# INVOLUNTARY SALE DAMAGES IN PERMANENT NUISANCE CASES: A BIGGER BANG FROM *BOOMER*

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## I. INTRODUCTION

During its evolution in the last one hundred years, the permanent nuisance doctrine has significantly changed prior concepts of damage recovery in nuisance actions. Before courts began to apply the permanent nuisance doctrine, a plaintiff in a nuisance or trespass suit was allowed to recover damages for future injuries only if the tort involved a permanent, physical change in his property.[1] A plaintiff's future damages were measured by the diminution of the property's fair market value caused by the defendant's actions.[2] If the tort involved a temporary injury to the property, though, the plaintiff was allowed to recover only for injuries which had occurred prior to the suit, even if the temporary injury was of a frequently recurring nature.[3] Starting in the late nineteenth century, courts began to recognize that a temporary injury to the plaintiff's property could give rise to future damages if such an invasion was likely to recur.[4] In these cases, the defendant's activity was deemed to be a permanent nuisance.

Today, the permanent nuisance doctrine has evolved into a widely accepted, but not uniform, doctrine. In determining whether a recurring invasion of the plaintiff's property rights constitutes a permanent nuisance, the key issue is the likelihood that such invasions will continue with the requisite frequency. In resolving this issue,

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[1] *See infra* notes 15–24 and accompanying text.

[2] *See infra* note 19.

[3] *See infra* notes 25–28 and accompanying text.

[4] *See infra* notes 38–47 and accompanying text.

courts consider such factors as the ability of the plaintiff to get injunctive relief,[5] the physical permanence of the structure causing the invasion,[6] and whether or not the nuisance value of the defendant's activity is a result of negligence in carrying on that activity.[7]

Despite wide acceptance of the doctrine, it has also been criticized by both courts and commentators. Most significantly, critics assert that the permanent nuisance doctrine is inconsistent with the concept of ownership of private property.[8] This criticism is based on the argument that the permanent nuisance doctrine allows the defendant to acquire, against the plaintiff's will, the legal right to cause future injury to the plaintiff's property. This involuntary transfer of a package of rights that is essentially an easement seems inconsistent with the idea that a private property owner has the right to exclusive control of his property, except when an important public interest is involved. Conversely, the principle advantage of the permanent nuisance doctrine seems to be that it gives the court an alternative to the harsh remedy of injunction.

Another less noticed, but related drawback of the doctrine is the inadequacy of the diminution of market value as the sole measure of permanent damages. This measure probably results from the doctrine's roots in eminent domain law and traditional nuisance law. A large number of early permanent nuisance cases involved public or quasi-public bodies that possessed the power of eminent domain.[9] These entities were able to take an easement on the plaintiff's property in return for the market value of the easement. The courts therefore limited the plaintiff's recovery to the same amount when the defendant acquired the easement in a permanent nuisance suit.[10] Further, the early courts analogized recurring property invasions to physically permanent damages, for which recovery of diminution of market value was traditionally allowed.[11] The courts consequently adopted the permanent damage measure as the permanent nuisance measure.

These two bases for the application of the diminution of market value measure, though, are no longer valid in many permanent nuisance cases. Today, the permanent nuisance doctrine is often applied to cases where the defendant is a private citizen.[12] In these

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[5] *See infra* notes 50–57 and accompanying text.
[6] *See infra* notes 74–78 and accompanying text.
[7] *See infra* notes 58–61 and accompanying text.
[8] *See infra* notes 82–95 and accompanying text.
[9] *See infra* notes 105–110 and accompanying text.
[10] *See infra* note 110 and accompanying text.
[11] *See infra* notes 121–123 and accompanying text.
[12] *See infra* notes 72, 110 and accompanying text.

cases, the original rationale based on eminent domain is not applicable. When courts use the diminution of market value in such cases, they fail to recognize that a permanent nuisance is not a taking of property for a public purpose, but instead is a tortious invasion of the plaintiff's property rights by another private citizen. Furthermore, a permanent nuisance differs from a permanent injury. A permanent nuisance involves not only a permanent diminution of the plaintiff's use and enjoyment of his property, but also a derogation of the plaintiff's right to free disposition of his property. When courts apply the permanent nuisance doctrine, they force an involuntary sale of an easement at a price they determine. This derogation of dispositional rights does not occur in permanent injury cases. The diminution of market value compensates only for the easement lost, and is therefore inadequate to compensate the plaintiff fully for his losses.

Future damages, as measured by diminution of market value, are inconsistent with recognized elements of past damages. The elements of past damages include not only diminution of use and enjoyment, which is considered to be an injury to the property, but also discomfort, annoyance, and inconvenience suffered by the plaintiff. In a permanent nuisance case, the diminution of market value only compensates the plaintiff for future diminution of his use and enjoyment. The plaintiff is not compensated for his future discomfort, annoyance, and inconvenience, which the plaintiff will suffer as a result of the continuing nuisance. Because a plaintiff is allowed to recover for past annoyance and discomfort, but not for future annoyance and discomfort, the measure of future damages in permanent nuisance cases is inconsistent with the measure of past damages.

Finally, the use of diminution of market value as the sole measure of damages can be economically inefficient. The diminution of market value takes into account only the community consensus of the amount of injury to the property.[13] It is likely that the individual owner of the property attaches certain subjective values to the property over and above those attached by the community at large. The defendant is forced to pay only for the community's value of the injury and not for the owner's subjective value. Thus, the defendant is not required to internalize the full cost of his activity. Failure to internalize the full cost, in turn, leads to an economically inefficient decision by the defendant about the level of his activity.

This Comment examines the permanent nuisance doctrine, focusing primarily on the issue of the measure of damages. Initially, the

[13] *See infra* note 134.

Comment considers the evolution of the permanent nuisance doctrine from the traditional concepts of nuisance and trespass law. The second section discusses in greater detail the various measures of damages in permanent nuisance cases. This section concludes that courts should permit recovery of additional damages for injuries resulting from the involuntary sale that is inherent in the doctrine. The third and final section presents one court's practical approach which compensates the plaintiff fully while seeming to avoid some of the valuation pitfalls of these additional damages.

## II. The Permanent Nuisance Doctrine

### *A. Evolution*

In the nineteenth century, the remedies available in nuisance and trespass cases depended on the nature of the injury to the property. If the defendant's activity was likely to result in substantial harm, and money damages would not provide an adequate remedy, the plaintiff was entitled to seek an injunction in equity.[14] In addition, the plaintiff could bring an action at law for damages.[15] The plaintiff could in all cases recover for past personal injuries resulting from the invasion. The recoverable elements of such personal injuries included injury to the health of the plaintiff and his family,[16] and in some cases, past annoyance, discomfort, and mental distress.[17]

In addition to damages for personal injuries, the plaintiff could also recover for injuries to his property. The measure of damages,

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[14] *E.g.*, Oswald v. Wolf, 129 Ill. 200, 209, 21 N.E. 839, 840 (1889) (denying equitable relief to a plaintiff in a nuisance suit on the grounds that the plaintiff's legal rights had not been established); Sam Warren and Son Stone Co. v. Gruesser, 307 Ky. 98, 104, 209 S.W.2d 817, 820 (Ct. App. 1948) (affirming a lower court's injunction of stone cutting engines that created noise and vibrations on the grounds that the defendant did not show disproportionate hardship would result from the injunction and that damages were inadequate to compensate the plaintiff); Powell v. Bentley and Gerwig Furniture Co., 34 W.Va. 804, 811, 12 S.E. 1085, 1087 (1891) (refusing to enjoin a factory as a nuisance on the grounds that plaintiff had not established that the factory was a legal nuisance); Wood v. Sutcliff, 61 Eng. Rep. 303, 303–04 (1851).

[15] *E.g.*, City of Phoenix v. Johnson, 51 Ariz. 115, 124, 75 P.2d 30, 34 (1938); *Powell*, 34 W. Va. at 811, 12 S.E. at 1087. *See generally* 66 C.J.S. *Nuisances* § 139 (1950).

[16] *E.g.*, Kornoff v. Kingsburg Cotton Oil Co., 45 Cal.2d 265, 273, 288 P.2d 507, 512 (1955); Sam Finley, Inc. v. Russell, 75 Ga.App. 112, 117, 42 S.E.2d 452, 456 (Ga. Ct. App. 1947) (upholding the plaintiff's cause of action in nuisance for damages for personal injuries due to smoke and dust emitted from defendant's asphalt processing plant); Gergeson v. Fermenich Mfg. Co., 77 Iowa 576, 582, 42 N.W. 448, 450 (1899).

