimed, seeking an injunction requiring in effect that the offending two upper stories be rebuilt to a less intrusive design.

The court found for the victim of nuisance, ruling that *Shelfer* was not engaged, and that there was no broad equitable reason for granting damages instead of an injunction. The injury was serious enough, held Langan J. Were he to be wrong, other things pointed in favour of a injunction. In particular, there was nothing oppressive about requiring a developer who had invested £35m in a development known to be actionable investing further sums in making it lawful.

> The claimant was not driven by necessity, but could have very easily, if somewhat less profitably, built sixth and seventh floors of reduced dimensions. In my judgment, it would be wholly wrong for the court effectively to sanction what has been done by compelling the defendant to take monetary compensation which he does not want.[35]

One lesson from this is that, whilst the courts are reluctant to grant injunctions that will end a defendant enterprise's viable existence at a site, they will be willing to do so where it will elicit change that brings the land use into line with nuisance law.

A different slant on this is the scenario where an injunction is withheld but with the prospect of one being granted in the future, with equitable damages being order in lieu. The closest illustration is *Dennis v Ministry of Defence*.[36] There are a number of similarities with *Birmingham Corporation*, notably substantial injury to the victim; substantial public interest in the continuation of the defendant's activity; no short term fix but the possibility of a long term one. In *Dennis* the nuisance concerned noise from a Royal Air Force site affecting the enjoyment of a large rural estate. The Ministry of Defence had used its site for purposes of training fighter pilots since 1984, but had plans for a new use from 2012, when existing training provision would likely be moved to the United States. The new use could involve Future Carrier Borne Aircraft (FCBA), which was not a prospect the claimant welcomed. The trial judge (Buckley J) had this to say about the future:

> I…add, in the hope that it might assist the parties in the regulation of their affairs, that on the present evidence touching the noise of FCBA, I can easily envisage a court

[34] [2010] EWHC 2245 Ch
[35] *Heaney* [81]
[36] *Dennis v Ministry of Defence* [2003] EWHC 793 (QB)

> finding it literally intolerable for residents at Wittering [where the claimant resided] and probably others in the immediate locality. The argument that such a level of noise, which would cross the threshold of potential damage to hearing, should not be inflicted on residents anywhere, would be strong. To put it bluntly, the MOD would be well advised to train pilots for FCBA in the wide-open spaces the USA can provide or reconsider the location of training fields here.[37]

This appears an injunction in all but name, and as such it is a further illustration of the flexibility and nuance in the practice in the field of nuisance remedies. It is against this backdrop that the latest developments should be understood and evaluated.

2. Making Sense of Injunctions and Damages after *Coventry v Lawrence*

The nuisance in *Coventry* concerned noise from the operation of a motor racing track near the claimants' residence. It is a landmark case on matters of liability, because it was the first opportunity at the highest appellate level the judiciary has had to consider the modern application of nuisance taking the form of 'sensible personal discomfort' (now commonly known as 'amenity nuisance') as first recognised in the middle of the nineteenth century by Lord Westbury in *Tipping*. Most of the substantive issues centred on defences. Briefly, the Supreme Court ruled that coming to a nuisance in certain limited circumstances can provide a defence (contrary to *Tipping*),[38] but that planning consent does not change the character of the neighbourhood for purposes of nuisance law (contrary to *Gillingham*).[39] The court also ruled that prescription encompasses noise – something that had until then been open. However, our focus is on the exercise of discretion in regard to an injunction, about which all the members of the Supreme Court had something to say. Lord Clarke thought this 'the most important aspect of this case'.[40]

At first instance, Seymour J awarded damages for past nuisance (amounting to £20,000) and an injunction restraining the noise nuisance. The terms of the injunction, he said, would be left to the parties to agree. He took a paternalistic line on the claimants' proposal to live with noisy activity at the site for 40 days. He advised against '[w]ooliness as to what level of noise is permitted, and on what precise days, [which] strikes me as a recipe for future problems.'[41] 40 days of consecutive noise would surely be unacceptable, he pointed out. This is how the matter was left:

