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STRICT LIABILITY, NUISANCE AND LEGISLATIVE AUTHORIZATION

ALLEN M. LINDEN

I Introduction

Common law and statutory law have not blended together very well over the years. Sometimes courts resist legislative encroachments into the sphere of the common law by strict interpretation while on other occasions they have enlarged the scope of the operation of legislation beyond the fondest expectations of the draftsmen. One example of the latter approach is the treatment of legislative authority in nuisance and strict liability cases. Generally when one permits to escape something which he has collected on his premises which is likely to do damage if it escapes, he is strictly liable for the consequences. So too when one creates a nuisance on his land he is liable regardless of fault. However, if the activity in question is authorized by legislation, liability is not strict but will be found only if the defendant is negligent. Thus, the courts distinguish between certain non-natural activities which may subject an enterprise to nuisance and strict liability on the one hand, and activities authorized by legislation on the other, which do not import liability in the absence of fault.

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2 See, for example, the use of criminal statutes in the creation of tort liability, Morris, The Role of Criminal Statutes in Negligence Actions (1949), 49 Colum. L. Rev. 21; Thayer, Public Wrong and Private Action (1924), 27 Harv. L. Rev. 317; Lowndes, Civil Liability Created by Criminal Legislation (1932), 16 Minn. L. Rev. 361.


4 Prosser, Nuisance Without Fault (1942), 20 Tex. L. Rev. 399. See also Fleming, op. cit., supra footnote 3 at p. 364.

This partial immunity of legislatively authorized activities has generated a considerable amount of confusion which has not been resolved by the treatises or articles on the subject. Some authors contend that the problem is one of administrative law whereas others insist that it is only a matter of statutory interpretation. Most often the accepted catechism is parroted without any serious attempt to rationalize the cases in the light of the policy questions involved. Because of the burgeoning participation of the state in the economy, and the increased number of state-authorized activities, the treatment of this problem deserves greater attention. This article will examine the decisions in the area and attempt to explain what the courts are doing in an attempt to clarify the confusion that abounds.

As always, history has left its imprint on the partial legislative immunity in nuisance and strict liability cases. The notion that the King could do no wrong has long been a part of the common law. The birth of this conception was a matter of pure historical accident since no feudal lord could be sued in his own court. The King, who was the feudal lord at the apex of the manorial system, enjoyed the same protection in his courts. The sovereign immunity was adopted in the United States as well, but it was accorded to the federal and state governments after the monarchy was abolished.

As the role of the government expanded and the number of public servants increased, the scope of the immunity contracted. Only if public officials acted arbitrarily, or oppressively, or in excess of their jurisdiction, would they be held responsible. Somehow public officials were lumped together with public and private corporations doing quasi-governmental tasks and the courts began to treat these different instruments of society in like fashion. Where the defendant was exercising a "duty imposed on him by the legislature which he is bound to execute" no liability would be imposed in the

7 Friedman, Statutory Powers and Legislative Duties of Local Authorities (1945), 8 Mod. L. Rev. 31; Note (1952), 51 Colum. L. Rev. 781.
8 Friedman, op. cit., supra footnote 7.
10 See footnote 6.
13 See United States Constitution, Eleventh Amendment; this was "one of the mysteries of legal evolution", Borchard, op. cit., supra footnote 12; See also Hans v. Louisiana (1890), 134 U.S. 1 which holds that an individual cannot sue his state and Moffat v. U.S. (1884), 112 U.S. 24 (citizen cannot sue United States).
14 See Salmond, Torts, p. 602.
16 Ibid.; see also British Cast Plate Manufacturers v. Meredith (1792), 4 T.R. 794, 100 E.R. 1306 (K.B.).
absence of negligence. The problem was originally treated as one of public officials doing a public duty, rather than as a case of statutory immunity for those persons who were acting with legislative sanction.

In the late sixteenth century Parliament began to overshadow the importance and pre-eminence of the King and the common law courts. When Parliament authorized individuals to do certain acts, the courts hesitated to treat the agents chosen to do the work as mere private individuals. Although injunctions seem to have been issued almost as a matter of course in those days to halt ordinary interference with private rights, the courts were understandably reluctant to flout the will of Parliament by enjoining these legislatively authorized activities, even where damage to individuals would result. Paradoxically, democracy was preserved by the sacrifice of individual rights. The victims of progress had to bear their losses with such stoicism as they could muster. Finally, it appears as though the courts confused the cases involving public officials and the cases of legislative authority, and wove the immunity into the fabric of the common law.

No longer is the King identified completely with the state; monolithic central governments have engulfed King, legislature and public servants alike. Nevertheless, the courts persist in according preferred treatment to these organs as in days gone by. The legislatures of the Commonwealth, the United States, and the several states have given some relief, allowing suits against governments as if they were private individuals in some cases, but little has been done to place private companies engaged in authorized work in the same position as individuals. Modern states spend billions of dollars fulfilling their governmental obligations and much of this is done by private corporations under contract with government agencies. Many of these contracts are authorized by legislation, municipal ordinances or departmental regulations. Despite this aggravation of the problem, legislative interest has failed to grow correspondingly and judicial creativity has been largely lacking.

17 See Sutton v. Clarke (1815), 6 Taunt. 29 at p. 44; 16 R.R. 563 (C.P.) distinguishing both Leader v. Moxon and Meredith cases supra footnotes 15 and 16.
18 Boulton v. Crouther (1824), 2 B. & C. 703 at p. 709, 107 E.R. 544 at p. 546 "being public officers having a duty to perform, they are not liable for a damage resulting to an individual from an act done by them in the discharge of that public duty." per Bayley, J.
19 Holdsworth, op. cit., supra footnote 11 at p. 3.
24 For a refreshing example contra see Traynor J. in Muskopf v. Corning Hospital District (1961), 11 Cal. Rptr. 89 at p. 95, "Only the vestigial remains of such governmental immunity have survived. Its requiem has long been
Another historical factor leading to the confusion surrounding legislatively authorized activities is the theory of no liability without fault. Tort law, which emerged from the criminal law, has clung to the concepts of culpability and moral wrongdoing. At one time persons convicted of the crime of trespass could be fined as well as forced to pay civil damages. The notion of the defendant as a wrongdoer, which is based on this background, persisted long after tort actions were separated from criminal prosecutions. If someone was merely acting in accordance with the dictates of a statute, it was logically impossible to say that he was at fault when damage ensued; since no law was being violated he could not be a "wrongdoer". On the contrary, if he failed to act, he might be held criminally responsible. Thus, where legislation authorized some act which infringed on private rights, the courts refused to say that the defendant was at fault.

In addition to the historical explanations for the growth of the immunity, there are several policy reasons for it. Some of these policy rationales have retained their validity while others have become empty shells. Perhaps the most important policy reason for the creation of the immunity was the desire to promote industrial expansion and to refrain from saddling infant industries with legal responsibility for their non-negligent conduct. Legislative authority was generally used in cases involving semi-public activities such as railways, roadbuilding, canals and hospitals. These types of enterprise were even more vital to the economy than were other industries and thus deserving of additional protection from civil liability. In any event, there was and still is considerable judicial antipathy toward strict liability. The defence of legislative authority was one weapon that could be used in a counter-attack on this doctrine. Although the vibrant industrial society of today is to some extent a monument to the wisdom of that policy, there is no longer such pressing need to nurture infant industry in this way. A few giant corporations now control much of our economies. The railways, roads, canals and sewers are largely built, and those that remain to be constructed will probably be undertaken by corporate contractors or

foreshadowed. For years the process of erosion of governmental immunity has gone on unabated; the legislature has contributed mightily to that erosion. The courts by distinction and extension, have removed much of the force of the rule. Thus in holding that the doctrine of governmental immunity for torts which its agents are liable for has no place in our law, we make no startling break with the past, but merely take the final step that carries to its conclusion an established legislative and judicial trend."

