Les Cahiers de droit

Legislative authority as a defense to tort liability

Allen Martin Linden

Volume 5, numéro 1, mars 1962

URI : https://id.erudit.org/iderudit/1004165ar

Aller au sommaire du numéro

Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

Découvrir la revue

Citer cet article

Linden, A. M. (1962). Legislative authority as a defense to tort liability. *Les Cahiers de droit*, *5*(1), 38–78.

TABLE OF CONTENTS

LEGISLATIUE AUTHORITY AS A DEFENSE TO TORT LIABILITY*

ALLEN MARTIN LINDEN,
Lecturer at Osgoode Hall Law School.

Chapter I :

INTRODUCTION

The marriage of the common law and statutory law has never been a blissful one. Historically, Anglo-American courts have resisted the encroachments of legislation on the symmetry of the common law (1). On the other hand, where it suited the courts' notions of policy, they have not hesitated to expand the scope of legislative intention beyond the fondest expectations of any legislature (2).

When the legislature has authorized some activity that results in damage to a legally recognized interest, the courts are placed in a difficult position. To the normally complex task of resolving the conflicting interests in a nuisance or strict liability case (3) is added another factor. The legislative intention, which always appears ambiguous, must be discovered. Seldom is it apparent whether the activity is intented to be carried on subject to private rights or whether it is to be exercised with impunity. The compromise reached, as would be expected, lies somewhere between these two extremes.

Several historical anomalies have left their imprint. The virtual immunity of the King from ordinary suit in feudal society continues to haunt us. The special position of the municipality has affected the principle. The concept of liability based on fault alone is interlaced into the problem.

It is said that this problem is one of administrative law rather than a tort one (4). It has been said that this is primarily a question of statutory interpretation (5). Clearly, the intelligent solution of the question requires a consideration of all these elements. Such meaningless categorization aids little, if at all. Labels, conveniently invoked, will

* *THESIS*

Submitted in partial satisfaction of the requirements for the degree of MASTER OF LAWS in THE SCHOOL OF LAW OF THE UNIVERSITY OF CALIFORNIA. — 1961.

only add to the difficulties. No magic formula will erase the complexities. An easy solution does not exist. Only a careful weighing of the numerous competing policies will result in a sensible answer.

Little light has been cast on the problem in legal articles (6). Treatises on tort law almost unanimously parrot the judicial language used in the cases, without any serious attempt at the rationalization of the results reached (7). Existing decisions have led to a "confusion of principles which is becoming serious (8)". This paper will attempt "to free our legal thought from the slavery of mocking phrases which defy analysis" (9).

The writer will show that the theory of legislative immunity from civil suit is founded on historical accidents and outmoded policies. The modern British and American decisions bear this out. The courts have consistently invented techniques with which they could avoid its application. But the real issues are seldom faced squarely. Juridical subterfuge is employed. Lip service is paid to the ancient doctrine while the actual deciding is done on the basis of unarticulated policy reasons. This paper will indicate what the courts are actually doing (10). Recitation of the dogma in the opinions will be avoided except for illustrative purposes. At the conclusion some suggestions will be offered, perhaps presumptuously, urging legislative action to end the morass. Having no illusions as to the likelihood of such aid being given, the writer will suggest a shift in judicial approach.

Chapter II :

THE BIRTH OF THE CONCEPT

A. *Historical Roots* i) *Fault Notion*

The immunity from liability for torts resulting from activities carried on under legislative authority originated in a fusion, or confusion, of several historical factors. Civil liability for torts has long been tied to the idea of culpability (1). Tort law developed out of the early criminal law. At one time persons convicted of the crime of trespass could be fined as well as forced to pay civil damages (2). The notion of the defendant as a wrongdoer, which was based on this background, persisted long after tort actions were separated from criminal prosecutions. One of the purposes of allowing the civil action was to dissuade the injured person from taking the law into his own hands and seeking revenge (3). The granting of a pecuniary payment had a salutary effect in soothing the plaintiff's ruffled feelings. Cries for vengeance were replaced by the arguments of counsel seeking damages for their clients. Although earlier liability was based on mere causation, by the end of the 19th century it was said that there could

be no liability without fault. (4) It has been suggested that the earlier liability for the direct causation of harm had moral or fault overtones as well (5).

The existence of some culpable act was thought to be necessary for recovery. If someone was merely acting in accordance with the dictates of the law, it was logically impossible to say that he was at fault when damage ensued (6). Since he was not violating any law, he could not be a wrongdoer. On the contrary, if he failed to act he might be criminally responsible. Thus, where legislative authority existed for some act which infringed private rights, the courts were unable to say that there was any fault. This appears to be one of the reasons for the growth of the immunity.

ii) *Demise of the Fault Concept*

The complexion of the law of tort has been drastically altered in the 20th century. Although courts continue to speak in terms of fault, moral fault has all but been abandoned as the only basis of tort liability (7). The modern law of tort stresses compensation rather than admonition. Losses are being shifted to superior risk-bearers in order to compensate the victims (8). The punishment of the defendant has been forgotten by and large. Defendants are now typically large public or private corporations which can easily spread the risk over a large segment of the population by increased prices or by the machinery of taxation. For lesser enterprisers liability insurance is widely available. The insurance company may thus play the role of loss distributor. The evolution of the service state has led people to expect much in the way of social insurance. They are re-imbursed by workmen's compensation statutes, unemployment insurance, social security legislation and by health insurance for financial losses suffered.

The evolution of tort law has reflected some of these changes in society, but seldom candidly. Moral fault is no longer the only basis of liability (9). Strict liability is increasing in prevalence and scope (10). Society is using new deterrents to prevent losses. Criminal statutes and inspections by insurance companies, who may cancel policies, encourage careful conduct. The fact that liability may flow from every loss caused should increase efforts to avoid losses rather than halt these efforts. Res ipsa loquitur is used profusely. The ambit of vicarious liability has been broadened. Juries assist in mollifying the rigors of a rigid law by extra-legally ignoring instructions and finding for the plaintiff wherever possible (11). Many of the old defenses have been wittled away to allow more frequent imposition of liability (12). As one might expect, the defense of statutory immunity is also being eroded, sometimes openly (13), but more frequently by stealth (14).

iii) *The King Can Do No Wrong*

The idea that the King could do no wrong has long been a part of the common law [15]. This was a matter of pure historical accident since there was no court available in which to sue the King in feudal society [16]. No feudal lord could be sued in his own court. The King, as the highest feudal lord, enjoyed the same protection in his courts. [17]. It was not until the breakdown of the manorial system that the King became identified with the state. As the concept of the divine right of kings came into being, the Sovereign became incapable of doing any wrong [18]. Strangely enough, this idea became part of the common law of the American colonies and was adopted in a modified form in the U.S. Constitution. It was the federal and state governments that were accorded the immunity rather than a non-existent Sovereign [19].

As the participation of government in everyday life expanded, the number of public servants increased. A less extensive immunity was given them [20]. Only if they acted arbitrarily and oppressively [21] or in excess of their jurisdiction [22] would they be held responsible. Somewhere public officials were lumped together with public and private corporations doing quasi-governmental tasks. The courts began to treat these different instruments of society in like fashion. [23] No liability would be imposed, in the absence of negligence, where the defendant was exercising a "duty imposed on him by the legistature, which he is bound to execute" [24]. 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 [25].

In the late 16th century Parliament began to overshadow the importance and pre-eminence of the King and the common law courts [26]. When Parliament authorized certain acts, the courts hesitated to treat as mere private individuals those agents chosen to do the work. Injunctions seem to have been issued almost as a matter of course in those days to halt any interference with private rights [27]. The courts were understandably reluctant to flout the will of Parliament by enjoining these authorized activities, even where damage to individuals would result [28]. To do so would be to interfere with the efficacy of Parliament. Thus democracy was preserved, paradoxically, 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 principle of immunity into the tissue of the common law [29].

iv) *Changed Position of the State*

No longer is the King identified with the state. The monolithic central government has swallowed up 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 the government as if it were a private individual in some cases (30). Little has been done however to place private companies engaged in authorized work in the same position as individuals. States spend billions of dollars today fulfilling their governmental obligations. Much of the work is done by private corporations under contract with the government agencies that dominate the land. Many of these contracts are authorited by legislation, municipal ordinance or departmental regulation. The scope of the problem has expended, but legislative interest has failed to grow correspondingly. Judicial creativity is largely lacking (31). Governments and their typical contractors can well afford to re-imburse individuals for incursions on their legally recognized rights. These institutions should bear the losses in the first instance, and replenish their funds from those benefiting by the enterprise.

B. *THE EARLY RULE*

The rule was first enunciated in its present form in the case of VAUGHAN v TAFF VALE RAILWAY COMPANY (32). When 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." (33)

The court relied heavily on R. v PEASE (34), which was a criminal prosecution for public nuisance. Perhaps in these circumstances statutory sanction was properly invoked as a defense. However, the parties, issues and policies in a civil case are quite different (35). The court was not forced by STARE DECISIS to legalize this infringement of private rights. This decision came before modern strict liability had developed. The famous case of RYLANDS v FLETCHER (36) had not yet been decided. Had the VAUGHAN case been decided a few years later, its result might have been different. In addition, if the immunity is to be used, it should legalize all types of tort liability, or none at all. It is inconsistant to apply it to nuisance and strict liability cases while refusing to invoke it where negligent conduct is involved.

Nevertheless, in the later cases the principle has entrenched itself as a defense to nuisance (37) as well as strict liability cases (38). It has been applied to deny recovery where a nuisance due to vibrations was caused by an authorized locomotive, (39) where a mine was flooded through a sanctioned canal (40), and where land was used for rifle practice (41). A railway keeping cattle close to a home (42), and a tramway company using wires so as to interfere with a telephone company's electric current (43) were not enjoined from carrying on. Part of this later development might well be attributed to judicial reaction against a wide use of the strict liability rubric.

C. *POLICY CONSIDERATIONS*

i) *Developmental*

In addition to the historical explanations, there were valid policy reasons underlying the creation of the immunity. Some of these policy rationales have retained their validity, but most of them have become empty shells. The courts were anxious to promote the growth of an industrial society. New and exciting ventures were encouraged (44). The courts refrained from saddling infant industries with judgments that might lead to bankruptcy. Nothing was done to dampen the aggressive spirit of the time. Also, a distrust for Parliament and the courts might result if liability was found when the enterprisers were doing what they were authorized to do in the absence of negligence.

The vibrant industrial society we have to-day is some evidence that this policy was wise. However there is no longer a pressing need to nurture infant industries (45). A few giant corporations control much of the economies of the U.K. and the U.S. to day (46). The railways, canals, and sewers are largely built. Those that remain to be constructed will be undertaken by these corporate giants or by the various arms of government in large mesure. These entrepreneurs can afford to pay for damage caused and then distribute the loss by higher rates or taxes.

ii) *Freedom for Public Servants*

The courts were anxious to promote the policy of having fearless public servants who would act without fear of civil liability for the consequences of their acts (47). In the performance of public duties individual interests would be damaged occasionally. If personal action were tolerated, good men might be deterred from entering the public service. If they did enter, their actions might be unduly confined. Thus they were granted an immunity except where they acted in excess of authority or oppressively and arbitrarily (48).

It matters little to the victim of legislatively authorized damage that the action was authorised. Individuals must be compensated for their losses suffered in behalf of the public interest. Public servants may be controlled by their superiors without the necessity of the deterrent of civil liability.

iii) *Salus Populi Suprema Lex*

Few men walk the earth who would challenge the validity of the maxim, "The welfare of the people is the supreme law"(49). The courts have utilized this ancient phrase to deny liability where the public good requires an act to be done which results in harm to an individual (50). They suggest that private interests must bend to the public good derived from the activity (51).

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. These losses are merely another cost item. "It is not for the judiciary to permit the doctrine of Utilitarianism to be used as a makeweight in the scales of justice" (52).

iv) *Multiplicity of Actions*

Fear of an infinity of actions has been utilized whenever courts have wished to rationalize a refusal to grant judgment (53). It is also argued that these many actions will keep the administrators away from their work. Thus the public interest will suffer.

