



## Using the existing law to leverage property owners to deal with problem conifers

**This does not constitute legal advice and is provided for interest only. If you have any queries or are considering how to approach a difficult neighbour, then I will welcome a phone call to talk it through. My contact details are below.**

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What became clear at the National Wilding Pines Conference 2024 in Taupo is that we, collectively as an industry, are going to need to start getting tougher with the landowners of problematic seed sources if we are to cement in the gains made on clearing neighbouring land. Rather than operating in isolation, we should be pooling our experience and expertise to share strategies to deal with uncooperative landowners with seeding trees. We will look to corral the wilding conifer experiences to create some best practise guides and share stories of what has worked and why.

One tool that has not been used as much so far is the existing law of nuisance, which provides a useful lever to encourage compliance and, in the alternative, a useful tool to get compensation to pay for wilding removal.

The questions to ask in advance to ascertain the facts are:

- Who is the landowner? What trees do they have that we are concerned about?
- Why do we think that they are the cause of wilding conifers? How could this be evidenced?
- Whose land is being affected?
- Is it likely that any of the defences listed overleaf apply?

We can then discuss how we might leverage this to convince the landowner to address the problem trees. I am not currently a solicitor but will happily just have a chat around this.

### The existing law: Nuisance and Negligence

At the National Wilding Pines Conference 2024 in Taupo, I addressed the following question: can you successfully sue a neighbour who is causing wilding pines to infect your property? The answer is yes. In determining a case the courts will look at both questions of law and questions of fact.

The monetary damage caused by wilding pines can be enormous and the legal avenues for seeking redress for damage to property will use already settled law, i.e. it is already a well-trodden path with fairly clear principles that are well established at law.

The claimant will utilise one of two heads of tort law. The most applicable /suitable is the law of nuisance and the other which is likely to be argued in tandem is negligence.

### **Nuisance**

Nuisance is the more immediately applicable avenue to plead because it is land based, and the spread of wilding pines fits so neatly and precisely into this legal remedy. It is easier for the claimant to prove so really is route one. The main points are that:

1. It applies to damage or nuisance to interests in land
2. There is strict liability – i.e. it looks at whether the interference with the ‘victim’s land is unreasonable rather than whether the defendant is behaving unreasonably
3. There is case law already about weeds invading property satisfying the test
4. It is probably not going to matter if the owner of the property that is spreading wilding pine seeds didn’t plant the trees and is dealing with a legacy problem themselves. If they haven’t taken steps to remove the wilding pines on their land, then they may be said to have adopted the risk
5. It is not necessary for the plaintiff to prove that the defendant knew how severe, i.e. how much damage is being caused by the spread. It is enough that the type of loss was reasonably foreseeable.

The law is settled: the spreading of wilding pines by wind borne seed spread **will** constitute a nuisance. We should not need to create new law. These cases will be won or lost on the strength of the evidence. Remember “not my fault” is unlikely to provide a valid defence to nuisance. This means that there will be less uncertainty for claimants in bringing an action.

A bigger factor in determining success for a claimant is what they can prove as fact. The claimant needs to prove that the spread did in fact come from the defendant’s property and to bring evidence to establish the amount of loss or harm suffered. Some reasons for alleging loss can be lifted straight from the National Wilding Conifer Programme website:

- Loss of productive farmland and precious water resources (they are very thirsty trees)
- Destruction of native biodiversity as they smother native plants and reduce the habitat for native animals
- Increased wildfire hazard and intensity
- Dramatic changes to iconic landscapes and scenery
- Negative impacts on culturally and historically important landscapes and sites.