26 Ibid., see also Fifoot, History and Sources of Common Law, chapter 3.
27 Mersey Docks v. Gibbs (1866), L.R. 1 H.L. 93 at p. 112, "The action is not wrongful because it is authorized by the legislature." See report in 14 L.T.R. (N.S.) 677 at p. 681, "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful". (Blackburn J.)
by the various arms of government. Such enterprisers should be expected to shoulder the losses generated by these activities and to pass them on to those who benefit from them by insurance, increased prices or taxation.

A further policy advanced by the immunity is the protection of impoverished municipalities and public servants from civil liability. Municipalities were given much of the responsibility of building roads, sewers and power plants. Notoriously short of funds in the early days, municipalities might be bankrupted and these projects doomed if they were held strictly responsible for the damage caused by them. The courts were anxious to encourage public servants to act without fear of civil liability for the consequences of their acts. If personal actions were tolerated, good men might be deterred from entering the public service and if they did enter, their actions might be unduly confined. Thus, they were granted an immunity except where they acted in excess of authority, oppressively or arbitrarily, even though individual interests had to be sacrificed occasionally.

It has been also contended in justification of the principle that *salus populi suprema lex*, few men walk the earth who would challenge the general validity of the maxim, “The welfare of the people is the supreme law.” The courts have sometimes relied on this policy in denying liability where action in furtherance of the public good causes harm to an individual, since private interests must bend to the public good. Where undertakings are necessary for the benefit of the many, individual rights may have to be infringed, but there is no reason why compensation should be refused; this theory is accepted in the law of expropriation and eminent domain. The more important a project is, the more sensible it is to pay for it. “It is not for the judiciary to permit the doctrine of Utilitarianism to be used as a makeweight in the scales of justice.”

Fear of an infinity of actions has been expressed whenever courts have wished to rationalize a refusal to expand tort liability. It is also

31 Harper and James, *op. cit.*, supra footnote 3, at p. 293.
33 See Friedman, *op. cit.*, supra footnote 7 where the author contends that where great public need exists private rights may be sacrificed, but where the enterprise is of an economic nature the contrary. This argument brings to mind the defence of necessity. If the property of many is saved there is no redress, *Surocco v. Geary* (1853), 3 Cal. 69, 58 Am. Dec. 385, but where one person only gains, the privilege is said to be “incomplete”. See Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interest of Property, Selected Essays on the Law of Torts* (Harv.); see also *Vincent v. Lake Erie Transport* (1910), 109 Minn. 456; 124 N.W. 221. Keeton, *Conditional Fault in the Law of Torts* (1959), 72 Harv. L. Rev. 401. But see *contra* Manor & Co. v. Sir John Crosbie (1965), 52 D.L.R. 48 (Ex. Ct.).
35 Meredith case, *supra* footnote 32 at 1307, “If this action were allowed every Turnpike Act, Paving Act and Navigation Act would give rise to an infinity of actions”. See also *Russell v. Men of Devon*, 2 Term. Rep. 667, 100 E.R. 319. Lord Chelmsford in *Brand* footnote 21 at p. 245, “... each time a train passed ... and shook the houses ... actions might be brought by their owners ...”
argued that these many actions will keep the administrators away from their work which will harm the public interest. This “chop logic” is a meagre basis for the denial of compensation. When injuries are multiplied, so must actions be multiplied. Officials need not leave their work if some just process for the assessment of damages publicly caused is instituted.

Finally, it might be argued that the courts should buttress legislative pronouncements of public policy in a democratic society. However, there is seldom evident any legislative intention to immunize from liability the authorized activity and it is questionable whether the policy of the legislature is advanced by protecting authorized activities from ordinary tort liability.

All of these policy reasons supported the creation of the rule. However, the recent erosion of the immunity indicates that, even though lip service is still paid to the received doctrine, these policy arguments have been weakened. More and more courts are prepared to impose strict liability for the protection of individual interests and to hold enterprise responsible for the losses typically caused by profit-making activities. The trend is toward the abolition of governmental immunity from tort liability. The decisions dealing with the defence of legislative authority for nuisance and strict liability are consistent with this development.

II Development of the Immunity in the Commonwealth

The doctrine of immunity from strict liability of legislatively authorized activity was first enunciated in its present form in the 1860 case of Vaughan v. Taff Vale Railway Company, where it was said that the legislature has “sanctioned the use of particular means . . . the parties are not liable for any injury . . . unless they have contributed to it by some negligence.” The court relied heavily on R. v. Pease, where legislative authority was accepted as a defence to a criminal prosecution for public nuisance, and extended this criminal immunity to legalize the infringement of private interests. The Vaughan decision, which antedated the famous case of Rylands v. Fletcher where the doctrine of strict liability for non-natural user of land was first proclaimed, may have been decided otherwise a

36 See Alabama etc. Ry. Co. v. King (1908), 47 So. 857 at p. 861, 93 Miss. 379.
37 Lord Holt in Ashby v. White (1703), 2 Ld. Raym. 938, 87 E.R. 808, “But it is objected that there will be a multiplication of actions. I answer so there ought; for if one will multiply injuries, it is fit the actions for the same be multiplied.”
40 Ibid., at p. 396, per Cockburn J.
41 (1832), 4 B. & A. 39 (locomotive on railway built according to authorized plan frightened horses on nearby highway.)
42 (1868), L.R. 3 H.L. 330.
few years later. Nevertheless, in the cases subsequent to Rylands v. Fletcher the courts retained the defence of legislative authority in nuisance situations. Recovery was denied, for example, where a locomotive caused vibration, where a mine was flooded and where land was used for rifle practice. Indeed, the survival of this immunity might be attributed in part to judicial reaction against the notion of strict liability enunciated in Rylands v. Fletcher.

The basis of the immunity is said to rest on the intention of the legislature. This approach is acceptable where there is an express intention set out in the legislation; seldom, however, is this the case. The legislation is normally silent on the effect of the legislation on tort liability. Undaunted, the courts continue to speculate about the mythical and non-existent legislative intention in their quest for a solution to these problems. For example, one of the interpretation aids relied on is the presence or absence of compensation mechanism in the statute. Where no provision is made for compensation there may be a tendency to conclude that the act should be performed only if it can be done without injury, but no presumption to this effect is said to exist.

The more recent history of the immunity is one of contraction and decay. Numerous judicial techniques have been devised to permit courts to impose strict liability despite legislative authorization of the activity. One of the most widely utilized devices is the tendency to construe strictly the legislation which authorizes the activity in question. Courts have proclaimed that grants of legislative authority are not "charters to commit torts" nor do they give a

43 See Brand case supra footnote 21 where Latin maxim is used to add an aura of antiquity to the rule, cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit.
45 See Brand case, supra footnote 21.
49 See Hill case, supra footnote 48; Cf. Guelph Worsted Spinning Co. v. Guelph (1914), 18 D.L.R. 73 at p. 80, "absence of such a provision does not create a right of action; it only suggests a more careful scrutiny of the act..." 50 Edgington v. Swindon. [1939] 1 K.B. 86.
51 See Richard v. Washington Terminal Co. (1914), 233 U.S. 546 where commenting on the English cases Pitney J. said that the acts "are strictly construed so as not to impair private rights."
“carte blanche” to create nuisances, all of which is in accord with the general rule of statutory construction applied when private rights are interfered with. The approach taken is that unless a contrary intention is clearly indicated in the statute, liability will be imposed as it normally is where statutorily authorized activities invade private rights. Only rarely, however, is the authorized activity relieved of ordinary tort liability expressly. In a few instances the enterprise is given power to be exercised only subject to any civil liability which may be incurred. Most often, however, the courts are left to struggle with statutes that make no express provision for civil liability. Nevertheless, by the use of this device of strict interpretation the courts have held that there was no legislative intention to grant immunity and have allowed recovery for locomotive sparks which set a haystack on fire and for nuisances caused by a sewer, a small-pox hospital, a horse stable and sewage emitted from an authorized building. Similarly, liability was imposed where a steamroller crushed underground pipes and where snow was cleared off the tracks of a tramway. A diverted stream which caused a flood, live tension wires which caused a fire, poisonous fumes from a chimney and bull

55 See Leverington v. Lurgian Union (1868), 2 Ir. R.C.L. 202 at p. 219. [An action lies “... unless the provisions of the legislature by express enactment or necessary implication otherwise determines.” Also Mersey Docks v. Gibbs (1866), L.R. 1 H.L. 93 where Blackburn J. said, “... in the absence of something to show a contrary intention the legislature intends that the... creature of statute shall have the same duties... as the general law would impose on a private person doing the same thing.”
59 A.-G. v. Leeds (1870), 22 L.T.R. 320 at p. 331, “If the legislature had intended anything so monstrous they should have expressed it distinctly.”
60 Metropolitan Asylum v. Hill (1881), 6 App. Cas. 183.
dozers which frightened mink during the whelping season also imported liability on this theory.