This chop logic (54) is a meagre basis for the denial of compensation to victims. When injuries are multiplied, so must actions be multiplied (55). Society must bear the delay with fortitude as it can muster. Officials need not leave their work if some just process for assessment of damages publicly caused is instituted.

v) *Impoverished Municipalities*

Municipalities, which were notoriously short of funds in the early days (56), were given much of the responsibility for 19th century expansion. They built roads, sewers, and power plants. If they were to be liable for damage caused, they might be bankrupted and the projects doomed (57). Although perhaps wise in the early days, this is but a paltry justification for denying compensation to-day. A slightly higher incidence of taxes could easily cover the losses.

Chapter III:

THE EROSION OF THE RULE IN ENGLAND

A. *DEVICES USED*

Although the dogma used by the courts has changed only slightly, there has been a revolutionary change in the treatment of the immunity. The courts continue to cling to the idea that Parliament may legalize any harm caused by an authorized activity (1), but seldom is it invoked save for copious OBITER references. Throughout the annals of the history of the common law, harsh and unjust results have been avoided by a judicious utilization of fictions. Judges have often voiced the old doctrine while deciding cases sensibly, despite it. These are the "fictions and other surreptitious devices which are com-

monly pressed into service in the transitional stages of legal development to pave the way to a franker recognition of the altered concepts" (2). The Commonwealth courts have not been averse to using the trusted phrases in such a way as to largely eclipse the immunity. Reflecting the altered social policies of the 20th century the rule has fallen into disrepute. But unarticulated reasons for judgment make accurate prediction well nigh impossible. It may tend to increase disrespect for the law, if judges say one thing while doing another. Worship of ancient phrases while while refusing to examine the policy issues may lead to a stultification of the growth of the law.

B. *THE MYTH OF LEGISLATIVE INTENTION*

Notorius is the way courts are able to create legislative policy where none exists, and to blink at it where it appears to exist (3). It is therefore not surprising to find this fascinating exercise used in this context. The issue is said to be resolved into determining the "intention of the legislature in any particular Act (as) a question of construction of the Act" (4). This determination of the intention and contemplation of the legislature has become a favored device for avoiding the invocation of the immunity. Many difficulties are presented by this, however. Seldom, if ever, does the legislature consider the question of civil liability arising from the operations it authorizes. Even if the legislature were alert to consider the problem, a collective intention would undoubtedly be lacking at debate's end. In any event, the refusal of Commonwealth courts to examine the legislative debates to aid their search for the intention of the enacting body, precludes any effective solution.

One factor which the courts have used in finding this elusive intention is the presence or absence of compensation provisions in the statute. Where there is no compensation given, it may afford a reason for thinking that the act should be done only if it could be done without injury (5), although no presumption is said to be established (6).

C. *SCOPE OF THE AUTHORIZATION*

i) *Strict Construction*

One of the most widely used devices invoked by courts wishing to avoid the immunity is the strict construction of what was authorized by the legislature (7). This tactic is in accord with the general rule of statutory construction which is applied whenever the legislature interferes with private rights (8). Grants of legislative authority are not meant to be "charters to commit torts"(9). No "carte blanche" to create nuisances is given (10).

Where private rights are invaded by an authorized act, liability will follow in the same manner as with a private individual, unless

a contrary intention is clearly shown (11). There are cases where liability for certain harms caused has been removed expressly by the legislature in question (12). There are other cases where the power given is clearly to be exercised subject to any liability created for nuisance (13). Usually, however, there is no express grant or express removal of the right to sue. The courts are left to struggle with the problem as best they can.

This tool has been utilized to allow recovery where sparks from a locomotive set a haystack on fire (14), where sewage from an authorized building created a nuisance (15), and where a sewer (16) and a smallpox hospital created nuisances (17). So too, where a steamroller crushed underground pipes (18), where horse stables (19) and where snow cleared off tramway tracks caused nuisances was liability imposed (20). A diverted stream causing a flood (21), high tension wires causing a fire (22), poisonous fumes from a chimney (23) and the operation of bulldozers so as to frighten mink in the whelping season (24) imported liability.

ii) *Implied Authority Narrowed*

Since seldom is express authority to cause harm given, the courts have said that implied authority would absolve the defendant of civil responsibility (25). In recent years the courts have confined the ambit of permissible implication. Only where the damage is a necessary or inevitable result of the authorized act will the legislative intention to legalize the harm be implied (26). 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 feasability" (27). 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 (28).

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 (29), where a fire resulted from locomotive sparks (30), and where shelters blocked the access to certain land (31).

iii) *Permissive Power*

Another convenient weapon in the court's arsenal is the finding that the statute is permissive rather than imperative (32). The statute is examined to see the form of the authorization. If the court finds that the wording is permissive, it will conclude that there was no intention to legalize any damage (33). This formula reduces a complex policy question to a robot reaction which is triggered by words that may have been used by mere chance, since this issue is seldom, if ever, considered by the draftsman. This is not a very sound base for wise decisions, unless the tool is merely used to conceal the true basis of decision. If this is what is wanted, it is a salutary device.

This method has been employed to impose liability for harm caused by a small pox hospital (34), a slide caused by a stream diversion (35), a polluted river (36), a fumigator, (37) and a water main that burst (38).

Salmond has urged a variation of this formula (39). The statute must be scanned to see if the authority is "absolute" or "conditional". If it is found to be absolute, no liability will ensue; if it is conditional, it is concluded that the legislature intended the act to be done only if it could be done without harming anyone. This casts little light on the matter. It merely restates the issue with two new labels (40).

iv) *Location not Authorized*

Another convenient evasive tactic used by courts is to say that although the activity may have been authorized, the particular site or location of its operation has not been sanctioned. Therefore, the courts are able to say that immunity is not to be awarded when damage results because of the choice of the location where the activity is to be carried on.

A small pox hospital in a residential district (41), a stable for the horses of a tramway (42), and a public urinal have created liability since the sites chosen for them were not prescribed by the legislation (43).

v) *Manner not Authorized*

Even more common is the mechanism of denying immunity where the manner of operation or erection of the enterprise has not been authorized (44). Thus liability was found where a steamroller damaged underground pipes (45), where creosoted wood blocks were used in paving a road (46), where a flood resulted from highway construction (47), where a river was polluted (48), where blasting damaged a dwelling (49), and where a tramcar escaped from a defective tramway (50).

D. *ONUS SHIFTED TO DEFENDANT*

Shifting the onus of proof to the defendant has always been a method of extending the incidence of liability (51). Although it was uncertain or non-existent as a tool in the earlier cases (52), it has been accepted in England (53) and Canada (54) by the recent decisions.

The defendant must prove the absence of negligence, as defined in a specialized sense (55). This is no small tactical advantage to the prospective plaintiff. The presence or absence of negligence is often precarious. Where this state of suspension exists, the court must resolve it in favor of the injured party. This important shift in emphasis can only indicate the growing hostility toward the defense of legislative immunity.

E. *DEFINITION OF NEGLIGENCE*

The courts have further indicated their antipathy toward the immunity by the way they have defined the term negligence. The ordinary meaning of the word is the absence of reasonable care in the circumstances having regard to the gravity of the harm, its likelihood of transpiring and the utility of the defendant's conduct. It has been admitted that the term negligence is not appropriate (56). It has been used in a specialized sense (57). If "the damage could be prevented it is, within this rule, 'negligence' not to make such a reasonable exercise of their powers" (58). 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" (59). Thus there is an onerous responsibility on the defendant to adduce expert evidence that will show that no other method of operation was available whereby the damage could have been avoided. This is a difficult task, since other alternatives exist usually, but are discarded because they are more costly.

F. *PRESENCE OF NEGLIGENCE*

The court may purport to accept the rule as governing, but then proceed to find that negligence was present or allow a jury (60) to so find. Plaintiffs counsel are all aware of the importance of having the case submitted to the jury, who are in fact, though not in law, at liberty to ignore the instructions and to award damages. This process has been recognized as a way of mollifying the rigor of the law while retaining a superficial aura of stability (61).

Negligence has been found where buoys were badly placed (62), where a reservoir was badly maintained (63), and where gas escaped because of negligent excavation (64). Where there was negligent maintenance of a gas pipe allowing escape (65), where horses ran into a tramcar which lacked headlights (66) and where road grading was poorly done (67) negligence has been said to exist. One case went so far as to impose responsibility where the negligence that existed was that of an independent contractor hired by the defendant, and not the negligence of the defendant at all (68). There are cases where the court has refused to find that any negligence was present (69).

G. *TECHNICALITIES IN THE AUTHORIZING STATUTE*

A few cases exist where reaction toward the immunity has manifested itself in the invalidation of the municipal legislation purporting to legalize the harm. If the intention of the legislature was in fact crucial, the defendant should be immune even where some technical defect existed, since this in no way affects the presence of the legislative intention.

A municipality was said to be exceeding its legislative power in allowing a highway obstruction (70). In another case a municipal by-law was not passed to authorize the building of a culvert, but only a municipal resolution. It was held that in the absence of a properly passed by-law the immunity could not be invoked (71).

Chapter IV :

DECAY OF IMMUNITY IN THE UNITED STATES

A. *GENERAL*

The courts of the United States have almost unanimously seen fit to adopt as law the errors of their counterparts in England. Statements abound in the U.S. decisions which assert the vitality of the immunity where legislative authorization has been given in nuisance actions (1) and in strict liability situations in the absence of negligence (2). There were some early cases which seemed to sanction the infliction of what was called "consequential injury", if it was in connection with an authorized activity 3). These cases seem to have been largely abandoned because of the change in circumstances in the U.S. to-day. The courts seem to have confused the English cases they were purporting to follow. Somehow, they failed to weigh the importance of the historical and constitutional differences between England and the U.S. with sufficient care.

Most of the decisions since that time are concerned with devices by which the immunity has been whittled away. Many of the tools used by the English courts have found favor with the American judges. Some new ones have been discovered, particularly constitutional devices. The writer will attempt to summarize the various techniques used by the U.S. courts to overcome the unjust results achieved by a strict adherence to the concept of immunity.

B. *CONSTITUTIONAL TECHNIQUES*

i) *Confusion with the British*

The constitutions of the U.S. and of the several states have been invoked to assist the courts in giving compensation to individuals whose rights have been infringed by operations sanctioned by legislation. It has been pointed out that although the British Parliament is supreme, and thus may legalize any infringement of individual rights (4), the U.S. and the several states are limited in their actions by constitutions (5). Some confusion has resulted from a failure of U.S. courts to recognize this difference fully (6). One interesting manifestation of this difference is that a state may cons-

titutionally legalize a public nuisance (7) or foreclose its own right to sue, but it may not legalize a private nuisance so as to interfere with private rights (8).

ii) Taking

The constitution of the U.S. and many of the state constitutions prohibit the taking of private property for public purposes without compensation (9). The determination as to what will amount to a taking at law has plagued the courts. The weight of authority seems to require that some substantial physical injury to the property be suffered (10), and not merely an encroachment on the use of the property (11). Some courts have required an actual taking of the title of the land (12). whereas on the other extreme there are courts which allow recovery for any "deprivation of the full, unimpaired use thereof" (13). The rule generally accepted is that the "legislature may authorize small nuisances without compensation but not great ones" (14).

A taking has been held to occur where there was considerable damage from an explosion (15), smoke and soot from a roundhouse (16), pollution of a stream (17). a flood from manholes (18), noise, dust and stench from a terminal yard (19), a romoval of a wharf (20), flooding from a dam (21), and from a diverted stream (22).

No taking has been held to have occurred where there were cinders and obstruction caused by a railway (23), where sewage was deposited on the plaintiff's land, (24) and where there was a strench exuded from a sewage disposal plant (25).

