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NUISANCE AND THE DEFENCE OF STATUTORY AUTHORITY: INFERRING THE INTENTION OF PARLIAMENT

INTRODUCTION

The law of torts has been tardy in recognising the problems involved in reconciling the liability of public or statutory authorities[1] with common law principles. A feature of the "jurisprudence" of the law of torts in this respect has been its failure to adapt to changes in society,[2] and its adherence to inappropriate concepts of fault[3] and damages principles.[4] The case law is imbued with what might be termed an "immunity perspective"[5] which accords the statutory authority a special status arising from its functional aspect.[6]

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1 The term "statutory authority" is used throughout this article in preference to "public authority". The former expression emphasises the relationship between common law principles of liability, statutory powers, and principles of statutory construction, whereas the latter entrenches the "immunity perspective" to be described below.

2 Cf Friedmann "Statutory Powers of Local Authorities" [1945] MLR 31, 48: "What is . . . indispensable, for urgent practical reasons, is the recognition of public law problems as such". Contrast the American writers' attention to this problem. For a summary see White, Edward G *Tort Law in America: An Intellectual History* (1980) 176-9, 231-3; also Aronson & Whitmore, *Public Torts & Contracts* (1982); Craig, "Compensation in Public Law" (1980) 96 LQR 413; Ganz, "Compensation for Negligent Administrative Action" [1973] PL 84; Harlow, "Fault Liability in French & English Public Law" (1976) 39 MLR 516; *Compensation & Government Torts (1982); Harlow & Rawlings, Law & Administration (1984);* Phegan, "Damages for Improper Exercise of Statutory Powers" (1979) 9 Syd LR 93.

3 One of the major problems is attributing "fault", ie normative standards, to a statutory authority. Cf Williams and Hepple, *Foundations of the Law of Torts"* (1976) 85-88. See also Buckley, "Liability in Tort for Breach of Statutory Duty" (1984) 100 LQR 204, 207-8, 222-224; Bowman and Bailey, "Negligence in the Realms of Public Law - A Positive Obligation to Rescue?" [1984] PL 277.

4 Cf *Allen* v *Gulf Oil Refining Ltd* (1979) 3 WLR 523 (CA). Lord Denning at 532 suggested that a right to compensation should be implied in all statutes affecting the rights of persons. Cf Craig supra n 2; Phegan supra n 2; cf Atiyah, *Accidents, Compensation and the Law* (3rd edn 1980) 486-8, referring to *Burmah Oil Co Ltd* v *Lord Advocate* [1965] AC 75.

5 Cf *Sutherland Shire Council* v *Heyman* (1985) 59 ALJ 564 per Brennan J, 589. Cf *Rickards* v *Australian Telecommunications Commission* [1983] 3 NSWLR 155, 160 where Priestley JA said "statutory authority to construct and use an undertaking confers immunity from action for nuisance on the authority so long as the statutory powers are exercised with all reasonable regard and care for the interests of other persons . . ."

6 It is not suggested that special considerations do not apply to statutory authorities, or that they should be equated to a private person. See Lunts, Hambly, Hayes, *Torts: Cases and Commentary* (2nd edn 1985) 961 [17.7.08]. See also the Harlow-Samuel discussion in Harlow, " 'Public' and 'Private' Law: Definition without Distinction" (1980) 43 MLR 241; Samuel, "Public and Private Law: A Private Lawyer's Response"

Such confusion is manifested by the use to which principles of statutory interpretation are put in attempting to accommodate common law principles. As with the action for breach of statutory duty,[7] it seems that the defence of statutory authority in nuisance depends upon implying a legislative intention. This article will discuss how the inferring of such intention leads to various and inconsistent approaches, and to confused concepts of liability. It may be that the common law has developed a separate concept of liability in the case of statutory authorities when there is no real necessity as the tort of nuisance is sufficiently flexible to accommodate the liability of statutory authorities. This article will also explore that hypothesis.

1 The Defence

The emergence of the defence of statutory authority, arising from the "railway cases" of the 19th Century, was an outcome of the Industrial Revolution[8] as was the tort of nuisance itself to a very large extent.[9] But whereas the tort of nuisance arose from a perceived need to balance two competing interests in land, namely that of those interested in the "productive exploitation of the land and its resources" and that of the person conserving his interest in the land,[10] the defence of statutory authority rested upon the presumed intention of Parliament to abrogate common law rights.[11] Such an approach depends on the view that private rights must yield to the public interest. In an historical sense, the development of the defence can be seen as an anomaly as it would seem that in actions in nuisance involving private parties, the courts were not all reticent in attempting to curb the intrusion of industrial pollution,

(1983) 46 MLR 558. The "immunity perspective" manifests itself in various ways. For example, the use of the presumption that the intention of Parliament is paramount and common law rights are intended to be abrogated. See *Hammersmith & City Railway Co* v *Brand* (1869) LR 4 HL 171. A variation of this approach is the assumption that as a statutory authority is acting in the public interest, it must be the presumed intention of Parliament that the public interest is to prevail. See *Allen Gulf Oil Refining Ltd* (1981) 2 WLR 188 (HL). This is also expressed as "the lesser private right must yield to the greater public interest" (per Lord Roskill in *Allen* at 201). Although it is not intended in this article to examine the concept of "public interest" it may be said that the "immunity perspective" tends to ignore the dual aspect of "public interest"; namely the detriment which the public incurs as a result of an indivual's suffering.

7 Cf Buckley, supra n 3, who argues in relation to the tort of breach of statutory duty that the fiction that liability depends exclusively on legislative intention should be abandoned. However, his suggestion (at 232) that it should be recognised that the issue is one of policy, is, with respect, not one that is likely to lead to clearer decisions.

8 See Linden, "Strict Liability, Nuisance & Legislative Authorization" (1966) 4 Osgoode Hall LJ 196, 199. See also the judgment of Denning MR in *Allen* (CA) supra n 4 at 528-530.

9 To be discussed infra. See McLaren, "Nuisance Law and the Industrial Revolution — Some Lessons from Social History" (1983) 3 Ox JLS 155.

10 Ibid. See eg *St Helens Smelting Co* v *Tipping* (HL) (1865) 11 (HL) 642, 11 ER 1483.

11 See eg *R* v *Pease* (1932) 4 B & Ad 30; *Vaughan* v *Taff Vale Railway Co.* (1860) 5 H & N 679. But very little thought is given to the principle of statutory construction that common law rights are not to be abrogated without a clear intent to the contrary, and this includes rights of access to the courts. See *Chester* v *Bateson* [1920] 1 KB 829; cf Heuston, and Chambers, *Salmond & Heuston on the Law of Torts* (18th edn 1981) 477, who refer to this as the distinction between "conditional" and "absolute" powers; cf Bramwell in *Brand* supra n 6 at 191.

and this at a time when there was little interest in environmental problems.[12]

The defence of statutory authority rests on the presumed intention of the legislature. It is to be presumed in other words that as parliament intended a certain activity, it must be taken to have authorized the consequences of the activity.[13]

2 "Inevitable Accident"

In the case of *Brand* v *Hammersmith & City Railway Co*[14] the qualification was added that the presumed intent related only to the inevitable consequences of the orderly and proper use of the railway.