> Subject to the parties' agreement on some other form of order, what I have in mind is to grant an injunction directed to each of Mr. David Coventry and Moto-Land restraining him or it, save with the express prior written consent of the claimants, from causing or permitting noise to be generated from activities at the Stadium or the Track, as the case may be, which generate a noise level, measured at the boundary of Fenland, which exceeds, between 08:00 and 20:00 hours, 45 dB LAeq15minutes or, between 20:01 and 7:59 hours, 37 dB LAeq15 minutes. A question which does arise, since

[37] Ibid [77]
[38] *Coventry* [53] (per Lord Neuberger)
[39] Ibid [89]-[99] (with respect to *Gillingham BC v Medway Chatham Dock Ltd* [1993] QB 343).
[40] Ibid [171].
[41] [2011] EWHC 360 QB [242]

> Fenland is presently unoccupied and will remain unoccupied until the Bungalow is repaired, is as from what date any injunction should take effect.[42]

Throughout the subsequent appellate history of the case the bungalow remained unoccupied, the injunction was not 'in effect', and racing could continue within the framework of planning permission with noise subject to no additional abatement.

The Court of Appeal found for the defendant on the basis that planning permission had changed the character of the neighbourhood and that the noise was reasonable against the background of that character. The issue of damages instead of an injunction did not arise until the Supreme Court hearing. Seeking to pay damages rather than change practice, the defendants reasoned that the racing activities were popular among many members of the local community, and that the activities were being adequately managed within a regulatory framework (planning law). The planning authority had carefully considered the balance between the costs of noise with the benefits of racing, and had reflected that in planning conditions. Finally the injury could be compensated in damages. The Court of Appeal in *Watson v Croft*, dealing with similar facts, was wrong to ignore these factors and approach *Shelfer* slavishly.[43]

The salient issue was defined by the Supreme Court thus:

> The approach to be adopted by the court when deciding whether to grant an injunction to restrain a nuisance being committed, or whether to award damages instead, and the relevance of planning permission to that issue.[44]

Before looking at the judgments, it is important to acknowledge that there is some debate about the extent to which the approach of the court arising from the judgment is clear. Some consider it is broadly speaking clear, for example Jenny Steele:

> To one degree or another, all members of the Supreme Court agreed the courts should approach the choice of injunction or damages in a far more flexible and open way than implied by the *Shelfer* case.[45]

Lunney however emphasises the differences of opinion in the case about what the law now is, what it was, and also the debate in the commentary about what it ought to be (including the merits of the Victorian era position).[46] The impression is that *Coventry* is rather confusing. What, then, is the current position in a black letter law sense? This is a challenging question which is addressed below, in light of the main opinions expressed by the judges in *Coventry*, followed by consideration of the reception of *Coventry* within the very latest case law.

A helpful starting point in discussing the opinions in *Coventry* is the judgment of Lord Sumption. Though by no means the longest, it is ostensibly the most radical. It proposes reversing the established presumption in favour of an injunction encapsulated in *Shelfer* and wider nineteenth century practice, with the general effect that a victim would usually receive future damages instead of an injunction. Thus the injunction would become the exception. Lord

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[42] Ibid [245]

[43] *Watson v Croft Promo Sports* [2009] EWCA Civ 15. At first instance Simon J had withheld an injunction, awarding damages instesd.

[44] *Coventry* [6].

[45] Steele, *Tort Law*, 642. See too E Lees [2014] Conv 449,455 ('*Shelfer* is no longer good law')

[46] Lunney et al, *Tort Law*, 698, citing Paul Davies, 'Injunctions in Tort and Contract', in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 127, 128 ('Given the disparate judgments…and the disparagement of *Shelfer* without a clear replacement, it is unclear how predictable the resolution of the issues…is').

Sumption thought there were three main problems with the established approach inherited from the Victorian era which his approach would overcome. These are discussed in turn.