Because of the constitutional difficulties, the courts have often evaded the question. This has been done by construing the statute so that no taking was authorized by the legislature (26).

iii) *Take or Damage*

Because of the narrow interpretation of the above constitutional clauses, nearly one-half of the number of states have adopted constitutional amendments which prohibit the taking or damaging of property for public purposes without compensation given therefor (27). Under this type of guarantee, the courts are free to interpret the power of the states to legalize harm in a much more restricted manner. The rule fashioned by the courts requires more than a mere annoyance or personal inconvenience before damage will be found (28). Some cases indicate that there must be some interference with the property itself (29), so as to amount to an actionable wrong at common law (30). Gradually, however, the majority of courts have broadened the still narrow interpretation of damage clauses. Very often the injury caused by state activity was not actionable at common law. Thus many people were still left unjustly uncompensated. Compensation will now be allowed where there has been some physical disturbance of a right, which the owner of land enjoys in connection with his property and

which gives it additional value; also by reason of such disturbance he must have suffered special damage beyond that suffered by the general public (31). It has been said that the purpose of the broader provision has not been to enlarge the substantive law to allow recovery for mere trifles (32). However, courts are more able to strike down supposedly authorized incursions on private rights than they were with the narrower constitutional clause.

Under this clause liability has been found where there was vibration and soot from a railway (33) and from an electrical plant (34), stench, smoke and noise from a roundhouse (35), smell and noise from a stockyard (36), pollution of a river (37) and where there was interference from a garbage incinerator (38). But no damage occurred, according to the court at least, where there was mere noise (39). The court erroneously reasoned that there had been no interference with the land itself, but only an interference with the people on the land.

iv) *Police Power*

The usual effect of unconstitutionality is the rendering invalid ing its police power where serious interferences with land are authorized by unreasonable laws (40). The state may, however, authorize any interference or taking of land if compensation is provided (41).

v) *Effect if Authorization Invalid*

The usal effect of unconstitutionality is the rendering invalid of the authorization. Thus, any possibility of using it as a defense in a tort action is removed (42). Although there is a dictum that the only remedy may be to apply to the authorizing body for compensation (43), 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 (44).

C. *DETERMINATION OF WHAT WAS AUTHORIZED*

i) *Strict Construction*

As in England, the U.S. courts have been quick to interpret the statutory authorization so as to deny a shield from civil liability wherever possible. The statement most often quoted indicating that the authorization is strictly construed is from the case of

COGSWELL v NEW YORK, N.H. & H.R. RAILWAY COMPANY (45),

> "Statutory sanction 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 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" (46).

In some states the codes or statutory law provide that legislative authority can only be a defense if it is express, or if there is the plainest implication (47), or if the harm is a necessary result of the powers granted (48). In some cases the courts have said that there is a presumption that nothing unlawful has been authorized (49). "Very clear evidence" is required to decide that the intention of the legislature was to authorize a nuisance (50). This theory is in accord with the general principles of statutory construction used whenever private rights are tempered with by statute (51). It has also been suggested that from a "general grant of authority" the legislature cannot be presumed to sanction a private nuisance (52).

ii) *Implied Condition not to Injure*

Another available technique for halting uncompensated interference with private rights is the creation of an implied condition or limitation (53). When some activity is sanctioned by the legislature, there is an implied condition that no invasion of private rights is thereby authorized (54). Some courts have stated that grants of licenses do not give the recipients the privilege of disregarding private rights (55). Although also a fiction, this is an effective tool at the disposal of the judiciary to aid it to combat incursions on individual interests under the cloak of legislative authorization.

The use of the word permissive, which is so popular in the English decisions, has crept into the repertoire of devices of the American judiciary as well. Although it has been used on occasion, it has not been very widely invoked (56). It is suggested that it is no more helpful in solving the difficult questions involved in the U.S. than it is elsewhere.

iii) *Manner of Operation not Authorized*

A common way for the court to impose liability is to hold that although the activity may have been authorized generally, the manner inwhich 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 (57), a pole supporting a trolley wire (58), a gas manufacturing plant (59), and an indecently operated concert hall (60). Liability was also imposed for a dam holding polluted water (61), a smoke stack (62), a wagon which blocked the street (63), a cannery which polluted a stream (64), and where blasting operations caused damage (65). Thus, as in England, this tool has seen much use.

iv) *Location not Authorized*

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. This method is often used to refuse the application of the immunity. Authority has been said to be lacking because of the site chosen where a roundhouse was located near a private residence (66), where a leper was billeted in a home in a residential district (67), and where large coalbins were built near a home (68).

D. *PRESENCE OF NEGLIGENCE*

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 immunity rule is adopted in theory, but the court holds that this method of operation is within the latter part of the rule, and not entitled to protection.

There does not seem to be the same dramatic distortion of the meaning of the term negligence in the U.S. as there is in England. The negligence question is 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 (69). This varies from the British approach where the court finds negligence if it concludes that the defendant could avoid the harm by alternative conduct (70). One reason for this may be that in the U.S. the various constitutions were available as tools to take the place of these tactics. It is clear that the more doing of the exact thing authorized cannot be negligence (71).

Negligence in the manner of operation or construction has been held to be present where sewage caused damage (72), where a railway blocked access to a warehouse (73), where a whistle frightened a horse which injured a child (74), where airports were improperly operated (75), and where a boiler factory (76) and a freight terminal (77) caused private nuisances. A structure, properly built ab initio, may later become a nuisance if improperly maintained (78).

So too, negligence may be found where the site of the operation was improperly chosen (79).

E. *OTHER METHODS*

The shifting of the onus of proof to the defendant has not found favor with the majority of American courts. There are hints in some cases that the onus of proof remains on the plaintiff (80). In other cases, the onus appears to be on the defendant, as in England (81).

Technical objections to the validity of municipal authorizations are sometimes utilized to allow recovery (82).

F. *MUNICIPAL AUTHORIZATION*

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 licenses have been held consistently not to grant immunity in actions for damages (83).

When a municipality merely tolerates a nuisance and fails to take action to have it abated, a fortiori, this does not legalize it (84).

Zoning ordinances permitting certain uses of land give no immunity when injury occurs from those uses, since they are held to be merely permissive legislation (85). The enterprisers, although they cannot be held criminally responsible, may still be held civilly responsible for private harm caused (86).

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" (87).

Chapter V :

THE TRUE BASES OF DECISION

A. *Statute only One Factor of Many*

The immunity has fallen into disfavor. It has been debilitated consistently both in England and America in response to the changing conditions and attitudes of 20th century society. Although the courts overtly continue to accept the vitality of the immunity, the cases show a steady undermining of it. Its invocation is avoided wherever possible. It is submitted that whatever language is used in the cases, the courts are really only considering the legislative authority as one of the many factors to be weighed in determining the existence of a public or private nuisance or a strict liability situation (1). In fact, it is not even the most important factor placed in the scale. Among the more important factors considered are the absence of compensation provisions, the type of remedy sought, the severity of the damage, the conduct of the defendant, whether the harm can be easily avoided, the nature of the defendant, the nature of the authorization and the public interest. The process used is no different to the everyday balancing of competing interests encountered in all tort actions. The court decides the case on some key fact or policy consideration and then uses one of the available techniques to rationalize its avoidance of the immunity. But never yet has a court candidly admitted that it is deciding on this basis. Often the court does not mention what it conceives to be the crucial fact or policy issue in the case. Frequently, however, one may get

a clue to what the court is doing from the specific facts or issues that it enumerates and dwells upon in the reasons for judgment.

In order to be able to forecast results of cases intelligently counsel must assess the factors actually considered by the courts in deciding those cases. This has not been made easy by the lack of frankness displayed in most of the decisions. When counsel has found what looks like a factor which will sway the court, he must, in arguing the case, make it known to the court. Then the various techniques must be placed at the disposal of the court. It will probably decide the case overtly in accordance with the current dogma, while basing its real decision on hidden, unexpressed factors. The various factors that seem to have been influential with the courts will now be examined.

B. *Compensation in the Statute*

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 (2), where it appears that no compensation will be obtained for a substantial injury, the court will strain to award damages (3), 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 (4). This does not seem unreasonable. Although persons should be compensated for government authorized harm, they can be expected to use the process supplied by the legislature to obtain this compensation.

When it is found that the plaintiff will be entirely remediless if the court fails to avoid the invocation of the immunity, counsel will find himself more likely to be on the winning side of the case. If, however, counsel is merely using the ordinary court in an attempt to get a possibly higher award of damages where another route to recovery exists, he should be prepared for defeat.

C. *Remedy Sought*

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 (5). 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 more likely to be receptive to the idea of civil liability (6). This factor is much less important in the U.S. since the attitudes 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 sobre 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 (7). 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 (8). In the Commonwealth, on the other hand, injunctions generally follow as a matter of course where nuisances are found and threaten to continue (9). 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" (10). But injunctions are granted more commonly in the Commonwealth than in the U.S. 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 (11) 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 (12). The English courts could learn much from their American breathren in this field. The policy in favor of encouraging industry might be a valid reason to deny an injunction that would tend to destroy an industry. This compromise of allowing damages but not injunctions is worth serious consideration by English courts.

D. *Severity of the Damage*

The cases tend to find liability and ignore the authorizing legislation where the damage caused is of a serious nature (13). 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 (14), where there was a serious explosion (15), where a haystack was set on fire by a spark (16), where steamrollers damaged underground pipes (17), where a landslide resulted from a stream diversion (18), where a flood was caused by a reservoir (19), and where a fumigator caused a death (20) liability was found. But where a slight obstruction to a right of access resulted from bus shelters (21), where mere vibrations were caused by a railway (22) and where no damage could be shown because of a small pox hospital (23) no liability was said to exist.

The American cases follow a similar pattern to that of the Commonwealth. Where "serious injury" was inflicted by a railway roundhouse (24) and by a terminal yard (25), and where a church could not possibly be occupied because of a "constant disturbance" by a railway (26), 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 (27), where there was dirt and noise from a factory (28), where only a slight interference with church services was caused by a railway (29), where the presence of a small pox hospital lowered the market value of an empty lot slightly (30) and where a telephone pole merely obstructed the sidewalk (31). The general rule seems to be that the legislature may authorize small nuisances but not large ones (32).

E. *Conduct of the Defendant*

The court will examine the conduct of the defendant to see whether he has 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" (33) or a "high hand" (34) is demonstrated or where there has been an "outrageous use of land," (35) 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 favorably. Thus, where the defendant took pains to build a high fence to isolate its small pox patients in deference to plaintiff's interests, the court refused to aid the latter (36). So too, where the defendant put up double windows to reduce the noise caused by his bowling alley, the plaintiff was denied recovery (37). In another case where the damage seemed largely due to the plaintiff's own acts, the court refused to evade the immunity rule (38).

F. *Harm Easily Avoidable*

Where the defendant could easily avoid the harm caused the courts tend to give relief (39). 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" (40). The cost to a factory of a smoke arrester is not an "extra-ordinary price" to pay for the plaintiff's comfort (41). A public convenience that could for little extra cost be built underground was enjoined (42). The method of operation of a quarry could be easily changed (43). Noxious water could be sent to a nearby river without damaging the crops of the plaintiff (44). Stables could have been located elsewhere but in the defendants' "attempt to economise they have gone too far," and liability was imposed (45).

Liability was imposed where roads could have been repaired in the absence of steamrollers (46), and where high tension wires could have been grounded at intervals to avoid fires caused when they broke for

lack of proper grounding (47). 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 (48). The mere inspection of gas pipes was not too much to ask of a defendant to avoid harm to others (49).

The courts have denied liability where a whole sewer system would have to be rebuilt (50), where a coke oven would be put out of business (51) and where a railway could not operate at all without some vibrations, noise and soot (52).

G. *Nature of the Defendant*

If the defandant 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 government or a municipality, the courts are much less likely to penalise it by making it pay for damage since it is not acting for its "own purposes" (53).

It is difficult to complain about such a preference, if a preference must be made at all. It would be more consistent with the modern society to hold all enterprisers responsible in the same way. However, the courts have shown this hostility toward the private corporation 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" (54).

