

CANADA / JUDGMENT

Tock v. St. John's Metropolitan Area Board

[1989] 2 SCR 1181

COURT

Supreme Court of Canada

DECIDED

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Tock v. St. John's Metropolitan Area Board

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Date

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Report

[1989] 2 SCR 1181

Case number

20267

Judges

Dickson, Robert George Brian; McIntyre, William Rogers; Lamer, Antonio; Wilson, Bertha; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John

On appeal from

Newfoundland and Labrador

Subjects

Torts

Notes

SCC Case Information: 20267

Decision Content

Tock v. St. John's Metropolitan Area Board, [1989] 2 S.C.R. 1181

Neil Tock and Linda Tock Appellants

v.

St. John's Metropolitan Area Board Respondent

indexed as: tock v. st. john's metropolitan area board

File No.: 20267.

1989: January 31; 1989: December 7.

Present: Dickson C.J. and McIntyre*, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

on appeal from the court of appeal for newfoundland

Torts -- Nuisance -- Public body -- Defence of statutory authority -- Basement flooded when sewer blocked -- Installation and operation of sewer sanctioned by statute -- Whether or not municipality liable for damages in nuisance -- The Municipalities Act, S.N. 1979, c. 33, s. 154(1), (2), (3).

Appellants' house was serviced by the water and sewer system operated by the respondent board. On a day of exceptionally heavy rainfall, appellants discovered that a large amount of water had entered their basement, immediately notified the Board and vainly attempted to pump the water out themselves. Two employees of the Board inspected the storm sewer, determined that it was blocked and a crew located and removed the blockage. The water drained from the basement shortly afterwards but substantial damage had been incurred.

The trial judge found that appellants' right of enjoyment of their property had been seriously interfered with and allowed their claim in nuisance. He also found that the collection and drainage of water from rain or other sources constituted a non-natural user of land within the meaning of the rule in *Rylands v. Fletcher*. The Newfoundland Court of Appeal reversed this judgment. The issue of negligence was not in issue at the Court of Appeal or in this Court. At issue here was whether the rule in *Rylands v. Fletcher* was applicable. Also at issue was whether a nuisance existed and if the defence of statutory authority applied in the circumstances to absolve the municipality of liability arising in nuisance.

Held: The appeal should be allowed.

Per Lamer, Wilson and L'Heureux-Dubé JJ.: The rule in *Rylands v. Fletcher* had no application here.

The flooding of the appellants' basement would clearly have been an actionable nuisance if the parties had been two private individuals. Different considerations applied, however, because respondent was a municipality. The crucial question was whether or not the respondent was able to rely on the defence of statutory authority. The Municipalities Act, which authorized the respondent to construct, operate and maintain the sewage system, conferred a power but did not impose a duty. This distinction is relevant to the question of respondent's liability in nuisance.

The following principles, which were established in the early cases, should be reaffirmed. Firstly, if the legislation imposes a duty and the nuisance is the inevitable consequence of discharging that duty, then the nuisance is itself authorized and there is no recovery in the absence of negligence. Secondly, if the legislation merely confers an authority but is specific as to the manner or location of doing the thing authorized and the nuisance is the inevitable consequence of doing the thing authorized in that way or in that location, the nuisance is itself authorized and there is no recovery absent negligence. On the other hand, if the legislation confers an authority on a public body and also gives it a discretion, not only whether or not to do the thing authorized but also how to do it and in what location, then if that public body decides to do the thing authorized, it must do it in a manner and at a location which will avoid the creation of a nuisance. If the public body implements the thing authorized in a way or at a location which gives rise to a nuisance, it will be liable therefor, whether there is negligence or not. The more recent cases, to the extent that they are inconsistent with these principles, should not be followed.

The inevitable consequences doctrine will only protect the public body if the statute ordered the thing to be done or authorized it to be done in a particular manner or location. It should not be extended to cases where the public body was perfectly free to exercise its statutory authority without violating private rights. It is only in cases where the public body has no choice as to the way in which or the place where it engages in the nuisance-causing activity that the inevitable consequences doctrine protects it. For only in such cases can it be said that the legislature has authorized any nuisance which is the inevitable consequence of the public body's carrying out its mandate.

The legislation in this case was purely permissive. It authorized a sewage system to be constructed but did not specify how or where it was to be done. The respondent was accordingly obliged to construct and operate the system in strict conformity with private rights. It did not do so. The defence of statutory authority is not available to it and the appellants are entitled to recover.

Per Dickson C.J. and La Forest J.: The rule in *Rylands v. Fletcher* cannot be invoked where the user is not inappropriate to the place where it is maintained.

The flooding here would constitute a compensable nuisance if this case had been between private individuals. It was not reasonable to deny compensation to the appellant because the damage was suffered at the hands of a body exercising statutory authority. The law of nuisance as it relates to the defence of statutory authority should be reformulated in functional terms.