A concept of inevitability assumes the occurrence of an unavoidable act,[15] and an act which can be avoided soon came to mean one which could be executed without fault. Thus it was a short step to saying that the legislature is presumed only to authorize the doing of an act which is done in a careful manner.[16]

In *Brand's* case the test of "inevitability" was expressed thus[17]

> "If this power could be *practically* exercised without causing vibration, smoke, and noise, then the company would not be justified in subjecting the plaintiff and his property to these nuisances, and an action might be brought against the company, notwithstanding the statute, for abusing their powers. But as these annoyances are, as I suppose, the *inevitable and necessary* result of the *ordinary and careful* use of engines and carriages on a railway, the legislature must be presumed to have contemplated and legalized, not only such *use*, but the *consequences* of it. The right of action, then, is gone, and the redress, if at all, is under the compensation clause."

This statement left unanswered a number of issues; one such issue being the meaning of "inevitable and necessary". What is meant by practical? What is meant by "ordinary and careful"? Is it sufficient to show that certain consequences could not be practically avoided without demonstrating the use of care? Is it in other words a defence of "inevitable accident" or of "inevitable consequences"? If the former, what is the difference between the defence and a claim in negligence?[18]

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12 See McLaren, supra n 9, who sets out to refute the view expounded by Brenner, in "Nuisance Law & the Industrial Revolution" (1973) 3 JLS 403 that the courts favoured the industrial users of lands. See in particular McLaren at 219-221. See eg *St Helen's Smelting Co* v *Tipping* supra n 10.

13 Cf Luntz, Hambly, Hayes supra n 6, 959 [17.7.03]. The distinction is between authorized actions and authorized damage. Cf Walsh J in *Edwards* v *Blue Mountains City Council* (1961) 78 WN (NSW) 864, 869.

14 (1867) LR 1 QB 130 (QB) and (1867) LR 2 QB 223 (Ex Ch). See also *Hammersmith & City Railway Co* v *Brand* (HL) supra n 6.

15 See eg *Benning* v *Wong* (1969) 122 CLR 249, 308 per Windeyer J; *Provender Millers (Winchester) Limited* v *Southampton County Council* [1940] 1 Ch 131, 138, per Farwell J: "there was no way of doing it which would not have had that effect".

16 See *Benning* v *Wong* supra n 15 at 256, per Barwick CJ. "This condition of skill and care in the performance of the authorized act is in reality but the obverse of the proposition that a statute authorizes matters necessarily incidental to the performance of the act expressly authorized".

17 Supra n 14 at 242 (Ex Ch) per Montague-Smith J. Emphasis supplied.

18 Cf n 3 supra.

(i) "Inevitable and Necessary" – "Reasonable" practical feasibility?

The first issue was dealt with in 1930 by Viscount Dunedin in the House of Lords in a much quoted statement in the case of *Manchester Corporation* v *Farnworth.*[19] He said that what is "inevitable" is judged by "not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of *practical feasibility* in view of situation and of expense". In that particular case, the Corporation had built and operated an electric power generation plant which burned coal. The plaintiff complained of the noxious sulphur dioxide fumes emitted from the plant. However, evidence was given to the effect that means could be adopted to control the discharge, albeit at the expense and to the ultimate cost of the consumers of electricity. It was decided that the Corporation was liable in nuisance as they had not discharged the onus of proving that the nuisance was an inevitable consequence.

Whilst Viscount Dunedin's formulation concentrates on "practical feasibility", Lord Sumner in the same case said: "The nature and degree of the plaintiff's suffering and the *cost* trouble and inconvenience to the defendant Corporation of saving him from it are elements of the two sides of the case, which must be considered in deciding what is *reasonable".*[20] He continued, "but I cannot see that either on principle or on authority it is sufficient answer to a criticism, otherwise sound, to say that, if so, Manchester's electricity would cost it more".

A similar test of "reasonable" practical feasibility was applied in *Rudd* v *Hornsby Shire Council.*[21] The Council had drained its roads and collected the run-off water from many private plots of land. Water thus accumulated was allowed to empty from its drains onto the plaintiff's land. The cost of continuing the drainage system past the plaintiff's land was estimated at about $60,000. Even if that estimate were to be accepted, Holland J decided that it would be quite unreasonable to relieve the ratepayers of paying that sum by making the plaintiff suffer. He said:[22] "It would hardly be reasonable to require the plaintiff to suffer the burden of a drainage system designed to benefit other ratepayers without making a comparison between the cost of providing them with that benefit and the cost of protecting the plaintiff from the consequences which he has been made to suffer".

On this view, what is practical or *reasonable* (rather than feasible) depends on balancing the two interests of the plaintiff and the defendant in the use of their land. It is suggested that such an approach is consistent with the concept of nuisance to be discussed infra. It will be noted that Viscount Dunedin in *Farnworth* stressed that the plaintiff's suffering may outweigh the cost and inconvenience to which the defendant is put. This is an interesting use of "cost - benefit" arguments,

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19 [1930] AC 171, 183. Emphasis supplied.

20 Supra n 19, 195. Emphasis supplied.

21 (1975) 31 LGRA 120, cf *Edwards* v *Blue Mountains City Council* supra n 13 at 870, where Walsh J says, "This harm is not to be regarded as authorised by the statute unless it could not be prevented, and the defendant must show that it was not reasonably practicable to prevent it . . . " Emphasis supplied.

22 Ibid 139.

which seems to depend in this context on achieving a balance between the parties in contrast to the use of such arguments in negligence actions.[23]

(ii) Ordinary & Careful — Negligence or Nuisance?

As the concept of inevitability seemed to imply a lack of fault, the test of "inevitable accident" has come to mean more than mere "practical necessity". As has been seen in the preceding discussion, the favored test is in any event one of "reasonable" practical feasibility, thereby introducing normative standards which can be met by applying a balance of "cost-benefit" factors, consistent with the tort of nuisance.[24]

There is a line of authorities which prefers to adopt such a "balancing" approach, thereby asserting the distinction between "inevitability" and negligence. However, there are other authorities where the distinction becomes blurred.

The "balancing" approach is illustrated by *Rudd's case*[25] in which it was stressed that "inevitability" is not to be confused simply with lack of negligence, but is to be tested by reference to a much wider inquiry of what alternative courses, if any, are open to a defendant, in the light of Lord Dunedin's statement in *Manchester Corporation* v *Farnworth.*[26]

A similar approach was adopted in *Schenck's*[27] case, a Canadian decision involving the use of salt in the Government's winter de-icing of highways programme. It was stressed by Robins J that despite the high cost that would be involved in the use of alternative compounds, it could not be concluded that such "additional expenditures would be such as to render unfeasible the continuation of the de-icing programme or to significantly reduce the Minister's capacity to provide high standards of winter road care".[28] In applying Viscount Dunedin's statement he said[29] "regard should be had, not only to expense, but to the gravity of the harm suffered and other factors relevant to the adjustment of the conflicting interests in the law of nuisance".