Thus liability was imposed on a gas company, (55) a cannery, (56) a quarry, (57) a railway, (58) a mine (59) a canal company, (60) all private corporations motivated by the quest for profit.

No liability was imposed where the U. S. Government itself was the cause of harm (61) nor where municipalities were the perpetrators of various injuries (62).

H. *Nature of the Authorization*

There may be a greater respect paid to activities authorized by statute directly (63) than there is for those authorized more indirectly. Thus, where there is mere authorization by a board (64) or by a contract, (65) liability is more probable. Municipal authorization is held in much lower esteem than legislative authorization in the U. S. (66) whereas in the Commonwealth it has been accorded slightly more weight (67).

I. *Public Interest*

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 (68). But if the benefit of these activities goes to the public generally, it is unfair to force one individual to bear the entire loss. If the public benefits it should bear the loss (69).

Nevertheless where a flood was caused by a sewer (70), where a coke oven caused a nuisance in a good industrial area (71), where a gas pipe exploded (72) and where blasting damaged a private home (73) no recovery was had since the public interest would suffer if these industries were discouraged. But, 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". (74)

Chapter VI :

CONCLUSION

A. *Legislative Recommendations*

Only a complete legislative overhaul can sort out the confusion now in existence. Legislatures must be more astute to state their own public policies. To abdicate the entire policy-making role to the judiciary is to invite chaos. It is strange that, in view of the recent statutes, private corporations acting with legislative authority may have greater protection from liability than the body authorizing the activity. Whenever statutory powers are granted they should be made expressly subject to any common law actions that would be available if the authorized body were acting as a private individual. (1) This provision should be made to apply to public as well as private institutions. This would merely be an extension to the growing modern legislative policy which permits actions against some governments as if they were individuals. (2) This would also correspond to the modern shifts in the law of torts which tend to make enterprisers liable for the risks created in the pursuit of their business interests.

As part of a wholesale legislative program, a special statute could be divised to control all these situations where authorized acts run afoul of private rights. The legislatures may prefer to funnel all these claims through some administrative board or arbitration process. This would halt the over-burdening of the courts which, overtly at least, seemed to bother many of the judges. This would then more closely parallel the European administrative process. (3) The legislatures may wish to set certain tests or standards for determining the amount of compensation.

It is unwise for legislatures to leave gaping blanks in their statutes when the courts are so obviously groping in the maze of words

for some formula by which they can award or deny damages with some logical consistency. Public policy should be determined and then clearly stated. The courts should not be forced to guess at the legislative policy without guidance.

The legislatures may deem it advisable to remove from the courts the power to halt legislatively authorized activity by injunction. If this were done, however, compensation should be clearly provided. This suggestion has the merit of allowing the activity to continue while insuring that private persons will be compensated for their sacrifices in the name of the "greatest good of the greatest number."

When the legislative action is undertaken, whether a complete program or the usal patchwork, the courts should reinforce the policy decision made. If compensation is provided for, it should be broadly construed. This would insure that all persons who are damaged by the operation or the erection of the enterprise would be compensated, where they would be entitled to it in the absence of legislative sanction. Where no special immunity is clearly granted to the activity and no legislative machinery for compensation is provided, the courts should be prepared to entertain actions for injuries inflicted.

B. *Recommendations to the Judiciary*

In the absence of any legislative assistance, which only a naive optimist could expect, the courts must take the lead in clearing up the confusion. They must recognize that the archaic policy rationales have lost most of their validity. The historical foundation of the immunity has long since passed away. A new society and new policies are in existence. Some courts have recognized these changes. The losses caused by an operation should be borne by the corporation as part of its ordinary costs. (4) "Why should the final burden of such damage . . . rest upon him and not upon those causing it and through them upon those benefiting by or interested in the undertaking . . . ?" (5) A concession is merely granted to the undertakers to carry on for their profit, but they should have to bear the inevitable losses arising from it. (6) Other courts should be ready to cast aside the hollow phrases still used and follow the lead of these few courts.

There may be judges who are not yet prepared to abandon these time-worn phrases. For a time, the best alternative would be to treat the grant of power as subject to an implied condition that no private rights may be invaded without compensation. (7) The U.S. courts could very easily utilize the constitutions more liberally to make unconstitutional any grant of power that interferes with legally recognized interests. (8) All the other weapons are, of course, available too. Fortunately, the courts have by and large proven themselves wiser than the law.

Subterfuge should be avoided, if possible, since prediction is made much more difficult. Hypocrisy in the law is no more admirable than it is in other spheres of life. The language of the law should mirror the policies underlying it.

Where legistatures have given an indication that the powers are given subject to common law rights the courts should hasten to fortify the legislative intention by granting compensation wherever an ordinary defendant would be subject to liability. Where a statutory route to compensation other than the ordinary courts is supplied, the courts should force the claimant to use that method. Mercenary plaintiffs should be kept out of the court if their only motives are the securing of higher damage awards by juries. (9) A rationale similar to the administrative law doctrine of "exhaustion" may be introduced for this purpose, since this problem does have administrative law overtones. (10)

English courts should consider its injunction-granting philosophy in the light of the American decisions. (11) Perhaps if the court fashioned a rule which would deny an injunction to someone seeking to halt a legislatively authorized enterprise, but which would allow damages, the best balance between the warring policies would be struck.

Courageous courts should reject the devices now in use and overthrow the immunity altogether. (12) Legislative authority implies no grant of immunity at all. It merely gives the legal power to carry on the activity. All such powers must be exercised in strict compliance with private rights. The legislation should merely be one of the factors considered in deciding whether there is a nuisance, or strict liability situation. Perhaps some slight noise or smoke should be suffered by the few for the benefit of the many. But once a nuisance is found to exist after a sober analysis of the competing policies, private persons should be compensated without reference to some relic of a by-gone age. This is the inevitable path of the common law of legislative immunity.

FOOTNOTES

Introduction

(1) See Blackstone: Commentaries on the Laws of England (1765). He felt that the "magestic simplicity" of the common law was being destroyed by "innovations" made by the "rash and inexperienced workmen" of Parliament. See Dr. Bonham's case 8 Coke Rep. 118, (1610).

(2) The liberal construction rule originated in Heydon's case 3 Coke Rep. 7. See Morris: Relation of Criminal Statutes to Tort Liability 46 Harv. L. Rev. 453 (1933); Thayer: Public Wrong and Private Action (1924) 27 Harv. L. Rev. 317; Lowndes: Civil Liability Created by Criminal Legislation 16 Minn. L. Rev. 361, (1932).

(3) The literature on strict liability is voluminous. Generally in favor of it are Bohlen: Rule in Rylands v Fletcher 59 U of Penn. L. Rev. 298, 373, 423 (1911); Gregory: Trespass to Negligence to Absolute Liability 37 Va. L. Rev. 359 (1951); Friedmann: Law in a Changing Society (1959) Chapter 5: Pound: The Problem of the Exploding Bottle 40 Boston L. Rev. 167 (1960); Ehrenzweig: Negligence Without Fault (1951); Fleming: Torts (1957) Chapter 13; Harper and James: Torts (1956) Chapter 13. Generally opposed to the idea are Thayer: Liability Without Fault 29 Harv. L. Rev. 801 (1916): J. Smith: Tort and Absolute Liability 30 Harv. L. Rev. 231, 319, 409 (1917): G. H. L. Fridman: Rise and Fall of Rylands v Fletcher 34 Can. B. Rev. 810 (1956); Tylor: Restriction of Strict Liability 10 Mod. L. Rev. 39 (1947). V. C. MacDonald: Rylands v Fletcher and its Limitations 1 Can. B. Rev. 140 (1923).

(4) See Freidmann: Statutory Powers and Legislative Duties of Local Authorities 8 Mod. L. Rev. 31 (1945); Note 52 Colum. L. Rev. 781.

(5) See Charlesworth: Negligence (3rd Ed. 1956) at 268 "The exact legal position depends on the construction of the statute in question".

(5) See also Finlay L.J. in Edginton v Swindon Corporation (1939) 1 K.B. 86 at 89.

(6) Friedmann OP. CIT. SUPRA note 4 and Note there cited.

(7) Winfield: Torts (5th Ed. 1950) at 59, 498, and 604 and ff.
Salmond: Torts (12th Ed. 1957) Sect. 165 at 573-574, sect. 15 at 151-6;
Clerk & Lindsell: Torts (11th Ed. 1954) sect. 119 at 79;
Charlesworth: Negligence (3rd Ed. 1956) sect. 430 at 268 & ff.
Pollock: Torts (15th Ed. 1951) at 93; Fleming: Torts (1957) at 329, 419;
Harper & James: Torts (1956) at 811; Prosser: Torts (2nd Ed. 1955) at 214.

(8) Friedmann OP. CIT. SUPRA note 4 at 72.

(9) See Leon Green: Rationale of Proximate Cause (1927) at 199.

(10) See Llewellyn: The Bramble Bush (1930). This writer is probably the present day leader of the American realist movement. See also Frank: Law and the Modern Mind, (1930).

CHAPTER II

(1) See Ames: Law and Morals 22 Harv. L. Rev. 97 (1908); Wigmore: Responsibility for Tortious Acts 7 Harv. L. Rev. 315, 383, 441 (1894); Ehrenzweig: A Psychoanalysis of Negligence 47 Northwestern L.J. 855; Fifoot: History and Source of Common Law Chapter 3.

(2) Ibid.

(3) See Bohlen: Rule in Rylands v. Fletcher, 59 U. of Penn. L. Rev. at 450 footnote 145; Fleming: Torts at 9. in another context.

(4) Ehrenzweig: OP. CIT. SUPRA note 1 at 856.

(5) Ibid. See also Isaacs: Fault and Liability, 31 Harv. L. Rev. 954, 966, (1918) Selected Essays on the Law of Torts (1924) at 235 where the author shows a conflict between Holmes, and Wigmore and Ames. Holmes indicated that he thought fault was the earliest base of liability. Wigmore and Ames believed that the law developed from strict liability to fault. The author constructs a type of "pendulum theory" of development.

(6) Mersey Docks v. Gibbs, (1866), L.R. 1 H.L. 93 at 112, "The action is not wrongful because it is authorized by the legislature." See report in 14 Law T. R. 677 at 681, "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful". Blackburn J.

(7) But see Keeton: Conditional Fault 72 Harv. L. Rev. 326 where the author contends that liability is moving closer to fault.

(8) See Ehrenzweig: Negligence Without Fault (1951); Fleming: Torts at 4; Wright: Introduction to the Law of Torts 8 Can. L. J. 238; Harper & James: Torts, Introduction and chapter 13; this was foreseen by Bohlen in 1911, OP. CIT. SUPRA note 3 at 452.

(9) Negligence has developed to an objective standard of care. See Seavey: Negligence — Subjective or Objective 41 Harv. L. Rev. 1; Vaughan v. Menlove, (1837), 3 Bing N. C. 468 at 475.

(10) For example see Wilson: Products Liability 43 Cal. L. Rev. 614, 809.

(11) Fleming: Torts at 14.

(12) Ibid.

(13) See Bramwell B. dissenting in Hammersmith Railway v. Brand, L.R. 4 H.L. 171, 21 Law T.R. (NS) 238 (1869); Lord Watson in Metropolitan Asylum Board v. Hill, (1881), 6 App. Cas. 193, 44 Law T.R. 653 at 660, (The defendant is able to) "... delray the cost by rates levied from the public.' Lord Blanesburgh in Manchester v. Farnworth, (1930) A.C. 171 at 203, (The) "... loss is just as much a part of the cost ... as is, for example, the cost of the coal..."

(14) See chapters III and IV INFRA.

(15) The English maxim had its counterpart in Roman-Byzantine law, PRINCEPS LEGIBUS SOLUTUS EST. See Harper & James: Torts ch. 29, Holdsworth: History of English Law Vol. 6 at 267.

(16) Borchard: Government Responsibility in Tort 36 Yale L. Rev. 1 at 30.

