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Torts -- Nuisance -- Defence of Statuatory Authority: Tock v. St. John's Metropolitan Area Board

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construed as abrogating the rule only in a case of a single action; in a case of successive actions, the rule remains law. In the remaining common law jurisdictions, the rule has not been abrogated in any case.

(5) Are there relevant provisions lurking in the applicable Rules of Court? I have made no attempt to investigate this question here.

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Peter W. Hogg*

The Tock Case

In Tock v. St. John’s Metropolitan Area Board, the Supreme Court of Canada had to decide whether the defence of statutory authority protected a public body from tortious liability. The court was unanimous that, on the facts of the case, the defence was not available. However, the court split into three camps in its reasoning, and each camp was sharply critical of the reasoning of the other two. No line of reasoning attracted a majority of the six-judge bench. The unfortunate result is that a well-settled body of law has been thrown into confusion by the court’s inability to produce a majority ratio decidendi. My purpose in writing this comment is to argue that the opinion that received the least support—that of Sopinka J., with whom no one else agreed—is the one that is correct, both on principle and on authority. For this reason, Sopinka J.’s judgment should be taken as the only reliable guide to the future, despite the fact that the other five judges all emphatically disagreed with him.

The facts of the Tock case were as follows. A storm sewer in the city of St. John’s, Newfoundland, became blocked. The back-up of water flooded the basement of the house owned by Mr. and Mrs. Tock. The sewer system was operated by the St. John’s Metropolitan Area Board. Mr. and Mrs. Tock sued the Board for damages. The trial judge found that there was no negligence on the part of the Board. The Board had taken all reasonable precautions to keep the system flowing, and the blockage could not be attributed to its fault. This finding was not challenged on appeal.

Supra, the text accompanying footnotes 29-42.

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1 [1989] 2 S.C.R. 1181, (1989), 64 D.L.R. (4th) 620. The court was unanimous in its result, but three different opinions were written: (1) by Wilson J., with the agreement of Lamer and L’Heureux-Dubé JJ.; (2) by La Forest J., with the agreement of Dickson C.J.C.; and (3) by Sopinka J. Only six judges participated in the decision, McIntyre J. having retired during the ten-month period between argument and judgment.
Negligence having been eliminated as a cause of action, the question was whether the Board was liable for nuisance. The flooding of the plaintiffs' house would certainly qualify as a nuisance had it been caused by a private person. The question was whether the Board was immunized from liability by the fact that it was acting under statutory authority. The case thus turned on the scope of the defence of statutory authority.

At trial, damages were awarded for nuisance. The Newfoundland Court of Appeal reversed this judgment. The Supreme Court of Canada restored the trial judge's award of damages. The court was unanimous in the outcome, but three concurring opinions were written, each proceeding along quite different lines.

The Inevitable-Result Doctrine

Before Tock, the law respecting the defence of statutory authority was reasonably clear, and, as I hope to demonstrate, reasonably satisfactory. It was axiomatic, of course, that an act that was authorized by a statute could not be a tort. The difficulty was to determine whether or not a particular act was authorized by a statute. Where a public body had acted in the purported exercise of a statutory power, its acts were not necessarily immune from tortious liability. On the contrary, the rule was that the statutory power had to be exercised, as far as possible, in conformity with private rights. Only if the interference with private rights was unavoidable would the statute be construed as authorizing the commission of what would otherwise be a tort. An interference with private rights was said to be unavoidable when the commission of a tort was "the inevitable result" of the exercise of a statutory power.

The inevitable-result doctrine has provided the solution to many different claims of nuisance against public bodies. In the leading case of Metropolitan Asylum District v. Hill, it was held that a hospital board was liable for a nuisance caused by one of its hospitals to adjoining residents. The board had a statutory power to establish hospitals in metropolitan areas, but the sites of the hospitals were left to the discretion of the board. Since the board could have chosen a site more distant from residential housing, it could not be said that the damage to the adjoining residents was "the inevitable result" of the exercise of statutory power. Therefore, the board could not rely on the defence of statutory authority, and the plaintiffs recovered their damages.

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2 A cause of action in Rylands v. Fletcher (1868), L.R. 3 H.L. 330, was also accepted by the trial judge. The Supreme Court of Canada (like the Newfoundland Court of Appeal) unanimously rejected this cause of action on the basis that the provision of storm sewers was not a non-natural user of land; supra, footnote 1, at pp. 1189 (S.C.R.), 637-639 (D.L.R.), per La Forest J.