One is a version of criticism noted in the previous section that the courts have been indifferent to public misery.

> An injunction is a remedy with significant side effects beyond the parties and the issues in the proceedings. Most uses of land said to be objectionable cannot be restrained by injunction simply as between the owner of that land and his neighbour. If the use of a site for (say) moto cross is restrained by injunction, that prevents the activity as between the defendant and the whole world. Yet it may be a use which is in the interest of very many other people who derive enjoyment or economic benefits from it of precisely the kind with which the planning system is concerned.[47]

The difficulty is that this does not support a *change* in approach. Though the Court of Appeal took an extremely rigid approach in *Watson v Croft*,[48] and this may have deterred the defendants from requesting damages instead of an injunction earlier, the case is potentially an aberration. Generally the courts already exercise considerable caution when asked by a proprietor to 'prevent an activity' of the neighbour that is valued within the wider world, and the terms on which injunctions are awarded reflect this. This is obvious from the cases noted in the previous section, where the courts drafted injunctions on terms as flexible as possible to allow for the continuation of the defendant enterprise at the site at hand (as in *Coventry* itself), or exploited the flexibility inherent in the discretion to award damages instead of an injunction where that was not feasible. *Miller* is the best example of last resort flexibility in withholding an injunction, whilst *Regan* is another, and *Dennis* a further one.

A second reason for change adduced by Lord Sumption is that the courts are not equipped (whether with the research resources or 'democratic' legitimacy) to weigh the public interest in how the activity is to be performed. They should stick to awarding damages that internalise (from the defendant's perspective) the costs of the nuisance, allowing them (the defendant) to pass on costs to third parties if they wish. Though this appears to represent liberal economic reasoning of the kind familiar in law and economics literature, Lord Sumption is in fact acknowledging – indeed prioritising – the role of regulatory law. His point is to internalise the costs and 'let the market decide' within the framework of the decisions of planners.[49] However, as is apparent from some of the cases noted in the previous section, planners do not in practice weigh private interests or rights, nor do applicants for planning permission expect them to do so. This best illustrated in the right to light cases touched on in the previous section (notably *Heaney*), where developers as a matter of course see compliance with public and private law as fundamentally discrete obligations.

The third reason for change according to Lord Sumption is that *Shelfer* is 'unduly moralistic' in requiring a wrong to be remedied by desisting from it rather than compensating for it

[47] *Coventry* [157]. He continues, 'An injunction prohibiting the activity entirely will operate in practice in exactly the same way as a refusal of planning permission, but without regard to the factors which a planning authority would be bound to take into account. The obvious solution to this problem is to allow the activity to continue but to compensate the claimant financially for the loss of amenity and the diminished value of his property.'

[48] In *Watson* the award of damages instead of an injunction was quashed because the trial judge ultimately did not 'recognise the limitations on his discretion to withhold an injunction' [47] (per Sir Andrew Moffitt, Chancellor)

[49] *Coventry* [157].

monetarily.[50] As Lord Sumption rightly points out, Victorian England was 'much less crowded' and 'comparatively few people owned property' in land.[51] Property in land had a sanctity which the presumption in favour of injunctions over damages reflected. Claimants in the past often had deep attachment to the specific piece of land the enjoyment of which they were using nuisance law (and injunctions) to protect. Money was no object (and it was no substitute for the specific land at hand). This is true not only of elite proprietors such as Adderley, but also (moving into the twentieth century) the yearly tenant farmer behind the *Manchester Corporation* injunction. His action was funded by the National Farmers Union, but his family connection to the land went back many generations. Lord Sumption is implicitly suggesting that property in land is more of a commodity today, with a property market, including a property ladder, and to some extent it is. But is the change 'complete'?