(17) 1 Pollock & Maitland: History of English Law (1909) at 512-518; Street: Governmental Liability (1953) at 1.

(18) The philosophers Hobbes and Bodin helped the idea that the King was incapable of thinking or doing wrong.

(19) U.S. Constitution 11th Amendment; This was "one of the mysteries of legal evolution", Borchard OP. CIT. SUPRA note 16 at 4. A U.S. citizen cannot sue his own state, Hans v. Louisiana, (1890), 134 U.S. 1, nor the U.S., Moffat v. U.S., (1884), 112 U.S. 24.

(20) See Salmond: Torts at 57-61.

(21) Leader v. Moxon, 2 W. Bl. 924, 3 Wils. 462, at 468, 95 Eng. Rep. 1157 (1773).

(22) Id. W. Bl. at 925, "... the commissioners had grossly exceeded their powers... Their discretion is not arbitrary but must be limited by reason and law." Pavers treated same as commissioners.

(23) See British Cast Plate Mfrs. v. Meredith, 4 Term Rep. 794, 100 Eng. Rep. 1306 (K. B. 1792); Leader v. Moxon, note 21 SUPRA.

(24) See Sutton v. Clarke, 6 Taunt. 29 at 44, 16 Rev. Rep. 563 (C. P. 1815) Both the Leader and Meredith cases were distinguished.

(25) Boulton v. Crowther 2 B. & C. 703 (K.B. 1824) at 709 Bayley J., "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."

(26) When Charles I was beheaded, Parliament won a decisive battle for supremacy, (1642), Holdsworth vol. 6 at 3.

(27) See Attorney-General v. Colney Hatch Lunatic Asylum, 19 Law T.R. 708 (Ch. 1869); Transportation Co. v. Chicago, 99 U.S. 635 at 640.

(28) Lord Cairns dissenting in Brand case note 13 SUPRA.

(29) See Dixon v. Metropolitan Board, 7 Q.B.D. 418, 45 Law T.R. (NS) 312, 315.

(30) Crown Proceedings Act (1947) sect. 2 (1) U.K.; Federal Tort Claims Act 28 U.S.C.A. sect. 2764; New York has waived immunity and set up special court to decide liability, N.Y. Court of Claims Act Ann. sect. 2 (Gilbert-Bliss, 1947); For an examination of the position in all the states see Leflar & Kantrowitz: Tort Liability of the States 29 N.Y.U.L. Rev. 1363 (1954). In Canada see Petition of Right Act 1952 R.S. Can. Ch. 210 sect. 8. Only 4 of the provinces have other than patchwork legislation (Man., N.B., N.S., Sask.). Crown immunity is removed in Australia, see Fleming: Torts at 362 note 7, For the situation in Europe see Street: Governmental Liability, A Comparative Study (1953).

(31) For a refreshing example contra see Traynor J. in Muskopf v. Corning Hospital District, 11 Cal. Rptr. 89 (1961) at 95, "Only the vestigial remains of such governmental immunity have survived. Its requiem has long been 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."

(32) 5 H. & N. 679, 2 Law T.R. (NS) 394 (Ex. 1860) No liability for fire caused by spark from locomotive.

(33) Id. at 396, Cockburn J.

(34) 4 B. & A. 30 (K.B. 1832) locomotive on railway built according to authorized plan frightened horses on nearby highway.

(35) See Bramwell dissenting in Brand case note 13 SUPRA at 243.

(36) (1868), L.R. 3 H.L. 330.

(37) See Brand case note 13 SUPRA where Latin maxim is used to add an aura of antiquity to the rule, CUICUMQUE ALIQUIS QUID CONCEDIT CONCEDERE VIDETUR ET ID SINE QUO RES IPSA ESSE NON POTUIT.

(38) Green v. Chelsea Waterworks Co., 70 Law T.R. 547 (C.A.) accepting OBITER DICTUM in Geddis v. Bann Reservoir, 3 App. Cas. 430. See also Porter & Co. v. Bell, (1955) 1 D.L.R. 62 (N.S.C.A.) at 69, "Statutory authority applies equally to either form of action."

(39) See Brand case note 13 SUPRA.

(40) Dunn v. Birmingham Canal Co., (1873), L.R. 8 Q.B. 42, 27 Law T.R. 683 (Ex.) Boughton v. Midland etc. Ry. Co., 7 Ir. R. (C.L.) 169 (C.P. 1872).

(41) Hawley v. Steele, (1877), 6 Ch. D. 521, 37 Law T.R. 625.

(42) London, Brighton etc. Ry. v. Truman, 11 App. Cas. 45, 54 Law. T.R. 250 (1886).

(43) National Telephone Co. v. Baker, (1893) 2 Ch. 186, 68 Law T.R. 283.

(44) Railways, Brand note 13 SUPRA; Canals, Dunn case note 40; Sewers, Green v. Chelsea Waterworks, note 38 SUPRA.

(45) For a comment on this see Townsend v. Norfolk Ry., (1906) 105 Va. 22, 52 S.E. 970 at 978.

(46) Adolph Berle has shown that control of big industry in the U.S. is concentrated in the hands of a few banks, trust companies, and insurance companies. Power Without Property (1959).

(47) Harper & James Sect. 29.3.

(48) Leader v. Moxon, Sutton v. Clarke, Boulton v. Crowther, notes 21, 24, 25, respectively SUPRA.

(49) British Cast Plate v. Meredith, note 23 SUPRA, at 1308 in Eng. R. Sutton v. Clarke note, 24 SUPRA at 570 in Rev. Rep.

(50) See Friedmann: Statutory Powers Etc. 8 Mod. L. Rev. 31 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 writer submits that where there is a great public need the cost should be more gladly borne. For a comparison of the English and American attitudes to use of land and the public good, see Bohlen OP. CIT. SUPRA note 3.

(51) This brings to mind the defense of necessity. See Prosser at 96, Fleming at 107. If the property of many is saved there is no redress, Surocco v. Geary, 3 Cal. 69, 58 Am. Dec. 385 (1853). Where one person only gains the privilege is said to be "incomplete". See Bohlen: Incomplete Privilege to Inflict Intentional Invasions of Interests of Property, Selected Essays on the Law of Torts (Harv.), see also Vincent v. Lake Erie Transport, 109 Minn. 456; 124 N.W. 221 (1910). This problem differs from public necessity in several ways; seldom is there great danger threatned, see Seifert v. Brooklyn, 101 N.Y. 136, 4 N.E. 321 at 325 (1886) (SALUS POPULI only applies where there is a "great emergency"), immediate action is not here necessary and the benefiting defendant is known. If anything this is closer to the incomplete privilege, since it is generally a competition between private interests with the public good only a remote matter.

(52) See Stewart J., Stephens v. Richmond Hill, (1955) O.R. 806 at 812.

(53) Meredith case note 23 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 Eng. Rep. 319. Lord Chelmsford in Brand note 13, at 245. "... each time a train passed ... and shook the houses ... actions might be brought by their owners ..."

(54) See Alabama etc. Ry Co. v. King, 47 So. 857 at 861, 93 Miss. 379 (1908).

(55) Lord Holt in Ashby v. White, 2 Ld. Raym. 938, 87 Eng. Rep. 808 (1703), "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."

(56) Municipalites are preferred in other areas too. See East Suffolk Rivers Catchment Bd. v. Kent. (1941) A.C. 74, Hesketh v. Birmingham, (1924) 2 K.B. 260 (C.A.) no liability for failure to expand sewers, Glossop v. Heston, (1879), L.R. 12 Ch. D. 102 no liability for failure to prevent pollution; Bank View Mills v. Nelson Corp., (1943) 1 K.B. 337 (C.A.) failure to remove stream obstruction; Shepard v. Glossop, (1921) 3 K.B. 132 (C.A.) no liability for allowing street light to go out; Smith v. Cawdle Fen, (1938), 160 Law T.R. 61 failure to regulate drainage; See critique on non-feasance by Denning L.J. (as he then was) Pride of Derby v. British Celanese, (1953) 1 Ch. 149 (C.A.).

(57) See Fleming: Torts at 395 in the context of highway authorities.

CHAPTER III

(1) See C.P.R. v. Roy, (1902) A.C. 220 at 231. "The legislature is supreme and if it has enacted that a thing is lawful, such a thing cannot be a fault or a wrong."

(2) See Fleming: Torts at 309.

(3) See Willis: Statutory Interpretation in a Nutshell 16 Can. B. Rev. 1 (1938).

(4) "The exact legal position depends on the construction of the statute in question," Charlesworth: Negligence (3rd Ed. 1956) at 268; Metropolitan Asylum v. Hill, 6 App. Cas. 193, 44 Law T.R. 653 at 656; London, Brighton Ry. v. Truman, 11 App. Cas. 49, 54 Law T.R. 250 at 254; R. v. Bradford Navigation, (1865), L.J. 34 C.L. (NS) 191 at 199, "The thing actually done was never contemplated by the legislature." Canadian courts have followed England. Wilkinson v. St. Andrews, (1923) 4 D.L.R. 780 at 784 intention to remove action found;
Stephen v. Richmond Hill, (1956) O.R. 88, "Legislature did not contemplate the creation of a private nuisance," Laidlaw J.A.

(5) See Hill case note 4 SUPRA; Cf. Guelph Worsted Spring Co. v. Guelph, (1914), 18 D.L.R. 73 at 80, "absence of such a provision does not create a right of action; it only suggests a more careful scrutiny of the act..."

(6) Edginton v. Swindon, (1939) 1 K.B. 86.

(7) See Richard v. Washington Terminal Co., 233 U.S. 546 (1914 D.C.C.A.) where commenting on the English cases Pitney J. said that the acts "are strictly construed so as not to impair private rights..."

(8) See Jenkins L.J. in Marriage v. E. Norfolk Catchment Bd., (1950) 1 K.B. 284 at 304 (C.A.).

(9) Quebec Railway Co. v. Vandry, (1920) A.C. 662 at 679 (P.C.).

(10) Midwood v. Manchester, (1905) 2 K.B. 597 at 606 (C.A.).

(11) See Levingston v. Lurgian Union, (1868), 2 Ir. R.C.L. 202 at 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."

(12) See Stoneman v. Halifax, (1936) 2 D.L.R. 504 (N.S.C.A.) where legislation said, "...no action for injury thereby occasioned." See Brodie v. The King, (1946) Ex. C.R. 283 at 304, Sect. 8. of the statute "bars the remedy against the board."

(13) Shelfer v. London Electric Lighting Co., (1895) 1 Ch. 287 (C.A.) "Nothing in this order shall exonerate the undertakers from any... action... for nuisance..." Goodson v. Sunbury Gas, (1896), 75 Law T.R. 251; Midwood v. Manchester, (1905) 2 K.B. 597 (C.A.); Prices Patent Candle Co. v. London County Council, (1908) 2 Ch. 526; Charing Cross Electric Supply v. Hydraulic Power Co., (1914) 3 K.B. 772 (C.A.). In Canada: Stephens v. Richmond Hill, (1956) O.R. 88 at 105: But see Wilkinson v. St. Andrews, (1923) 4 D.L.R. 780.

(14) Jones v. Festiniog Railway, (1868), 3 Q.B. 773, 18 Law T.R. (NS) 903 "No express Parliamentary power" was given to allow use of locomotive. But see C.P.R. v. Roy, (1902) A.C. 222 (P.C.).

(15) Attorney-General v. Colney Hatch Lunatic Asylum, (1869), 19 Law T.R. 708 (Ch. D.); Burgess v. Woodstock, (1955) O.R. 814.

(16) A/G v. Leeds, (1870), 22 Law T.R. 320 at 331, "If the legislature had intended anything so monstrous they should have expressed it distinctly."

(17) Metropolitan Asylum v. Hill, (1881), 6 App. Cas. 193.

(18) Gas, Light & Coke Co. v. Vestry of St. Mary's Abbotts, (1885), 15 Q.B.D. 1 Alliance & Dubin Gas v. Dublin, (1901) 1 Ir. 492 (C.A.).