[17] *E.g.*, Baltimore and Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 329 (1883); Krulikowski v. Polycast Corp., 153 Conn. 661, 670, 220 A.2d 444, 449 (1966); *Kornoff* 45 Cal.2d at 273, 288 P.2d at 512; *Sam Finley* 75 Ga. App. at 117, 42 S.E.2d at 456. *See generally* 66 C.J.S. *Nuisances* § 174 (1950).

however, differed according to the nature of the injury. If the nuisance or trespass resulted in a permanent physical injury to the property, the plaintiff was required to sue for all damages, past, present, and future, in one action.[18] In such cases, the damages were measured by the diminution of the property's fair market value,[19] or by the cost of repairing the injury.[20] In *Jacksonville, Tampa, and Key West Ry. Co. v. Lockwood*,[21] for instance, the defendant railway company dug up the plaintiff's property and laid track across the property. The trial court admitted testimony regarding the diminution of the property's market value.[22] On appeal, the defendant argued that the plaintiff could only recover for damage incurred prior to the suit rather than recover the entire damages sustained.[23] The Florida Supreme Court held that the plaintiff was entitled to recover the diminution of market value since the injury done to the plaintiff's property was permanent in nature.[24]

In contrast, if the invasion involved a temporary, recurring invasion with no physical injury to the land, the plaintiff could recover only for past injuries.[25] Any injuries to the person and property resulting from subsequent invasions gave rise to a new cause of action for damages. In *Cooper v. Randall*,[26] for example, the defendant's flour mill emitted chaff, dust, and dirt which settled on the plaintiff's property. The plaintiff appealed the trial court's refusal to admit evidence concerning the diminution of the property's market value.[27] The Illinois Supreme Court upheld the lower court's refusal, noting that this case did not involve permanent damages, and therefore plaintiff was entitled to recover only past damages.[28]

One of the primary reasons courts distinguished between permanent and temporary injuries was the presumption that the defendant

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[18] *E.g.*, Shelley v. Ozark Pipe Line Corp., 327 Mo. 238, 245, 37 S.W.2d 518, 521 (1931); City of Amarillo v. Ware, 120 Tex. 456, 461, 40 S.W.2d 57, 61 (1931). *See generally* 1 Sedgwick, *Damages* §§ 94–95 (9th Ed. 1920); McCormick, *Damages* § 127 (1935).

[19] Jacksonville, Tampa, & Key West Ry. Co. v. Lockwood, 33 Fla. 573, 586, 15 So. 327, 331 (1894); N. Indiana Pub. Serv. Co. v. Vesey, 210 Ind. 338, 353, 200 N.E. 620, 627 (1936). *See generally* 66 C.J.S. *Nuisances* § 175 (1950) and cases cited therein.

[20] *E.g.*, Stratford Theater, Inc. v. Stratford, 140 Conn. 422, 424, 101 A.2d 279, 280 (1953); Braun v. Iannotti, 57 R.I. 194, 195, 189 A. 25, 26 (1937).

[21] 33 Fla. 573, 15 So. at 327 (1894).

[22] *Id.* at 578, 15 So. at 329.

[23] *Id.* at 579–80, 15 So. at 329.

[24] *Id.* at 596, 15 So. at 334–35.

[25] *See, e.g.*, Cooper v. Randall, 59 Ill. 317 (1871); Langford v. Owsley, 5 Ky. 215 (1810); Shelley v. Ozark Pipe Line Corp., 327 Mo. 238, 37 S.W.2d 518 (1931). *See generally* Sedgwick, *supra* note 18, § 91 and cases cited therein.

[26] 59 Ill. 317 (1871).

[27] *Id.* at 321.

[28] *Id.* at 321–22.

would not continue an unlawful activity.[29] Courts assumed that once the defendant's activity was found to be unlawful, the defendant would either voluntarily cease the unlawful activity due to threat of further liability, or that the plaintiff could obtain an injunction if the defendant continued the activity.[30] As such, the courts thought that the defendant should not be required to pay for damages which might not occur.[31]

Contrary to these assumptions, however, the plaintiff was not always able to secure abatement of the nuisance. The plaintiff was allowed to recover damages as a matter of right once the nuisance and injury was established.[32] But whether an injunction should issue was up to the discretion of the court.[33] To obtain an injunction, the plaintiff was required to show that, absent an injunction, he would suffer irreparable injury, and that he was without adequate remedy at law.[34] In addition, the courts employed a balancing test: no injunction would issue if the issuance of the injunction would cause the defendant harm greater than the harm suffered by the plaintiff as a result of continuation of the nuisance.[35] In *Wood v. Sutcliff*,[36] for instance, the plaintiff was a wool yarn producer who relied on water from an adjacent river to cleanse its wool. The defendant operated a dye plant upstream from the plaintiff. Periodically the defendant's wool dying operations polluted the water. After obtaining nominal damages in a nuisance action at law, the plaintiff sued in equity for an injunction. The equity court denied the injunction; it balanced the equities and determined that the defendant's business would be ruined if an injunction was issued.[37] The plaintiff was left

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[29] Cumberland and Oxford Canal Corp. v. Hitchings, 65 Me. 140, 140–41 (1876); Uline v. New York Cen. and Hudson River R.R. Co., 101 N.Y. 98, 112, 4 N.E. 536, 543 (1886); Bartlett v. Grasselli Chem. Co., 92 W. Va. 445, 454, 115 S.E. 451, 454 (1922) (overturning an award of permanent damages on the grounds that defendant's chemical manufacturing plant was an abatable nuisance, and thus did not constitute a permanent nuisance).

[30] *Bartlett*, 92 W. Va. at 451, 115 S.E. at 453.

[31] *Shelley*, 327 Mo. at 246, 37 S.W.2d at 521.

[32] *Powell*, 34 W. Va. at 811, 12 S.E. at 1087.

[33] Haack v. Lindsay Light and Chem. Co., 393 Ill. 367, 370, 66 N.E.2d 391, 393 (1946), rev'g 325 Ill. App. 581, 60 N.E.2d 578 (Ill. Ct. App. 1945) (overturning an injunction of a chemical factory that emitted chemicals and smoke on the grounds that the plaintiffs suffered only nominal damages and that the defendant was engaged in a lawful and important business); *Powell*, 34 W. Va. at 811, 12 S.E. at 1087.

[34] *Oswald*, 129 Ill. at 209, 21 N.E. at 839–40; *Wood*, 61 Eng. Rep. at 303–04.

[35] *See, e.g.*, Haack v. Lindsay Light and Chem. Co., 393 Ill. 367, 66 N.E.2d 391 (1946); Powell v. Bentley and Gerwig Furniture Co., 34 W. Va. 804, 12 S.E. 1085 (1891); Wood v. Sutcliff, 61 Eng. Rep. 303 (1851).

[36] 61 Eng. Rep. 303 (1851).

[37] *Id.* at 304–05.

with his legal remedy, which was the nominal damages awarded by the court of law. Furthermore, because the defendant was unlikely to shut down its plant to abate the nuisance voluntarily, the plaintiff was forced to sue for past damages each time the defendant polluted the river. As a result, the plaintiff's only recourse was to bring successive suits for damages.

Beginning in the late nineteenth century, the courts began to recognize that a temporary, recurring invasion of the plaintiff's property rights could give rise to damages for future injuries. The case that opened the door to recovery of permanent damages in these instances is *Town of Troy v. Cheshire Ry. Co.*[38] There, the town of Troy sued the Cheshire Railway Company for laying tracks across a road and tearing down a bridge in order to construct a railroad bridge.[39] At the trial, the railroad argued that the town could recover damages only for past injuries, and, since the town had not yet paid out any money to replace the road and bridge, no recovery could be had.[40] The New Hampshire Supreme Court rejected the defendant's argument and awarded damages to the plaintiff based on diminution of the market value of the road and the bridge. The court noted,

> Wherever the nuisance is of such a character, that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there, the damage is an original damage, and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong, to apply the labor necessary to remove the cause of the injury . . . .
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> But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may, or may not be, continued there the injury . . . is only the damage that has happened.[41]

Ironically, the use of diminution of market value as the measure of damages in this case was consistent with the traditional view of damages in trespass and nuisance cases because the injury was a permanent one for which permanent damages were recoverable.[42] However, the language of the case was used in subsequent cases as precedent for the idea that future damages are recoverable in nuisance cases that do not involve a permanent injury to the land.[43]

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[38] 23 N.H. 83 (1851).

[39] *Id.* at 83–84.

[40] *Id.* at 101.

[41] *Id.* at 102.

[42] McCormick, *supra* note 18, at § 127.

[43] *See, e.g.*, Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 S.E. 216 (1907) (citing

Early in the twentieth century, courts began to focus on the permanence of the source of the invasion rather than the permanence of the effect of the invasion.[44] If the structure that injuriously affecting the plaintiff's property was permanent, and the continuance of the injurious effect was relatively certain, then the injury to the property was considered permanent, or "original."[45] The result was that the plaintiff was allowed to recover damages for injuries that were likely, but not certain, to occur. In *City of Paris v. Allred*,[46] for example, the defendant-municipality built a sewer that emptied into a stream running across the plaintiff's property. The waste discharged by the sewer was deposited onto the plaintiff's property, rendering it unfit for use. In determining that the sewer was a permanent injury that justified the plaintiff's recovery of permanent damages, the Texas Civic Court of Appeals noted,

> [t]he main question in the case is . . . whether or not the cause of the nuisance is permanent in its character, and entitles the plaintiff to recover all the damages in one suit, or whether the nuisance is temporary in its nature, and entitles plaintiff to recover only such special damages as may have accrued up to the time of the suit . . . . We think it clear from the evidence . . . that the damages to [plaintiff's] land result from a cause permanent in its character.[47]

There was no showing that the plaintiff's land was permanently affected by past sewage deposits. It would seem likely that, if the sewage flow was abated, the sewage already deposited on the plaintiff's land would decay and leave the plaintiff's property as it was before the sewage was deposited. Under the traditional view, then, the plaintiff was entitled to recover only for past damages to the property, that is, diminution of the property's rental value. Since the sewer was a relatively permanent structure, however, and since the sewage deposition was likely to continue as long as the sewer remained, the plaintiff was allowed to recover future damages as

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*Troy* as support for the holding that a sewer depositing waste on the plaintiff's land constituted a permanent nuisance).