A claim for nuisance arising out of the action of a public body that has been sanctioned by statute should be dealt with rather like claims in nuisance between two private individuals. Given all the circumstances, is it reasonable to refuse to compensate the aggrieved party for the damage he has suffered? If the legislature wishes to shift the risk from a public authority to the individual, it can do so in express terms. The legislature should not be presumed to authorize a serious nuisance and no weight should be accorded a showing by the public body that damage was

inevitable. The determination that damage was inevitable does not provide a rationale for concluding that it is reasonable to demand of the person whom misfortune has singled out that he or she pay for the damage concerned. The costs of damage that is an inevitable consequence of the provision of services that benefit the public at large should be borne equally by all those who profit from the service.

The defence of statutory authority is not deprived of all vigour. A public body will not be subject to a claim in nuisance because a work is constructed in a particular place if the legislature has authorized it to be built there. Nor can landowners complain about ordinary disturbances or loss of amenity that necessarily results from the construction or operation of a statutorily authorized work, provided it is built and operated with all reasonable care and skill.

A useful distinction exists between isolated and infrequent occurrences which inflict heavy material damage on a single victim and those ordinary disturbances which have a broad and general impact on the public at large. Damage attributable to a calamitous event should be viewed as a part of the overall cost of providing a beneficial service to the community and should be placed on the body that undertakes it. That body can defray the cost among its subscribers or increase the frequency of inspections to forestall the occurrence of such calamities.

Per Sopinka J.: The state of the law with respect to the defence of statutory authority should not be departed from except for good reason and on the basis of substantial unanimity. The rationale of this defence is that if the legislature expressly or implicitly says that a work can be carried out which can only be done by causing a nuisance, then the legislation has authorized an infringement of private rights. If no compensation provision is included in the statute, all redress is barred. A work is authorized by statute, whether the statute is mandatory or permissive, if the work is carried out in accordance with the statute.

The burden of proof with respect to the defence of statutory authority is on the party advancing the defence. It is not an easy one and factual difficulties will be resolved against the defendant. The defendant must negate that there are alternate methods of carrying out the work and the fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negate negligence. The standard is a higher one. It was not met in this case.

Cases Cited

By Wilson J.

Distinguished: *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; *The King v. Pease* (1832), 4 B. & Ad. 30, 110 E.R. 66; considered: *Vaughan v. Taff Valley Railway Co.* (1860), 29 L.J. Ex. 247; *Hammersmith and City Railway Co. v. Brand* (1869), 38 L.J.Q.B. 265; *Geddis v. Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430; *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; *London, Brighton, and South Coast Railway Co. v. Truman* (1885), 11 App. Cas. 45; *City of Manchester v. Farnworth*, [1930] A.C. 171; *Stephens v. Village of Richmond Hill*, [1956] O.R. 88; *City of Portage La Prairie v. B.C. Pea Growers Ltd.* (1963), 45 W.W.R. 513, aff'd (1964), 50 W.W.R. 415, aff'd [1966]

S.C.R. 150; Royal Anne Hotel Co. v. Ashcroft (1976), 1 C.C.L.T. 299, aff'd [1979] 2 W.W.R. 462; Wiebe v. Rural Municipality of De Salaberry (1979), 11 C.C.L.T. 82; referred to: Guelph Worsted Spinning Co. v. City of Guelph (1914), 18 D.L.R. 73; District of North Vancouver v. McKenzie Barge & Marine Ways Ltd., [1965] S.C.R. 377; City of Campbellton v. Gray's Velvet Ice Cream Ltd. (1981), 127 D.L.R. (3d) 436; Temple v. City of Melville (1979), 105 D.L.R. (3d) 305; Fairview Suede and Leather Specialists Ltd. v. City of Dartmouth (1980), 40 N.S.R. (2d) 313; Buysse v. Shelburne (1984), 28 C.C.L.T. 1; Schenck v. The Queen in Right of Ontario (1981), 34 O.R. (2d) 595 (H.C.), aff'd (1984), 49 O.R. (2d) 556 (C.A.), aff'd sub nom. Schenck v. Ontario (Minister of Transportation and Communications), [1987] 2 S.C.R. 289.

By La Forest J.

Distinguished: Rylands v. Fletcher (1868), L.R. 3 H.L. 330; referred to: Rickards v. Lothian, [1913] A.C. 263; Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd., [1953] Ch. 149; Walter v. Selfe (1851), 4 De G. & Sm. 315, 64 E.R. 849; Bamford v. Turnley (1862), 3 B. & S. 66, 122 E.R. 27; St. Helen's Smelting Co. v. Tipping (1865), 11 H.L.C. 642; Royal Anne Hotel Co. v. Ashcroft, [1979] 2 W.W.R. 462; City of Portage La Prairie v. B.C. Pea Growers Ltd., [1966] S.C.R. 150; Russell Transport Ltd. v. Ontario Malleable Iron Co., [1952] 4 D.L.R. 719; Vaughan v. Taff Valley Railway Co. (1860), 29 L.J. Ex. 247; Geddis v. Proprietors of the Bann Reservoir (1878), 3 App. Cas. 430; City of Manchester v. Farnworth, [1930] A.C. 171; Schenck v. The Queen in Right of Ontario (1981), 34 O.R. (2d) 595 (H.C.), aff'd (1984), 49 O.R. (2d) 556 (C.A.), aff'd sub nom. Schenck v. Ontario (Minister of Transportation and Communications), [1987] 2 S.C.R. 289; Bishop v. Town of Gander (1986), 60 Nfld. and P.E.I.R. 310; Vergamini v. Regional Municipality of Hamilton-Wentworth (1986), 54 O.R. (2d) 494; Arif v. City of Fredericton (1986), 77 N.B.R. (2d) 34.