One of the conceptions used by courts in protecting these authorized activities is that the legislation contains implied authority to invade the interests of others. In recent years, however, the ambit of permissible implication has been confined by the courts; only where the damage is a necessary or inevitable result of the authorized act will the legislative intention to legalize the harm be implied. Inevitability has been defined not as what is "theoretically possible" but what is possible "according to the state of scientific knowledge at the time . . . having also in view . . . practical feasibility." It has been said that unless it would be "impossible" to prevent damage by "any reasonable use of their statutory powers", no authority would be implied. There are only a few cases where authority to injure was implied. Liability was denied where vibrations caused by a passing locomotive created a nuisance, where a fire resulted from locomotive sparks, and where shelters blocked the access to certain land.

Another convenient weapon in the judicial arsenal is the finding that the legislation is permissive only and not imperative. Where the language employed is permissive, the court may conclude that there was no intention to legalize any damage. A variation of this formula has been urged by Salmond who suggested that the legislation should be examined to discover whether the authority is "absolute" or "conditional". If it is found to be absolute, no liability will ensue; if conditional, it is concluded that the legislature intended the act to be done only if it could be done without harming anyone. This rationale casts little light on the problem but merely restates

69 The court implies authority though it seems to think that the legislature would not expressly do so, see Hammersmith v. Brand, 21 L.T.R. (N.S.) 238 at p. 245.
70 Farnworth case, supra footnote 67 at p. 182 "... there can be no action for nuisance caused by the doing of that thing if the nuisance is the inevitable result." Whitehouse v. Fellows, 10 C.B. (N.S.) 765 at p. 780, "... the act . . . must necessarily produce damage whether done carefully or not". Stephenson, supra footnote 57 at p. 811, "the inevitability of the damage" had not been shown.
71 Farnworth case, supra footnote 67 at p. 182.
76 Lord Watson in Hill, supra footnote 43 at p. 659, "where the terms of the statute are not imperative but permissive . . . the fair inference is that the legislature intended that the discretion be exercised in strict conformity with private rights." See also R. v. Bradford Navigation (1865), L.J. 34 C.L. (N.S.) 191. See also Lawryson v. Town of Kipling (1965), 48 D.L.R. 690 (Sask. H.C.) for a recent statement of the rule.
77 In Burniston v. Corp. of Bangor, [1932] N. Ir. 178 (C.A.) suggestion that this tool only applied where no exact plans authorized.
the issue using two new labels.79 Notwithstanding the fact that this technique reduces the art of decision-making to a robot reaction according to the particular words used perhaps by mere chance, courts have imposed liability for harm caused by a polluted river,80 a fumigator,81 a burst water-main,82 a small-pox hospital,83 and by a slide caused by the diversion of a stream84 by invoking this theory.

Sometimes a court may evade the immunity by holding that, although the activity may have been authorized, the particular site or location of its operation has not been sanctioned. Thus, the immunity need not be invoked when damage results because of the choice of an unauthorized location for an authorized activity. Pursuant to this reasoning liability was imposed for a small-pox hospital,85 a stable86 and a public urinal.87

A related mechanism is to deny immunity where the manner of the operation of the activity has not been authorized.88 By using this theory there was said to be liability where a steamroller damaged underground pipes,89 where creosoted wood blocks were used in paving a road,90 where a flood resulted from highway construction,91 where a river was polluted,92 where blasting damaged a dwelling,93 and where a tramcar escaped from a defective tramway.94

One common method of extending civil liability has been for courts to shift the onus of proof to the defendant.95 Although not

79 Ibid. at p. 64. It is argued that where the authority is permissive it is prima facie conditional, a classic example of circular reasoning.
82 Charing Cross case, supra footnote 57 at p. 782 where Green v. Chelsea, distinguished since no obligation to keep water there.
83 Hill case, supra footnote 48.
84 C.P.R. v. Parke, supra footnote 65 at p. 544 per Lord Watson.
85 See Hill, supra footnote 48 and obiter statement in Porter & Co. v. Bell [1955] 1 D.L.R. 62 at p. 72, Macdonald J. “In practically all cases the injury results not from the act per se but from the place where the authorized act is done or the manner in which it is done.”
86 See Rapier case, supra footnote 61.
87 Mudge v. Penge Urban Council (1917), 86 L.J. Ch. 126.
88 The court may prefer to say that the activity is authorized but that the manner of operation is negligent.
89 Gas, Light & Coke Co., supra, footnote 18 and Alliance case, ibid.
90 West v. Bristol Tramways, [1908] 2 K.B. 14, creosoted wood.
91 Stott v. N. Norfolk (1914), 16 D.L.R. 48 (Man. K.B.) failure to use engineer as required by act deprived municipality of protection.
92 Pride of Derby, supra footnote 80 (effluent poured into river).
94 Sadler v. S. Staffordshire Tramway (1889), 23 Q.B.D. 17 at p. 21, Lord Esher, “I think that in running their cars on the tramway, they would be doing what they are not authorized to do by the act.” (Liability in trespass for dangerous thing on the highway).
used in the earlier cases, the courts in England and Canada gradually recognized that it was up to the defendant to demonstrate that his otherwise tortious conduct was authorized by the legislation, and that the damage caused was inevitable. This device gives a small tactical advantage to prospective claimants and indicates the judicial hostility toward the defence of legislative authority.

The courts have also manifested their antipathy toward the immunity by creating a specialized definition of the word negligence as used in the statement of the immunity. Ordinarily negligence is the absence of reasonable care in the circumstances having regard to the gravity of the harm, the likelihood of its occurrence and the utility of the defendant's conduct. Rather than adopt this normal meaning the courts have narrowed it by holding that "if the damages could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of powers". Similarly it has been suggested that "it is negligence to carry out work in a manner which results in damage unless it can be shown that that, and that only, was the way in which the duty could be performed." The defendant who wishes to rely on legislative authority as a defence bears the onus of proof to demonstrate that the activity was carried on in the only way possible; if he fails he will be held to be negligent and outside the protection of the immunity.

Courts and juries found negligence to exist and imposed liability where buoys were badly located, where a reservoir was poorly maintained and where gas escaped because of an excavation negligently made. So too, where a gas pipe was badly maintained, where horses ran into a tramcar without headlights and where road grading was poorly effectuated. One case even imposed liability on a defendant, who was not negligent himself, for the

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96 See Brand, supra footnote 21 at p. 241, "It is for those who say that this nuisance is legalized and the right of action taken away to show it". Cf. Blackburn J. who said the onus was on the plaintiff to show he was entitled to compensation by the terms of the statute. In Hill, supra footnote 48, Blackburn altered his view and said that it was for those who assert the removal of a private right to show that words in the statute do so.

97 Manchester v. Farnworth, [1930] A.C. 171, Viscount Dunedin at p. 182, "the onus of proving that the result is inevitable is on those who wish to escape liability...." See Dett v. Chesham, [1921] 3 K.B. 427.

98 Remahan v. Vancouver, [1930] 3 W.W.R. 166 (B.C.S.C.); Porter & Co. v. Bell, supra footnote 93; Stephen v. Richmond Hill, supra footnote 57. See also Lawryson v. Town of Kipling, supra footnote 76.