[44] *See, e.g.*, Highland Ave. and Belt R.R. Co. v. Matthews, 99 Ala. 24, 10 So. 267 (1891); City of North Vernon v. Voegler, 103 Ind. 314, 2 N.E. 821 (1855); Stodghill v. Chicago, B. & Q. R.R. Co., 53 Iowa 341, 5 N.W. 495 (1880); Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 S.E. 216 (1907). *But see Uline*, 101 N.Y. 98, 4 N.E. 536; Carl v. Sheboygan and Fond Du Lac R.R. Co., 46 Wis. 625, 1 N.W. 295 (1879). *See generally* McCormick, *supra* note 18, at § 43.

[45] Virginia Hot Springs Co. v. McCray, 106 Va. 461, 464, 56 S.E. 216, 218 (1907).

[46] 43 S.W.2d 62 (Tex. Civ. App. 1897).

[47] *Id.* at 63.

well as past damages despite the absence of physically permanent damage.

### *B. The Modern Permanent Nuisance Doctrine*

Today, the concept of permanent nuisances is widely accepted. The courts, however, have expressed a variety of opinions on what constitutes a permanent as opposed to a temporary nuisance.[48] In general, the essential element of a permanent nuisance is that the nuisance will not be abated.[49] Accordingly, a central question in permanent nuisance cases is whether injunctive relief is available to the plaintiff.[50] As a general rule, the defendant's activities will be enjoined unless he has a legal right to maintain the activity,[51] or unless the activity is lawful.[52] For instance, in *Lyons v. Fairmont Real Estate Co.*,[53] the defendant constructed a road embankment partly on the plaintiff's land. The West Virginia Supreme Court ruled that the lower court had erred in admitting evidence of the diminution in the market value of the plaintiff's property, on the grounds that permanent damages were not recoverable.[54] The court noted that permanent damages may be recovered in certain cases where the structure causing the nuisance is built solely on the defendant's property.[55] But if the structure causing the nuisance is wholly or partially on the plaintiff's property, only temporary damages may be recovered, since the defendant has no right to maintain the structure on the plaintiff's property.[56] In such a case, the nuisance would not be considered permanent since the cause of the nuisance would be unlawful, and thus subject to abatement. In contrast, activities which benefit the public, that is, activities carried

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[48] Spain v. City of Cape Girardeau, 484 S.W.2d 498, 503 (Mo. Ct. App. 1972) (discussing at length the difference between a temporary and a permanent nuisance); McCormick, *supra* note 18, at § 127.

[49] *Vesey*, 210 Ind. at 353, 200 N.E. at 627; Kentucky-Ohio Gas v. Bowling, 264 Ky. 470, 477, 95 S.W.2d 1, 5 (1936); *Shelley*, 327 Mo. at 242, 37 S.W.2d at 519; *Spain*, 484 S.W. at 504; *Bartlett*, 92 W. Va. at 451, 115 S.E. at 453.

[50] Spaulding v. Cameron, 38 Cal.2d 265, 267, 239 P.2d 625, 627 (1952) (overturning an award of diminution of market value and remanding to determine whether the defendant's improperly filled slope constituted a permanent nuisance, or whether it constituted a temporary, abatable nuisance); *Bartlett*, 92 W. Va. at 451, 115 S.E. at 453.

[51] *Vesey*, 210 Ind. at 351, 200 N.E. at 627; *Bartlett*, 92 W. Va. at 451, 115 S.E. at 453.

[52] *Shelley*, 327 Mo. at 242, 37 S.W.2d at 519.

[53] 71 W. Va. 754 (1912).

[54] *Id.* at 759–62.

[55] *Id.* at 759.

[56] *Id.* at 760.

on by entities vested with eminent domain power, are generally considered lawful and therefore not subject to abatement.[57]

In addition to being lawful, courts have also required that the nuisance arise from the inherent nature of the activity and not from negligence in undertaking the activity.[58] In *Shelley v. Ozark Pipeline Corp.*,[59] the Supreme Court of Missouri held that a leaking oil pipeline was a temporary nuisance. The court noted,

> In order for a nuisance to be permanent, it is usually necessary that the nuisance be created by the inherent character of a structure or business and that its lawful and necessary operation creates a permanent injury. Where, however, the structure or character of the business, when properly conducted and operated, does not constitute a nuisance, but only becomes such through negligence, then the nuisance or injury is temporary and abatable.[60]

Since a leak in the oil pipeline was not essential to the pipeline's use, but was a result of the oil company's negligence, the nuisance in this case was deemed temporary and abatable.[61]

In determining whether permanent damages will be awarded in lieu of an injunction, courts have compared the burden that would be imposed on the defendant if an injunction was issued to the burden that would be imposed on the plaintiff if the defendant were allowed to continue the nuisance. This principle has been referred to as the comparative hardship doctrine, or the balancing of hardship doctrine.[62] If the injury suffered by the plaintiff is minor compared to the cost to the defendant of abatement, then the nuisance will not be enjoined and will be considered permanent.[63] In *Harrisonville v. Dickey Clay Co.*,[64] the plaintiff sought to enjoin the discharge of

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[57] *Spaulding*, 38 Cal.2d at 267, 239 P.2d at 627; *Vesey*, 210 Ind. at 353, 200 N.E. at 626; *Bartlett*, 92 W. Va. at 452, 555, 115 S.E. at 453–54. *See Kornoff*, 45 Cal.2d at 270, 288 P.2d at 510. *See generally* Note, *Enjoining Private Nuisances: Consideration of the Public Interest*, 43 U. Colo. L. Rev. 225 (1971).

[58] *Kentucky-Ohio Gas*, 264 Ky. at 477, 95 S.W.2d at 5; *Shelley*, 327 Mo. at 242, 37 S.W.2d at 519 and cases cited therein.

[59] 327 Mo. 238, 37 S.W.2d 518 (1931).

[60] *Id.* at 242, 37 S.W.2d at 519.

[61] *Id.* at 243, 37 S.W.2d at 520.

[62] *See generally* Maram, *Nuisance Abatement: Use of the Comparative Injury Doctrine*, Urban L. Ann. 1971:206; Note, *Private Nuisance - Abatement and Injunction - Disparity of Economic Consequences*, 22 Cas. W. Res. L. Rev. 356 (1971); Note, *Remedies - Private Nuisance - Comparative Injury Doctrine in West Virginia*, 77 W. Va. L. Rev. 780 (1975).

[63] Harrisonville v. Dickey Clay Mfg. Co., 289 U.S. 334, 338 (1932); *see Boomer*, 25 N.Y.2d at 223–27, 309 N.Y.S.2d at 315–17, 257 N.E.2d at 872–73.

[64] 289 U.S. 334 (1932).

inadequately treated sewage by the plaintiff municipality into a stream that ran across the plaintiff's pasture. The federal district court awarded the injunction and damages to compensate for the cost of restoring the land to its original condition.[65] The Eighth Circuit Court denied the damages, but affirmed the injunction. The U.S. Supreme Court noted that, if the injunction were granted, the city's available options would be to abandon a $60,000 disposal plant and leave the residents with no sewage disposal facilities at all, or to build an auxiliary sewage treatment plant for $25,000.[66] On the other hand, denial of the injunction would subject the plaintiff to a loss of property value amounting to approximately $100 per year.[67] Based on these facts, the Court denied the injunction and awarded the plaintiff depreciation of the property's market value, because "the compensation payable would obviously be small as compared with the cost of installing an auxiliary plant . . . ."[68] Thus, a court may declare the defendant's activity a permanent nuisance when an injunction is unavailable to the plaintiff due to the comparatively greater burden on the defendant resulting from abatement.

This doctrine is based on the traditional equitable principle that an injunction, as a drastic remedy, is to be used at the discretion of the court, and only when dictated by the equities of the case.[69] Where money damages will adequately compensate the plaintiff for his injury, and an injunction would subject the defendant to "grossly disproportionate hardship," then an injunction should not issue.[70] In most instances, this balancing test has been applied in cases where the defendant is acting for the public good.[71] The balancing test has also been applied in instances where the defendant is a private entity.[72] When the court declares the defendant's activity a permanent nuisance, the plaintiff's remedy is not limited to the initiation

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[65] *Id.* at 337.

[66] *Id.* at 339.

[67] *Id.*

[68] *Id.*

[69] *Harrisonville*, 289 U.S. at 337–38; *Haack*, 393 Ill. at 370, 66 N.E.2d at 392. *See* Wood v. Sutcliff, 61 Eng. Rep. 303 (1851).