Similarly, Lord Edmund-Davies in *Allen* clearly considered that the test of "inevitability" and negligence are quite separate.[30] He spoke of the issue of "inevitability" in the sense of being "wholly unavoidable and this regardless of the expense which might necessarily be involved in its avoidance".[31] Thus he appears to take the same view of "reasonable" practical feasibility which was applied in *Rudd* v *Hornsby Shire Council*[32] — an approach which seems to depend on a balancing of the interests of the individual against the public interest in which cost is only one factor to be taken into account. On this view, the degree of inconvenience to be suffered by a plaintiff may outweigh that factor.[33]

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23 See infra n 55.
24 To be discussed infra.
25 Supra n 21.
26 See supra n 19, 137.
27 *Shenck* v *R* (1981) 131 DLR (3d) 310.
28 Ibid 323-4.
29 Ibid 324.
30 Supra n 6, 194. (To be discussed infra).
31 Ibid.
32 Supra n 21, cf *York Bros (Trading Pty Ltd)* v *Commissioner of Main Roads* [1983] 1 NSWLR 391.
33 Cf *Lester-Travers* v *City of Frankston* [1970] VR 2 (golf-balls not "inevitable"); *Midwood* v *Manchester* [1905] 2 KB 597 (explosion not "inevitable") and cf *Edington*

Thus, this line of cases suggests that the issue of "inevitability" depends upon achieving a "reasonable" balance of the interests of the defendant and the plaintiff in the light of the following factors:
(1) the degree of risk undertaken by the defendant;
(2) the degree of inconvenience suffered by the plaintiff;
(3) the cost and "practical feasibility" of alternative procedures. (The question of "practical feasibility" is to be assessed in the manner suggested by Viscount Dunedin in *Manchester Corporation* v *Farnworth);* and
(4) the benefit or burden to the community of continuing the nuisance unabated. According to this line of authorities, it will basically be "substantial interferences" which will be actionable.[34]

A second approach to this issue applies a particular concept of "fault" liability. In this line of authorities the issue of "inevitability" has been treated as an application of the reasonable man test in negligence. For example, in *Buley* v *British Railways Board,*[35] it was decided, in an action to prevent the use of a goods terminal at night, that if it should appear in connection with any railway operation that there had been a failure to take reasonable care to avoid a greater degree of noise than is inherent in that operation, then statutory authority is no defence. Similarly, in *City of Portage la Prairie* v *British Columbia Pea Growers Ltd,*[36] it was said on this issue: "The defendant has not only failed to establish that it has used reasonable diligence or taken all reasonable steps and precautions to prevent leakage [of sewage] . . . but to my mind quite the contrary is the case".

Whether such an approach is an application of the foreseeable risks of the reasonable man test to the exercise of the power in the "special" sense referred to by Lord Wilberforce in the House of Lords in *Allen's* case is not clear. In that case, Lord Wilberforce considered that the defence of statutory authority was available subject to the powers being exercised without "negligence", to which he attached a special meaning of requiring "the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with *all reasonable regard and care for the interests of other persons".*[37] On the other hand it may stem from the desire to add a further qualification to the "inevitable accident" requirement, namely that there also be "inevitable consequences" in the sense that the nuisance be a "reasonably necessary" consequence of the activity.[38] In *York's* case it was suggested that this would be satisfied where there is "no reasonable way in which

v *Swindon Corp* [1939] 1 KB 86 (slight obstruction to a right of access resulting from a bus shelter); *Brand's* case (supra n 6) ("mere vibrations").

34 See Linden supra n 8, 217, who suggests in his study of the cases that they tend to find liability when the damage caused is of a "more serious nature". See also Davis, *Administrative Law Text* (3rd edn 1972) 481-3, who suggests that there should be liability for "exceptional losses"; cf *York Bros* supra n 32, 394.

35 [1975] CLY 2458.

36 43 DLR (21d) 713, 735. Cf *Edwards* v *Blue Mountains City Council* supra n 13, 869, where Walsh J speaks of inevitability in terms of "proper diligence and care".

37 Supra n 6, 191. Emphasis supplied. Cf Lord Roskill at 201 who defines negligence in similar terms in this context as "meaning reasonable regard for the interests of others".

38 Cf *Provender Millers (Winchester) Limited* v *Southhampton County Council* supra n 15, 138, per Farwell J.

the end directed or permitted could have been achieved without doing the damage which in fact resulted".[39]

It may be argued that such a view of the authorities is consistent with the statement in *Brand's* case set out above, and that it is a defence of "inevitable consequences".

Finally there is an approach which equates nuisance with negligence suggesting that it is a defence of "inevitable accident". In *Manchester Corporation* v *Farnworth,*[40] Lord Sumner, whose statements appear above, furthered his discussion of the question of inevitability by concluding[41] "that they have failed to show that they have used all *reasonable diligence* and taken all *reasonable precautions* to prevent their operations from being a nuisance to their neighbours". He refers to the fact that at the time of the erection of the plant they "never directed their minds to the prevention of nuisance, which it was quite obvious might occur".[42] The language which he uses in this instance is reminiscent of the duty of care formulation to be propounded two years later by Lord Atkin in *Donaghue* v *Stevenson.*[43] Lord Sumner explained what he meant by "reasonable" in the following passage. He said[44] that it "means reasonable according to all the circumstances, and reasonable not only in the interest of the undertakers but also in that of the sufferers . . . Great powers often involve great responsibilities and before the defendants can be said to have proved that they have done all that they reasonably can, I think that they ought to have done a good deal more than they have done to find out what can usefully and reasonably be done".

The language he uses here could be taken as suggesting that a duty of care arises from the assumption of a responsibility.[45]

In some recent Australian cases, the defence of statutory authority has been equated with an action in negligence to the extent that it becomes necessary to ask whether a separate action in nuisance can be maintained.[46] In *Benning* v *Wong,* Barwick CJ in discussing the defence[47] said that the implication which must be read into the statute is that in general it only authorizes the act to be done in a careful manner. This proposition he said has two aspects. First, a person who has to justify his otherwise tortious act by assertion of statutory authority must show as part of his justification in defence that he did the authorized act skilfully and carefully. And secondly, he said, the statutory authority to do the authorized act imports a duty of care towards persons who are likely to be affected by the performance of the act.

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39 Supra n 32, 398. Note this was a case in public nuisance. Query whether the defence applies to a public nuisance. See the doubts expressed by Bramwell B in *Brand* (Ex Ch) supra n 14, 235.

40 Supra n 19.

41 Ibid 195. Emphasis supplied.

42 Ibid.

43 [1932] AC 562.

44 Supra n 19, 201-202.

45 Cf *Sutherland Shire Council* v *Heyman* supra n 5, per Mason J, 577-8, 581; Brennan J, 587, 589. Cf Deane J, 599. See also Lord Sumner, supra n 19, at 202, introducing notions of public duties and private rights: "the authority to erect and work the plant and the obligation in both respects to use reasonable care and precautions are correlative . . ."

46 Cf Luntz, Hambly and Hayes supra n 6, 960-2, [17.7.07-17.7.10] 967.

47 Supra n 15, at 256. The discussion was in relation to an action in *Rylands* v *Fletcher.*

It was suggested in *Nalder* v *The Commissioner for Railways*[48] that it makes little difference whether a cause of action is pleaded in negligence or nuisance. In that case Kneipp J said[49]:

> "If there were no statutory protection the action would be framed in nuisance. In the absence of negligence, the cause of action in nuisance is taken away . . . Is not the case really one of nuisance, although, because of the statute, negligence has to be proved in order to make it out? The point appears not to have any practical significance".[50]

However, it would seem that the issue, if not of practical, is one of conceptual significance. The disagreement in the judgments in *Benning* v *Wong* highlights the significance in terms of the onus of proof. In that case the High Court was divided on the issue.[51] In an action in nuisance, the burden of proving the absence of negligence is on the defendant, whereas in an action in negligence the burden is on the plaintiff throughout.[52] Although in practical terms, the placing of the onus may make little difference to the manner in which a plaintiff presents a case, in conceptual terms, the question of the onus is important. For if it is accepted that the overall onus is on the plaintiff then it is tantamount to saying that the defence of statutory authority confers a complete immunity and that an action in nuisance is not available,[53] thereby depriving the plaintiff of the right to bring an action in nuisance.