99 See infra.

100 Geddis v. Bann (1878), 3 App. Cas. 430 at p. 455.

101 Provender Millers v. Southampton County Council, [1940] 1 Ch. 131 at 140; "negligence as there used means adopting a method which in fact results in damage to a third party except in a case where there is no other way of performing the statutory duty."


103 Jolliffe v. Wallasey Local Board (1873), L.R. 9 C.P. 62.

104 Geddis v. Bann, supra footnote 100.


negligence of his independent contractor.\textsuperscript{109} There are cases, of course, where the courts applied the immunity and held that there was no negligence demonstrated.\textsuperscript{110}

On a few occasions the immunity rule was avoided by holding invalid the legislation purporting to legalize the damage. In one case the court held invalid a resolution authorizing the building of a culvert since a by-law was required\textsuperscript{111} and in another a municipality was said to exceed its legislative power by permitting a highway obstruction.\textsuperscript{112}

In conclusion, the defence of legislative authority has been circumscribed by various judicial techniques, manifesting judicial opposition toward it. It is safe to predict that this trend will continue in the years ahead.

\section*{III \ The American Treatment of the Immunity}

American courts have embraced the immunity from strict liability\textsuperscript{113} and nuisance\textsuperscript{114} of legislatively authorized activities in the absence of negligence. In some early cases the courts seemed to sanction the infliction of what was called "consequential injury", if it was in connection with an authorized activity.\textsuperscript{115} Because of rapidly changing circumstances and altered judicial attitudes in the United States, the courts have largely abandoned these decisions and have commenced to whittle down the immunity. While many of the devices used in America for the task resemble those used in the Commonwealth, several new techniques have been invented.

\begin{itemize}
  \item[\textsuperscript{109}] Hardaker \textit{v.} Idle District Council, [1896] 1 Q.B. 335. Scant mention of legislative authority is made, but it appears that the municipality contracted with the contractor under terms of the Public Health Act.
  \item[\textsuperscript{110}] S.S. Eurana \textit{v.} Burrard Inlet Tunnel, [1930] 3 D.L.R. 48 (Ex.) no liability where ship hit bridge which interfered with traffic since exact plan was authorized; \textit{Renaham v. Vancouver}, [1930] W.W.R. 166, no liability where waterworks system burst and caused flood; \textit{Smith v. Campbellford Ry.}, [1936] O.W.N. 649 (Ont. C.A.) no liability where bridge collected ice which caused flood. Real ground for decision was lack of causal connection and act of God. Also every step was supervised by the Bd. of Ry. Commissioners; \textit{Partridge v. Etobicoke}, [1956] O.R. 121, no liability where boy climbed tree and was burned by wire. Real ground may be that boy was author of his own harm. Onus point not discussed; \textit{Romanica v. Greater Winnipeg Water District}, [1921] 2 W.W.R. 399 (Man. C.A.) no liability where flood caused by heavy rain.
  \item[\textsuperscript{112}] Gould \textit{v.} Jones \& Town of Perth, 54 O.L.R. 425 (C.A.).
  \item[\textsuperscript{113}] Gould \textit{v.} Winona Gas (1907), 100 Minn. 258 at p. 261, 111 N.W. 254 at p. 255. But see \textit{Blanc \& Murray} (1884), 36 La. Ann. 162 at p. 164, where it is said that the doctrine is "exploded".
  \item[\textsuperscript{114}] "Legislative sanction makes that lawful which would otherwise be a nuisance." \textit{Atchison T. \& S.F. Railway v. Armstrong} (1905), 71 Kan. 366, 80 P. 978. "That which is done under authority of law in a place and in a manner authorized cannot be a nuisance." \textit{Transportation Co. v. Chicago} (1878), 99 U.S. 633.
  \item[\textsuperscript{115}] Hollister \textit{v.} Union Co. (1833), 9 Conn. 435; \textit{Radcliffe v. Mayor of Brooklyn} (1850), 4 N.Y. 195, no liability for grading which caused cave-in since public benefit. \textit{Bellinger v. N.Y. Central} (1861), 23 N.Y. 42.
\end{itemize}
As might have been expected the Constitution of the United States and the constitutions of the several states have yielded much in the way of ammunition for courts who wished to provide compensation for individuals whose rights were infringed by operations authorized by legislation. This contrasts with the position in the U.K. where Parliament, which is supreme, may immunize from liability any infringement of private rights. One interesting manifestation of this difference is that a state may constitutionally legalize a public nuisance or foreclose its own right to sue, but it may not legalize a private nuisance so as to interfere with private rights. Some confusion has resulted from the failure of American courts to comprehend this difference.

The United States Constitution and many of the state constitutions prohibit the taking of private property for public purposes without compensation. In order for there to be a taking the weight of authority requires some substantial physical injury to the property and not merely an encroachment on the use of the property. On one extreme some courts have insisted on the actual taking of the title of land; on the other extreme some courts allow compensation for any “deprivation of the full, unimpaired use thereof”.116

116 Richard v. Washington Terminal Co. (1914), 233 U.S. 546; Sadlier v. New York, 81 N.Y.S. 308 at p. 310. “The English rule is founded on the unrestrained and unlimited power of parliament to take or damage private property at will without compensation, whereas in this country legislatures are under constitutional restraints. ...” Dupont Power Co. v. Dodson (1915), 150 P. 1055 at p. 1057, 49 Okla. 58 at p. 64.


118 “... the legislature of a state ... may authorize a use of property that will operate to produce a public nuisance; it cannot authorize a use of it that will create a private nuisance.” See Blanc v. Murray, supra footnote 113 at p. 164; Baltimore & Potomac Ry. Co. v. Fifth Baptist Church (1883), 108 U.S. 317 at p. 322; Bohan v. Port Jervis Gas-Light Co. (1890), 122 N.Y. 18, 25, N.E. 246; Choctaw O. & G.R. Co. v. Drew (1913), 37 Okla. 396, 130 P. 1149, alternate holding.

119 U.S. Constitution 5th and 14th amendments. Among the states that have similar constitutional provisions are Md. Art. 3 Sec. 40, see Taylor v. Baltimore (1917), 130 Md. 133, 99 A. 900; N.Y. Art. 1 Sec. 7; N.J. Art. 1 Sec. 16, see Grey v. Paterson (1900), 60 N.J.E. 355, 45 A. 995; see 2 Nichols, Eminent Domain (3rd Ed.), p. 240 footnote 22 for other states.

120 “... must be substantial destruction of the rights of ingress and egress; ...” see Taylor case footnote 119; Steifert v. Brooklyn (1886), 101 N.Y. 136, 4 N.E. 321 at p. 324, compensation where “physical injury”; Pennsylvania v. Angel (1886), 41 N.J.E. 316, 7 A. 432 at p. 434; see also 2 Nichols, Sec. 6.11 at p. 238.

121 Transportation v. Chicago, supra footnote 114.

122 Atchison case, supra footnote 114.

123 See Sadlier case, supra footnote 116 at p. 315; Pennsylvania v. Angel, supra footnote 120 at p. 433, “Whether you flood the farmers’ fields so that they cannot be cultivated, or pollute the bleachers’ stream so that his fabrics are stained, or fill one’s dwelling with smell and noise so that it cannot be occupied in comfort, you equally take away the owner’s property. In neither instance has the owner the loss of material things that he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is a taking of his property in the constitutional sense. Of course mere statutory authorization will not avail for such an interference with private property.” See also 2 Nichols, op. cit., footnote 119, p. 236.
Perhaps the most generally accepted principle is a compromise one which holds that "the legislature may authorize small nuisances without compensation but not great ones." A taking was said to have occurred where there was a floods from manholes, a dam and a diverted stream, pollution of a stream, smoke and soot from a roundhouse, noise, dust and stench from a terminal yard, where a wharf was removed and where an explosion caused serious damage. No taking was made where a railway caused obstruction, where sewage was deposited on land and where a sewage disposal plant created a stench. On occasion the courts have evaded the constitutional issues by construing the statute as not authorizing any taking.