[70] *Harrisonville*, 289 U.S. at 338. *But see* Pendoly v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963) (injunction awarded despite disparity in economic consequences).

[71] *See, e.g.*, Huebachmann v. Grand Co., 166 Md. 615, 172 A. 227 (1934); *Boomer*, 26 N.Y.2d at 230–31, 309 N.Y.S.2d at 321, 257 N.E.2d at 876 (Jasen, J., dissenting).

[72] Harrisonville v. Dickey Clay Mfg. Co., 289 U.S. 334. *See, e.g.*, Patz v. Farmegg Products, Inc., 196 N.W.2d 557 (Iowa 1972) (upholding a finding that the defendant's chicken farm constituted a permanent nuisance based on the balance of hardship test); *Boomer*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870.

of multiple suits for past damages even though the nuisance is physically abatable.[73]

Finally, courts have stated that the physical permanence of the structure causing the nuisance is a factor in distinguishing a permanent nuisance from a temporary nuisance. If the invasion is caused by a structure or condition that is relatively permanent, or treated as such by the parties, the court will declare it a permanent nuisance.[74] In *Wright v. City of Richmond*,[75] for example, the city built a road embankment across a stream running through the plaintiff's property. The culvert under the embankment was insufficient to handle the flow of water in the stream during heavy rainstorms.[76] As a result, the water in the stream often backed up and flooded the plaintiff's property. In determining whether the culvert constituted a permanent nuisance, the Virginia Supreme Court noted that the culvert was "built for present and future use," and that it was "constructed with a view towards permanency."[77] As such, the court held that the culvert was a permanent nuisance.[78]

One should note, however, that this permanency test makes sense only if one assumes that the defendant will not, or cannot, alter the offending structure to avoid future injury. Future damages are given on the theory that the injury to the property, though temporary, is likely to recur in the future.[79] When the injury is caused by a structure alone, such as a culvert, future injury is likely only if the defendant does not remove or repair the offending structure. In *Wright*, for example, the city might have altered the culvert so that the water would not back up. By awarding permanent damages, the court assumed that such alterations would not be made. Such an assumption may be logically based on the balancing of hardships test noted earlier,[80] or on the fact that the parties themselves assume that the structure will not be altered, as in *Wright*.[81]

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[73] *Harrisonville*, 289 U.S. at 339–40. *See Vesey*, 210 Ind. at 353–54, 200 N.E. at 627.

[74] Stodghill v. Chicago, B. & Q. R.R. Co., 53 Iowa 341, 5 N.W. 495 (1880); *Amarillo*, 120 Tex. at 467, 40 S.W.2d at 61; *see* Southern Ry. Co. v. White, 128 Va. 551, 566, 104 S.E. 865, 870 (1920). *See generally* 66 C.J.S. *Nuisances* § 5 (1950).

[75] 146 Va. 835 (1926).

[76] *Id.* at 838.

[77] *Id.* at 842.

[78] *Id.* at 843.

[79] *See supra* note 49 and accompanying text.

[80] *See supra* notes 62–63 and accompanying text.

[81] In *Wright*, the court agreed with the city that the court was not empowered to alter or revise the city's drainage plans. *Wright*, 146 Va. at 835. Thus, the culvert could not be altered by order of the court; nor did the city argue that they could or would alter the culvert. It follows that the court had to determine the likelihood of future flooding based on the present condition of the culvert. This raises the question of whether a structure would be deemed a

### *C. Critique of the Permanent Nuisance Doctrine*

Despite wide judicial acceptance of the permanent nuisance doctrine, it is not without its critics. The most significant criticism is that, because the permanent nuisance doctrine essentially forces the plaintiff to sell an easement on his land to the defendant, it is an unconstitutional taking of private property when the defendant is a private citizen. Presumably, this criticism is based on the notion that the doctrine interferes with certain legal rights that define ownership of property. In the broadest sense, property consists not only of the physical object itself, but also of the right to free use, enjoyment, and disposal of one's acquisitions without control or diminution save by operation of the law.[82] As a corollary, these property rights involve the negation of a neighbor's right to interfere unreasonably with, or lessen, the use and enjoyment of the property.[83] In a permanent nuisance case, though, the neighbor-defendant acquires the right to continue the nuisance,[84] thereby depriving the plaintiff of his right to undiminished use and enjoyment of his property. This permanent diminution of the owner's property rights is an easement on the property.[85] While the plaintiff-owner could voluntarily sell such an easement to the defendant-neighbor, the application of the permanent nuisance doctrine forces the plaintiff to sell the easement to the defendant. When the defendant is a private party, the involuntary sale of the easement is a taking of property for private purposes, and therefore arguably unconstitutional.[86]

In *Boomer v. Atlantic Cement Co.*,[87] for example, the defendant's cement factory emitted dirt, smoke, and vibration which injured the

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permanent nuisance if the defendant shows that the structure could be altered so as to prevent future flooding.

[82] Buchanan v. Warley, 245 U.S. 60, 74 (1917); Duffield v. DeKalb County, 242 Ga. 432, 433–34, 249 S.E.2d 235, 237 (1978).

[83] Peabody v. U.S., 43 Ct. Cl. 5 (1907).

[84] Rebel v. Big Tarkio Drainage District, 602 S.W.2d 787, 792 (Mo. Ct. App. 1980) (discussing whether the defendant's levy, which caused plaintiff's land to flood, constituted a permanent nuisance for which no action could be maintained due to the statute of limitations, or whether the levy was a temporary nuisance for which recurring actions arose).

[85] *Id.* at 794; Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100, 106 (1962) (noise from operation of an airport held to constitute a taking of an easement requiring compensation to nearby property owners); Dobbs, *Handbook on the Law of Remedies* § 5.4 (1973).

[86] Hulbert v. California Portland Cement Co., 161 Cal. 239, 245, 118 P. 928, 930 (1911) (enjoining operation of a cement plant that emitted large quantities of dust even though the defendant would suffer great hardship as a result of the injunction); *Boomer*, 26 N.Y.2d at 231, 309 N.Y.S.2d at 321, 257 N.E.2d at 876 (Jansen, J., dissenting). *See generally* Maram, *supra* note 62, at 360; Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 740 (1973).

[87] 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (N.Y. App. 1970).

plaintiff's property. The New York Court of Appeals refused to enjoin the cement factory, and instead awarded permanent damages for a "servitude on the land of plaintiffs imposed by defendant's nuisance."[88] Accordingly, the defendants acquired the right to injure the plaintiffs' property forever in return for damages. In his dissent, however, Judge Jasen argued that it was not "constitutionally permissible to impose servitude on the land, without the consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use."[89]

The concept of a forced sale is also inconsistent in other ways with the concept of property ownership. As mentioned earlier, the owner's right to dispose of his property freely is an inherent property right.[90] As shown below, the dispositional aspect of ownership consists of two closely intertwined rights: the right to decide whether to sell or not sell (the "selling right"), and the right to determine at what price the object will be sold (the "pricing right"). The selling right is embodied in the principle that the taking of property without the consent of the owner must be accompanied by a public purpose.[91] Without a public purpose, then, the state may take private property only with the owner's consent. Similarly, transfer of property to another without the owner's consent is deemed to be an unlawful conversion.[92] These protections afforded to private ownership of property represent the inherent right of property owners to decide whether or not to sell their property. The selling right, then, is a right inherent in property, and is qualified only by the ability of the government to take property for a public purpose. The pricing right is also an inherent attribute of the property itself. As such, it too is protected by the Fifth and Fourteenth Amendments.[93] The owner's right to fix the price for his property may not be taken except by the government for an important public purpose.[94]

The forced sale resulting from application of the permanent nuisance doctrine, however, derogates both the plaintiff's pricing and

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[88] *Id.* at 228, 309 N.Y.S.2d at 319, 257 N.E.2d at 875.

[89] *Id.* at 231, 309 N.Y.S.2d at 321, 257 N.E.2d at 876.

[90] *See supra* note 82 and accompanying text.

[91] Sadler v. Langham, 34 Ala. 311, 315 (1859); *Boomer*, 26 N.Y.2d at 231, 309 N.Y.S.2d at 321, 257 N.E.2d at 876 (Jasen, J., dissenting).

[92] Conversion is generally defined as any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. Zaslow v. Kroenert, 29 Cal.2d 541, 549, 176 P.2d 1, 6 (1946). *See generally* 89 C.J.S. *Trover and Conversion* § 3 (1950).

[93] Old Dearborn Co. v. Seagram Corp., 299 U.S. 183, 192 (1936).

[94] Tyeson and Bros. v. Banton, 273 U.S. 418, 430 (1927); Williams v. Standard Oil Co., 278 U.S. 235, 239 (1928).

selling rights. The plaintiff has no choice in deciding whether or not to sell the easement—he must sell it. Nor does the plaintiff have the right to determine at what price the easement will be sold—the price will be the diminution of market value. In *Boomer*, for example, the plaintiffs were forced to sell an easement to the cement company in return for the damages.[95] Thus, the plaintiffs were not able to exercise either their right to decide whether to sell the easement, or their right to determine the price at which the easement was sold. Since the plaintiff loses these dispositional rights, the permanent nuisance doctrine is inconsistent with the concept of private property.