But the questions of onus of proof aside, recent developments concerning the law of negligence and the liability of statutory authorities show that there is a great deal of uncertainty as to the approach to adopt in conferring a duty of care on a statutory authority.[54] In addition, the duty of care approach lends itself to the use of cost-benefit arguments to negate rather than to confer liability,[55] in contrast to the use to which such arguments can be put in nuisance.[56]

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48 [1983] 1 Qd R 620.

49 Ibid 623.

50 Ibid.

51 The High Court decided 3:2 that the defence of statutory authority was eliminated and that the plaintiff bore the onus of proof of negligence. This reasoning was accepted in *Edwards* v *Blue Mountains City Council* Supra n 13, 868. See also *Delaney* v *FS Evans & Son Pty Ltd & District Council of Stirling* (1985) 121 LSJS (SA) 1, per Olsson J 45-48.

52 See the discussion by Walsh J in *Edwards* v *Blue Mountains City Council* supra n 13, 869. See Fleming, *The Law of Torts* (6th edn 1983) ch 13 in particular at 285; *Nalder's* case, supra n 48, 637-9.

53 Cf Menzies J in *Benning* v *Wong* supra n 15 at 278. The reasoning applicable to the strict liability tort of *Rylands* v *Fletcher* bears no analogy to the concept of nuisance to be disucssed infra.

54 See *Heyman's* case supra n 5, Evans, "The Foundations of Negligence" (1985) LIJ 1235. See Craig, "Negligence in the Exercise of a Statutory Power" (1978) 94 LQR 428; Aronson & Whitmore, supra n 2, Ch 2; Seddon, "The Negligence Liability of Statutory Bodies: Dutton Reinterpreted" (1978) 9 FLR 326; Buxton, "Built upon Sand" (1978) 41 MLR 85; Bowman and Bailey, supra n 3; Hamson, "Escaping Borstal Boys and the Immunity of Office" [1969] CLJ 273; *L* v *Commonwealth* (1976) 10 ALR 269; *Takaro Properties Ltd* v *Rowling* [1976] 2 NZLR 657; *Taranaki Catchment Commission* v *R & D Roach Ltd* [1983] NZLR 641; *Governors of the Peabody Donation* v *Parkinson* [1983] NZLR 623; *Meates* v *Attorney-General* [1983] NZLR 308; *City of Kamloops* v *Nielson* (1984) 11 DLR (4th) 641.

55 See *Heyman's* case, supra n 5, per Gibbs CJ at 573.

56 See supra n 23.

Finally, one may enquire which of the above approaches most accords with fairness and legal principle.

The first "balancing" approach would seem to be consistent with the concept of nuisance. However, this approach also suggests that a concept of defence of statutory authority is redundant, and is likely to be rejected on this basis. The courts, with some notable exceptions,[57] seem keen to accord a special status to statutory authorities which is related to the functions that such authorities fulfil.[58] It may be that the concept of "inevitability" propounded under the first approach is sufficiently flexible to accommodate the special status accorded to statutory authorities.[59]

The second approach, which suggests that the defence applies only to "reasonably necessary" consequences is consistent with the principle that the defence rests on the implied intention of Parliament. For, logically, an authorized activity must lead to authorized consequences; the link between the activity and the consequences can be provided by a concept of "reasonably necessary" consequences. However, the objection to this approach is that it depends upon implying an intention, a process which, as this article describes, is fraught with uncertainty and may lead to conflicting decisions.

The negligence approach, which depends upon conferring a duty of care, would seem to be conceptually wrong, and contrary to principle, denying as it does the right of a plaintiff to bring an action in nuisance.[60]

The preceding discussion emphasises the impreciseness which attends the inferring of Parliament's intention when considering the concept of inevitable accident. Similar uncertainty surrounds the implications that are drawn from the effect of compensation clauses, and the significance that is attributed to the distinction between permissive powers and mandatory powers. These will now be considered.

3. The Effect of Compensation Clauses

There is a view that the absence of a compensation clause in a statute is an indication that Parliament intended that a common law right to claim damages is to be preserved,[61] or in other words that the defence of statutory authority is not applicable. This view has developed from the converse: namely, that the presence of a compensation clause is a strong indication that Parliament knew that the activity would result in a nuisance and thus provided for compensation in lieu of a common law action.[62]

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57 See Smith J in *Bryan* v *Swan Hill Sewerage Authority* [1960] VR 573: "If a scheme for the benefit of a community cannot be established and carried on without injury to individuals then I should think that prima facie they ought justly to be compensated by the community, and their right should not be dependent on their loss having been caused by carelessness or lack of skill".

58 In so doing, it is of course arguable that the courts adopt a very narrow concept of "public interest" and ignore what might be called the "dual aspect" of this concept. Supra n 6.

59 Supra at n 34.

60 Supra at n 53.

61 See eg *Metropolitan Asylum District* v *Hill* (1891) 6 AC 193 per Lord Blackburn at 203; cf Rogers, *Winfield and Jolowicz on Tort* (12th edn 1984) 415 n 68, who refers to it as a "weak indication" only.

62 See eg *Provender Millers (Winchester) Ltd* v *Southampton County Council* supra n 15; *Marriage* v *East Norfolk Rivers Catchment Board* [1950] 1 KB 284 to be discussed

An examination of the cases under this heading suggests that the defence of statutory authority for inevitable nuisances may be qualified by adding to the criteria of "inevitability" discussed above the fact of absence of any compensation clauses. The discussion to follow will show that the cases are inconsistent and that the rules of statutory construction are being utilised in an artificial way to enable the judiciary to speculate on the intention of the legislation.[63] There is little understanding of the difference between implying an intention to authorise an activity and an intention to authorise the consequences of such activity.[64]

The relevance of compensation clauses first arose in *Brand's* case,[65] where the Act in question provided that the company should make full compensation for the value of lands taken, and in the case of persons "injuriously affected by the construction" of the railways, compensation was to be paid "for all damage . . . as regards such lands". Thus the main issue in *Brand's* case was whether or not the plaintiff was entitled to compensation. It was eventually decided by a majority of one in the House of Lords[66] that the legislation had extinguished any claim for damages for nuisance as the damage was an inevitable consequence of the ordinary and proper use of the railway. Thus the majority decided that both the common law right to claim damages and the statutory right to claim compensation were not available for "inevitable" nuisances. The plaintiff was therefore left without a remedy.

Lord Cairns, one of the two dissenting judges,[67] agreed with the majority that the legislation was effective to extinguish the common law right to damages for nuisances which were an inevitable consequence of action authorized by Parliament. He said; "It must be taken, I think,... that the railway could not be used for the purpose for which it was intended without vibration. It is clear to demonstration that the intention of Parliament was, that the railway *should be used*".[68] But, with respect to the compensation clause, as Parliament had chosen to give owners of land the right to be compensated if their lands were "injuriously affected" by the exercise of their statutory powers, then it must surely have had in view the ultimate object of those works, namely the execution of those works.