3 (1881), 6 App. Cas. 193 (H.L.).
A contrasting case is *Allen v. Gulf Oil Refining*, where it was held that an oil refinery was not liable for the smell, noise and vibration that its operations caused to adjoining residents. In that case, the oil company had obtained the enactment of a private Act to acquire the land, and the Act authorized the construction of an oil refinery on the land. Since the statutory power stipulated the site upon which the refinery was to be built, the House of Lords held that the Act immunized the oil company from any nuisance caused by the smell, noise and vibration that would be "the inevitable result of erecting a refinery upon the site...".

How would the inevitable-result doctrine apply to the facts of *Tock*? In *Tock*, the Board had a statutory power to construct and operate a sewerage system in the St. John's metropolitan area, but the statute was expressed in perfectly general terms, saying nothing about the location or size of the pipes or other details of the design or operation of the system. In these respects, the statute was very similar to the statute in *Metropolitan Asylum District v. Hill*. However, the Newfoundland Court of Appeal decided that the inevitable result test was satisfied. In its view, the finding that there was no negligence on the part of the Board meant that the blockage and back-up were the inevitable result of the exercise of the power to construct and operate a sewerage system.

In the Supreme Court of Canada, Sopinka J. held that this absence-of-negligence test was too low a standard for a finding of inevitable result. The Board had to establish not only that it had not been negligent, but also that there were no alternative methods of carrying out the work (including more expensive methods) that would have prevented the damage. On the facts, that higher standard had not been met by the Board. It followed that the Board could not rely on the defence of statutory authority, and the plaintiffs were entitled to damages for the tort of nuisance.

For Sopinka J., the issue in *Tock* was the meaning of the inevitable-result test. The test was settled, and all that remained to be determined was whether a result that ensued without negligence was for that reason an inevitable result. But Sopinka J. was alone in his reasoning. Wilson and La Forest JJ. each wrote separate opinions rejecting the inevitable-result test, and formulating and applying a new test. Fortunately for the plaintiffs, these new tests produced the same result as Sopinka J.'s reasoning, so that the plaintiffs were able to hold their damages award. Unfortunately for the defence of statutory authority, Wilson and La Forest JJ.'s reasons were inconsistent with each other—and indeed each was sharply critical of the other—and neither set of reasons commanded majority approval. Two judges (Lamer and L'Heureux-Dubé JJ.) aligned themselves with Wilson J., and one judge (Dickson C.J.C.) with La Forest J.
La Forest J.'s reasons were the most radically reformist of the two unorthodox opinions. He described the defence of statutory authority, at least as hitherto applied by the courts, as "a legacy of the Victorian age".6 He approved the suggestion that the costs of governmental action should be absorbed by the public body rather than by the unfortunate individual who happened to be injured.7 In his view, instead of applying the inevitable-result test, the court should simply ask "whether, given all the circumstances, it is reasonable to refuse to compensate the aggrieved party for the damage he has suffered".8 In this case, it was not reasonable to refuse to compensate the plaintiffs for the damage caused by the flooding. The damage should be "viewed as what it in fact is, a part of the overall cost of providing a beneficial service to the community".9 The Board was in a better position to bear this cost, which could be spread among all ratepayers, than was the "hapless victim".10 Therefore, La Forest J. concluded, the damages award at trial should not be disturbed.

La Forest J. said that this approach "does not denude the defence of statutory authority of all vigour".11 By this he seemed to mean that the existence of statutory authority would be a factor to be weighed by the court in assessing whether or not it was reasonable to deny compensation. He suggested that it would be reasonable to deny compensation for "ordinary disturbances diffuse in their effect", but not reasonable to deny compensation for "isolated and infrequent occurrences which inflict heavy material damage on a single victim".12 But he was frank to affirm that there was no "hard and fast rule".13 The question was inherently discretionary, depending upon the judicial judgment as to what was a reasonable result in the circumstances of the case.