The chief advantage of a court awarding future damages is that the defendant, and society at large, does not incur considerably higher costs in abating the nuisance than the plaintiff would incur should the nuisance be allowed to continue. In *Northern Indiana Public Service Co. v. Vesey*,[96] for instance, the plaintiff sought to enjoin the operation of an adjacent natural gas manufacturing factory that emitted ammonia, acid, and soot which killed the plants in the plaintiff's greenhouse. The gas from the factory provided the city of Fort Wayne, Indiana and neighboring towns with both heat and light; the gas plant itself cost $3,000,000.[97] In comparison, the diminution of the market value of the plaintiff's property as a result of the gas plant's operation was only $150,000.[98] The Indiana Supreme Court agreed with the lower court that the gas plant could not be enjoined since "less injury will be occasioned by requiring the defendant to pay the plaintiff all of the suffered damages . . . than by enjoining the operation of the defendant's said gas plant . . . ."[99] This rationale is the balancing of hardship test mentioned earlier.[100]

The assumption inherent in that test is that, if the plaintiff were awarded an injunction rather than future damages, the defendant would be forced to forgo his activity, even if the activity is worth more to society than the freedom from the nuisance is worth to the plaintiff.[101] One counterargument to this reasoning is that if the right to continue the activity is worth that much to the defendant, he will buy the plaintiff's right to enjoin the nuisance.[102] Despite this coun-

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[95] *See infra* notes 169-80 and accompanying text.

[96] 210 Ind. 338, 200 N.E. 620 (1936).

[97] *Id.* at 346–47, 200 N.E. at 624.

[98] *Id.* at 343, 200 N.E. at 622.

[99] *Id.* at 348, 200 N.E. at 624.

[100] *See supra* text and notes accompanying notes 62–73.

[101] Ellickson, *supra* note 86, at 736.

[102] Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan. L. Rev. 1075, 1089–90 (1980).

terargument, most courts implicitly seem to adopt the former view when awarding future damages.[103]

## III. Damages in Permanent Nuisance Cases

### *A. The Inadequacy of Diminution of Market Value as the Sole Measure of Damages*

Courts usually measure the future damages in permanent nuisance cases by the diminution in the market value of the plaintiff's property.[104] The diminution of market value, however, should not be the sole measure of damages in such cases where the defendant does not have eminent domain powers. The diminution of market value compensates the plaintiff for the easement acquired by the defendant, but it fails to fully compensate the plaintiff for his injuries. A permanent nuisance is a tort rather than an eminent domain taking, therefore the court should focus on the injury to the plaintiff rather than the property taken.

In the late nineteenth century, courts apparently adopted diminution of market value as the measure of damages in permanent nuisance cases because the permanent nuisance doctrine probably evolved from eminent domain actions. In early permanent nuisance cases, the defendant was frequently a public or quasi-public body endowed with eminent domain powers.[105] In *Highland Ave. and B. Ry. Co. v. Matthews*,[106] for example, a railroad company with eminent domain powers built a railway embankment in the street adjacent to the plaintiff's land, thus obstructing access to the property.[107] In an action for damages, the railroad company argued that, in a nuisance suit, the plaintiff could only recover past damages.[108] The Alabama Supreme Court rejected this argument, holding that the defendants were authorized to build the embankment pursuant to the power of eminent domain. Accordingly,

> [i]f the injury was such that final compensation could have been had in condemnation proceedings, its character was not changed by the fact that such proceedings were not resorted to . . . .

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[103] Ellickson, *supra* note 86, at 736.
[104] *Vesey*, 210 Ind. at 353, 200 N.E. at 627; *Amarillo*, 120 Tex. at 467, 40 S.W.2d at 61.
[105] McCormick, *supra* note 18, at § 127.
[106] 99 Ala. 24, 10 So. 267 (1891).
[107] *Id.* at 26, 10 So. at 268.
[108] *Id.* at 28, 10 So. at 268.

> Damages which can be assessed in condemnation proceedings can be assessed just as well in an ordinary action at law.[109]

Many early permanent nuisance actions were in fact inverse condemnation actions in nuisance clothing. Recognizing this, courts measured the damages according to the appropriate eminent domain standards, rather than the more appropriate tort law standards. As courts extended the permanent nuisance doctrine to cases in which the defendant was a private entity, the courts also extended the market value measure of damages.[110]

Such an extension, however, is not justified. While the diminution of market value may be an appropriate measure of compensation for an eminent domain taking, it is not an appropriate measure of damages for all permanent nuisances. When the government takes or damages property for a public use, the owner is entitled to receive just compensation. Such compensation is generally measured by the market value of the property taken or damaged, plus compensation for severance damages to the property not taken.[111] The principle goal of compensation in eminent domain cases is to reimburse the owner for that which is taken,[112] but not to compensate the owner for all incidental damages suffered as a result of the taking.[113] For example, where the government takes property particularly suited to the owner's business, and the owner is unable to relocate elsewhere, the loss of the business is incidental to the taking, and therefore not compensable.[114] Loss of profits due to the condemnation

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[109] *Id.* at 29–30, 10 So. at 269.

[110] *See, e.g.*, International Shoe Co. v. Gibbs, 183 Ark. 512, 36 S.W.2d 961 (1931) (holding that the septic tank at defendant's textile plant constituted a permanent nuisance); Southern Ice and Utilities Co. v. Bryan, 187 Ark. 186, 58 S.W.2d 920 (1933) (holding that the defendant's ice plant constituted a permanent nuisance); Hardin v. Olympic Portland Cement Co., Ltd., 89 Wash. 320, 154 P. 450 (1916) (holding that the defendant's cement plant could be found to constitute a permanent nuisance).

[111] Orange County Flood Control District v. Sunny Crest Dairy, 77 Cal.App.3d 742, 763, 143 Cal.Rptr. 803, 815 (1978). *See generally* 25A C.J.S. *Eminent Domain* § 136 (1950). Severance damages are awarded in cases where a portion of a single tract is taken. Such damages include any element of value arising out of the relation of the part taken to the entire tract. United States v. Miller, 317 U.S. 369, 376 (1942).

[112] U.S. v. Virginia Elec. and Power Co., 365 U.S. 624, 633 (1961); Schniable v. City of Bismark, 275 N.W.2d 859, 865 (N.D. 1979).

[113] *Orange County*, 77 Cal.App.3d at 763, 143 Cal.Rptr. at 915; Brooks v. New Orleans Pub. Serv., Inc., 370 So.2d 686, 690, *writ denied* 373 So.2d 512 (La.Ct.App. 1979). *But see* City of Yonkers v. State, 40 N.Y.2d 408, 386 N.Y.S.2d 865, 353 N.E.2d 829 (1976) (owner of land retained after appropriation entitled to compensation for all substantial elements of compensable damage to his property, including, in appropriate cases, increased traffic noise).

[114] Mitchell v. U.S., 267 U.S. 341 (1924) (holding that destruction of plaintiff's corn growing business due to the condemnation of uniquely adapted property was incidental to the taking and not compensable).

of property has likewise been deemed incidental to the taking and not compensable.[115] Courts have viewed the incidental damages such as loss of business, loss of profits, discomfort, disturbance, inconvenience, or loss of sentimental value in the property taken as the price one must pay for living in a civilized society. As noted by Justice Frankfurter in *Kimball Laundry Co. v. United States*,

> In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.[116]

A permanent nuisance, in contrast, is not an eminent domain taking when the defendant is a private citizen. It is rather a tortious invasion of private property rights. As such, the measure of damages should not be the same as in eminent domain cases. The principle goal of tort damages, as opposed to eminent domain compensation, is to compensate the plaintiff for all injuries proximately caused by the defendant's actions.[117] In a permanent nuisance case, then, the plaintiff should be compensated for all injuries received rather than only for the property lost. This measure of damages would include compensation for the property lost and for incidental injuries which are not recognized in eminent domain actions. Damages for incidental injuries are not recoverable in eminent domain cases because, as Justice Frankfurter suggests, society as a whole is benefited if citizens whose property is condemned are required to bear the loss of the incidental injuries that accompany the taking. When such injuries are suffered as a result of a tort committed by a private party, however, the benefit inures not to the "common good," but primarily to the tortfeasor. Society as a whole does not benefit from the loss of the property's incidental value to the owner. Therefore, the principle justification present in condemnations for imposing these incidental costs on the owner is not present in tort cases.

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[115] U.S. *ex rel.* Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1942) (denying recovery of lost profits where the federal government condemned land that the defendant was going to use in creating a large hydroelectric power project).

[116] 338 U.S. 1, 5 (1948) (holding that, where the government condemned the defendant's laundry business for four years, the defendant should be allowed to recover for diminution in the value of its laundry business due to destruction of trade routes on the grounds that the trade routes represent tangible and valuable business assets).

[117] Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir. 1963); Drayton v. Jaffe Chem. Corp., 395 F.Supp. 1081, 1096 (N.D.Ohio 1975).