(19) Rapier v. London Tramways, (1893) 2 Ch. 588; but cf. Truman note 4 SUPRA.

(20) Ogston v. Aberdeen Tramways, (1897) A.C. 111 (H.L.).

(21) C.P.R. v. Parke, (1899) A.C. 535; Guelph Worsted v. Guelph, (1914), 18 D.L.R. 73 (Ont. S.C.) flood because of authorized bridge.

(22) Quebec Railway v. Vandry, (1920) A.C. 662 (P.C.) decided on Quebec "sous la garde" clause. Sect. 1054 Que. Civ. Code.

(23) Manchester v. Farnworth, (1930) A.C. 171.

(24) Grandel v. Mason, (1953) 1 S.C.R. 459.

(25) The court implies authority though it seems to think that the legislature would not expressly do so, see Hammersmith v. Brand, 21 Law T.R. (N.S.) 238 at 245.

(26) Farnworth cast note 23 SUPRA at 182 "...there can be no action for nuisance caused by the doing of that thing if the nuisance is the inevitable result." Whitehouse v. Fellowes, 10 C.B. (NS) 765 at 780, "...the act... must necessarily produce damage whether done carefully or not". Stephens case note 13 at 811, "the inevitability of the damage" had not been shown.

(27) Farnworth case note 23 SUPRA at 182.

(28) Lord Selborne in Geddis v. Bann Reservoir, (1878), 3 A.C. 430.

(29) Hammersmith v. Brand, L.R. 4 H.L. 171.

(30) C.P.R. v. Roy, note 14; Vaughan v. Taff Vale, 5 H. & N. 679 (Ex. Ch. 1860).

(31) Edginton v. Swindon, (1939) 1 K.B. 86.

(32) Lord Watson in Hill note 4 at 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. (NS) 191.

(33) In Burniston v. Bangor Corp., (1932) N. Ir. 178 (C.A.) suggestion that this tool only applied where no exact plans authorized.

(34) Hill case note 4 SUPRA.

(35) C.P.R. v. Parke, note 21 SUPRA at 544, Lord Watson.

(36) Pride of Derby v. British Celanese, (1953) 1 Ch. 149 (CA) at 163.

(37) Schubert v. Sterling Trust Co., (1943) 4 D.L.R. 584 (Ont. H.C.).

(38) Charing Cross case note 13 at 782 where Green v. Chelsea, distinguished since no obligation to keep water there.

(39) Salmond: Torts (12th Ed. 1957 Houston) at 53.

(40) Id. at 54. It is argued that where the authority is permissive it is prima facie conditional, a classic example of circular reasoning.

(41) See Hill note 4 and OBITER statement in Porter & Co. v. Bell, (1955) 1 D.L.R. 62 at 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."

(42) See Rapier case note 19 SUPRA.

(43) Mudge v. Penge Urban Council, (1917), 86 L.J. Ch. 126.

(44) The court may prefer to say that the activity is authorized but that the manner of operation is negligent. See sect. E and F.

(45) Gas, Light & Coke Co. note 18 SUPRA and Alliance case ibid.

(46) West v. Bristol Tramways, (1908) 2 K.B. 14 creosoted wood.

(47) 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.

(48) Pride of Derby note 36 (effluent poured into river).

(49) Porter & Co. v. Bell, (1955) 1 D.L.R. 62 at 72.

(50) Sadler v. S. Staffordshire Tramway, (1889), 23 Q.B.D. 17 at 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).

(51) Cf. Pratt v. Waddington, 23 O.L.R. 178, bailment case.
See also George v. Can. Northern Railway, 51 O.L.R. 608.

(52) See Brand note 29 SUPRA. At 241, "It is for those who say that 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 note 4 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.

(53) Manchester v. Farnworth, (1930) A.C. 171 V. Dunedin at 182, "the onus of proving that the result is inevitable is on those who wish to escape liability..." See Dell v. Chesham, (1921) 3 K.B. 427.

(54) Renahan v. Vancouver, (1930) 3 W.W.R. 166 (B.C.S.C.), Porter & Co. v. Bell note 49 SUPRA; Stephen v. Richmond Hill, Note 13 SUPRA.

(55) See Sect. E INFRA.

(56) Biscoe v. Great Eastern Ry., (1873), L.R. 16 Eq. 636, Vickens V.C., "The expression in the cases is negligence which is hardly the appropriate word, but it is sufficient to convey the idea."

(57) See Porter & Co. v. Bell, note 49 SUPRA at 70.

(58) Geddis v. Bann, 3 A.C. 430 at 455, (1878).

(59) 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." See also Porter & Co. v. Bell, note 49 at 71.

(60) Jury found negligence in Fremantle v. London etc. Ry., 10 C.B. (NS) 89; Whitehouse v. Fellowes, note 89 at 765; Dent v. Bournemouth Corporation, (1897), 66 L.J.Q.B. (NS) 395.

(61) See Frank: Law and the Modern Mind (1930).

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

(63) Geddis v. Bann note 58 SUPRA.

(64) Price v. S. Metropolitan Gas Co., (1896), 65 L.J.Q.B. (NS) 126.

(65) N.W. Utilities v. London Guaranty, (1936) A.C. 108 (P.C.).

(66) Pronek v. Winnipeg Ry., (1933), 102 L.J.P.C. 12.

(67) Eakins v. Town of Shaunavon, (1918), 42 D.L.R. 473 (Sask. C.A.).

(68) Hardaker v. Idle District Council, (1896) 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.

(69) SS. Eurania 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; Renahan v. Vancouver, (1930) W.W.R. 166, no liability where waterworks system burst and caused flood; 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; 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; Romanica v. Greater Winnipeg Water District, (1921) 2 W.W.R. 399 (Man. C.A.) no liability where flood caused by heavy rain.

(70) Code v. Jones & Town of Perth, 54 O.L.R. 425 (C.A.).

(71) Canadian Westinghouse v. Hamilton, (1948) O.R. 144; Stephens v. Richmond Hill, (1956) O.R. 88 (alternate holding); Culp v. East York, (1956) O.R. 983 (obiter dictum).

(72) A recent case indicating the continuing confusion in this area in Canada. Cf. Vaughan v. Halifax — Dartmouth Bridge Commission, (1961), 29 D.L.R. 523, (N.S. court of appeal awards judgment for different reasons where bridge painted pursuant to statutory authority).

CHAPTER IV

(1) "Legislative sanction makes that lawful which would otherwise be a nuisance. "Smith v. New England Aircraft, 270 Mass. 511, 170 N.E. 385 (1930); "That which is done under authority of law in a place and in a manner authorized cannot be a nuisance." Atchison T. & S.F. Railway v. Armstrong, 71 Kan. 366, 80 P. 978 (1905); "That cannot be a nuisance such as to give a common law right of action, which the law authorizes." Transportation Co. v. Chicago, 99 U.S. 635 (1878).

(2) Gould v. Winona Gas, 100 Minn. 258 at 261, 111 N.W. 254 at 255 (1907). But see Blanc v. Murray, 36 La. Ann. 162 (1884) at 164, where it is said that the doctrine is "exploded."

(3) Hollister v. Union Co., (1833) 9 Conn. 436; Radcliff v. Mayor of Brooklyn, (1850) 4 N.Y. 195, no liability for grading which caused cave-in since public benefit.; Bellinger v. N.Y. Central, 23 N.Y. 42 (1861).

(4) Richard v. Washington Terminal Co., (1914) 233 U.S. 546; Sadlier v. New York, 81 N.Y.S. 308 at 310.

(5) "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 Powder Co. v. Dodson, 150 P. 1085 at 1087, 49 Okla. 58 (1915).

(6) See Sadlier case note 4 SUPRA at 309.

(7) People v. Brooklyn & Queen's Transit Co., (1940) 283 N.Y. 484, 28 N.E. 2d 925; Toledo Disposal Co. v. State, (1914) 89 Ohio St. 230, 106 N.E. 6. "The full extent of legislative power to shield a nuisance is to exempt it from public prosecution." Sadlier case note 4 SUPRA.

(8) "...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, note 2 SUPRA at 164; Baltimore & Potomac Ry. Co. v. Fifth Baptist Church, 108 U.S. 317 at 332 (1883); Bohan v. Port Jervis Gas-Light Co., (1890) 122 N.Y. 18, 25 N.E. 246; Choctaw O. & G.R. Co. v. Drew, 37 Okla. 1396, 130 P. 1149, (1913), alternate holding.

(9) 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, 130 Md. 133, 99 A. 900 (1917); N.Y. Art. 1 Sec. 7; N.J. Art. 1 Sec. 16, see Grey v. Paterson, 60 N.J.E. 385, 45 A. 995 (1900); see 2 Nichols. Eminent Domain (3rd Ed.) at 240 note 22 for other states.

(10) "...must be substantial destruction of the rights of ingress and egress..." see Taylor case note 9; Seifert v. Brooklyn, 101 N.Y. 36, 4 N.E. 321 at 324 (1886), compensation where "physical injury"; Pennsylvania v. Angel, (1886) 41 N.J.E. 316, 7 A. 432 at 434; see also 2 Nichols Sec. 6, 1 (1) at 238.

(11) Transportation v. Chicago note 1 SUPRA.

(12) Atchison case note 1 SUPRA.

(13) See Sadlier case note 4 at 315; Pennsylvania v. Angel, note 10 at 433, "Whether you flood 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 any less of material things than 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 at 236.

(14) Bacon v. Boston, (1891) 154 Mass. 100, 29 N.E. 9 at 10.

(15) Vincent v. Hercules Powder Co., 239 N.Y.S. 547 (1930).

(16) Louisville v. Lellyet, 85 S.W. 881, 114 Tenn. 368 (1905).

(17) Grey v. Paterson, note 9 SUPRA.

(18) Seifert case note 10.

(19) Angel case note 10.

(20) Yates v. Milwaukee, 77 U.S. 497 (1870) removal of wharf invalid without compensation.

(21) Eastman v. Amoskeog Mfg., 44 N.H. 143, 82 Am. Dec. 201 (1862).

(22) Tinsman v. Belvidere Del. R.R. Co., 69 Am. Dec. 565 (N.J. 1857).

(23) Atchison case note 1 at 980, but court thought might be exceptional cases where such injury would amount to a taking.

(24) Bacon v. Boston note 14 SUPRA (OBITER DICTUM).

(25) Taylor v. Baltimore, note 9.

(26) Tinsman case note 22 at 573 (alternate holding); Bacon case note 14.

(27) Ark., Cal., Col., Ga., Ill., La., Minn., Miss., Mo., Mont., Neb., N.D., Pa., S.D., Tenn., Tex., Utah, Wash., W. Va., Wyom., are some of these states, see Richard note 4 and Church of Jesus Christ v. Oregon Short Lines, R. Co., 36 Utah 238, 103 P. 243 (1909); 2 Nichols at 241 for article numbers: Ill. was first state to adopt amendment in 1870.

(28) Eachus v. Los Angeles Ry. Co., 105 Cal. 614, 37 P. 750 (1884); Varney and Green v. Williams, 155 Cal. 318, 100 P. 867 (1909).

(29) See Church of Jesus Christ note 27; Campbell v. Metropolitan Ry., 82 Ga. 320, 9 S.E. 1078 (1889); Austin v. Augusta Ry., 108 Ga. 671, 34 S.E. 852 (1899).

(30) Stuhl v. Great Northern Ry., 136 Minn. 158, 161 N.W. 501, (1917); Paducah v. Allen, 11 Ky. 361, 63 S.W. 981 (1901); but see Eachus case note 28 SUPRA.

(31) Rigney v. Chicago, 102 Ill., 64; Eachus note 28; Edmondson v. Pittsburg R.R. Co., 111 Pa. 316, 2 A. 401 (1886); 2 Nichols at 331-334.

(32) Stuhl note 30; Lambert v. Norfolk, 108 Va. 259, 61 S.E. 776 (1908); Lamb v. Reclamation District, 73 Cal. 125, 14 P. 625 (1887).