By Sopinka J.

Referred to: City of Manchester v. Farnsworth, [1930] A.C. 171; City of Portage La Prairie v. B.C. Pea Growers Ltd., [1966] S.C.R. 150; Schenck v. Ontario (Minister of Transportation and Communications), [1987] 2 S.C.R. 289; Royal Anne Hotel Co. v. Ashcroft, [1979] 2 W.W.R. 462; Temple v. City of Melville (1979), 105 D.L.R. (3d) 305; City of Campbellton v. Gray's Velvet Ice Cream Ltd. (1981), 127 D.L.R. (3d) 436; Allen v. Gulf Oil Refining Ltd., [1981] 1 All E.R. 353; Tate & Lyle Industries Ltd. v. Greater London Council, [1983] 1 All E.R. 1159.

Statutes and Regulations Cited

Municipalities Act, S.N. 1979, c. 33, s. 154 (1), (2), (3).

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APPEAL from a judgment of the Newfoundland Court of Appeal (1986), 62 Nfld. & P.E.I.R. 133, 190 A.P.R. 133, allowing an appeal from a judgment of Adams C.J. Dist. Ct. (1983), 45 Nfld. & P.E.I.R. 197, 132 A.P.R. 197. Appeal allowed.

Kevin Stamp, for the appellants.

Thomas J. O'Reilly, Q.C., and Paul M. McDonald, for the respondent.

//La Forest J.//

The reasons of Dickson C.J. and La Forest J. were delivered by

LA FOREST J. -- This appeal raises the important question whether a municipal authority which operates and maintains a sewer may, in the absence of negligence on its part, incur liability to a person whose property is damaged as a result of flooding caused by a random blockage of the sewer.

Facts

The appellants, Neil and Linda Tock, have a house in East Meadows in the St. John's Metropolitan Area. The respondent, the St. John's Metropolitan Area Board, operates the water and sewer system in the area.

In the early afternoon of October 10, 1981, a day of exceptionally heavy rainfall, the Tocks discovered that a large amount of water had entered their basement. They immediately notified the Board and attempted, in vain, to pump the water out themselves. Two employees of the Board came to inspect the storm sewer in the vicinity and determined that the sewer was blocked. A crew was summoned and by early evening it had located and removed the blockage. Within ten to fifteen minutes of the removal, the water drained from the basement which had, by this time, incurred substantial damage.

The Tocks brought an action against the Board in the District Court of Newfoundland. They claimed that the obstruction was caused by the negligence of the Board in the construction or maintenance of the storm sewer, relying on the doctrine of *res ipsa loquitur*. They also invoked the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, and in the alternative, alleged that the Board was liable on a claim for nuisance.

The Courts Below

The trial judge, Adams C.J. Dist. Ct., held that the flooding was caused by the blockage and not by the exceptionally heavy rainfall. He went on to dismiss the claim in negligence, holding that the Board had not been negligent in the construction, maintenance or operation of the storm sewer. He did, however, hold that the escape of the water into the Tock's residence constituted a serious interference with their right of enjoyment of their property and, in consequence, allowed the claim in nuisance. In his opinion, the collection and drainage of water from rain or other sources constituted a non-natural user of land within the meaning of the rule in *Rylands v. Fletcher*. In the result, the trial judge awarded the Tocks a total of \$13,456.11 in damages.

The Newfoundland Court of Appeal reversed this judgment. Gushue J.A., writing for a unanimous court, held that the rule in *Rylands v. Fletcher* had no application. In his view, the provisioning of an indispensable service such as a water and sewer system could not be held to constitute a non-natural user of land within the meaning of the rule.

On the question of nuisance, Gushue J.A. expressed the view that a claim in nuisance would not lie against a municipal corporation for damage resulting from a service provided under statutory authority if that body could establish that the occurrence complained of was inevitable in the sense that it could not have been avoided by the exercise of all reasonable and available expertise and care in the design, construction and operation of the service. On the facts, he concluded that the Board had satisfied the onus of demonstrating that it had done everything that could reasonably be expected to avoid the occurrence.

The question of negligence was not in issue in the Court of Appeal. Nor was it raised on the appeal to this Court. I turn then to an examination of the other grounds.

The Rule in *Rylands v. Fletcher*

As noted above, the Court of Appeal held that the trial judge erred in holding that the construction of a sewer system would trigger the application of the rule in *Rylands v. Fletcher* on the ground that the sewer constituted a non-natural user of land. I share the conclusion of the Court of Appeal.