The plaintiff in a permanent nuisance case suffers not only from a loss of an easement affecting the use and enjoyment of his property, but also from a loss of his dispositional rights in regard to that easement.[118] The diminution of market value compensates for the easement taken,[119] but not for the loss of dispositional rights. In an eminent domain case, the diminution of market value would suffice as the sole measure of compensation for the property taken. The loss of the dispositional rights could be viewed as damages incidental to the taking, and hence not compensable. But in a permanent nuisance case, where the defendant is a private citizen, the plaintiff should be compensated for the loss of dispositional rights as well. In these instances, then, the diminution of market value is inadequate as the sole measure of damages, since it does not compensate for the loss of dispositional rights.

The use of diminution of market value as the measure of damages might also be explained by the fact that the permanent nuisance doctrine evolved in part from the permanent injury doctrine.[120] If the plaintiff's property suffered permanent physical injury, the measure of damages was the diminution of the property's market value.[121] In adopting the future damages concept, the courts couched early permanent nuisance cases in terms of permanent injury. In *Virginia Hot Springs Co. v. McCray*,[122] for example, the defendant, a resort hotel, discharged sewage into a stream, thus rendering it unfit for use by the downstream plaintiff. In determining whether the plaintiff was required to recover all damages in one action or bring successive actions, the Virginia Supreme Court noted, "[t]he question presented by the rejected plea [of statute of limitations] is simply whether the injury is of a permanent character, resulting from a permanent structure . . . ."[123] Strictly speaking, the injury itself was not permanent. The plaintiff could have used the water again had the defendant stopped discharging sewage into the stream. The real issue, then, was the permanence of the cause of the injury, rather than the permanence of the injury even though the court spoke in terms of the latter. While this framing of the issue allowed nineteenth century courts to grant a plaintiff relief that was previ-

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[118] *See supra* notes 90–94 and accompanying text.
[119] *Boomer*, 26 N.Y.2d at 319, 309 N.Y.S.2d at 228, 257 N.E.2d at 875.
[120] *See supra* notes 42–43 and accompanying text.
[121] *See supra* notes 18–19 and accompanying text.
[122] 106 Va. 461, 56 S.E. 216 (1907).
[123] *Id.* at 471, 56 S.E. at 220.

ously denied,[124] it also resulted in application of the "permanent injury" measure of damages to "permanent cause" cases.

A temporary, recurring injury to the plaintiff's property, however, is distinguishable from a single invasion of the property that results in a permanent physical injury. In a permanent nuisance case, the plaintiff suffers injuries that are not suffered in the case of a permanent injury case, and for which the diminution of market value does not compensate. Application of the permanent nuisance doctrine affects not only the plaintiff's undiminished use and enjoyment of his land, but also his right to control the disposition of his property.[125] These dispositional rights are an inherent and important aspect of private property ownership. A court that permits one private citizen to force a private property owner to sell him the owner's property at a set price violates our society's concept of property ownership.[126] Accordingly, the derogation of the plaintiff's dispositional rights, which results from the inevitable forced-sale aspect of the permanent nuisance doctrine, is a concrete injury to the plaintiff just as is the diminution in use and enjoyment of the property.

In the case of a permanent injury resulting from a single invasion of the plaintiff's property, the plaintiff does not suffer this loss of dispositional rights. The basic principle of nuisance law is that a property owner has the right to be free of unreasonable interference with the use and enjoyment of his property.[127] A necessary corollary of this principle is that the right to affect the use and enjoyment of property is vested solely in the owner. In a permanent injury case, the defendant's actions result in a single disturbance of the plaintiff's right to exclusive control over the use and enjoyment of the property. The result of that single disturbance — the injury to the property and the consequent diminution in the use and enjoyment — is ongoing, but the plaintiff's loss of exclusive control over his property is not. The plaintiff regains exclusive control once the defendant ceases his tortious activity. On the other hand, in the case of a permanent nuisance, the plaintiff not only loses a certain "amount" of use and enjoyment, but also the right of exclusive control over the use and enjoyment of the property. This loss is permanent, and is what distinguishes the permanent nuisance case

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[124] *See supra* text accompanying notes 25–28.

[125] *See supra* note 94 and accompanying text.

[126] McIvor v. Mercer-Fraser, Co., 76 Cal.App.2d 247, 251–52, 172 P.2d 758, 761 (1946).

[127] Morgan v. High Penn Oil, Co., 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953). *See generally* Prosser, *The Law of Torts* § 86.

from the permanent injury case. Since the permanent injury case does not involve a forced sale of this right to exclusive control, it therefore involves no corresponding loss of dispositional rights. In both cases, the diminution of market value compensates for the loss of an "amount" of use and enjoyment, but not for the loss of the plaintiff's dispositional rights in permanent nuisance cases.

While potentially failing to compense the plaintiff adequately, the court's use of diminution of market value as the sole measure of damages may also be economically inefficient.[128] The economic analysis is based on the assumption that there is some price for which the plaintiff would voluntarily sell to the defendant the right to continue the nuisance.[129] This price represents the subjective worth to the plaintiff of the marginal diminution in the use and enjoyment of his property that results from the nuisance.[130] The diminution of the property's market value represents the community consensus of the value of the marginal diminution in use and enjoyment.[131] The difference between the market price and the plaintiff's subjective price is the consumer surplus; it represents the special, personal value that the plaintiff attaches to the marginal use and enjoyment that is over and above the value attached to it by the community.[132] For example, a long-time owner of a family residence is likely to value the home more than the community at large as a result of the sentimental attachment or idiosyncratic attachment to certain individual characteristics of the home. For optimum economic efficiency, this consumer surplus should be taken into account.

Assume, for example, a cement factory is built on a lot adjacent to the homeowner. Assume also that the homeowner's use and enjoyment is affected in proportion to the output of the factory: the greater the output, the greater the diminution of the homeowner's use and enjoyment. The economically desirable output level is the level at which the marginal profit of the factory equals the marginal damages to the homeowner.[133] The imposition of nuisance liability

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[128] For arguments concerning the role of economic efficiency in the law generally, see Calabresi and Melamed, *Property Rules and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 Harv. L. Rev. 1165 (1976); Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Legal Stud. 49 (1979).

[129] Ellickson, *supra* note 86, at 735.

[130] *See id.* at 736.

[131] *Id.*

[132] *Id.* at 735–36.

[133] *See* Polinsky, *supra* note 102, at 1082. The marginal profit is the extra profit resulting from the production of the last unit of goods at a given level of output. *Id.* Similarly, the

on the cement company will force it to internalize the cost to the homeowner, which is represented by the homeowner's damages. As a result, the company will choose to produce at the economically desirable level.[134] If the company is required to pay only the diminution of market value, however, it will not produce at the most efficient level. The owner's consumer surplus is not taken into account, so the total cost of producing the cement will not be internalized.[135] The resulting overall marginal cost to society of the production level chosen will thus exceed the marginal benefit for that level. The use of diminution of market value as the sole measure of damages is therefore likely to be economically inefficient.[136]

Permanent nuisance cases not involving a public entity, then, are fundamentally different than either eminent domain cases or cases involving a permanent injury to the plaintiff's property. As such, the measure of damages used in the latter types of cases — the diminution of market value — should not be the sole measure of damages in private permanent nuisance cases. The plaintiff should be allowed to recover for the loss of dispositional rights resulting from the forced sale of an easement to another private entity.

A major problem with allowing the plaintiff to recover damages for the loss of dispositional rights is the difficulty of determining with certainty the extent of damage. Even though the plaintiff has sustained a legal injury — the loss of dispositional rights resulting from the involuntary sale of an easement — the plaintiff, in order to recover more than nominal damages, must show with reasonable probability that damage was suffered as a result of the legal injury.[137] Where the existence of damage is established, however, difficulty in determining the extent of the damage will not bar recovery so long as the evidence is sufficient to provide a basis for a reasonable inference as to the extent of damage.[138]

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marginal damage to the homeowner is the extra damage resulting from the production of the last unit of goods. *Id.*

[134] *See id.* at 1090. Theoretically, the same result would be reached if the company was not held liable for any of the damage caused by the cement production since the homeowner would then offer to pay the company not to produce the economically ineffecient marginal unit. *Id.*

[135] Ellickson, *supra* note 86, at 736.

[136] A more complex analysis,though, reveals several possible flaws in this statement. A principle counterargument is that miscalculation of the true cost of production is preferable to the possibly high administrative cost of calculating the homeowner's consumer surplus. *Id.*

[137] Apperson v. Security State Bank, 215 Kan. 724, 735–36, 528 P.2d 1211, 1220 (1974). *See generally* 25 C.J.S. *Damages* § 27 (1950).

[138] Michaud v. Vahlsing, Inc., 264 A.2d 539, 545 (1970); Matthews v. Lineberry, 241 S.E.2d 735, 737, *writ den.* 244 S.E.2d 259 (N.C.Ct.App. 1978). *See generally* McCormick, *supra* note 18, § 27, 102; Annotation, *Distinction Between Uncertainty as to Whether Substantial Dam-*

In *Michaud v. Vahlsing, Inc.*,[139] for instance, the defendant, a potato processor, was held liable to the potato farmer for allowing the farmer's potatoes to spoil. The exact amount of potatoes that spoiled, however, was not determined. On appeal, the defendant argued that the verdict for the plaintiff could not stand because the plaintiff did not prove the extent of his damages with reasonable certainty.[140] The Maine Supreme Court upheld the award by distinguishing between uncertainty as to the existence of damage and uncertainty as to the amount of damage.[141] The court noted that, where substantial damages are established, a plaintiff is not denied recovery even though the monetary value of the damages is "either entirely uncertain or extremely difficult of ascertainment."[142] In such cases, the amount is fixed by the court or by the jury in the exercise of sound discretion.[143] In essence, this view imposes on the plaintiff a very light burden of proof on the issue of the amount of damages once a legal injury has been established.

