**‘An unduly moralistic approach to disputes’? Monetary remedies in nuisance after *Coventry v Lawrence*.**

*Coventry v Lawrence* is a hugely significant case for the development of the tort of private nuisance. The decision is dominated by the interplay between the planning process, and the law of tort; and by the contested place of public interest in the tort of nuisance. It was suggested however by Lord {Clarke} that the most important issue to arise in the case was one that was not to be resolved by the Supreme Court: the question of monetary remedies in relation to continuing nuisances or, as it is possibly misleadingly expressed, damages *in lieu* of injunction. There was an invitation to think about the thorny question of monetary remedies in this context. There was more or less sensitivity to quite how thorny the question is. Lord Sumption’s remark is quoted in the title. He goes to the nub of a very difficult and important issue in relation to continuing nuisances. Here the law has an *opportunity* to do what cannot be done where the damage is all in the past. Remedies cannot undo past harms unless those harms are genuinely purely economic. When it can prevent harms, [when] does it – should it – choose to do so? With respect I have there changed the assertion to a question. I think it is a challenging one.

Are monetary remedies sometimes not second best, but actually right, even where the opportunity to prevent the tort still exists?

I intend to make a start on taking up that invitation here, with a particular eye on the planning context. I expect that there will be other commentators offering very different analyses. I expect some of those will **defend** the need to take a moralistic view of disputes. I will instead spend more time trying to identify to what extent monetary remedies – and indeed injunctions themselves – may avoid being ‘unduly moralistic’, or fall into that trap, and what the solutions might look like. It is not obvious of course that injunctions or damages fall into one side of the divide or the other. An injunction may be – or allow – some sort of compromise; or it might prevent compromise. Similarly, monetary remedies may themselves be enormously moralistic – attempting to express the full value of a wrong and to deter future repeats, if necessary by going beyond what is compensatory – or they may amount to an enforced compromise (the sanctioning of a purchase of rights, it is sometimes said). I’ll try to negotiate through these various possibilities in a manner which does justice to the Supreme Court’s willingness to think afresh. I will also attempt to focus at least part of the discussion on the role of what might very loosely be called ‘public interest’, which emerged as key to the decision in *Coventry v Lawrence* itself, and on the question of whether monetary remedies are the route to the long-term survival of the tort of nuisance.

Why is it to some extent misleading to discuss the issues here in terms of whether damages may be awarded *in lieu* of an injunction? The reasons were lucidly explained by JA Jolowicz some decades ago in his review of Lord Cairns’ Act. Two steps on the way to clearing up the problem should be identified.

First, one view of the objectives of Lord Cairns’ Act might be that it allowed the courts of equity to do ‘complete justice’, so that claimants were not compelled to make repeated journeys to the courts to secure damages. However, Jolowicz points out that this was clearly not the whole effect of the new powers of the courts of equity to award damages. Damages at common law were only available for harm actually suffered. The award of such damages would still leave the claimant to return to the court repeatedly in the case of a continuing nuisance. The courts of equity were not simply to be given such an unsatisfactory power, replicating the limitations of common law. Besides, once the courts were fused, this would have no significance. An injunction of course would remove the problem, by blocking the continuation of a nuisance. In the particular context of a dispute where the nuisance has been administratively ‘permitted’, then an injunction appears to give rise to a contradiction. If so, that contradiction could also be replicated by damages however, if they are set at a level which is intended to deter. More generally, an injunction seems at first sight to be moralistic and uncompromising. But this view can be questioned. Injunctions may be subject to terms which are to some degree compromises of the dispute at hand. At the same time, it has been shown that injunctions may be seen as a precursor to negotiation and compromise – or, as a response to a breakdown in efforts to achieve an agreed settlement. The relationship between injunctions and negotiation is not clear; but in any event it does not bear directly on the question of public interest which in one form or another is key to the present exercise.

But as Jolowicz makes clear, where damages are awarded in lieu of an injunction, the award of damages now takes the form of a final settlement. In this sense it might be thought more intrusive than an injunction. It is not the precursor to negotiation. To look at it in this way however means suggesting that the injunction itself is not *necessarily* a moralistic response. That in turn however means that declining an injunction might be easier.

This means attending to the second step in the analysis of the nature of the power to award damages under Ld Cairns Act. For as Jolowicz points out, the injunction is itself a discretionary remedy; and the power to award damages ‘in lieu’ is a ‘discretion upon a discretion’. Proponents of the traditional approach to the *Shelfer* criteria should not be allowed to give the impression that there is a right to an injunction. The crucial point is that the situation envisaged by the *Shelfer* ‘criteria’ (or ‘good working rule’, to give it the name attached by its author, avoiding the temptation of slavish following) is only one situation where the award of damages might be relevant. That is, where an injunction *would have been awarded*, but there are reasons to award damages instead. Not surprisingly this should not be done where it inconveniences the claimant greatly. The alternative however is that an injunction may be *refused*, despite the existence of a continuing nuisance. Damages here are not so much a replacement for an injunction, as a free-standing remedy in circumstances where no injunction would have been awarded. This is particularly valuable in cases where any injunction awarded would be a *mandatory* injunction. But it could be important in any instance where an injunction would be refused. In these circumstances, it might well be thought that the underlying decision *not* to grant an injunction should affect the remedy for a continuing nuisance; for what is not desired is the deterrence of the activity concerned. This is in one sense a ‘compulsory purchase’ of the claimant’s rights; but only where continuation is justified. The critical questions here are when might an injunction be refused; and how might damages be assessed.

Not all assertions of rights are equally protected by the courts. The sytanx of the title quote is interesting: it is *disputes* we are concerned with – continuing disagreements into which the law will step. A different way of looking at the issues is to present them not as disputes but ‘wrongs’. But that tends to express a one-sided view. Amenity nuisance in particular tends to involve *competing* uses and interests.