The definitive statement of the meaning to be ascribed to Lord Cairn's qualification in *Rylands v. Fletcher*, at pp. 338-39, that strict liability would only attach in respect of "non-natural user" of land is generally agreed to be that of Moulton L.J. in *Rickards v. Lothian*, [1913] A.C. 263, at p. 280. Moulton L.J. thus expressed himself:

It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

The courts, as noted by Fleming, *The Law of Torts*, 6th ed., at p. 308, have, on the basis of this qualification, interpreted the notion of non-natural user as a flexible concept that is capable of adjustment to the changing patterns of social existence.

In the evolution of the patterns of social existence since the formulation of the rule in *Rylands v. Fletcher*, one of the most salient developments has been the ever-increasing degree of involvement by all levels of government in land planning. The point is nicely put by Williams in his article "Non-natural Use of Land" (1973), 32 *Cambridge L.J.* 310, at p. 319, when he argues that the existence of planning authorities which ensure that virtually all development of land occurs pursuant to planning decisions "puts the question of land use into a completely different context to that in which Messrs. Rylands and Horrocks built their little reservoir".

Public sewerage and drainage systems are an indispensable part of the infrastructures necessary to support urban life, and it is clear in my mind that the storm sewer in question here was constructed pursuant to planning decisions of the very sort alluded to in Williams' comments. As such, it would be difficult to conceive of a user of land falling more squarely within those that may be said to be ordinary and proper for the general benefit of the community; see the obiter remarks of Lord Denning to the same effect in *Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd.*, [1953] Ch. 149, at p. 189.

In summary, if, as argued by Prosser at p. 147 of his essay "The Principle of *Rylands v. Fletcher*," in *Selected Topics on the Law of Torts*, the touchstone for the application of the rule in *Rylands v. Fletcher* is to be damage occurring from a user inappropriate to the place where it is maintained (Prosser cites the example of the pig in the parlour), I would hold that the rule cannot be invoked where a municipality or regional authority, acting under the warrant of statute and pursuant to a planning decision taken in good faith, constructs and operates a sewer and storm drain system in a given locality.

To characterize a given use of land as appropriate to that locality does not, however, provide an answer to the question whether damage occasioned by that activity constitutes a nuisance. It is to that question that I now turn.

Nuisance

Generically, as Salmond on the Law of Torts, 17th ed. by R. F. V. Heuston, at p. 50, notes, "nuisances are caused by an act or omission, whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land". The same passage makes it clear that a nuisance may take a variety of forms, ranging from actual physical damage to land to interference with the health, comfort or convenience of the owner or occupier of land.

The assessment whether a given interference should be characterized as a nuisance turns on the question, simple to state but difficult to resolve, whether in the circumstances it is reasonable to deny compensation to the aggrieved party. The courts have traditionally approached this problem of reconciling conflicting uses of land with an eye to a standard based, in large part, on the formulations of Knight Bruce V.-C. in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, 64 E.R. 849, and Bramwell B. in *Bamford v. Turnley* (1862), 3 B. & S. 66, 122 E.R. 27, at pp. 83-84 and at pp. 32-33 respectively. There it was observed that the very existence of organised society depended on a generous application of the principle of "give and take, live and let live". It was therefore appropriate to interpret as actionable nuisances only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes. In effect, the law would only intervene to shield persons from interferences to their enjoyment of property that were unreasonable in the light of all the circumstances.

The courts are thus called upon to select among the claims for interference with property and exclude those based on the prompting of excessive "delicacy and fastidiousness", to employ the terms of Knight Bruce V.-C. The courts attempt to circumscribe the ambit of nuisance by looking to the nature of the locality in question and asking whether the ordinary and reasonable resident of that locality would view the disturbance as a substantial interference with the enjoyment of land. Among the criteria employed by the courts in delimiting the ambit of the tort of nuisance are considerations based on the severity of the harm, the character of the neighbourhood, the utility of the defendant's conduct, and the question whether the plaintiff displayed abnormal sensitivity.

It is important to bear in mind, however, that these criteria find their greatest application in cases where the interference complained of does not consist of material damage to property but rather interference with tranquility and amenity, i.e., what Westbury L.C. in *St. Helen's Smelting Co. v. Tipping* (1865), 11 H.L.C. 642, at p. 650, classified as "nuisance ... productive of sensible personal discomfort ... anything that discomposes or injuriously affects the senses or the nerves". Where "material damage" is concerned, it is clear that the criteria adverted to above are to be applied with great circumspection; see *Russell Transport Ltd. v. Ontario Malleable Iron Co.*, [1952] 4 D.L.R. 719, at pp. 729-30 per McRuer C.J.H.C. In the presence of actual physical damage to property, the courts have been quick to conclude that the interference does indeed constitute a substantial and unreasonable interference with the enjoyment of property. As put by Westbury L.C. in *St. Helen's Smelting Co. v. Tipping*, *supra*, at pp. 650-51:

... the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

On the basis of the foregoing considerations, I conclude that the escape of water at issue here would clearly constitute a compensable nuisance were this a case opposing two private individuals. The same view was taken by McIntyre J.A., later of this Court, in the very similar case of *Royal Anne Hotel Co. v. Ashcroft*, [1979] 2 W.W.R. 462 (B.C.C.A.) The question thus becomes

that of determining whether it is reasonable to deny compensation to the appellants because of the fact that they suffered the damage at the hands of a body exercising statutory authority. This requires a consideration of the defence of statutory authority.