In a permanent nuisance case, the existence of a legal injury is relatively certain. The plaintiff in a permanent nuisance case loses the right to determine whether and for how much to sell the defendant an easement.[144] The damage resulting from this involuntary sale is essentially the difference between the price that the plaintiff would have voluntarily sold the easement for and the price which the plaintiff was forced to accept, that is, the fair market value of the easement as measured by the diminution of the property's market value.[145] If there were no difference between these two amounts, then there would be no damage resulting from the involuntary sale. As noted by the court in *Boomer*, though, "it would be unrealistic to assume that the defendant could acquire a servitude . . . by simply paying the price which a willing seller would accept."[146] The plaintiff is simply not a willing seller. If he were, it is reasonable to assume that the plaintiff would have settled out of court for the market value. It is safe to assume that the plaintiff's voluntary sale price is greater than the fair market value, thus establishing the existence

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*ages Resulted and Uncertainties as to Amount*, 78 A.L.R. 858 (1932); 25 C.J.S. *Damages* § 28 (1950).

[139] 264 A.2d 539 (Me. 1970).

[140] *Id.* at 544.

[141] *Id.* at 544–45.

[142] *Id.* at 545.

[143] *Id.*

[144] *See supra* text and notes accompanying notes 82–94.

[145] *See supra* text and note accompanying note 103.

[146] *Kinley*, 42 A.D.2d at 499, 349 N.Y.S.2d at 202 (Herlihy, P.J., concurring).

of damage. Accordingly, the plaintiff should be allowed to recover damages for loss of dispositional rights if sufficient evidence is presented to allow the fact finder to approximate the extent of the damage. The problem of determining the extent of the damages is considered below.[147]

Apart from failure to compensate for loss of dispositional rights, the use of diminution of market value as the sole measure of future damages is inconsistent with the measure of damages for traditional trespass and nuisance cases. In cases of past trespass or nuisance, the plaintiff is entitled to recover for past annoyance and discomfort in addition to any diminution of rental value resulting from the defendant's actions. In *French v. Ralph E. Moore, Inc.*,[148] for example, the plaintiff's home and restaurant were filled with gasoline vapor as a result of a leak in the defendant's underground gasoline storage tank. The plaintiff and his family were forced to close the restaurant, and were prohibited from using the lower floor of their house.[149] In addition, the plaintiff's family suffered health effects, such as dizziness, headaches, nausea, and ulcers.[150] The trial court awarded the plaintiff $58,500 for diminution of their property's market value, plus $190,000 for "pain, discomfort, fear, anxiety, annoyance, and inconvenience, and other mental, physical and emotional distress."[151] On appeal, the defendant argued that the plaintiff could not recover the latter element of damages in a nuisance action.[152] The Montana Supreme Court upheld the lower court, noting that, in nuisance actions, the plaintiff may recover damages for discomfort and annoyance in addition to damages for injury to the land.[153] Discomfort and annoyance are distinct grounds of compensation that may be recovered in addition to diminution of market value due to the nuisance.[154]

Recognition of discomfort and annoyance as distinct grounds for recovery should not be limited to determination of past damages, but should be extended to determination of future damages in permanent nuisance cases. Where the effect of the defendant's nuisance is temporary, but recurring, the discomfort and annoyance suffered

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[147] *See infra* text and notes accompanying notes 164–184.
[148] 661 P.2d 844 (Mont. 1983).
[149] *Id.* at 845.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 847.
[153] *Id.*
[154] *Id. See also* Restatement (Second) of Torts § 920.

by the plaintiff will also continue. Since the diminution of market value compensates only for injury to the proprietary interests,[155] the plaintiff will not be compensated for future annoyance and discomfort if the permanent damages are limited to diminution of market value.

This view seems to have been impliedly adopted by the California Supreme Court in *Kornoff v. Kingsburg Cotton Oil Co.*[156] In that case, the plaintiff's house and shop were inundated with fumes, dust, dirt, lint, sediment and waste material emitted from the defendant's cotton gin. The trial court instructed the jury that the plaintiff was entitled to recover for diminution of market value and for discomfort and annoyance as a result of the ginning.[157] On appeal, the California Supreme Court held that the defendant's gin constituted a permanent nuisance for which all damages, past, present and future were recoverable.[158] In upholding the trial court's jury instructions regarding recovery for discomfort and annoyance in addition to diminution of market value, the court did not distinguish between past discomfort and future discomfort. Instead, the court allowed recovery for discomfort and annoyance that was a "natural consequence" of the injury to the real property.[159] Future discomfort and annoyance are natural consequences of future dust deposition just as past discomfort and annoyance are natural consequences of past dust deposition. Measuring permanent damages solely by diminution of market value, therefore, is inconsistent with the measure of past damages.

However the additional damages are characterized, any recognition of additional damages mitigates a number of shortcomings of the permanent nuisance doctrine. While the plaintiff is still forced to give the defendant an easement to continue the nuisance, the recognition of the additional damage elements for the involuntary sale compensates for infringement of the plaintiff's dispositional rights. Where the plaintiff is permitted to recover more than the market value of the easement, the forced sale becomes less involuntary. Since the plaintiff receives a higher price for the easement, the sale itself is more palatable to the plaintiff. In this way, the award of additional damages mitigates to a certain extent the derogation of the plaintiff's dispositional rights. The court's award of

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[155] Kornoff v. Kingsbury Cotton Oil Co., 45 Cal.2d 265, 273, 288 P.2d 507, 512 (1955).
[156] 45 Cal.2d 265, 288 P.2d 507 (1955).
[157] *Id.* at 267–68, 288 P.2d at 508–09.
[158] *Id.* at 271, 288 P.2d at 511.
[159] *Id.* at 273, 288 P.2d at 512.

additional damages also distinguishes between eminent domain and permanent nuisance cases. Such damages would demonstrate that the incidental injuries resulting from the acquisition by the defendant of an easement are not burdens of citizenship to be born by the plaintiff. Rather, they are injuries resulting from a tortious invasion of the plaintiff's property rights, the cost of which, according to traditional tort principles and economic policy, should be born by the wrongdoer rather than the injured party.[160]

These additional damages also lessen the force of economic criticisms of the permanent nuisance doctrine. When the incidental injuries are compensated by damages in addition to the diminution of market value, the defendant is forced to bear the full cost to society of his activity. As a result, the defendant will adjust the level of his activity to the optimal point at which the marginal benefit to society, as represented by his profit, will equal the true marginal cost to society of production at that level. Finally, an award of damages in addition to diminution of market value makes future nuisance damages consistent with past trespass and nuisance damages. In both types of damages, the plaintiff should be allowed to recover for injury to the property — diminution of market value — and for injury to the occupant — the additional damages for the loss of dispositional rights or future discomfort and annoyance. Judicial recognition of these additional damages in private permanent nuisance cases, then, would rectify a number of flaws in the permanent nuisance doctrine, and would improve a widely applied and useful remedy.

### *B. Valuation of Involuntary Sale Damages*

While the additional damages for the judicially forced sale should be recoverable in permanent nuisance cases, valuation of those damages is somewhat problematic. One solution to this valuation problem was fashioned by the New York Supreme Court in *Boomer v. Atlantic Cement Co.*[161] The court considered the plaintiff's estimate of what he would be willing to accept for an easement to interfere with the use and enjoyment of his property, but used the diminution of market value to check the inherent subjectivity of the plaintiff's

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[160] *See supra* text and note accompanying note 117.

[161] Boomer v. Atlantic Cement Co., 72 Misc.2d 834, 340 N.Y.S.2d 97, (N.Y. Sup. Ct. 1972), *enforcing* 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (N.Y. Ct. App. 1970), *rev'g* 30 A.D.2d 480, 294 N.Y.S.2d 452 (N.Y. App. Div. 1968), *aff'g* 55 Misc.2d 1023, 287 N.Y.S.2d 112 (N.Y. Sup. Ct. 1967), *aff'd sub nom* Kinley v. Atlantic Cement Co., 42 A.D.2d 496, 349 N.Y.S.2d 199 (N.Y. App. Div. 1973).

estimate. In this way, the court was able to compensate the plaintiff fully for his losses, and, at the same time, to mitigate the inflated and subjective nature of the damages.