(33) Alabama v. King, 47 So. 857, 93 Miss. 379 (1908).

(34) King v. Vicksburgh Ry., 42 So. 204, 88 Miss. 456 (1906).

(35) Rainey v. Red River, T. & S. Ry., 89 S.W. 768, 99 Tex. 276 (1905).

(36) Stuhl v. Great Northern Ry., note 30.

(37) Woodruff v. N. Bloomfield Gravel, 18 Fed. 753 (1884) alternate reason.

(38) Jacobs v. Seattle, 160 P. 299, 93 Wash. 171 (1916).

(39) Church of Jesus Christ note 27 SUPRA.

(40) See Sawyer v. Davis, 136 Mass. 239 (1884) OBITER DICTUM. Woodruff case note 37 alternate reasoning.

(41) Bancroft v. Cambridge 126 Mass. 438 (1879); Lewis v. Pingree National Bank, 47 Utah 35, 151 P. 558 (1915) where the court said a mere damage action might be allowed but an injunction denied.

(42) 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 note 37 SUPRA.

(43) Benner v. Atlantic Dredging, 134 N.Y. 156, 31 N.E. 328 (1892).

(44) Rose v. State, 19 Cal. 2d 713, 123 P. 2d 505 (1942); Chick Springs Water v. State Highway Dept., 159 S.C. 481, 157 S.E. 842 (1931); But see Zoll v. St. Louis County, 343 Mo. 1031, 124 S.W. 2d 1168 (1938).

(45) 103 N.Y. 10, 8 N.E. 537 (1886); Messer v. City of Dickinson, 71 N.D. 586, 3 N.W. 2d 241 at 245 (1942), "The immunity conferred by the legislature must be strictly construed..."; Bohan v. Port Jervis, 122 N.Y. 18, 25 N.E 246 (1890).

(46) Cogswell case 103 N.Y. 10; 8 N.E 537 at 541 (1886), Andrews J.

(47) Hassel v. San Francisco 11 Cal. 2d 168, 78 P. 2d 1021 (1938), express authority required by Sec. 3482 Cal. Civ. Code; Woodruff note 37 SUPRA; Rosenheimer v. Standard Gaslight, 55 N.Y.S. 192 at 197 (1898); Squaw Island Freight v. Buffalo, 273 N.Y. 119, 7 N.E. 2d 10 (1937).

(48) Bacon v. Boston, note 14 at 10.

(49) Haskell v. New Bedford, 108 Mass. 208 (1871); Morse v. City of Winchester, 139 Mass. 389, 2 N.E. 694 at 695 (1885).

(50) Hooker v. New Haven, etc. Co. 14 Conn. 146 at 155 (1841) approved in principle distinguished on facts in Burroughs v. Housatonic Ry., 15 Conn. 124 (1842); Baltimore v. Fairfield Improvement Co., 87 Md. 352, 39 A. 1081 at 1082 (1898), "... explicit legislative declaration (needed)".

(51) See Marshall C.J. in U.S. v. Fisher, 6 U.S. 390 (1805) bankruptcy case.

(52) Baltimore v. Fairfield, note 50 SUPRA.

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

(54) See Baltimore & Potomac Ry. Co. v. Fifth Baptist Church, 108 U.S. 317 at 331 (1883), 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 note 37 at 771, "condition implied" that right to be exercised without injury to others. Choctaw case note 8 SUPRA at 1151, "...implied qualification that the works should not be so placed as by their use to unreasonably interfere with (rights)". Booth v. R.W. & O.T.R. Co., (1893) 140 N.Y. 267, 35 N.E. 592, Privileges conferred on the "...understanding that they shall be exercised in strict conformity to private rights." Blanc v. Murray, note 2 SUPRA at 164, "...implied condition that no interference with private rights."

(55) See Choctaw note 8 at 1151; Fifth Baptist Church note 51 at 331.

(56) Rockenbach v. Apostle, 330 Mich. 338, 47 N.W. 2d 636 at 639 (1951), zoning ordinance held permissive and nuisance halted. Townsend v. Norfolk Ry., 105 Va. 22, 52 S.E. 970 at 978 (1906) permissive legislation for power house not allow nuisance.

(57) Richard v. Washington Terminal, note 4 SUPRA.

(58) McKimm v. Philadelphia, 217 Pa. 243, 66 A. 340 (1907).

(59) Rosenheimer v. Standard Gaslight, note 47 SUPRA.

(60) Koehl v. Schoenhausen, 17 So. 809, 47 La. Ann. 1316 (1895).

(61) Village of Pine City v. Munch, 42 Minn. 342, 44 N.W. 197, (1890). "...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."

(62) Sullivan v. Royer, 72 Cal. 248, 13 P. 655 (1887).

(63) Cohen v. Mayor of New York, note 42 SUPRA.

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

(65) Hakkila v. Old Colony Broken Stone, 264 Mass. 447, 162 N.E. 895, (1928).

(66) Louisville & N. Term. Co. v. Lellyet, 114 Tenn. 368, 85 S.W. 881 at 885, (1905); "...exact location" not authorized by charter. Choctaw case note 8 SUPRA; Louisville v. Jacobs, 109 Tenn. 727, 72 S.W. 954, (1903).

(67) Baltimore v. Fairfield, note 50 SUPRA.

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

(69) See cases cited in footnotes 71 to 77 Infra for American approach.

(70) See Chapter III Sections E and F for Commonwealth handling.

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

(72) Hashell v. New Bedford, 108 Mass. 208 (1871); Boston Rolling Mills v. Cambridge, 117 Mass. 396 (1875); Seifert v. Brooklyn, 101 N.Y. 36, 4 N.E. 321 at 324, (1886), "remediable by change of plans or adoption of prudential measures".

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

(74) City of Winona v. Botzet, 169 Fed. 321 (1909).

(75) Thrasher v. Atlanta, 173 S.E. 817, 178 Ga. 514, (1934); Anderson v. Souza, 38 Cal. 2d 825, 243 P. 2d 497, (1952); Hyde v. Somerset Air Service, 1 N.J.S. 346, 61 A. 2d 645 (1948).

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

(77) Weltshe v. Graf, 323 Mass. 498, 82 N.E. 2d 795, (1948).

(78) Eisman v. Consolidated Gas Co., 197 N.Y.S. 251, 119 Misc. 762 (1922).

(79) Terrel v. Chesapeake & O. Ry., 110 Va. 340, 66 S.E. 55 (1909) roundhouse; Tuebner v. California Street Rlrd., 66 Cal. 171, 4 P. 1162 (1884) car house.

(80) Morse v. City of Worcester, 139 Mass. 389, 2 N.E. 694 (1885) "...if the plaintiff can show negligence (he can recover)"; Atchison v. Garside, 10 Kan. 552 "...plaintiff must show..."

(81) Choctaw case note 8 where defendant liable since failed to show it could not locate elsewhere; see also Rainey v. Red River note 35 SUPRA, where parts of English decisions pertaining to the onus were quoted and presumably relied on.

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

(83) Woodsmall v. Carr Tire Co., 98 Ind. App. 446, 185 N.E. 163 (1933) licence to move building not deprive store owner who damaged thereby from action; Price v. Grose, 78 Ind. Ap. 62, 133 N.E. 30 (1921) licence not legalize nuisance caused by fertilizer plant; Strong v. Sullivan, 181 P. 59, (1919) licence to lunch wagon not authorize public nuisance; First National Bank v. Tyson, 133 Ala. App. 459, 32 So. 144 (1902) licence for building not authorize nuisance; Sullivan v. Royer, 72 Cal. 248, 13 P. 655 (1887) licence of board of supervisors did not and could not authorize nuisance by erection of steam engine; Tuebner case note 79, where nuisance not authorized when street railway sanctioned; Ryan v. Copes, 73 Am. Dec. 106 at 113 "licence does not sanction abuse" by steam cotton press; But see Levin v. Goodwin, 191 Mass. 341, 77 N.E. 718 (1906) where licence for bowling alley legalized what may otherwise have been a nuisance; see also Murtha note 82.

(84) Seifert v. Dillon, 83 Neb. 322, 119 N.W. 686 (1909) and Ingersoll v. Rousseau, 35 Wash. 92, 76 P. 513 (1904) both dealing with houses of ill-repute which had been tolerated by the municipal authorities.

(85) Rockenbach v. Apostle, Note 56 SUPRA.

(86) Eaton v. Klimm, 217 Cal. 362, 18 P. 2d 678 (1933) although ordinance allowed light industrial use liability imposed for such a use; Appeal of Perrin, 305 Pa. 42, 156 A. 305 (1931), service station enjoined from being built in a residential area; Weltshe v. Graf, note 77 SUPRA, freight terminal; Commerce Oil Refining v. Miner, 281 Fed. 2d 469 (1960) quoting Weltshe case in OBITER; But see Bove v. Donnerhanna Coke Corp., 258 N.Y.S. 229, 236 A. Div. 37 (1932) alternate reasoning, where coke oven authorized by zoning ordinance, but court found there was no nuisance at all; Morin v. Johnson, 49 Wash. 275, 300 P. 2d 569 (1956) tire capping plant not enjoined since no nuisance existed after zoning ordinance had authorized this use (subsidiary holding).

(87) Perrin case note 86 SUPRA; Weltshe v. Graf note 77 SUPRA; Rockenbach v. Apostle note 56 SUPRA.

CHAPTER V

(1) See Booth v. Rome W. & O.T.R. Co., 140 N.Y. 267, 35 N.E. 592 (1893), Andrew J. in denying recovery weighed the legislation as one of the many factors in "the adjustment of conflicting interests through reconciliations by compromise, each surrendering something of his absolute freedom so that both may live." at 598 in N.E.; See also Marriage v. E. Norfolk Catchment Bd., (1950) 1 K.B. 284 (C.A.) Jenkins L.J. at 305 weighed "the object and terms of the statute conferring the power in question (including the presence or absence of a clause providing for compensation and the scope of any such clause), the nature of the act giving rise to the injury complained of and the nature of the resulting injury."

(2) See Finlay L.J. in Edginton v. Swindon Corp., (1939) 1 K.B. 86 at 90 (K.B.D.); see also Fleming: Torts at 419.

(3) Metropolitan Asylum v. Hill, (1881), 6 A.C. 193, 44 Law T.R. 653 at 656 Selborne L.C., "... if not 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."; Prices' 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."; Guelph Worsted v. Guelph, (1914), 18 D.L.R. 73 (Ont.) Middleton J. at 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."; Bacon v. Boston, 154 Mass. 100, 28 N.E. 9 (1891); Hooker v. New Haven, (1841) 14 Conn. 146 at 159; Cogswell v. New York etc. Ry Co., 103 N.Y. 10, 8 N.E. 537 at 539 (1886); Haskell v. New Bedford, 108 Mass. 208 (1871); liability for sewage damage since had been a waiver of the right to compensation when the consent to the sewer's construction was given.

(4) Marriage case note 1 SUPRA, liability denied since recovery available under Sec. 34 Land Drainage Act; Dunn v. Birmingham Canal L.R., 8 Q.B. 42, 27 Law T.R. 683 (1873), one of the reasons for dismissal fact that compensation available under statute; C.P.R. v. Roy, (1902) A.C. 220 at 231, Dom. Ry. Act allowed recovery; Southland Coffee Co. v. City of Macon, 60 Ga. 253, 3 S.E. 2d 739 (1939), no compensation since statute allowed other method of recovery; DuPont Powder Co. v. Dodson, 49 Okla. 58, 150 P. 1085 (1915), court said compensation rights not involved in this injunction application.