This reason is the most original, and perhaps the strongest, of those advanced by Lord Sumption, and the opinion as a whole was endorsed by Lord Clarke. He too proposed a radical overhaul of what he considered to be the Victorian era foundations of the law, for the reasons given by Lord Sumption. However, he stopped short of advocating the reversal of the presumption in favour of an injunction, preferring a case by case approach in which the onus could vary from party to party.[52]

Other judges cast doubt on the idea that land ownership lacks sentiment today, such that payment to move on (rather than invest greater sums in clean up) can legitimately become the new norm. Lord Mance strongly defended the *Shelfer* approach (or something like it) when it came to cases where the claim was a defence of a home:

> I would only add in relation to remedy that the right to enjoy one's home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of money. With reference to Lord Sumption's concluding paragraph, I would not therefore presently be persuaded by a view that 'damages are ordinarily an adequate remedy for nuisance'.[53]

This covers the scenario in *Coventry* and a great many others. Lord Carnwath agreed, acknowledging 'the special importance [that] should attach to the right to enjoy one's home without disturbance, independently of financial considerations.'[54]

Ultimately, our view is that the *Coventry* ruling as a whole is not a rejection of *Shelfer* but some of its treatment in the case law. The specific case that came in for the most criticism is a very modern one, namely, *Watson v Croft*.[55] The trial judge had interpreted *Shelfer* flexibly, such that damages instead of an injunction were appropriate. But the Court of Appeal ruled that Smith LJ's working rule was rigid and binding. Even so, in criticising the approach of the Court of Appeal in *Watson*, the Supreme Court nevertheless ruled Seymour J's disposal of *Coventry* as broadly sound. Lord Neuberger, who delivered the lead judgment, proposed a resolution of the appeal that upheld the approach of Seymour J. If the defendants wished to apply to discharge injunction, with or without payment of equitable damages, they were at liberty to apply to the court to do so.[56]

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[50] Ibid [160]
[51] Ibid [161]
[52] Ibid [170].
[53] Ibid [168]
[54] Ibid [247]
[55] See Lord Neuberger [115] et seq and Lord Carnwath [239] (*Watson* wrongly decided).
[56] *Coventry* [149].

Talk, then, of *Shelfer* being 'shelved'[57] and the like would appear premature. Not only is there enough support in the opinions of Lords Neuberger, Mance and Carnwath for the 'Victorian fundamentals' – including its moralism - but there is support for this approach in the commentary. For example, Paul Davies writes that 'property rights should not be lightly taken owing to the courts, which is the practical effect of allowing the defendants to pay damages and thereby continue to commit the nuisance'.[58] Maria Lee, though being the most consistent and cogent advocate of a flexible approach to remedies that marches with regulatory law developments, does not point to any injunction being wrongly awarded.[59]

This business-as-usual conclusion is reinforced by the continued support for *Shelfer* in the small handful of nuisance action reported post *Coventry*. For example, in *Higson v Guenault*[60] the Court of Appeal noted the difference of opinion among Supreme Court justices in *Coventry*, yet held that the starting point in approaching the discretion to award an injunction remained *Shelfer*.[61] Applying Smith LJ's exception, this was not satisfied, nor was there any other ground for awarding damages instead of an injunction. Similarly, in *Pieres v Bickerton Aerodromes Ltd*,[62] the tortfeasor aerodrome operator was required to reduce the exposure of the victim's home to noise from helicopter training operations. This is notwithstanding that the aerodrome in that case had the benefit of planning permission.

3. Injunctions and the Right to Light

In 2012 the Law Commission began consulting on reform to injunctions in relation to the right to light. The right to light is valuable, the Law Commission stated, because it gives landowners some certainty that natural light will continued to be enjoyed by property, notwithstanding the grant of planning permission.[63] This reinforces the point above, that nuisance and planning co-exist to a substantial degree in parallel. However, the Law Commission was concerned that nuisance law in this area was too favourable to the defender of entitlements to light, at the expense of the developer.

Initially the consultation focused the proposal of a statutory procedure by which a developer who risked obstructing a neighbour's light could draw attention to this risk and bring issues of liability (and remedies) to a head early in the development process. The consultation was then modified midstream to address the potential uncertainties arising from *Coventry* concerning the law relating to the award of damages in lieu of an injunction.