Wilson J. was very critical of La Forest J.'s reasonableness test. In her view, "such a major departure from the current state of the law would ... require the intervention of the legislature".14 She objected to "the high degree of judicial subjectivity involved in its application",15 and its consequent failure to provide guidance to public bodies or potential litigants. As for La Forest J.'s suggestions as to how his reasonableness test might work, they were "incompatible with the concept of principled decision-

6 Supra, footnote 1, at pp. 1193 (S.C.R.), 641 (D.L.R.).
7 Ibid., at pp. 1194 (S.C.R.), 642 (D.L.R.).
9 Ibid., at pp. 1202 (S.C.R.), 648 (D.L.R.).
10 Ibid.
13 Ibid.
15 Ibid., at pp. 1205 (S.C.R.), 648 (D.L.R.).
These are strong criticisms indeed, but in my respectful opinion they are justified. The problem is that the idea of loss distribution, which is La Forest J.'s policy justification for the new approach, is far too vague and general to yield a rule that can be applied with any consistency.

The vagueness (I suppose I should say indeterminacy) of La Forest J.'s reasonableness test is an obvious flaw in the new doctrine. But I would offer the additional criticism that La Forest J. never spelled out what was wrong with the outcomes yielded by the inevitable-result test, or how the reasonableness test would change those outcomes. Some demonstration of this kind is surely necessary before a court (or legislature, for that matter) should abandon a well-settled rule in favour of a new rule. La Forest J.'s general idea seemed to be to widen the liability of public bodies for serious individual losses, but the vagueness of the approach makes it hard to be sure whether even this result would be achieved. In this particular case, La Forest J.'s approach yielded the same result as Sopinka J.'s application of the inevitable-result rule. And the other examples offered by La Forest J. indicated that, in his mind at least, the results might not be very different from those yielded by the inevitable-result rule.

**Absolute Liability**

Wilson J., while emphatically rejecting La Forest J.'s approach, also rejected the inevitable-result rule. In her view, the inevitable-result rule applied only to those statutory powers that were specific as to the manner or location of doing the thing authorized. Those statutory powers that were framed in discretionary terms gave rise to absolute liability for any tortious action taken under their authority. Where a public body had a discretion as to the manner and location of doing the thing authorized, the public body had to choose a manner and a location that would avoid the commission of a tort. This was so, even if there was no manner or location that would avoid the commission of a tort. In the case of action taken under discretionary authority, the inevitable-result doctrine "is no defence at all".

Wilson J. acknowledged that commentators and courts generally disagreed with her, but she insisted that the reason for the inevitable-result doctrine applied "only in cases where the public body has no choice as to the way in which or the place where it engages in the nuisance-creating activity". In the present case, since the statute authorized the construction and operation of a sewerage system, but did not specify how or where it was to be done, the Board was obliged to construct and operate the

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16 Ibid.
17 Ibid., at pp. 1214 (S.C.R.), 629 (D.L.R.).
18 Ibid.
19 Ibid., at pp. 1222 (S.C.R.), 634-635 (D.L.R.).
system in strict conformity with private rights. The defence of statutory authority was not available, and the plaintiffs were entitled to recover damages for their injury regardless of whether the Board could have avoided their injury.

In my view, Wilson J.'s distinction is not a tenable one. It is true that in many cases—Metropolitan Asylum District v. Hill is a good example—where the public body has a discretion as to the manner and location of constructing or operating the work, there is no reason to suppose that the statute authorized the commission of a tort. The public body can, and therefore must, exercise its power in a manner and at a location that avoids interference with private rights. But it is easy to imagine a statute that, while conferring a discretion as to manner and location, still cannot be exercised without interfering with private rights. For example, the construction of a subway system in a metropolitan area would inevitably cause a nuisance to the residents of properties adjoining the selected route. According to Wilson J., the defence of statutory authority would be available only if the legislation authorizing the construction of the subway stipulated the route. If the legislation left the selection of the route to a transit authority, no defence would be available. But the nuisance to adjoining residents is as inevitable in the latter case as in the former. Surely, the legislation must be taken to authorize the commission of the nuisance in both cases.