(5) Edginton v. Swindon note 2, injunction against bus shelters denied; London, Brighton etc. Ry. Co. v. Truman, 11 App. Cas. 45, 54 Law T.R. 250, injunction sought for cattle near railway denied; National Telephone v. Baker, (1893) 2 Ch. 186, 68 Law T.R. 283 (1893), injunction sought to halt injury to wires denied; see the better method of decision where injunction denied for garbage disposal while damage question left open for later decision, Gibson v. Baton Rouge, 161 La. 637, 109 So. 339 (1926); Hawley v. Steele, 6 Ch. D. 521. 37 Law T.R. 625 (1877), injunction to halt rifle practice denied.

(6) Sadler v. S. Staffordshire Tramways, (1889), 23 Q.B.D. 17, damages granted when plaintiff injured when tram went off track; Jones v. Festiniog Ry., (1868), L.R. 3 Q.B. 733, 18 Law T.R. (NS) 903, no injunction sought and damages given for fire caused by spark from train; Geddis v. Bann Reservoir, 3 A.C. 430, liability imposed for negligence in keeping reservoir which caused flood; Midwood v. Manchester, (1905) 2 K.B. 597 (C.A.), no injunction sought and damages given where gas main exploded and caused fire; Young v. C.P.R., (1931) 2 D.L.R. 968 (Sask. C.A.), damages awarded for fire caused by railway; Porter & Co. v. Bell, (1955) 1 D.L.R. 62 (N.S.C.A.) blasting; But cf. Metropolitan Asylum v. Hill, 6 App. Cas. 193, injunction and damages both awarded against small pox hospital; Rapier v. London

Tramways, (1893) 2 Ch. 588 (C.A.), injunction granted against stable; Manchester v. Farnworth, (1930) A.C. 171, injunction and damages both given against poisonous fumes from electric station.

(7) Riter v. Keokuk Electro-Metals, 248 Iowa 710, 82 N.W. 2d 151 (1957) at 161, injunction set aside since "appropriateness of an injunction depends on a comparative appraisal of all the factors in the case". Hopkins v. Exelsior Powder Co., 259 Mo. 254, 169 S.W. 267 (1914), injunction refused where plaintiff's damage "trivial, uncertain or remediable by a suit of law"; Kuntz v. Werner Flying Service, 257 Wis. 405, 43 N.W. 476 (1950), 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, 89 Ohio 230, 106 N.E. 6 (1914), 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".

(8) Weltshe v. Graf, 323 Mass. 498, 82 N.E. 2d 795 (1948); Ferriter v. Herlihy, 287 Mass. 138, 191 N.E. 352 (1934).

(9) See Lord Cairns in Hammersmith v. Brand, 21 Law T.R. (NS) 238, if liability followed, injunction would defeat intention of Parliament; see also Stephens v. Richmond Hill, (1955) O.R. 806, affirmed (1956) O.R. 88; Burgess v. Woodstock, (1955) O.R. 814; old U.S. case Village of Dwight v. Hayes, 150 Ill. 273, 37 N.E. 218 (1894).

(10) See A.L. Smith in Shelfer v. London Electric Lighting, (1895) 1 Ch. 287 at 322-3; but cf. Lord Halsbury, in the same case, who speaks of a RIGHT to an injunction; Maberly v. Peabody, (1946) 2 All E.R. 192.

(11) See Stephens case note 9 SUPRA; McKie v. K.V.P. Co., (1949) S.C.R. 698.

(12) See Bramwell B. in Dunn case note 4 at 691.

(13) Manchester v. Farnworth, (1930) A.C. 171 at 182, Dunedin V. stressed the "gravity of the nuisance" and said there was a "substantial diminution in the productivity of the farm", and at 194 Summer Ld. considered the "nature and degree of the plaintiff's suffering."

(14) See Farnworth case note 13 SUPRA.

(15) Midwood v. Manchester, (1905) 2 K.B. 597 (C.A.); Porter & Co. v. Bell, (1955) 1 D.L.R. 62 (N.S.C.A.).

(16) Jones v. Festiniog Ry., L.R. 3 Q.B. 733, 18 Law T.R. (NS) 903; Young v. C.P.R., (1931) 2 D.L.R. 968 (Sask. C.A.).

(17) Gas, Light Co. v. Vestry of St. Mary's, (1885), 15 Q.B.D. 1 (C.A.).

(18) C.P.R. v. Parke, (1899) A.C. 535.

(19) Geddis v. Bann Reservoir, 3 App. Cas. 430.

(20) Schubert v. Sterling Trusts Co., (1943) 4 D.L.R. 584.

(21) Edginton v. Swindon Corp., (1939) 1 K.B. 86.

(22) Hammersmith v. Brand, 21 Law T.R. (NS) 238, L.R. 4 H.L. 171 (1869).

(23) A/G v. Corporation of Nottingham, (1904) 1 Ch. 673.

(24) Cogswell case note 3 SUPRA.

(25) Pennsylvania Ry. Co. v. Angel, 41 N.J.E. 316, 7 A. 432 (1886).

(26) Baltimore & Potomac Ry. v. Fifth Baptist Church, 108 U.S. 317 at 329 (1883).

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

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

(29) Church of Jesus Christ v. Oregon Short Lines, 36 Utah 238, 103 P. 243 (1909); Fifth Baptist Church case note 26 distinguished as case of "severe damage".

(30) Fraser v. Chicago, 186 Ill. 480, 57 N.E. 1055 (1900).

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

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

(33) Manchester v. Farnworth, (1930) A.C. 171 at 183.

(34) Biscoe v. Great Eastern Ry., (1873), L.R. 16 Eq. 636 at 641.

(35) Hawley v. Steele, 6 Ch. D. 521, 37 Law T.R. 625 at 627.

(36) A/G v. Nottingham, note 23 SUPRA.

(37) Levin v. Goodwin, 191 Mass. 341, 77 N.E. 718 (1906).

(38) See Dunn case note 4 SUPRA.

(39) Guelph Worsted v. Guelph, note 3 SUPRA, could have easily avoided the damage in the building of the bridge.

(40) See Sumner V. in Farnworth Case note 13 SUPRA.

(41) Ibid.

(42) Hassel v. San Francisco, 11 Cal. 2d 168, 78 P. 2d 1021 (1938).

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

(44) Dell v. Chesham Urban Council, (1921) 3 K.B. 427.

(45) Rapier v. London Tramways, (1893) 2 Ch. 588 at 602 (C.A.) it was a "mere question of money" here.

(46) Gas, Light & Coke case note 17 SUPRA.

(47) Quebec Ry. v. Vandry, (1920) A.C. 662 at 680.

(48) Tuebner v. California Street Ry., 66 Cal. 171, 4 P. 1162 (1884).

(49) Price v. S. Metropolitan Gas Co., (1896), 65 L.J.Q.B. (NS) 126.

(50) Hesketh v. Birmingham Corp., (1924) 1 K.B. 260 (C.A.).

(51) Bove v. Donner-Hanna, note 28 SUPRA.

(52) Hammersmith v. Brand, note 21 SUPRA; Vaughan v. Taff Vale Ry., 2 Law T.R. (NS) 394 (Ex. Ch. 1860), 5 H. & N. 679.

(53) See Salmond: Torts at 574 for an explanation of the Green v. Chelsea case on similar reasoning.

(54) Midwood v. Manchester, note 15 SUPRA at 610, Mathew L.J.

(55) Price v. S. Metropolitan, note 49 SUPRA at 128, "company for profit".

(56) Webster & Co. v. Steelman, 172 Va. 342, 1 S.E. 2d 305 (1939) at 315 "necessity of one man's business cannot permit it to be operated at the expense of another man's rights."

(57) Hakkila v. Old Colony Broken Stone Co., 264 Mass. 447, 162 N.E. 895 (1928).

(58) Booth v. Rome W. & O.T.R. Co., 140 N.Y. 267, 35 N.E. 592 (1893); Cogswell v. N.Y., N.H. & H.R. Co., 103 N.Y. 10, 8 N.E. 537 (1886); Tinsman v. Belvidere Delaware R. Co. 69 Am. Dec. 565 (N.J.S.C. 1857).

(59) Woodruff v. N. Bloomfield Gravel Mining Co., 18 Fed. 753 (Cal. 1884).

(60) Hooker v. New Haven & Northampton Co., 14 Conn. 146, 15 Conn. 313.

(61) Benner v. Atlantic Dredging, (1892) 134 N.Y. 156, 31 N.E. 328, government supervised dredging operations. No "private benefit" as in Cogswell case note 58 SUPRA.

(62) Transportation Co. v. Chicago, 99 U.S. 635 (1878); Wilkinson v. St. Andrews, (1923) 4 D.L.R. 780; Edginton v. Swindon Corp., (1939) 1 K.B. 86; Burniston v. Corporation of Bangor, (1932) N. Ir. L.R. 178.

(63) Dunn v. Birmingham, L.R. 8 Q.B. 42, 27 Law T.R. 683; Hammersmith v. Brand, 21 Law T.R. (NS) 238; Green v. Chelsea, 70 Law T.R. 547.

(64) Thompson v. Kraft Cheese, 210 Cal. 171, 291 P. 204 (1930) State Board of Health authorized putting sewage into stream, liable; Metropolitan Asylum Board v. Hill, note 3 SUPRA, 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.

(65) Hardaker v. Idle District Council, (1896) Q.B. 335.

(66) See Chapter IV, F SUPRA; Hakkila Case note 57 SUPRA.

(67) Partridge v. Etobicoke, (1956) O.R. 121; Culp v. East York (1956) O.R. 983.

(68) See Bohlen: Rule in Rylands and Fletcher 59 U. of Penn. L. Rev. at 441: see also Holmes J. in Quinn v. Crimmins, 171 Mass. 255 at 258 (1898).

(69) Id. at 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.

(70) Dixon v. Metropolitan Board, 45 Law T.R. (NS) 312 at 315, "public duty".

(71) Bove v. Donner-Hanna, note 28 SUPRA, "No consideration of public policy demands... sacrifice of this industry".

(72) Shmeer v. Gaslight Co., (1895) 147 N.Y. 529 at 541, 42 N.E. 202 at 205, Gas is an article "universally important for city life."

(73) Benner v. Atlantic Dredging, note 61, government doing this for "public purpose".

(74) Appeal of Perrin, 305 Pa. 42, 156 A. 305 (1931).

CHAPTER VI

(1) See Shelfer v. London Electric, (1895) 1 Ch. 287; Goodson v. Sunbury Gas Co., (1896), 75 Law T.R. 251; Midwood v. Manchester, (1905) 2 K.B. 597; Stephens v. Richmond Hill, (1956) O.R. 88 at 105.

(2) See Crown Proceedings Act (1947) U.K. Sec. 2 (1), Tort Claims Act 28 U.S.C.A. Sec. 2674; see Chapter II note 30 for more complete discussion of this legislation, SUPRA.

(3) See Street: Governmental Liability, A Comparative Study for comments on the Conseil d'Etat of France and on the systems of other European lands.

(4) See Lord Blanesburgh in Manchester v. Farnworth (1930) A.C. 171 at 203.

(5) Ibid.

(6) See Mathew L.J. in Midwood v. Manchester, (1905) 2 K.B. 597.

(7) Baltimore & Potomac v. Fifth Baptist Church, 108 U.S. 317 at 331.

(8) Pennsylvania v. Angel, 41 N.J.E. 316, 7 A. 432.

(9) This was done in Marriage v. E. Norfolk, (1950) 1 K.B. 284; Bancroft v. Cambridge, 126 Mass. 438 (1879); Washburn & Moen Mfg. v. City of Worcester, 116 Mass. 458 (1875); Borough of Collegeville v. Philadelphia Suburban Water Co., 377 Pa. 636, 105 A. 722 (1954).

(10) See for administrative problem Myers v. Bethlehem Shipbuilding, 303 U.S. 41 (1938); see also Gellhorn: Materials in Administrative Law (1960) at 321.

(11) A start has been made in this direction by A.L. Smith L.J. in Shelfer v. London Electric, note 1 SUPRA at 313; see also DuPont Powder Co. v. Dodson, 150 P. 1085.

(12) Such a spectacular leap has been made in California recently, see Muskopf v. Corning Hospital District, 11 Cal. Rptr. 89 (1961).