The draft Rights to Light (Injunctions) Bill contains a clause (clause 1 and the accompanying Schedule) which, at the initiative of the developer, would give a neighbour likely to suffer an interference with light a minimum of 8 months notice of the proposed obstruction (a Notice of Proposed Obstruction or NPO), in which time they would be expected to bring nuisance proceedings seeking an injunction. If, after the expiring of the notice period, proceedings were commenced, the only remedy they could obtain for any actionable loss of light would be damages. This differs from the present position, whereby the onus is on the developer who is

[57] D Holland, 'Remedies after Coventry v Lawrence: Shelfer Sheleved? Landmark Chambers Working Paper (2014) <http://www.landmarkchambers.co.uk/userfiles/documents/resources/DMH%20CovLawrence.pdf>
[58] Davies, above n 46 136.
[59] M Lee, 'Tort Law and Regulation: Planning and Nuisance' [2011] JPL 986; 'Nuisance and Regulation in the Court of Appeal' [2013] JPL 277; 'Occupying the Field', in J Steele and TT Arvind (eds), *Tort Law and the Legislature* (Hart Publishing 2014).
[60] [2015] EWCA Civ 703.
[61] Ibid [51]
[62] [2016] EWHC 560 (Ch)
[63] Note 4 above.

worried that their development will constitute a nuisance to seek a declaration from the court one way or another, including a declaration as to whether the interference lends itself to remedy by way of damages or an injunction. This happened in *Heaney*, but not to the advantage of the tortfeasor. In other words, the Bill was a response to the 'problem' of *Heaney*.

Does it make sense to confine a proposal of this kind to light issues? Arguably not, insofar as it is conceiveable that a racing enterprise (or piggery or cricket club and so on) might wish to bring issues of liability and remedy to a head in the same way that developers might wish to under the Law Commission's proposals with respect to light. That is one difficulty with the principle of the draft Bill. Continuing in this vein, if the problem is that the neighbour may use delaying tactics to extort a higher monetary settlement, is there any reason why that should apply more to a neighbour protecting light than tranquillity or fragrance? 'If' here is the operative term, because it is unclear that the Law Commission's case rests on compelling empirical evidence that neighbours do tend to stand on extreme rights. The evidence that the Law Commission relies relies rather heavily on *Heaney*, above. But the judge exonerated the rights-holder of extortion or anything like it; it was the developer who may have been behaving oppressively.[64]

The second tranche of Law Commission proposals bears on the replacing the *Shelfer* critieria to be applied in deciding whether to award of damages instead of an injunction:

> The court must not grant an injunction if, in all the circumstances of the case, an injunction would be a disproportionate means of enforcing the claimant's right to light.

The draft section goes on to specify eight factors the courts should take into account. These include 'the impact of the injunction on the defendant'[65] and 'the public interest, so far as relevant'.[66]

Once again, the question arises as to whether light can be sensibly singled out for special treatment. In *Coventry* there was some doubt whether nuisance in the context of right to light does raise special issues for purposes of discretion in the award of damages or an injunction. Lord Carnwath noted that injunctions requiring the demolition of a property do crop up seemingly more commonly in a right to light setting than elsewhere,[67] and that when they do, an injunction will be more drastic than would otherwise be the case (and the case of damages instead more cogent). However, other judges looked at nuisance within differentiation of this kind. Moreover, Carnwath does not seem to be suggesting that there is anything *inherently* drastic about a right to light injunction compared to other amenities. Sometimes the award of an injunction in 'non-light' settings would be drastic, as in *Miller* and *Dennis*, and sometimes in light settings there is a pragmatic accommodation where the developer respects their neighbour (as in *Heaney*, albeit that the claimant there sought more than the court was prepared to grant, not appreciating the defendant's good faith offer of a higher sum settlement before proceedings were commenced). Whether the topic is light or something else, nuisance is about about reciprocity. If this ethic is put into practice through sagacious judging, it can surely only be balanced.