Statutory Authority

Briefly put, the test applied by the courts when faced with the decision whether a nuisance may be defended on the ground that it was created pursuant to the exercise of statutory authority takes the form of inquiring whether the statute expressly or impliedly authorizes the damage complained of, and whether the public or other body concerned has established that the damage was inevitable. This was the test applied by this Court in *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150.

The approach to this defence, though considerably refined, is a legacy of the Victorian age. The gist of the doctrine as it then emerged was to the effect that in the absence of negligence no action would lie for damage occasioned by a body acting within the confines of its statutory authority. Negligence, it may be noted, was understood in a special sense as the failure on the part of the body to observe all precautions consistent with the carrying out of the activity in question; see *Vaughan v. Taff Valley Railway Co.* (1860), 29 L.J. Ex. 247, *passim*. The locus classicus is that of Blackburn L.J. in *Geddis v. Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430 (H.L), at pp. 455-56:

For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law.

In his essay "Strict Liability, Nuisance and Legislative Authorization" (1966), 4 Osgoode Hall L.J. 196, at p. 202 ff., Professor, now Justice, Linden makes the point that the formulation of the doctrine of immunity reposed on a supposed divination of legislative intent, for the statutes which authorized undertakings were normally silent as to the effect of the legislation on tort liability. As he notes, the emergence in the 19th century of a doctrine conferring substantial immunities on public authorities corresponded to then pressing policy reasons. He states at p. 199:

Perhaps the most important policy reason for the creation of the immunity was the desire to promote industrial expansion and to refrain from saddling infant industries with legal responsibility for their non-negligent conduct. Legislative authority was generally used in cases involving semi-public activities such as railways, roadbuilding, canals and hospitals. These types of enterprise were even more vital to the economy than were other industries and thus deserving of additional protection from civil liability.

It is clear, however, that the concern that the imposition of tort liability would nullify the ability of public and semi-public bodies to carry out what was authorized by the legislature has waned in this century, giving way, in considerable measure, to the notion that it is unreasonable to immunize these bodies from tort liability. As Linden, *op. cit.*, at p. 202 puts it, the broad immunity previously given public bodies is now in the process of "contraction and decay". The rationale for this shift may be said to lie in the perception that, when an individual suffers damage attributable to such a body, it is only just that the cost of this damage should be absorbed by it and thus become a charge on all those who benefit from the service, rather than being laid at the feet of the hapless individual who has been injured or incurred damage; see McLaren, "Nuisance in Canada," in A. M. Linden, ed., *Studies in Canadian Tort Law*, at p. 372.

This shift away from the notion that public authorities as such should enjoy an immunity from liability in tort was effected by means of a number of techniques developed by the courts for eliciting the supposed intent of the legislature; see McLaren, *op. cit.*, at pp. 372-73; Linden, *op. cit.*, at pp. 201 et seq. Thus, liability has turned on the question whether the statute should be characterized as mandatory or permissive, the basis for the distinction being the premise that, where the legislature has merely accorded a power as opposed to having mandated the doing of a particular thing in a given locality, it is to be supposed that the power is meant to be exercised in strict conformity with individual rights.

Again, rather than applying a presumption that the authorizing statute impliedly sanctioned the invasion of individual rights, the courts have sought to determine whether the nuisance would inevitably arise from the construction or operation of the authorized work. Damage is said to be "inevitable" when the body responsible for it establishes to the satisfaction of the court that it was demonstrably impossible to avoid the damage inasmuch as it had carried out its operations with a degree of skill and care commensurate with current scientific and technical knowledge, but with due allowance for practical considerations bearing on time and expense. On proof of inevitability, a plaintiff is denied redress. Viscount Dunedin put it this way in *City of Manchester v. Farnworth*, [1930] A.C. 171 (H.L.), at p. 183:

When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

Though the words of Viscount Dunedin have now taken on the aura of dogma, the question of what is meant by inevitability invites scrutiny.

In the case before us, the Court of Appeal took the view that a statutory body would establish the inevitability of damage on a showing that it had not been negligent in its operation of the system in question. This emerges from the following passages from its decision, at p. 136 and p. 139:

As a general rule, municipal authorities have not been held liable in nuisance by the courts if the municipality has been authorized by the Legislature to construct and maintain an undertaking or work, the nature of which may involve interference with the rights of individuals, where negligence has not been demonstrated.

...

I think it unnecessary to go to either extreme to establish inevitability because in my view what is really meant by inevitability is "unavoidability". Thus, a municipal corporation, acting under statutory authority, may successfully defend an action in nuisance if it can establish that the occurrence complained of was inevitable in the sense that it could not have been avoided by the exercise of all reasonable and available expertise and care in the design, construction and operation of the works from which the nuisance emanated. This obviously comes very close to stating that the onus on the municipality is to disprove negligence

...