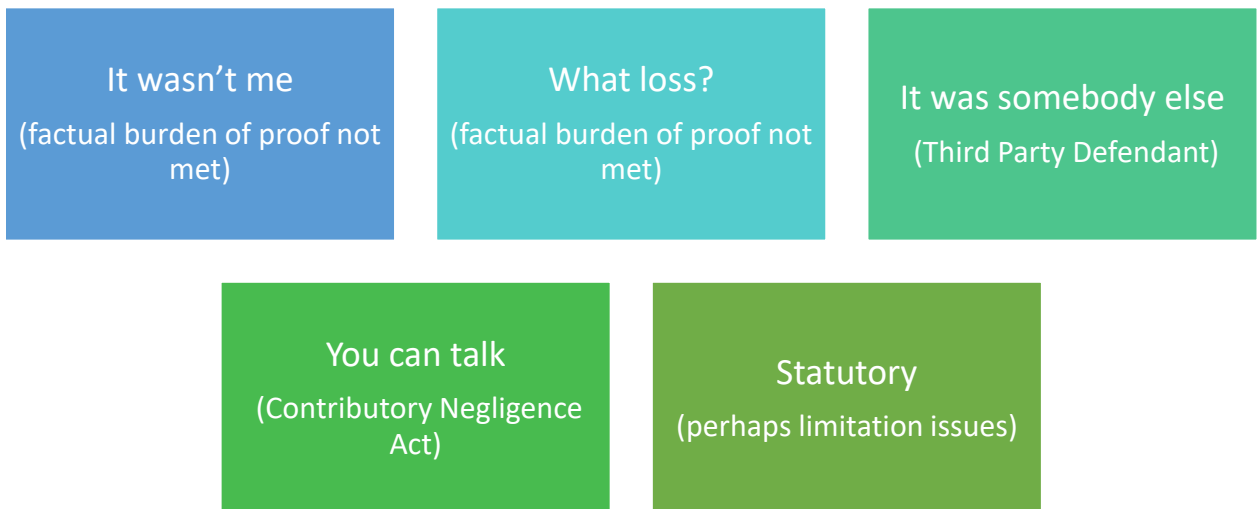
Remember, the claimant only needs to prove that it is more likely than not, i.e. 51% chance that the spread came from the defendant’s property. This is lower than the criminal standard of proof. We should not be put off threatening legal action because we cannot 100% prove the origin of the seed source. We may be able to use wind modelling or other evidence.

## Negligence

Negligence will likely be pleaded in tandem to nuisance, but it really is more of a secondary alternative. There is more for a plaintiff to prove which makes it less useful when there is a more tailor-made avenue.

## Defences

It pays to think about whether the defendant might be able to avail themselves of a defence before approaching them. The defendant will have the burden to prove that a defence applies. The five most obvious defences that may be available to them are listed below:



*“Not my trees causing the spread.”*

This is an evidential point. Remember that the test is on the balance of probabilities (i.e. 51% - the plaintiff just needs to show it is more likely than not that the trees spread from the defendant's land. Note that this is the civil standard: much lower than the criminal standard that people may think of first).

1. *“What loss?”*

The claimant has to bring evidence as to the quantum of the loss, i.e. if it is claimed that there is \$100k in damage then bring evidence to show how that is quantified. This may be the cost of removal etc.

2. *“It was not me: it was that other guy.”*

This is an evidentiary point similar to the first defence mentioned. In this case the defendant may add his/her neighbour as a third party defendant to share the blame or cost.

3. *“I may be causing some spread but so are you buddy”*

The effect of a contributory negligence defence is easy to understand. It involves asking to what extent a claimant contributed to their own injuries as a percentage, and then taking that percentage off his or her damages. Thus, if the courts regard a claimant as having made a 40% contribution to their own injuries, the court will reduce their damages by 40%. The Contributory Negligence Act is quite clear that it applies to nuisance claims.

4. *“You’re out of time mate.”*

The Statute of Limitations may preclude actions where the cause of action is older than 6 years (i.e. the spread occurred more than six years previously). There are different time limits to bring an action that may apply depending upon the facts, i.e. when the spread may have been reasonably discoverable. This is worth looking at and having a conversation around it if it is potentially an issue.

A lot of these points actually just go to the evidence needed to succeed. Remember, success or not will largely hinge upon collating the evidence. Think about telling a story to a sceptic who doesn’t want to take your word for it and then find evidence for each fact asserted. Another way to think about it is by making a list of points to prove.

We do not necessarily want to always end up in litigation. If you can write a good letter setting out the facts and we can robustly show that a defendant can be found liable for the cost of spreading wilding pines, it may ordinarily be enough to convince them to act (or contribute financially) without the need to file a claim with the courts. Often a good outcome will be getting agreement from the landowner to drop the problematic trees.

I am more than happy to talk through any practical cases that you may have to see if there is a good strategy for bringing the spreaders on board.