Because the courts have interpreted "taking" rather narrowly, a good number of states amended their constitutions to prohibit the taking or damaging of property for public purposes without compensation given therefor. The courts have fashioned a rule which restricts the power of the states to legalize tortious incursions of individual interests. Although more than mere annoyance or personal inconvenience must be found it may not be necessary to demonstrate interference with the property itself as some courts have held. Compensation is probably available where there is some physical disturbance of a right which the owner of land enjoys in connection with his property and where there is special damage beyond that suffered by the general public. However, it has been said that the purpose of this broader provision has not been to allow recov-

125 Sefert case, supra footnote 120.
128 Grey v. Patterson, supra footnote 119.
129 Louisville v. Letlyty (1905), 85 S.W. 881, 114 Tenn. 368.
130 Angel case, supra footnote 120.
133 Atchison case, supra footnote 114 at p. 980, but court thought might be exceptional cases where such injury would amount to a taking.
136 Tinsman case, supra footnote 127 at p. 573 (alternate holding); Bacon case, supra footnote 124.
137 Ark., Cal., Col., Ga., Ill., La., Minn., Miss., Mo., Mont., Neb., N.D., Pa., S.D., Tenn., Tex., Utah, Wash., W.Va., Wyo., are some of these states, see Richard, supra footnote 116 and Church of Jesus Christ v. Oregon Short Lines, E. Co. (1909), 36 Utah 238, 103 P. 243; 2 Nichols, op. cit., footnote 118, at p. 241 for article numbers; Ill. was first state to adopt amendment in 1870.
ery for mere trifles.\textsuperscript{141} Under this clause liability has been found where there was vibration and soot from a railway\textsuperscript{142} and from an electrical plant,\textsuperscript{143} stench, smoke and noise from a roundhouse,\textsuperscript{144} smell and noise from a stockyard,\textsuperscript{145} pollution of a river\textsuperscript{146} and where there was interference from a garbage incinerator.\textsuperscript{147} But no "damage" occurred, according to the court at least, where there was mere noise.\textsuperscript{148} The court erroneously reasoned that there had been no interference with the land itself, but only an interference with the people on the land.

On occasion it has been held that a state has exceeded its police power where serious interferences with land were authorized by unreasonable laws.\textsuperscript{149} But there is no prohibition on a state authorizing interference with or taking of land if compensation is given.\textsuperscript{150}

The legal effect of a declaration of unconstitutionality is that the authorization is invalid and it cannot be used as a defence to a tort action.\textsuperscript{151} Although there is a dictum that the only remedy may be to apply to the authorizing body for compensation,\textsuperscript{152} most cases hold that these constitutional provisions are self-executing. Therefore, an action in the ordinary courts may be maintained if the statute fails to provide for another procedure.\textsuperscript{153}

The American courts have emulated the Commonwealth courts in their utilization of interpretation devices to combat the protective shield provided for legislatively authorized activities. They too have tended to construe strictly legislation which authorizes tortious activity. One oft-quoted statement from the case of \textit{Cogswell v. New York, N.H. and H.R. Railway Company}\textsuperscript{154} is as follows:

Statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can be fairly said that

\begin{footnotesize}
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\item \textsuperscript{141} Stuhl, supra footnote 139; Lambert v. Norfolk (1908), 108 Va. 259, 61 S.E. 776; Lamb v. Reclamation District (1887), 73 Cal. 125, 14 P. 625.
\item \textsuperscript{142} Alabama v. King (1908), 47 So. 577, 93 Miss. 379.
\item \textsuperscript{143} King v. Vicksburgh Ry. (1906), 42 So. 194, 88 Miss. 456.
\item \textsuperscript{144} Rainey v. Red River, T. & S. Ry. (1905), 89 S.W. 768, 99 Tex. 276.
\item \textsuperscript{145} Stuhl v. Great Northern Ry., supra footnote 139.
\item \textsuperscript{146} Woodruff v. N. Bloomfield Gravel Mining Co. (1884), 19 Fed. 753, (alternate reason).
\item \textsuperscript{147} Jacob v. Seattle (1916), 160 P. 299, 93 Wash. 171.
\item \textsuperscript{148} Church of Jesus Christ, supra footnote 137.
\item \textsuperscript{149} See Sawyer v. Davis (1884), 136 Mass. 239 (obiter dictum), Woodruff case, supra footnote 146 (alternate reasoning).
\item \textsuperscript{150} Bancraft v. City of Cambridge (1879), 126 Mass. 438; Lewis v. Pingree National Bank (1915), 17 Utah 35, 151 P. 558 where the court said a mere damage action might be allowed but an injunction denied.
\item \textsuperscript{151} Cohen v. Mayor of New York (1889), 113 N.Y. 532, 21 N.E. 700, municipality authorizing and person authorized both liable; see also Woodruff case, supra footnote 146.
\item \textsuperscript{152} Benner v. Atlantic Dredging (1892), 31 N.E. 328.
\item \textsuperscript{153} Rose v. State (1942), 19 Cal. 2d 713, 123 P. 2d 505; Chick Springs Water v. State Highway Dept. (1931) 159 S.C. 491, 157 S.E. 842; but see Zoll v. St. Louis County (1938), 343 Mo. 1031, 124 S.W. 2d 1168.
\item \textsuperscript{154} (1886), 103 N.Y. 10, 8 N.E. 578 at p. 581; Messer v. City of Dickinson (1942), 71 N.D. 586, 3 N.W. 2d 341 at p. 345. "The immunity conferred by the legislature must be strictly construed . . . ."; Bohan v. Port Jervis (1890), 122 N.Y. 18, 25 N.E. 246.
\end{itemize}
\end{footnotesize}
the legislature contemplated the doing of the very act which occasioned the injury. This is but an application of the reasonable rule that statutes in derogation of private rights, or which may result in imposing burdens on private property, must be strictly construed.

In some states the codes or statutory law provide that legislative authority can only be a defence if it is express, or if there is the plainest implication, or if the harm is a necessary result of the powers granted. In some cases the courts have said that there is a presumption that nothing unlawful has been authorized. “Very clear evidence” is required to decide that the intention of the legislature was to authorize a nuisance. This theory is in accord with the general principles of statutory construction used whenever private rights are tampered with by statute. It has also been suggested that from a “general grant of authority” the legislature cannot be presumed to sanction a private nuisance.

Another technique available for halting uncompensated interference with private rights is the judicial creation of an implied condition or limitation; when some activity is sanctioned by the legislature, there is an implied condition that no invasion of private rights is hereby authorized. Some courts have stated that grants of licenses do not give the recipients the privilege of disregarding private rights. Although also a fiction, this is an effective tool at the disposal of the judiciary in resisting incursions on individual interests under the cloak of legislative authorization.

The popular English device of attempting to decide whether a statute is permissive only has crept into the American judicial repertoire, but it has not been as widely invoked in the United

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156 Bacon v. Boston, supra footnote 124 at p. 10.


158 Hooker v. New Haven, etc. Co. (1841), 14 Conn. 146 at p. 155, approved in principle, distinguished on facts in Burroughs v. Housatonic Ry. (1842), 15 Conn. 124; Baltimore v. Fairfield Improvement Co. (1898), 87 Md. 352, 39 A. 101 at p. 1082, “... explicit legislative declaration [needed].”


160 Baltimore v. Fairfield, supra footnote 158.

161 Ferriter v. Herlihy (1934), 191 N.E. 352 at p. 354, 287 Mass. 138, Licence granted with the “... limitation that the business must be carried on ... without unnecessary disturbance to the rights of others.”

162 See Baltimore & Potomac Ry. Co. v. Fifth Baptist Church (1883), 108 U.S. 317 at p. 331, Field J. “... implied condition that the works should not be placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property.” Woodruff case, supra footnote 146 at p. 771, “condition implied” that right to be exercised without injury to others. Choctaw case, supra footnote 118 at p. 1151, “... implied qualification that the works should not be so placed as by their use to unreasonably interfere with [rights]”. Booth v. Rome, W. & O.T.R. Co. (1888), 140 N.Y. 267, 35 N.E. 592, privileges conferred on the “... understanding that they shall be exercised in strict conformity to private rights.” Blano v. Murray, supra footnote 113 at p. 164, “... implied condition that no interference with private rights.”