It is established that there was no negligence by the municipality and I am unable to conclude that the municipality created any nuisance. As stated, the mere fact of the interference with the respondent's land does not in my view create a nuisance because, while unfortunate, there was no "unreasonableness" which can be ascribed to the appellant municipality.

The problem with this approach is that it directs the focus of the inquiry solely on the conduct of the defendant. Yet the fundamental issue before the court in a claim for nuisance is not whether the defendant has acted prudently. Rather, the issue for determination is whether, on a consideration of all the circumstances, it is reasonable or unreasonable to award compensation for the damage suffered. McIntyre J.A., as he then was, put the point well in *Royal Anne Hotel Co. v. Ashcroft*, *supra*, when after noting (at pp. 465-66) that the most carefully designed industrial plant operated with the greatest care could cause a nuisance, he added, at p. 467:

In my opinion the rationale for the law of nuisance in modern times, whatever its historical origins may have been, is the provision of a means of reconciling certain conflicting interests in connection with the use of land, even where the conflict does not result from negligent conduct. It protects against the unreasonable invasion of interests in land.

The meaning of what constitutes an "unreasonable" invasion accordingly cannot turn on the sole question whether the defendant has taken reasonable care in the circumstances.

I would therefore respectfully reject the view of the Court of Appeal that the test whether a given occurrence is "inevitable" turns on whether the accident was bound to occur despite the exercise of "reasonable and available expertise and care in the design, construction and operation of the works from which the nuisance emanated". The test for inevitability does not, in my view, centre on whether a particular infrastructure with all its deficiencies is bound to produce occurrences of the nature complained of. What Viscount Dunedin's statement in the *City of Manchester* case invites the courts to do, as I see it, is to take a broad view of the matter and to ask whether, having regard both to the technical knowledge available to the public body concerned, and the limitations of cost, it was demonstrably impossible for it to provide the service without causing a nuisance. This is obviously a question of quite a different order from asking whether it was demonstrably impossible for that body, with the equipment it had in place or with the level of service it chose to provide, to avoid causing the damage through the exercise of due care.

The invitation proffered by Lord Dunedin has been accepted by a number of Canadian courts; see especially *Royal Anne Hotel Co. v. Ashcroft*, *supra*; *Schenck v. The Queen in Right of Ontario* (1981), 34 O.R. (2d) 595 (H.C.), *aff'd* (1984), 49 O.R. (2d) 556 (C.A.), *aff'd sub nom. Schenck v. Ontario (Minister of Transportation and Communications)*, [1987] 2 S.C.R. 289; *Bishop v. Town of Gander* (1986), 60 Nfld. and P.E.I.R. 310 (Nfld. S.C.) These courts, while according due respect to the traditional garb in which the defence of statutory authority was clothed, were not dissuaded from reformulating the law to meet modern conditions and values. Some courts, however, including, with deference, the Court of Appeal in this case, appear to have been misled by the traditional verbiage and failed to follow this development; see, for example, *Vergamini v. Regional Municipality of Hamilton-Wentworth* (1986), 54 O.R. (2d) 494 (Ont. Dist. Ct.)

The truth is that there is an air of unreality and contrivedness to the defence of statutory authority in this context, however one may seek to rationalize it. Where the statute in question does not expressly exempt a body for damages in nuisance, or, in the alternative, does not provide for a compensation scheme of its own or contain other clear legislative indications, I doubt that divination of an unexpressed intent of the legislature can shed much light on the question whether the person who has suffered damage should be denied compensation. At this remove from the 19th century, therefore, it would seem appropriate to reformulate the law in more functional terms. To give one instance, I would reject the notion that the distinction as to whether a statute is permissive or mandatory is, without more, determinative. Thus, if one looks at the statute authorizing the storm drain in question here, it is clear that the statute is framed in permissive terms. By application of the traditional test, this would ground the presumption that the sewer was meant to be built in strict conformity with private rights, whereas, had the statute been mandatory, the operative presumption would have been that the statutory powers were merely to be exercised without negligence, as that term was defined earlier. But I cannot see how liability for nuisance can credibly be said to depend on whether the legislature has conferred a general power to build sewers that, on all accounts, it must be taken to know will be built as and where the demand arises, or whether it goes to the trouble of passing a special enactment to authorize each sewer in turn. Whatever statutory route is taken will result in the construction of sewerage and drainage facilities in the same locations, and the nature of the authorization

cannot, in all reason, have any bearing on the question whether compensation is owed, or is not owed, for damage suffered as a consequence of the operation of the sewer.

Turning to the question of inevitability, it seems to me that, in strict logic, most nuisances stemming from activities authorized by statute are in fact inevitable. Certainly, if one is to judge from the frequency with which storm drain and sewer cases occur in the reports, it would seem a safe conclusion that blockage of such systems is inevitable if one accepts this to mean that it is demonstrably impossible to operate these systems without such occurrences. But what escapes me is why any particular importance should be accorded this fact when weighing a nuisance claim against a statutory authority. The fact that the operation of a given system will inevitably visit random damage on certain unfortunate individuals among the pool of users of the system does not tell us why those individuals should be responsible for paying for that damage.