Judicial sagacity is however frequently tested by hard cases. One of the latest is the on-going Chelsea stadium dispute, which currently stands with a neighbour holding an injunction

[64] *Heaney*.
[65] Clause 2(3)(f)
[66] Clause 2(3) g)
[67] *Coventry* [247]

prohibiting the implementation of planning permission for a new stand at the south London football club's home ground.[68] The proposed stand consists of, inter alia, 17,000 hospitality seats, and is materially higher than a new stand would be if it comprised the same number of 'ordinary' seats, that were less lucrative. Chelsea accept that the stand, if erected, would amount to a nuisance, but not that an injunction is the appropriate remedy. They are offering the Crosswaite family (the claimants) a six figure sum of compensation instead of submitting to the injunction. Other neighbours of the Crosswaites (there are about 50 properties in the terrace affected) are happy to accept damages instead of an injunction. The Crosswaites have no objection to the stadium redevelopment to accommodate 17,000 fans, but the greed that this is being pursued against the wishes of a family that had lived at its address for over half a century, Are they the only 'ancestral' neighbours and should this count in their favour?

It is interesting, and often illuminating, to consider the profile of the consultees to Law Commission enquiries.[69] A look at the list of consultees in this instance suggests a balance tilted in favour of large developers and the city practitioners representing them.[70] Though there are references to a residents association here and there, and the Council for Protection of Rural England and the National Trust, many of the 'big players' on the claimant side of nuisance litigation are conspicuous by their absence. This is particularly notable in connection with Richard Buxton,[71] but also Client Earth, the Environmental Law Foundation and the United Kingdom Environmental Law Association. This is a significant body of stakeholder absentees, whose opinions might be expected resist implementation of the Law Commission's proposed reforms.

4. Conclusions

In an influential study of Victorian era urbanisation, E P Hennock wrote of the 'force' that injunctions had in shaping the behaviour of private and public corporations, particularly in the field of nuisance.[72] 'Barons' of industry and local government, he showed, planned infrastructure developments around property rights protected inter alia by nuisance. Our analysis suggests that they continue to do so, and that this is part of a broader history of injunctions coercing the most powerful economic forces in society going back to the medieval period. It is fascinating, as well as complex and challenging. The courts risk not only the wrath of the most powerful economic interests in society, but also 'the world' (per Lord Sumption in *Coventry*). The situation is dramatic and difficult, because courts cannot afford to get it wrong, nor can they fully please everybody.

Against that backdrop, the current law is poised between a position in which the courts continue to be trusted (and to trust themselves) with discretion to award injunctions where appropriate, on terms which are appropriate, on the one hand, and the prospect of statutory reform on the

[68] 'Chelsea forced into extra time as family's fight for daylight blocks new £1bn stadium', The Telegraph, 12 January 2018 <http://www.telegraph.co.uk/news/2018/01/12/no-light-end-tunnel-chelseas-new-1-billion-stadium/>

[69] On the (controversial) politics of Law Commission refor in a adjacent field of remedies, see D Campbell, 'The Heil v Rankin Approach to Law Making: Who Needs the Legislature' (2016) 45 Common Law World Review 340

[70] *Right to Light*, n 4 above, Appendix E.

[71] Who represented claimants in a number of cases mentioned in this chapter, e.g. *Dennis, Biffa Waste, Coventry*.

[72] E P Hennock, *Fit and Proper Persons: Ideal and Reality in Nineteenth Century Urban Government* (McGill-Queen's University Press 1973) 107 (quoted in Pontin, n 13 47).

other. Our analysis does not support statutory intervention as things stand, whether in local fields (notably light) or any more general picture that may emerge in the near future. But that could change, particularly if the courts lose confidence in the current Victorian era foundations of the law, and attempt radical reform through obiter dictum, along the lines of Lord Sumption above all in *Coventry*. More research is needed into how injunctions work in practice one way or another, so that less reliance is placed on untested assumptions about how the law actually operates, and there is more understanding of how many 'problems' are real.