163 See Choctaw, supra footnote 118 at p. 1151; Fifth Baptist Church, supra footnote 159 at p. 531.
States. This approach is no more helpful in the solution of these problems in America than it is in the Commonwealth.

As in the United Kingdom, American courts sometimes hold that although the activity may have been authorized generally, the manner in which it was to be carried on was not so authorized. Authority was held to be absent because of the manner of operation or erection of a tunnel, a pole supporting a trolley wire, a gas manufacturing plant, and an indecently operated concert hall. Liability was also imposed for a dam holding polluted water, a smoke stack, a wagon which blocked the street, a cannery which polluted a stream, and where blasting operations caused damage.

The court may say that the site or location of the activity has not been sanctioned by the legislature, although the activity itself was authorized. Authority has been said to be lacking because of the site chosen where a roundhouse was located near a private residence, where a leper was billeted in a home in a residential district, and where large coalbins were built near a home.

Although the activity may have been authorized, the court may decide that it has been negligently or improperly carried on and thus cannot be protected. The court adopts the immunity rule, but holds that this method of operation is within the latter part of the rule and therefore not entitled to protection. There does not seem to be the same dramatic distortion of the meaning of the term negligence in the United States as there is in England, the negligence question being handled in the same way as in cases where there is no statutory authority. The usual criteria are utilized in determining whether there has been such unreasonable or substandard conduct as to be actionable. This varies from the British approach where the court finds negligence if it concludes that the defendant could have avoided the harm by alternative conduct. One reason for the different ap-

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169 Village of Pine City v. Munch (1890), 44 N.W. 197, 42 Minn. 342, "if they authorized an erection which does not necessarily produce such a result but such result flows from the manner of construction or operation, the legislative licence is no defense."

170 Sullivan v. Roger (1887), 72 Cal. 248, 13 P. 655.

171 Cohen v. Mayor of New York, supra footnote 151.

172 Webster v. Steelman (1939), 172 Va. 342, 1 S.E. 2d 305.


174 Louisville & N. Term. Co. v. Lellyet (1905), 114 Tenn. 368, 85 S.W. 881 at p. 885, "... exact location not authorized by charter; Choctaw case, supra footnote 118.

175 Baltimore v. Fairfield, supra footnote 155.

176 Spring v. Delaware L. & W. R. Co. (1895), 34 N.Y.S. 810, 68 N.Y. St. Rep.; but see Dudding v. Automatic Gas (1946), 145 Tex. 1, 193 S.W. 2d 517. Gas tanks proposed to be built near homes not enjoined (explanation may be favoured position of oil industry in Texas).
Strict Liability, Nuisance and Legislative Authorization

strict liability, nuisance and legislative authorization.

...torture the meaning of the word “negligence” because the constitutional devices were so readily available to circumscribe the immunity. Obviously the doing of the exact thing authorized cannot be negligence, but negligence has been found where the site of an operation was improperly selected. Negligence in the manner of operation or construction has been held to be present where sewage caused damage, where a railway blocked access to a warehouse, where a whistle frightened a horse which injured a child, and where a boiler factory caused private nuisances. A structure, properly built ab initio, may later become a nuisance if improperly maintained.

Other devices have been invoked as well. The shifting of the onus of proof to the defendant is not as prevalent in the United States as it is in England but there is authority going both ways. Sometimes technical objections to the validity of municipal authorizations are used to permit recovery.

The courts in the U.S. have not given the same respect to municipal authorizations as they have to state and federal legislation. Municipal permits and licences have been held consistently not to grant immunity in actions for damages. When a municipality

177 State v. Erie R. Co. (1913), 84 N.J.L. 661, 87 A. 141, soft coal authorized, so there was no liability for damage resulting from its use.


180 Atchison & N.R. Co. v. Garside (1873), 10 Kan. 552, “It can be liable if it constructs or operates its railroad in an illegal or improper or wrongful manner.”


183 Ellis v. Blanchard (1950), 45 So. 2d 100.


186 Onus on plaintiff: Morse v. City of Worcester (1885), 139 Mass. 389, 2 N.E. 694 “... if the plaintiff can show negligence (he can recover)”; Atchison v. Garside, 19 Kan. 552 “... plaintiff must show...”. Onus shifted to defendant: Ghoatow case, supra footnote 118, where defendant liable since failed to show it could not locate elsewhere; see also Rainey v. Red River, supra footnote 144, where parts of English decisions pertaining to the onus were quoted and presumably relied on.

187 Murtha v. Lovewell (1896), 166 Mass. 391, 44 N.E. 347, where notice requirement not followed and licence held invalid, but later proper notice was given and the injunction was therefore denied.

188 Woodsmall v. Carr Tire Co. (1933), 98 Ind. App. 446, 185 N.E. 163, licence to move building not deprive store owner who damaged thereby from action; Price v. Grosse (1921), 73 Ind. App. 62, 133 N.E. 30, licence not legalize nuisance caused by fertilizer plant; Strong v. Sullivan (1919), 151 P. 59, licence to lunch wagon not authorize public nuisance; First National

[Footnote continued on page 214.]
merely tolerates a nuisance and fails to take action to have it abated, a fortiori, this does not legalize it.\textsuperscript{189} A zoning ordinance permitting a certain use of land grants no immunity when injury results from that use, as it is held to be merely permissive legislation.\textsuperscript{190} The enterprisers, although they cannot be held criminally responsible, may still be held civilly responsible for private harm caused.\textsuperscript{191} A zoning ordinance may be considered, however, as a factor in determining whether a nuisance exists, since it is an “expression of municipal thought and opinion.”\textsuperscript{192}

IV The True Rationale

The immunity has fallen into disfavour; in both the Commonwealth and the United States it has been debilitated in response to the changing conditions and attitudes of the mid-twentieth century. Although courts continue to pay lip service to the continued vitality of the rule, they avoid its application whenever possible by the use of several different techniques. An activity which is authorized by legislation is now seldom held immune from strict liability or liability in nuisance. Statutory authorization of an activity has become only one of the factors which a court must weigh in determining the existence of a nuisance or strict liability situation. The court must consider various other factors as well.

Probably the most important factor for the court is whether the plaintiff will be left without compensation for damage to one of his legally recognized interests if the court denies recovery. Despite protestations to the contrary,\textsuperscript{193} where it appears that no compensation will be obtained for a substantial injury, the court will strain to

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\item \textit{Bank v. Tyson} (1902), 133 Ala. App. 459, 32 So. 144, licence for building not authorize nuisance; \textit{Sullivan v. Royer} (1887), 72 Cal. 248, 13 P. 655, licence of board of supervisors did not and could not authorize nuisance by erection of steam engine; \textit{Tuebner} case, supra footnote 178, where nuisance not authorized when street railway sanctioned; \textit{Ryan v. Copes}, 73 Am. Dec. 106 at p. 113, “licence does not sanction abuse” by steam cotton press; but see \textit{Levin v. Goodwin} (1906), 191 Mass. 341, 77 N.E. 718, where licence for bowling alley legalized what may otherwise have been a nuisance; see also \textit{Murtha}, supra footnote 187.
\item \textit{Seifert v. Dillon} (1909), 83 Neb. 322, 119 N.W. 686 and \textit{Ingersoll v. Rousseau} (1904), 35 Wash. 92, 76 P. 513, both dealing with houses of ill-repute which had been tolerated by the municipal authorities.
\item \textit{Rockenbach v. Apostle}, supra footnote 164.
\item \textit{Eaton v. Kilburn} (1933), 217 Cal. 362, 18 P. 2d 678, although ordinance allowed light industrial use liability imposed for such a use; \textit{Appeal of Perrin} (1931), 305 Pa. 42, 156 A. 305, service station enjoined from being built in a residential area; \textit{Weltshe v. Graf}, supra footnote 188; freight terminal, \textit{Commerce Oil Refining v. Miner} (1960), 281 Fed. 2d 465 at p. 468 quoting \textit{Weltshe} case in obiter; but see \textit{Booe v. Donner-Hanna Coke Corp.} (1932), 258 N.Y.S. 229, 236 A. Div. 37, alternate reasoning, where coke oven authorized by zoning ordinance, but court found there was no nuisance at all; \textit{Morin v. Johnson} (1956), 49 Wash. 275, 300 P. 2d 569, tire capping plant not enjoined since no nuisance existed after zoning ordinance had authorized this use (subsidiary holding).
\end{itemize}
award damages,\textsuperscript{194} and proceed to use one of the available techniques to remove the applicability of the immunity. Where, on the other hand, the statute provides for some method of compensation, the courts are prepared to deny recovery.\textsuperscript{195} This does not seem unreasonable. Although persons should be recompensed for legislatively authorized harm, they should use any special compensation procedure process supplied by the legislature. Thus, if a plaintiff will be entirely remediless if the court refuses to avoid the invocation of the immunity, he is more likely to be on the winning side of the case; if, however, the ordinary court process is being used in an attempt to get a higher damage award where another statutory route to recovery exists, the court will be more likely to apply the immunity.