This rationale was recently adverted to by Robins J. in *Schenck v. The Queen in Right of Ontario*, supra, where fruit farmers successfully sued the Ontario Government in nuisance for damage resulting to their orchards adjacent to provincial highways from the application of salt to the highways to permit winter travel. In reasons successively approved by the Ontario Court of Appeal and this Court, Robins J. perceptively observed that arguments about inevitability are essentially arguments about money. This was recently followed in *Bishop v. Town of Gander*, supra, which involved a ruptured water main. There, Barry J. had this to say, at p. 332:

In the case of *Schenck v. The Queen* (supra), the basis of the argument against the assumption of liability by the municipality, as in this instance, was essentially one of money, i.e. the high cost of paying the resulting damages or of avoidance of the risk of damage. If courts were to accept that contention, municipalities would be able to economise on such expensive capital works as water systems without responsibility to its citizens for the losses sustained by them in consequence of nuisances so caused.

Constraints of time and money will always militate against the building of absolutely failsafe systems (on the assumption that such systems are possible) and the maintaining of the best conceivable inspection system. Accordingly, a public authority charged with operating any service will inevitably have to strike a balance between the need to give due consideration to factors bearing on efficiency and thrift, and the need to protect persons and property from damage that the system in question is likely to cause. In a word, it will be necessary to make compromises, and I have no reason to doubt that these compromises will take into account the possibility of a certain amount of inevitable damage. This, it seems to me, is bound to occur where the costs of preventing predictable damage far outweigh the actual costs of that damage. To take one example, a public authority, depending on the nature of the threat posed to life and limb, might incur considerable difficulty in justifying to its ratepayers a decision to disburse annually an extra million dollars for a program of inspection that stood merely to forestall damage of one hundred thousand dollars. But the decision not to inspect in such circumstances does not change the fact that the resultant damage should properly be viewed as a cost of running the system. Similarly, in *Schenck v. The Queen in Right of Ontario*, there were no doubt alternative ways to make highways passable in winter, but they probably came at substantially

greater cost. If one can judge from the almost universal use of salt in this country, there was no realistic alternative. To my mind, the flaw in the inevitability test, as traditionally expressed, is that it does not take due account of the fact that "inevitable" damage is often nothing but a hidden cost of running a given system.

In short, I question the applicability to the facts of the instant case of the defence of statutory authority as it is conventionally formulated. Where, as here, the authorizing statute does not specifically provide that a right of action in nuisance is taken away (see *Arif v. City of Fredericton* (1986), 77 N.B.R. (2d) 34 (Q.B.), for an example of a statute that does take away such a right), I see no point in donning the cloak of a soothsayer to plumb the intent of the legislature. After all, if the legislature wishes to shift the risk from a public authority to the individual, it can do so in express terms. I see no reason why it should be presumed to be authorizing a serious nuisance. Nor do I accept that any weight should be accorded a showing by the public body that damage was inevitable. The determination that damage was inevitable, in the sense in which that term was defined earlier, does not provide a rationale for concluding that it is reasonable to demand of the person whom misfortune has singled out that he or she pay for the damage concerned. The costs of damage that is an inevitable consequence of the provision of services that benefit the public at large should be borne equally by all those who profit from the service.

Rather than approaching the matter in this way, I think the best way to resolve the problem is to proceed rather as one does when facing a claim in nuisance between two private individuals, and ask whether, given all the circumstances, it is reasonable to refuse to compensate the aggrieved party for the damage he has suffered. When the problem is stated in this fashion, I fail to see any reason that would compel this result on the facts of this case.

This does not denude the defence of statutory authority of all vigour. If, as Lord Dunedin explained, the legislature has authorized the construction of a work at a particular place, the owner of neighbouring land cannot complain if that work is built there. Similarly, if the legislature authorizes the construction of a work, such as a sewerage system, the adjacent landowners cannot complain of ordinary disturbances or loss of amenity that necessarily results to them from its construction or operation if it is built and operated with all reasonable care and skill. To permit action by a landowner in such circumstances (assuming this can be regarded as a nuisance) would in effect be to deny the statutory mandate. Again, if a municipality is given statutory authority to construct a garbage dump, landowners in the vicinity where it is built will not suffer an actionable wrong from unavoidable smells emitted from the dump or increased traffic from trucks. But if toxic waste escapes into their basements or wells, this would pose a completely different issue.

The damage in the present case is attributable to a single calamitous event which, in turn, finds its origin in the operation by the respondent of a service of undoubted public utility. This circumstance in itself provides no rationale for denying compensation. As McIntyre J.A. put it in *Royal Anne Hotel Co. v. Ashcroft*, *supra*, at p. 468, this would have the effect of visiting a disproportionate share of the cost of the beneficial service on the hapless individual who suffered the damage. As I earlier observed, damage attributable to a calamitous event such as the flooding

that occurred here should rather be viewed as what it in fact is, a part of the overall cost of providing a beneficial service to the community. As such it is appropriate, in my view, that the obligation of meeting such costs be placed on the body that undertakes it. That body, unlike its hapless victim, is in a position to defray the cost by spreading it among all subscribers to the system. In the alternative, if the authority is to bear the costs of accidents of this nature, it may realize that it is more cost-effective to forestall their occurrence by increasing the frequency of inspections.