Both La Forest and Sopinka JJ. were critical of Wilson J.'s rejection of the defence of statutory authority for action taken under discretionary powers. Sopinka J. pointed out that modern legislation authorizing the provision of public works is usually broadly permissive. Therefore, Wilson J.'s approach would expose most public authorities to the same liability as private enterprises. La Forest J. offered the example of a sewerage system. On Wilson J.'s view, only if the legislature took the trouble of passing a special enactment to authorize each sewer, would the defence of statutory authority be available. If the legislature simply conferred a general power to build sewers, the defence would not be available. But the reality is that, no matter which form the authorizing statute takes, the sewers will have to be built in similar locations, and they will create similar risks to those who are served by them. The nature of the statutory authorization "cannot, in all reason, have any bearing on the question whether compensation is owed, or is not owed, for damage suffered as a consequence of the operation of the sewer".

Rationale for the Defence of Statutory Authority

Implicit in the reasons of both La Forest and Wilson JJ. is an assumption that the defence of statutory authority is often a technical obstacle to a

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21 Ibid., at pp. 1224 (S.C.R.), 649 (D.L.R.).
22 Ibid., at pp. 1198-1199 (S.C.R.), 645 (D.L.R.).
just result. It should, therefore, be no more than a factor in assessing reasonableness (according to La Forest J.), or should be available only in those rare cases where powers are specifically limited to a particular manner and location (according to Wilson J.). But, in my view, it is a fundamental principle of our law that an act that is authorized by statute cannot be tortious. If every statute, regulation, by-law, order or official act could give rise to tortious liability, the cost to government would be overwhelming. This is not to say that those injured by some kinds of authorized governmental action should always go uncompensated. Many statutes do, and probably more should, provide for compensation for those who have been injured by a governmental programme. But the design of a compensation system has always been assumed to be a political question to be decided by elected representatives rather than a justiciable question to be decided by judges. There may be policy reasons for providing more or less compensation than that which would be provided by the law of torts. Those policy reasons would be related to the purpose, the efficacy and the cost of the governmental programme. Issues of this kind are not suitable for decision by judges. That is why the law of torts—the judicial compensation system—should apply only when statutory authority has been exceeded.

If, as I contend, the defence of statutory authority is one of the fundamental rules of the common law, then it ought not to be lightly displaced by alternative rules. In every case where it is alleged that a public body has committed a tort, the first inquiry must be whether the act was committed without statutory (or prerogative) authority. That inquiry involves the interpretation of the statute that confers authority on the public body. If the statute explicitly authorizes the doing of the tortious act, then obviously the act is authorized and the injured person has no remedy in tort. If the statute implicitly authorizes the tortious act, the same result must follow. The role of the inevitable-result rule is to determine when a statute should be taken to authorize implicitly a tortious act. If the commission of a tort is the inevitable result of exercising the statutory power, then the statutory power must be taken to have authorized implicitly the commission of the tort. In such a case, where the statutory power cannot be exercised without interfering with private rights, the only reasonable inference is that the statute has authorized the interference with private rights.

What is wrong with this rule? To be sure, it allows a sphere of immunity to public bodies. But, for the reasons given earlier, public bodies should be immune from tortious liability when they exercise statutory powers. In fact, as Sopinka J. emphasized, the immunity is as narrow as it could be while still respecting the authority of the legislature. If there is a way of exercising the power without interfering with private rights, then the

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immunity is lost. Obviously, the inevitable-result rule is exceedingly respectful of private rights. Any larger recognition of private rights, as suggested by La Forest and Wilson JJ., moves the law of torts into the sphere of authorized activity where in my view it has no place. I think, therefore, that the inevitable-result rule strikes an appropriate balance between the public and private interests that are in contention.

Conclusion

Before *Tock*, the defence of statutory authority was governed by a relatively well settled rule of law: the defence was available to a public body only when the commission of a tort was the inevitable result of the exercise of statutory power. In *Tock*, two of the six judges rejected the inevitable-result rule in favour of an entirely new defence of reasonableness. Three of the judges rejected the defence of statutory authority altogether in the case of statutory powers that confer discretion as to the manner of their exercise. Only one judge applied the inevitable-result rule.

The result is that five of the six judges rejected a fundamental rule of the common law that has been well settled since the nineteenth century. In my opinion, the reasons given for rejecting the inevitable-result rule were unpersuasive, and each of the two replacement rules was inferior to the inevitable-result rule. Moreover, neither replacement rule attracted a majority of the court. Who can say what the law is now? It has been thrown into confusion. In my opinion, the court should abandon these doctrinal adventures, and reinstate the tried and true defence of statutory authority, including the inevitable-result rule.

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