Where the plaintiff seeks an injunction which would result in putting the defendant out of business, the English courts have been reluctant to find liability.\textsuperscript{196} They have been prepared to employ the immunity to deny liability in the interest of the community in saving a needed industry. Where only damages are sought by the plaintiff, the courts seem to be more receptive to the idea of civil liability.\textsuperscript{197} This factor is much less important in the United States where the

\textsuperscript{194} Metropolitan Asylum v. Hill (1881), 6 App. Cas. 193, 44 L.T.R. (N.S.) 653 at 656 Selborne L.C. 
"... if no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the legislature that the thing be done ... without injury to others."

\textsuperscript{195} Price's Patent Candle v. London County Council, [1908] 2 Ch. 526 (C.A.). Liability found since there was a "presumption that ... not authorized to create a nuisance ... unless compensation is provided."

\textsuperscript{196} Guelph Worsted v. Guelph (1914), 18 D.L.R. 73 (Ont.) Middleton J. at p. 80, "... absence of [compensation] provision [does] not create a right of action; it only suggests the more careful scrutiny of the act to ascertain whether the real intention of the legislature was to permit the interference with private rights without compensation.";

\textsuperscript{197} Bacon v. Boston (1891), 154 Mass. 100, 28 N.E. 9; Hooker v. New Haven (1841), 14 Conn. 146 at 159; Cogswell v. New York etc. Ry. Co. (1886), 103 N.Y. 10, 8 N.E. 537 at 539; Haskell v. New Bedford (1871), 108 Mass. 208, liability for sewage damage since had been a waiver of the right to compensation when the consent to the sewer's construction was given.
courts are more flexible in dealing with injunctions. Where a nuisance is found to be present in America, an injunction will only be granted after a sober weighing of all the interests involved such as the public interest, the severity of damage, and the cost to the defendant if the injunction is awarded. The defendant’s interests are given considerable weight. Often American courts are prepared to fashion an injunction to suit the particular circumstances such as by limiting the hours of operation. In the Commonwealth, on the other hand, injunctions generally follow as a matter of course where nuisances are found and threaten to continue. It has been said that the prima facie right to an injunction may be denied and damages alone given where “(i) the injury to the plaintiff’s legal rights is small, (ii) and is one which is capable of being estimated in money, (iii) and is one that can be adequately compensated by a small money payment, (iv) and the case is one in which it would be oppressive to the defendant to grant an injunction.” But injunctions are granted more commonly in the Commonwealth than in the United States since these four conditions will seldom be present to deprive the plaintiff of his so-called prima facie right to an injunction. Delays in the date of operation of the injunction are often granted in order to allow the defendant time in which to find some way of abating the nuisance or to buy his peace from the plaintiff. So automatic was the award of injunctions by the English courts that they have been known to deny a remedy on the ground that since no injunction would be granted in these circumstances, no wrongful act has occurred. The English courts could learn much from their America brethren in this field. By awarding damages but denying injunctive relief the best compromise between the encouragement of enterprise and the protection of property interests might be struck.

198 Riter v. Keokuk Electro-Metals (1957), 248 Iowa 710, 82 N.W. 2d 151 at p. 161, injunction set aside since “appropriateness of an injunction depends on a comparative appraisal of all the factors in the case.” Hopkins v. Eversil Powder Co. (1914), 259 Mo. 254, 169 S.W. 267, injunction refused where plaintiff’s damage “trivial, uncertain or remediable by a suit of law”; Kuntz v. Werner Flying Service (1950), 257 Wis. 405, 43 N.W. 2d 476, no nuisance found, but in obiter court said there was an adequate remedy that the activity was important to the public, the investment was large and flying should be encouraged; Toledo Disposal v. State (1914), 39 Ohio 230, 106 N.E. 6, public nuisance abatement order reversed since garbage disposal very important to the community; Grey v. City of Paterson, 60 N.J.E. 385, 45 A. 995, injunction denied since there was “great injury to the defendant” and a “serious detriment to the public”.


203 See Bramwell B. in Dunn case, supra footnote 195 at p. 691.
The cases tend to find liability and ignore the authorizing legislation where the damage caused is of a more serious nature. The trend is to deny liability where the damage is only slight, on the ground that some slight annoyance should be borne for the common good. Thus, where a farm operation was seriously impaired by poisonous fumes, where there was a serious explosion, where a haystack was set on fire by a spark, where steamrollers damaged underground pipes, where a landslide resulted from a stream diversion, where a flood was caused by a reservoir, and where a fumigator caused a death liability was found. But where a slight obstruction to a right of access resulted from bus shelters, where mere vibrations were caused by a railway and where no damage could be shown because of a small-pox hospital no liability was said to exist. The American cases follow a similar pattern where "serious injury" was inflicted by a railway roundhouse and by a terminal yard and where a church could not possibly be occupied because of a "constant disturbance" by a railway, the court gave relief. On the other hand, the American courts have refused to give relief where the "slight annoyance" of a factory bell was authorized, where there was dirt and noise from a factory, where only a slight interference with church services was caused by a railway, where the presence of a small-pox hospital lowered the market value of an empty lot slightly and where a telephone pole merely ob-

204 Manchester v. Farnworth, [1930] A.C. 171 at p. 183, Viscount Dunedin stressed the "gravity of the nuisance" and said there was a "substantial diminution in the productivity of the farm", and at p. 194 Lord Sumner considered the "nature and degree of the plaintiff's suffering."

205 See Farnworth case, supra footnote 204.


210 Geddis v. Bann Reservoir, 3 App. Cas. 430.


214 A.G. v. Corporation of Nottingham, [1904] 1 Ch. 673.

215 Cogswell case, supra footnote 194.


218 Sawyer v. Davis (1889), 136 Mass. 239 at p. 243, court sees difference between "serious disturbances" and "comparatively slight ones".

219 Bove v. Donner-Hanna Coke Co. (1932), 258 N.Y.S. 229 at p. 232, 236 Ap. Div. 37, court said the "annoyance (was) more imaginary and theoretical than real or substantial" in view of the district.

220 Church of Jesus Christ v. Oregon Short Lines (1909), 36 Utah 238, 103 P. 243; Fifth Baptist Church case, supra footnote 217 distinguished as case of "severe damage".

221 Fraser v. Chicago (1900), 186 Ill. 490, 57 N.E. 1055.
The courts appear to permit legislatures to authorize small nuisances but not large ones.  

The court will examine the conduct of the defendant to see whether he had been careful or carefree. It will decide if the defendant has ridden roughshod over the protesting plaintiff or whether he has done his best to avoid injury. Where “callous indifference” or a “high hand” is demonstrated or where there has been an “outrageous use of land,” the court will tend to assist the plaintiff despite the presence of legislative authority. But where the defendant appears to have done all he could to avoid any injury to the plaintiff, the court inclines to view him more favourably. Thus, where the defendant took pains to build a high fence to isolate the small-pox patients in deference to plaintiff’s interests, the court refused to aid the latter. So too, where the defendant put up double windows to reduce the noise caused by his bowling alley, the plaintiff was denied recovery. In another case where the damage seemed largely due to the plaintiff’s own acts, the court refused to evade the immunity rule.