Bramwell B, alone, was prepared to argue that the common law right to claim damages was not extinguished. "Why," he asked, "if the common law is to be taken away, are there not express words to that effect?"[69] He expressed doubts about the correctness of the previous

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infra; cf Street, *The Law of Torts,* (7th edn 1983) at 87, who says that a compensation clause "may be material, and sometimes even decisive".

63 Cf Linden, supra n 8.

64 Cf *Edward's* case, supra n 13, 869, where it was said re "constantly smouldering rubbish", "the statute has specifically authorised the nuisance. It has authorised the burning of the rubbish, and the burning tip is 'the inevitable result' of the doing of the thing so authorised". See also supra at n 51.

65 Supra n 14.

66 The case was argued three times. The original Queen's Bench decision was reversed in the Exchequer Chamber and this decision was in turn reversed in the House of Lords.

67 The other dissentient, Willes J, decided upon reconstruction of the Act that the plaintiff was entitled to compensation, but did not discuss whether the common law right was available.

68 Supra n 14, 215, Emphasis supplied.

69 Supra n 14, 191.

decisions in *R* v *Pease*[70] and *Vaughan* v *Taff Vale Railway Company*[71] and suggested that "they have proceeded on an inadvertent misapprehension of the object"[72] of the relevant legislation as the provisions were directed to authorizing the activity in question in the sense of rendering them *intra vires*.[73] In dealing with the public benefit argument advanced by the railway company, he said:[74] "Admitting that the damage must be done for the public benefit, that is no reason why it should be uncompensated. It is to be remembered that the compensation comes from the public which gets the benefit. It comes directly from those who do the damage, but ultimately from the public in the fares they pay . . . Either, therefore, the railway ought not to be made, or the damage may well be paid for."

The presence of a compensation clause was a central issue in *Marriage* v *East Norfolk Rivers Catchment Board* (1950).[75] The opinion of the court was summarized by Singleton LJ, who, referring to the facts, says that "the operation of dredging . . . results in spoil which has to be put somewhere, and *that* may create a nuisance. This was recognised by Parliament, and [the ACT] provides that . . . the Board shall be liable to make full compensation . . . ".[76] On his view it seems that it is the *consequences* of the authorised activity which are anticipated by Parliament.

In a recent Canadian decision, *Von Thurn und Taxis* v *City of Edmonton,*[77] it was decided that an Act which provides for the payment of compensation is not a bar to an action for damages in nuisance. In that case, the court reasoned that as the nuisance was not authorised by statute, in that it was not the inevitable consequence of the exercise of statutory powers, then the claim for nuisance rested on the common law and the compensation clause could not affect the right to bring such action. Causey J said:[78] "The plaintiff's claim is not for damages arising from the exercise of statutory powers but for nuisance and the creation of a nuisance and this is not within the statutory powers of the city". Thus, he views the question of legislative intention from a different perspective to that of Singleton LJ in *Marriage* discussed above. On this view, the legislature had only authorised the activity, not the consequences which led from the activity and which amounted to a nuisance.

Similar reasoning was employed in *Rudd* v *Hornsby Shire Council,*[79] where the court said that the statutory powers relied on by the defendant

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70 Supra n 11.

71 Supra n 11.

72 Ibid 189.

73 Ibid. Cf Aronson & Whitmore, supra n 2, 65-66, 118; Goohart, "Corporate Liability in Tort and the Doctrine of Ultra Vires" (1926) 2 CLJ 350; Warren, "Torts by Corporations in Ultra Vires Undertakings" (1926) 2 CLJ 180.

74 Ibid.

75 Supra n 62. Cf *Schenck's* case supra n 27, 322, where the absence of a compensation clause was one factor which the court took into account in construing the legislation, together with the fact that it "is permissive . . . and gives no direction as to the specific manner or means by which the activity is to be performed."

76 Supra n 62, 297. Emphasis supplied. Contrast this decision with *East Suffolk Rivers Catchment Board* v *Kent* [1971] AC 74, where in a claim in negligence, it was held that the Board was not liable on a "cost-benefit" analysis.

77 [1982] 135 DLR (3d) 434.

78 Ibid 440.

79 Supra n 21.

were not sufficient to authorise the nuisance because the powers were limited to constructing works upon land and did not extend to permit the discharge of waters. Similarly, the right to compensation could not be relied upon as authorising the nuisance because that provision related only to the specific land on which the Council had carried out works.[80]

Thus, on the view expressed in *Von Thurn und Taxis* and *Rudd,* the presence of a compensation clause is not sufficient in itself to authorise a nuisance; there must be statutory authority to create and maintain the nuisance in the sense that the specific nuisance creating activity is itself authorised. So the power to construct sewers or drains does not authorise or include the power to discharge the overflow.[81] These two cases show that the presence of a compensation clause is not decisive in itself unless the nuisance can in any event be said to be an "inevitable and necessary" consequence[82] or result of the activity. Thus the view taken of the intention in these cases was that it related to the consequences. But one wonders whether on this view the discharge of fumes from an oil refinery or a railway would be treated in the same way. It would be more difficult to argue that such were not an "inevitable and necessary" consequence, provided that they were also "reasonably" necessary consequences as discussed above.[83]

4. The Distinction between Permissive Powers and Mandatory Powers:[84] the general and the specific[85]

Another example of the way in which principles of statutory construction are utilised is in the use of the distinction between permissive powers and mandatory powers. It is said that if a power is conferred in permissive terms, that is, containing a large element of discretion, then it cannot be said that Parliament "intended" or authorised a certain nuisance because of the choice of possible courses of action. In other words, if a power is permissive, a nuisance resulting from the exercise of such powers cannot be said to be "inevitable" and the defence of statutory authority cannot be invoked. On this approach the "inevitability" of a nuisance becomes dependent on the imputed intention of Parliament.

It seems that a power will be "permissive" if there is a choice as to the siting of a smallpox hospital,[86] where there is a choice as to the method by which to de-ice highways in winter[87] or as to how to pump out sewage.[88] The "permissive" cases include situations where there is a

80 Supra n 21, 136. Cf *Aisbett* v *City of Camberwell* (1933) 50 CLR 154; per Starke J, 167 and Dixon J, 176.

81 Cf *Smeaton* v *Ilford Corporation* (1954) 1 Ch 450 where the issue was avoided by arguing that the cause of the overflow was beyond the control of the defendant and that the defendant had *no power* to prevent discharge of sewerage.

82 See discussion supra.

83 See supra at heading 2(i).

84 Cf Heuston and Chambers, *Salmond & Heuston on the Law of Torts* (18th edn 1981) 477, who refer to this as the distinction between "conditional" and "absolute" powers.

85 Ibid, referring to this as the distinction between the "particular" and "variety". See *York Bros* supra n 32.

86 *Metropolitan Asylum District* v *Hill* supra n 61.

87 *Schenck's* case, supra n 27.

88 *City of Portage La Praire* v *BC Pea Growers* supra n 36; *Buysee* v *Town of Shelbourne* (1984) 6 DLR (4d) 734; *Bryan* v *Swan Hill Sewerage Authority* supra n 57; *Pride of Derby & Derbyshire Angling Assoc. Ltd.* v *British Celanese Ltd* [1953] 1 Ch

discretion[89] to adopt a particular method of executing an authorised activity.