The major drawback of an award of damages for the involuntary sale is the subjectiveness of the plaintiff's injury, and the resulting difficulty in determining the appropriate amount. The injury that results from the trespassory invasion of dispositional rights is the difference between the price at which plaintiff would have voluntarily sold the easement, and the price at which the plaintiff was forced to sell the easement, that is, the market value.[162] For the plaintiff to receive more than nominal damages for his injury, he would have to provide evidence regarding this price difference. The problem here is that the voluntary price is inherently subjective since it is based in part on the subjective value that the plaintiff attaches to the property. The court cannot rely solely on the plaintiff's estimation of his own voluntary price, since the temptation would be great to overstate the price he would accept for the easement.[163] The difficulty of determining the exact damages done by a wrongdoer, or of creating a precise formula for computing damages is not, however, cause for denying redress.[164] Accordingly, the courts should allow the plaintiff to recover more than nominal damages if he can provide sufficient evidence to allow the fact finder to infer a voluntary price in excess of the market value of the easement.

One commentator, Ellickson, suggests that, in nuisance cases, the property owner be awarded an amount based on the subjective value of the property when damages are awarded in lieu of an injunction.[165] He argues that one way to accomplish this would be for the legislature to enact a statutory compensation schedule that considers commonly held valuation factors,[166] such as longevity of occupation or convenience to the workplace. Such objective factors could also be used by the courts as a basis for determining the plaintiff's voluntary price in permanent nuisance cases. While no mathematical formula could be devised using these factors, they would provide an objective touchstone for the fact-finder's use when determining damages. If such factors were used, the determination of compensation in permanent nuisance cases would then be similar to the determi-

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[162] This difference is the consumer surplus discussed earlier. *See supra* text accompanying notes 130–133.

[163] *See Boomer*, 72 Misc.2d at 843, 340 N.Y.S.2d at 107.

[164] *Id.* at 838, 340 N.Y.S.2d at 101; Baker v. Akron, 145 Iowa 485, 490 (1910).

[165] Ellickson, *supra* note 86, at 736.

[166] *Id.*

nation of pain and suffering damages in personal injury cases.[167] Thus, a rough estimate of the plaintiff's voluntary sale price is calculable. From this, the court could determine an estimate of the injury suffered by the plaintiff as a result of the involuntary sale. Since this injury is subject to determination, the trespass damages for the infringement on the plaintiff's dispositional rights should not be limited to a nominal amount. In sum, the subjectiveness of the injury in a permanent nuisance case should not bar the recovery of damages for loss of dispositional rights.

### C. *The Boomer Court's Solution*

Another possible solution to the problem of determining the amount of damages for the involuntary sale is to balance the contract price, the special market price, and the diminution of market value, as done by the court in *Boomer v. Atlantic Cement Co.*[168] In *Boomer*, a dairy farmer and other property owners sued a neighboring cement manufacturing company for creating a nuisance as a result of its emission of large quantities of dust, smoke, and excessive noise. The plaintiffs sought an injunction plus damages for past injuries. When faced with the prospect of closing down a $45 million plant that employed over 300 people, however, the Appellate Division instead declared the plant to be a permanent nuisance, and allowed the plaintiffs to recover future damages.[169]

On remand, the Supreme Court considered the issue of damages. The plaintiff urged that the proper measure of damages should be the contract price or, alternatively, the special market value of the property. The contract price is the price at which the plaintiff would have been willing to sell to the defendant the right to continue the nuisance.[170] The special market price, on the other hand, is the price of the plaintiff's property based on the special market created in the area by the defendant's prior land purchases.[171] The plaintiffs' experts testified that the contract price of the plaintiffs' property was $918,000, while the special market value was $840,000.[172] There is no indication, however, as to how these figures were determined.

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[167] "[A]s to pain and suffering the law declares that there is no standard by which to measure it except the enlightened conscience of impartial jurors...." Toll v. Waters, 138 Fla. 349, 353, 183 So. 393, 395 (1939).

[168] *Boomer*, 72 Misc.2d 834, 340 N.Y.S.2d 97.

[169] *Boomer*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1972).

[170] *Boomer*, 72 Misc.2d at 837, 340 N.Y.S.2d at 100.

[171] *Id.*

[172] *Id.* at 840–41, 340 N.Y.S.2d at 104.

The defendant, on the other hand, insisted that the court should strictly apply the market value rule. "Any other considerations," the defendant argued, "would be speculative and uncertain."[173] Even the market value estimates, however, varied widely. The plaintiffs' expert came up with diminutions of market value of approximately $400,000,[174] while the estimates of the defendant's experts were $35,000 and $25,000.[175]

Rather than accept either argument, the court took a middle ground. The court noted that this was not an eminent domain case, but rather a case involving two private parties. The diminution of market value should not be the sole measure of damages, then, or the case would result in a private taking.[176] On the other hand, the court noted that the plaintiffs' measures of damages were likely to be excessive and overly speculative.[177] To counter this effect, the court used the diminution of market value as an objective check on the overly subjective contract price and special market price.[178] After reviewing the testimony regarding the various values, the court noted,

> If analogy is found in Newton's experiment with prisms showing that white light is composed of all the colors of the spectrum, each lending its own characteristics to a degree when passed through a prism, all the approaches to valuation entering into the informed mind and sensitive conscience of the court lend to an appropriate degree in the resulting decision. In determining permanent damages we have noted: (1) The temporary damages already found insofar as they assist us. (2) The damage from [when the nuisance began] to date. (3) The fair market value with and without the nuisance. (4) The consideration of [the contract price and the special market value]. (5) The future damages. In applying the statement above . . . we find the permanent damage to the plaintiffs to be: $175,000. We find the [diminution of the fair market value] to be: [$140,000].[179]

Implicit in this balancing test is the court's attempt to compensate the plaintiff for all injuries suffered by awarding the voluntary price of the easement. The ideal situation would have been for the defendant to bargain with the plaintiff to buy the easement before the

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[173] *Id.* at 837, 340 N.Y.S.2d at 101.
[174] *Id.* at 840, 340 N.Y.S.2d at 104.
[175] *Id.* at 841, 340 N.Y.S.2d at 105.
[176] *See id.* at 836–37, 340 N.Y.S.2d at 100.
[177] *Id.* at 843, 340 N.Y.S.2d at 107.
[178] *Id.*
[179] *Id.* at 844, 340 N.Y.S.2d at 108.

nuisance began. In that situation, there would be neither an involuntary sale nor a tortious invasion of the plaintiff's rights, since the plaintiff's duly acquired consent would render the defendant's actions lawful. If the court could determine this ideal, bargained-for price, then the plaintiff would essentially be put in the same position he would have been in had this prior bargaining taken place. In terms of the specific injuries discussed earlier,[180] the award of the voluntary price would compensate the plaintiff for all losses suffered. The diminution of market value compensates for the easement acquired by the defendant which gives him the right to affect the use and enjoyment of the plaintiff's property in the future.[181] The difference between this market value and the voluntary price represents the pecuniary loss due to the infringement of the plaintiff's dispositional rights.[182] Therefore, the award of the voluntary sale price would compensate the plaintiff for both the loss of the easement and the loss of the dispositional rights. By taking the plaintiff's theories into account, the court impliedly adopted the voluntary sale price as its ideal goal in setting damages.

By considering both plaintiff's own measures of his damages and the diminution of market value, the court in *Boomer* found a good way to determine the voluntary price of the easement. The amount that the plaintiff claims he would have taken for the property is likely an inflated value. More likely, the plaintiff's stated contract price is the amount that the plaintiff would have liked to have received for the easement. The court could not, however, let the plaintiff set his own damages, since the plaintiff is entitled to compensation for his losses and no more.[183] Due to the give and take nature of contract negotiations, the plaintiff probably could not have received the wished-for amount even in before-the-fact bargaining. The court's consideration of the plaintiff's requested damages, though, reflects the importance of the voluntary price of the easement. By tempering the plaintiff's wished-for amount with the more concrete diminution of market value, the court substantially reduced the risk of over-compensation, and brought the damages closer to the probable negotiation price. In this way, the court more fully compensated the plaintiff for all of his losses while mitigating the

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[180] *See supra* notes 90–94 and accompanying text.

[181] *See supra* note 120 and accompanying text.

[182] *See supra* note 164 and accompanying text.

[183] *E.g.*, Worldwide Carriers v. Aris Steamship Co., 301 F.Supp. 70, 72 (S.D.N.Y. 1969); *see also* Harrington v. Texaco, 339 F.2d 814, 820 (5th Cir.), *cert. denied* 381 U.S. 915 (1965).

danger of overcompensation due to the subjective nature of the plaintiff's theories.

## IV. CONCLUSION

As shown by the court's Solomonic decision in the *Boomer* case, application of the permanent nuisance doctrine to cases in which the defendant is a private citizen is often necessary to achieve an equitable resolution of conflicts arising from mutually antagonistic uses of property. In such cases, though, the use of the diminution of market value as the sole measure of damages is unfair to the plaintiff. In determining damages, the courts should bear in mind that the defendant is a tortfeasor. As such, the emphasis of the courts should be on full compensation for the plaintiff's injuries rather than on determining the market price of the easement taken. The courts should allow recovery of the involuntary sale damages in addition to recovery of diminution of market value. Such damages would compensate the plaintiff for his loss of dispositional rights. In this way, the courts would achieve a truly equitable solution: the harsh solution of enjoining the defendant would be avoided, and the plaintiff would be afforded full compensation for the tortious invasion of his property rights.