If the defendant could easily avoid the harm caused, the courts tend to give relief. Where the damage cannot be avoided except by a huge expenditure, or at the cost of closing down the defendant’s operation altogether, the plaintiff may be made to suffer for the public good. The court weighs “the cost, trouble and inconvenience to the defendant.” Liability was imposed in these situations: the cost to a factory of a smoke arrester is not an “extraordinary price” to pay for the plaintiff’s comfort; a public convenience that could for little extra cost be built underground was enjoined; the method of operation of a quarry could be easily changed; noxious water could be sent to a nearby river without damaging the crops of the plaintiff; stables could have been located elsewhere but in the defendants’ “attempt to economize they have gone too far.” So too where roads could have been repaired in the absence of steam-

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222 Irwin v. Great S. Telephone Co. (1885), 37 La. Ann. 63 at 67, there was “little inconvenience” and the defendant did “not materially interfere with the comfortable enjoyment of plaintiff’s property”.

223 Bacon v. Boston (1891), 154 Mass. 100, 28 N.E. 9 at p. 10, “the general rule is that the legislature may authorize small nuisance without compensation but not great ones.”


225 Bisceo v. Great Eastern Ry. (1873), L.R. 16 Eq. 636 at p. 641.


229 See Dunn case, supra footnote 195.

230 Guelph Worsted v. Guelph, supra footnote 194, could have easily avoided the damage in the building of the bridge.

231 See Lord Sumner in Farnworth case, supra footnote 204.

232 Ibid.


234 Jones v. Kelley Trust (1929), 179 Ark. 857, 18 S.W. 2d 356.


236 Rapier v. London Tramways, [1893] 2 Ch. 598 at p. 602 (C.A.) It was a “mere question of money” here.
and where high tension wires could have been grounded at intervals to avoid fires caused when they broke for lack of proper grounding the defendant was held liable. In one case the court felt that the method of operation of a car house could have been easily changed before the damage occurred since it was remedied after the action was commenced. In another it was held that the mere inspection of gas pipes was not too much to ask of a defendant to avoid harm to others. On the other hand, the courts have denied liability where a whole sewer system would have to be rebuilt, where a coke oven would be put out of business and where a railway could not operate at all without some vibrations, noise and soot.

If the defendant is a company operating for private gain, the courts are more likely to make it pay for damage arising out of authorized activities. If, however, it is a non-profit public corporation such as a government or municipality, the courts are less likely to penalize it by making it pay for damage since it is not acting for its "own purposes". The courts have manifested some hostility toward private corporations on the ground that "those who are empowered to carry on that business for their profit should have to bear the inevitable loss arising from such risks." Liability was imposed on a gas company, a cannery, a quarry, a railway, a mine, a canal company, all of which were private corporations motivated by the quest for profit. In comparison no liability was imposed in one case where the United States Government itself was the defendant nor in several cases where municipalities were the perpetrators of harm.

237 Gas, Light & Coke case, supra footnote 208.
239 Twedner v. California Street Ry. (1884), 66 Cal. 171, 4 P. 1162.
244 See Salmond, Torts, for an explanation of the Green v. Chelsea case on similar reasoning.
245 Midwood v. Manchester, supra footnote 206 at p. 610, per Mathew L.J.
246 Price v. S. Metropolitan, supra footnote 240 at p. 128, "company for profit".
247 Webster & Co. v. Steelman (1939), 172 Va. 342, 1 S.E. 2d 305 at p. 315, "necessity of one man's business cannot permit it to be operated at the expense of another man's rights."
250 Woodruff v. N. Bloomfield Gravel Mining Co. (1884), 18 Fed. 753.
251 Hooker v. New Haven & Northampton Co., 14 Conn. 146, 15 Conn. 313.
252 Benner v. Atlantic Dredging (1892), 134 N.Y. 155, 31 N.E. 328, government supervised dredging operations. No "private benefit" as in Cogswell case, supra footnote 249.
There may be a greater respect paid to activities authorized by statute directly than there is for those authorized more indirectly by subsidiary legislative means. Thus, where there is mere authorization by a board or by a contract, liability is more probable. Municipal authorization is held in much lower esteem than statutory authorization in the United States, whereas in the Commonwealth there is not such a marked difference in treatment.

It seems that, when the court believes that the industry is necessary in the public interest, it will be more reluctant to find liability than where the public has little interest in the industry. The court has tended to tolerate activities encouraged by the legislature for the general welfare. But if the benefit of these activities goes to the public generally, the public should bear the loss, and not the hapless individual harmed. Nevertheless, where a flood was caused by a sewer, where a coke oven caused a nuisance in a good industrial area, where a gas pipe exploded and where blasting damaged a private home no recovery was awarded since the public interest would suffer if these industries were discouraged. On the other hand, the court did not hesitate to deny protection to a service station since the court was of the view that such a station was not necessary “on every corner”.

V Conclusion

The importance of the defence of legislative authority is on the wane. Only rarely does the legislation authorizing activity expressly deal with the question of tort liability. This has left the judiciary in a position to fabricate legislative intention where none really exists, which path has created considerable confusion. Part of this confusion results from a changed attitude toward activities authorized by legislation and the need to compensate the victims of progress. Because

255 Thompson v. Kraft Cheese (1930), 210 Cal. 171, 291 P. 204, State Board of Health authorized putting sewage into stream, liable; Metropolitan Asylum Board v. Hill, supra footnote 194, small-pox hospital sanctioned by local government board; Young v. C.P.R., [1931] 2 D.L.R. 968, Board of Railway Commissioners authorized activity, liable.
257 Hakkila, supra footnote 248.
259 See Bohlen, Rule in Rylands v. Fletcher (1911), 59 U. of Penn. L. Rev. 423 at p. 441; see also Holmes J. in Quinn v. Crimmins (1898), 171 Mass. 255 at p. 258.
260 Ibid., at p. 444, in footnote 136 Bohlen expresses what has become almost a complete philosophy of tort law which dominates much of the modern literature in the field.
262 Bove v. Donner-Hanna, supra footnote 28, “No consideration of public policy demands . . . sacrifice of this industry”.
263 Shmeer v. Gaslight Co. (1895), 147 N.Y. 529 at p. 541, 42 N.E. 202 at p. 205, Gas is an article “universally important for city life.”
264 Benner v. Atlantic Dredging, supra footnote 252, government doing this for “public purpose”.
265 Appeal of Perrin (1931), 305 Pa. 42, 156 A. 305.
the historical and policy reasons which prompted the creation of the immunity have ceased to be influential, the courts have commenced to circumscribe its operation. However, rather than leading a direct frontal attack on the immunity, the courts have used subterfuge and have created several judicial techniques whereby invocation of the immunity can be avoided. At the same time lip service is paid to the received doctrine. This paper has attempted to demonstrate that there were certain factors that courts weigh in deciding whether to rely on the immunity or one of the techniques for its avoidance. The immunity will tend to be invoked and recovery denied where a plaintiff is seeking to gain increased compensation by avoiding a statutory compensation scheme, where the defendant is a non-profit making operation, where the authority is by statute rather than by an inferior legislative enactment, where an injunction is sought, and where a particularly important industry is involved. On the other hand, courts will tend to avoid the immunity and impose nuisance or strict liability where the defendant is a profit-making organization, where the legislative authority is a by-law or governmental contract, where the defendant’s conduct was reprehensible and where loss could be easily avoided. Although the best solution to this problem is for legislatures to consider this aspect of tort liability when legislation is drafted, experience dictates that this will not be done. The judiciary, as always, is left to do its best to reconcile the conflicting interests. It would be helpful if in so doing they would refuse to rely on fictions and disclose the true basis of their decisions. If this is done one can prophesy that the future of the immunity will be shortlived.