The rationale for this approach was stated by Lord Watson in *Hill's* case[90] to be that Parliament cannot "be said to have sanctioned that which is a nuisance at common law, except in a case where it has authorised a certain *use* of a *specific building* in a specified position, which cannot be so used without occasioning nuisance, or in the case where a *particular plan* or locality not being prescribed, it has *imperatively directed* that a building shall be provided within a certain area and so *used*, it being an obvious or established fact that nuisance must be the result". Thus, he says, liability in nuisance will not flow where a specific use is directed by statute.[91]

There are several objections to this use of principles of statutory construction to infer Parliament's intention. The artificiality of this approach is illustrated by the axiom that it will be a rare instance where a statutory authority can be said to have a mandate to execute an authorised act in such a manner as to commit a nuisance. Even in instances where the relevant legislation has authorised incidental works, it has been held that the statute is permissive and the defence does not apply.[92]

Moreover, the authorities on this point are not consistent. For example in *London, Brighton & South Coast Railway Co* v *Truman,*[93] a railway company was authorised by legislation to purchase lands "in such places" as should "be deemed eligible" for cattle yards, "or for any other purposes whatsoever connected with the undertaking by this Act authorised". It was decided that the purpose for which the land was acquired being expressly authorised by the Act, and being incidental and necessary to the authorised use of the railway for cattle traffic, the company was authorised to do what it did, and was not bound to choose a site more convenient to other persons. Clearly, on these facts, although the *purpose* of the legislation was specified, the mode of execution of that purpose was left to the discretion of the authority.[94]

The question whether legislation had authorised a specific activity was central to the decision in *Allen* v *Gulf Oil Refining Ltd,*[95] the facts of

149. Cf *Provender Millers (Winchester) Limited* v *Southampton County Council* supra n 15, 136-8 where such a permissive power was construed as a duty.

89 A discretion was defined by Lord Diplock in *Secretary of State for Education & Science* v *Tameside LBC* [1977] AC 1014, 1064, as an ability "to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred". See also Jowell, "The Legal Control of Administrative Discretion" [1973] PL 178, 179.80 who says "Discretion is rarely absolute and rarely absent. It is a matter of degree and ranges along a continuum between high and low".

90 Supra n 61, 212-3, emphasis supplied.

91 Cf *Rudd* v *Hornsby Shire Council* supra n 21, at 136, where it was said that the relevant powers, conferred in general terms "authorise use of and works upon specific land", not "the use of the land or the performance of works in such a way as to cause a nuisance".

92 *Jones* v *Shire of Perth* [1971] WAR 56.

93 (1886) 11 AC 45.

94 The Court in *Metropolitan Asylum District* v *Hill* supra n 61, had no hesitation in distinguishing this decision.

95 Supra n 4 and 6.

which have been set out above. The Court of Appeal decided that the legislation did not authorise the operation of a refinery as it was not specifically mentioned in the Act. Although the Act authorised the company to acquire lands for the construction of a refinery, this was not sufficient to authorise its use. Denning MR stressed that there were "no words authorising the company to *operate* or *use* the refinery so as to be a nuisance".[96] Cumming-Bruce LJ said[97] that the issue was simply "Did the Act authorise[98] the *use* of this refinery upon this site?" In other words, the intention of the legislation required to negate the defence relates to the activity, not to the consequences.[99]

The majority in the House of Lords on appeal decided that the Act did authorise the construction and operation of the refinery. Their judgments add very little to this discussion,[100] but it will be noted that the decision in *Jones* v *Festinog Railway*[101] which had been referred to in the Court of Appeal,[102] does not appear from the report to have been cited in the House. In *Jones,* it was decided that a company which had been authorised to *construct* a railway could not plead statutory authority as a defence for an action arising out of the *operation* of the railway as the specific activity had not been authorised.

A further and inconsistent refinement to the "permissive" line of authorities was added by the case of *Marriage* v *Fast Norfolk Catchment Board.*[103] In that case, a further distinction between statutory powers to execute a particular work and statutory powers to execute a variety of works was introduced. It was decided that a statutory drainage board was not liable when it raised the height of a river bank so that it caused the plaintiff's bridge to collapse when the river flooded. Because of the drainage board's act, the flood waters were not able to escape, and thereby caused the collapse. The board successfully raised the defence of statutory authority.

Tucker LJ distinguished previous decisions[104] on the basis that the instant case "is not concerned with specific works but is conferring a wide discretion on a statutory authority, necessarily involving interference with the legal rights of riparian owners".[105] However, it is not clear why this decision was distinguishable from the "permissive" cases discussed

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96 Supra n 4, 531, emphasis supplied.
97 Ibid 540, emphasis supplied.
98 He accepted the meaning of "authorised" proposed by Lord Jenkins in *Pyx Granite Co Ltd* v *Ministry of Housing & Local Government* [1960] AC 260, 312, as "to give formal approval to, to sanction, approve, countenance".
99 Ibid 539.
100 See supra n 6. Lord Wilberforce (with whom Lord Diplock agreed) considered that the situation was "entirely parallel" with *Manchester Corporation* v *Farnworth* supra n 19, 193. In the *Farnworth* case, it was decided that there was liability in nuisance as the nuisance was not "inevitable" and the defence could not therefore be raised. Lord Diplock distinguished *Metropolitan Asylum District* v *Hill* supra n 61, 193-4, on the basis that it did not involve a power of compulsory acquisition. Lord Edmund-Davies referred to *London & Brighton & South Coast Railway* v *Truman* supra n 93, 195, as an example of an authorisation by "necessary implication".
101 (1868) LR 3QB 733.
102 Supra n 4, per Denning MR at 529, Cumming-Bruce LJ at 539.
103 Supra n 62.
104 Eg *Manchester Corporation* v *Farnworth* supra n 19, and *Geddis* v *Proprietors of Bann Reservoir* (1878) 3 AC 430.
105 Ibid 294.

above, for it is clear that the discretion related to "the way or manner in which they shall perform the work".[106]

A clue as to the distinction comes from the judgment of Jenkins LJ.[107] He distinguished statutory powers to execute some particular work or carry on some particular undertaking,[108] and "statutory powers to execute a variety of works of specified descriptions in a given area . . . as and when the body invested with the powers deems it necessary . . . in furtherance of a general duty imposed on it by the Act . . . ".[109]

It seems clear that this decision is inconsistent with the "permissive" cases, and that the result stems from a reluctance to interfere with the exercise of a discretion.[110] However, it is consistent with the approach which the courts adopt in negligence actions where the distinction between "planning" and "operational" powers reflects the courts' reluctance to interfere with powers where there is a high degree of discretion.[111]

It would seem that the use of the distinction between "permissive" and "mandatory" powers in this context is not particularly helpful as it really adds little to the concept of "inevitability" discussed above. The discussion of the cases on "permissive" powers suggests that if the nuisance, or consequence is incidental to the main activity, then the defence will not be successful. However, if the power is described as "mandatory", it is in the sense that the "nuisance" is a necessary consequence flowing from the operation of the activity (and the defendant will be able to successfully plead statutory authority). The cases where the "permissive" characterisation has been employed involve situations where the nuisance was incidental but not inevitable in the sense that it could have been avoided. They are typically cases involving sewage, or drainage powers,[112] where the interference to the individual can be said to outweigh the public interest.

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106 Ibid per Singleton LJ 297.

107 Ibid 307-8.

108 Ibid 307. He cited *Geddis* v *Proprietors of Bann Reservoir* supra n 104. *Metropolitan District Asylum* v *Hill* supra n 61. *Manchester Corporation* v *Farnworth* supra n 19, as examples.

109 Ibid.

110 Cf Fleming supra n 52, 408, who refers to *Marriage* as an example of a "planning" decision employing the "planning/operational" dichotomy from the law of negligence. With great respect, it seems prima facie that the discretion in question in *Marriage* was "operational" as those involved in the "permissive" cases. Cf the decision in *East Suffolk Rivers Catchment Board* v *Kent* supra n 76, which Lord Wilberforce in *Anns* v *Merton London Borough Council* [1978] AC 728, 756-7 justified as "an example . . . where the operational activity . . . was still within a discretionary area". One can only surmise that the degree of discretion in *Marriage* was higher than in the other "permissive" cases. Cf *East Suffolk Rivers Catchment Board* v *Kent* and cf n 94 supra.

111 Supra n 89. It should be noted that despite the different approaches adopted by the High Court in *Heyman's* case (supra n 5), that decision reflects an entrenched reluctance to interfere with "planning" decisions. Ibid 573 per Gibbs CJ. "The council had a discretion as to how and when it should exercise its powers, and it could not be rendered liable for negligence unless it were shown that it had not properly exercised that discretion". Cf Mason J 578, 582, Deane J 596.

112 Eg *Buysee's* case, supra n 88, *Von Thurn und Taxis* supra n 77, *Schenck's* case, supra n 27, *Bryan* v *Swan Hill Sewerage* supra n 57, *Rudd* v *Hornsby Shire Council* supra n 21, but cf *Marriage* v *East Norfolk Rivers Catchment Board* supra n 62, and see

Although the judges do not often describe the powers as "mandatory", the decisions where this characterisation would apply are situations where power is described in specific terms.[113] The "railway cases"[114] are examples of powers which could be so characterised. They are also situations where the public interest may be said to outweigh the private interest if one accepts this view of public interest.[115] It could also be said that the community interest requires the continuance of the activity in these situations.

Another objection to the "permissive" characterisation is that such a description of powers in this context is misleading. The nuisance cases include statutory authorities where arguably there is no discretion as to whether or not to act; there is rather a duty to provide a service.[116] The choice is as to the method of operation, or as to how to carry out the power discretion.[117]

Emphasis on the discretionary nature of the powers is misleading for another reason. In *Nalder's* case,[118] for example, Kneipp J referred to the significance of the discretion in the following passage. He said that liability in nuisance would arise "only if, being authorised to do the work but having a discretion as to how it should be done, it fails to take proper steps to avoid causing what would otherwise be an actionable wrong".[119] Thus this approach would make liability *depend* on the existence of a discretion as to how to exercise the power.[120]

But a more fundamental objection to the "permissive" characterisation in this context is that it is inconsistent with the approach that the courts seem prepared to adopt in negligence actions.

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also *Lester-Travers* v *City of Frankston* supra n 33 (golf balls), *Metropolitan Asylum District* v *Hill* supra n 61 (siting of hospital), *Mudge* v *Penge Urban Council* (1917) 86 LJ Ch 126 (maintenance of public urinal).

113 Eg *Brand's* case supra n 14. See the discussion in *Allen* by Cumming Bruce LJ, supra n 4, at 540.

114 Eg *R* v *Pease* supra n 11; *Vaughan* v *Taff Vale Railway Co* supra n 11; *Buley* v *British Railway Board* supra n 35; cf *Jones* v *Festinog Railway*, supra n 92; and see also *York Bros (Trading) Pty Ltd* v *Commissioner of Main Roads* supra n 32.

115 *Allen's* case is difficult to categorise on this basis. Looked at in these terms it can be seen to be consistent with *Brand* etc, but it could equally have been decided as the "sewage" cases.

116 Cf the distinction between "powers" and "duties" where there may be a choice as to whether or not to act. See *R* v *Fitzroy City Council ex parte Sisters of Charity* [1982] VR 723; *R* v *Mahoney ex parte Johnson* (1931) 46 CLR 131. See also Mason J in *Heyman's* case supra n 5, 577, suggesting that the distinction between a statutory power and a statutory duty has limited relevance in this context.

117 See *Julius* v *Bishop of Oxford* (1880) 5 AC 214, per Earl Cairns, 222-3. It may be a power coupled with a duty to act. See Menzies in *Bennings* v *Wong* supra n 15, at 280, "statutory powers are given to be exercised". Cf Mason J in *Heyman's* case supra n 5, 577, "when a statute sets up a public authority, the statute prescribes its functions so as to arm it with appropriate powers for the attainment of certain objects in the public interest. The authority is thereby given a capacity which it would otherwise lack, rather than a legal immunity".

118 Supra n 48.

119 Supra n 48, 630-1.

120 Regrettably, the use of the term "permissive" or "power", "mandatory" or "duty" continues to be employed where the statute contains a "nuisance clause". See *Department of Transport* v *North West Water Authority* [1983] 3 WLR 105, [1983] 3 WLR 707.

5 Some Institutional Factors: The Tort of Nuisance[121] and Statutory Authorities

Whilst there is some lack of agreement[122] as to the legal basis of the tort of nuisance, it is clear that the tort developed in response to the disruption caused by the Industrial Revolution.[123] The consequential need to balance the interests of the industrialist and the land-owner was intended to achieve a balance of the whole community interest.[124]

In legal terms, this community interest has come to mean that the law required that an interference with an interest in land be unreasonable before it will intervene. What is meant by unreasonable before it will intervene? What is meant by unreasonable in this context is said to be inconvenience beyond that which occupiers in the vicinity can be expected to bear, having regard to the prevailing standard of comfort of the time and place.[125] There must be a substantial and unreasonable interference with an interest in land.[126]

It seems that *prima facie*, there is no reason why the balancing of interests, when the defendant is a statutory authority, cannot take into account the factors suggested as being relevant to the concept of "inevitable" discussed above.[127] They are equally applicable to that concept as to the concept of nuisance itself. As has been suggested, the courts tend to find liability when a substantial interference with the plaintiff's interests is involved. If this view is accepted, it would seem that the defence of statutory authority should be strictly confined. The qualification suggested in *York's* case, that the nuisance be a "reasonably necessary" consequence of the activity, is also consistent with the notion of "reasonableness" mentioned in the preceding paragraph.

However, there are two problems surrounding the application of the law of nuisance to statutory authorities to be surmounted before this view can be accepted. The first relates to the meaning attached by the courts to the concept of "neighbourhood" and the second relates to the entrenched tendency of the courts to find some fault basis in nuisance when a statutory authority is involved.

It would seem that the concept of "neighbourhood" is an elastic and flexible one.[128] However, in *Allen* v *Gulf Oil Refining Ltd,*[129] the concept of "neighbourhood" was given a restrictive meaning in relation to statutory authorities by Cumming-Bruce LJ and Lord Wilberforce. Such interpretation arose from the preceived need to impute an intention to the legislature. Both judges suggested that as (or if) the construction of the refinery were to be authorised by Parliament, then it must be taken that a change in the character of the neighbourhood was also authorised. Cumming-Bruce LJ expressed it most vividly when he said:[130]

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121 Reference here is to the law relating to private nuisance. As suggested supra n 39, the defence is not apt in the case of public nuisance.

122 See infra.

123 See McLaren supra n 9.

124 Ibid. The discussion of the cases in the historical context makes this clear.

125 See Fleming, supra n 52, 386.

126 See eg *Munro* v *Southern Dairies Ltd* [1955] VLR 332.

127 Supra at n 34.

128 Having regard to the "reasonableness" aspect and the balancing of interests involved. See Fleming ibid.

129 Supra n 4 and 6.

130 Supra n 4, 535. Cf Lord Wilberforce, supra n 6, 193, expressly approving and adopting this view. Lord Diplock agreed with Lord Wilberforce's judgment.

> "So in the instant case, if as a matter of interpretation of the Act it is clear that the intention of Parliament was to change the immediate environment of the village of Waterston by the construction upon the specified site immediately beside the village of a great oil refinery . . . it would follow that Parliament had authorised a dramatic change in the neighbourhood of the village".[131]

With respect, it seems that the resort to a "construction-justification" approach is here overstated. Whilst it may be that the very fact that the legislature has authorised an activity suggests that the character of the neighbourhood has changed, or is changing, this is only one factor to be taken into account in balancing the interests of the parties, and is not conclusive in itself.

This approach illustrates the entrenched "immunity perspective" from which the courts approach the question of nuisance and the defence of statutory authority.

The second institutional problem in relation to statutory authorities and the tort of nuisance arises from discussion of the basis of liability in nuisance. Whilst some writers take the view that it is a tort of strict liability and tend to equate it with the *Rylands* v *Fletcher* principle,[132] others argue that it is a fault based tort.[133] It can be argued that as nuisance is concerned with the activity of a party rather than with conduct, as in negligence, then it is a tort of strict liability. However, Fleming argues that it only means strict liability in the sense that the creator of a nuisance cannot defend himself on the basis that he has taken all reasonable care. At the same time, evidence of reasonable care is relevant to the issue of whether or not there has been an unreasonable interference.[134] It can therefore be argued that as the reasonableness of conduct is in issue, this involves an objective assessment of the activity, which is akin to applying the standard of care in a negligence action.

In the case of authorities exercising statutory powers, it seems that there is a strong tendency to find a fault requirement due to the fact that the issue of "inevitability" is often perceived as absence of negligence.[135] It has been seen that in many of the decided cases, the question of "inevitability" has been treated as a question of negligence,[136] whereas in other cases a clear distinction is made between a negligence

131 Cf Fleming supra n 52, 388 who accepts that an industrialist may be able to rely on statutory authority.

132 Prosser, "Nuisance without Fault" (1942) 20 TLR 399; Harlow, *Compensation and Government Torts* supra n 2, 71-72; cf the remarks of Lord Denning in *Allen* supra n 4, 530, and Webster J, in the *Department of Transport* v *North West Water Authority* supra n 120, 109; see also *Bryan* v *Swan Hill Sewerage Authority* supra n 57, 576.

133 Eg Fleming, supra n 52, 391, 394; cf Atiyah, supra n 4, 163, who suggests that the negligence enquiry is directed at the whole activity; Walsh J, in *Edward's* case supra n 13, 868. See eg *Delaney's* case supra n 51, 3, per King CJ.

134 Fleming, supra n 52, 391.

135 See the discussion supra. See Linden supra n 8, 196. Aronson and Whitmore, supra n 2, 161-162.

136 See eg *City of Portage la Prairie* v *British Columbia Pea Growers Ltd* supra n 36; *Lester-Travers* v *City of Frankston* cupra n 33; *Allen* supra n 6, per Lord Wilberforce and Lord Roskill, 191 and 201; *Department of Transport* v *North West Water Authority* supra n 120, 711; *Marriage* v *East Norfolk Rivers Catchment Board* supra n 62, per Jenkins LJ, 302; *Buley* v *British Railways Board,* supra n 35.

inquiry and the issue of inevitability.[137] In *Diversifield Holdings Ltd* v *R*,[138] where the issue was whether a governmental programme of feeding elks on alfalfa amounted to an actionable nuisance, no distinction was made between nuisance and negligence. It was decided that whether an action was brought in negligence or nuisance, there was no immunity against unreasonable acts. The *Anns* v *Merton* test of duty of care was applied to the defence of statutory authority.[139]

Where an Act contains a "nuisance clause" it seems clear that liability will depend on whether the obligation can be classified as a power or a duty, and whether there is negligence[140] in the sense required by Lord Wilberforce in *Allen's* case - namely that the power must be exercised "without reasonable regard and care for the interests of other persons".[141] The original intention of inserting nuisance clauses in legislation was that liability in damages would remain, whilst an injunction would not be issued to prevent the activity.[142]

Whilst it is clear that if one accepts a concept of "inevitable accident" - that some concept of fault is involved[143] – much of the present case law fails to recognise the dichotomy between nuisance and negligence discussed at length above.[144]

6 Conclusion

This article has described the way in which the defence of statutory authority in nuisance rests upon the imputed intention of parliament and has explored the hypothesis that the courts have unnecessarily created a separate concept of liability in nuisance in the case of statutory authorities.

It has been shown that the courts fail to recognise the distinction between imputing an intention to authorize activities and imputing an intention to authorize consequences. By confusing the concept of "inevitability" with negligence, the courts have moved far away from the original concept of nuisance when the liability of a statutory authority is in issue.

It has been suggested that if nuisance is to be equated with negligence, the "immunity perspective" will become entrenched as the courts use a cost-benefit analysis in favour of the defendant, thereby putting the private citizen in the position of in effect subsidizing "public" errors.

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137 See eg *Schenck's* case, supra n 27, 324. Lord Edmund-Davies in *Allen* supra n 6, 194. *Buysee's* case, supra n 88.

138 (1982) 143 DLR (3d) 529.

139 Ibid 534, 536.

140 See eg *Manchester* v *Farnworth* supra n 19; *Midwood & Co Ltd* v *Manchester* supra n 33; *Bryan* v *Swan Hill Sewerage Authority* supra n 57, and cf *City of Portage la Prairie* supra n 36, where a clause exonerating from negligence did not exonerate from nuisance.

141 This was accepted as the test of "negligence" by the House of Lords in *Department of Transport* v *North West Water Authority* supra n 120, 711; see also Street, "Clearing up the law on liabilities, duties and powers" [1984] LGC 36-37.

142 See Street, ibid.

143 Supra at heading 2(i) and (ii), and cf Atiyah, supra n 4, 486-9, who questions the applicability of fault in this context; cf Ganz, supra n 2, 97, who suggests that it is an unsatisfactory instrument for allocating losses because it involves courts substituting their judgment for that of administrative bodies.

144 Supra at heading 2(ii).

The preceding discussion points to the need to concentrate upon and to develop consistent theories of liability in the case of authorities exercising statutory powers. Such theories would develop consistently in this context if the courts were to accept that the concept of nuisance is sufficiently flexible to accommodate the special nature of statutory authorities.

Whilst there are some problems with the concept of nuisance when applied to statutory authorities, it is suggested that such difficulties are surmountable. The overriding consideration of the community interest and the suggested factors[145] which go to make up the concept of "inevitable" could be applied in the case of statutory authorities without resorting unnecessarily to the defence of statutory authority or to separate concepts of liability for statutory authorities.

145 Supra at n 34.