I do not share the qualms of the Court of Appeal that to hold the respondent liable in this instance, in the absence of a showing that it was negligent, will make of it an "absolute insurer in respect of all its works". To evoke this spectre of indeterminate liability is, with respect, to lose sight of the fact that a plaintiff does not, as a matter of course, win an action in nuisance on a mere showing that he has suffered damage as a result of interference with the use or enjoyment of his land; see the *Royal Anne* case, *supra*, at p. 467; see also *Street on Torts*, at p. 225. There is always the question whether the injury is one for which it is reasonable or unreasonable to award compensation, and this holds true whether the defendant is a private individual or a statutory body. I see no reason to doubt that in many cases the courts, when called upon to strike a balance between the interests of the private citizen and a statutory body, will conclude that it is appropriate that the interests of the private citizen yield to those of the public at large.

Without purporting to formulate a hard and fast rule, it seems to me that a useful distinction exists between isolated and infrequent occurrences which inflict heavy material damage on a single victim, such as we are concerned with in this case, and those ordinary disturbances diffuse in their effect and having a broad and general impact on the comfort, convenience and material well-being of the public at large. We all have to put up with a certain degree of inconvenience, and indeed some material harm as a price of living in organized society. We accept, for example, that we can look to no one for redress because salt on the roads causes our cars to rust out in five years, but as *Schenck v. The Queen in Right of Ontario*, *supra*, has shown, it is unreasonable that an individual's land be subjected to random and severe damage from that activity without compensation. The test for recovery in nuisance, after all, is whether the effect of the activity on a landowner's enjoyment of property is unreasonable or not. I, therefore, see no ground for viewing a finding of liability on the part of the Board as in any way a floodgates decision that stands, in the long term, to compromise the ability of statutory authorities duly to carry out their legislative mandates.

Disposition

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the trial judge. The appellants are entitled to their costs throughout.

//Wilson J.//

The judgment of Lamer, Wilson and L'Heureux-Dubé JJ. was delivered by

WILSON J. -- I have had the benefit of reading the reasons for judgment of my colleague, Justice La Forest, and, while I agree with his proposed disposition of the appeal, I have reservations about his approach to the law of nuisance as it applies to public bodies acting under statutory authority. The facts are set out in detail by my colleague and I need not repeat them here.

I agree with my colleague's conclusion that the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, has no application to this case but that the appellants are entitled to recover from the respondent in nuisance. I agree with him also that the Court of Appeal erred in concluding that if the respondent could show that it had not been negligent, then it could not be liable in nuisance.

I do not, however, share La Forest J.'s view that this Court should, or indeed can, on this appeal virtually abolish the defence of statutory authority for policy reasons and treat municipalities exercising statutory authority in the same way as private individuals. Such a major departure from the current state of the law would, it seems to me, require the intervention of the legislature.

Moreover, I do not favour replacing the existing law in this area with a general test of whether it is reasonable or unreasonable in the circumstances of the case to award compensation. This test may, because of the high degree of judicial subjectivity involved in its application, make life easier for the judges but, in my respectful view, it will do nothing to assist public bodies to make a realistic assessment of their exposure in carrying out their statutory mandate. Nor will it provide much guidance to litigants in deciding whether or not to sue. It is altogether too uncertain. Nor can I, with respect, accept the proposition that a single individual suffering damage from an isolated nuisance should be dealt with differently from a group of people suffering damage from an ongoing nuisance. This seems to me to be quite incompatible with the concept of principled decision-making. Accordingly, while I agree with my colleague in the result he has reached in this case, I prefer to write my own concurring reasons.

I agree that the flooding of the appellants' basement constituted an unreasonable interference with the appellants' use and enjoyment of the property and that, had the parties been two private individuals, it clearly would have been an actionable nuisance. However, since the respondent is a municipality, the law dictates that different considerations apply. The crucial question is whether or not the respondent is able to rely on the defence of statutory authority in the circumstances of this case.

Since the availability of the defence of statutory authority depends on the language of the statute I set out the relevant provisions of The Municipalities Act, S.N. 1979, c. 33, on which the respondent must rely:

154. (1) The council may, subject to the provisions of The Department of Consumer Affairs and Environment Act, 1973 and regulations made thereunder, construct, acquire, establish, own and operate

(a) a public water supply system for the distribution of water within or, with the approval of the Minister, outside of the town,

(b) a public sewerage system, either independently of or in conjunction with a public water supply system, for the collection and disposal of sewerage within or, with the approval of the Minister, outside of the town, and

(c) a storm drainage system within or, with the approval of the Minister, outside of the town.

(2) For the purposes of subsection (1) the council may

(a) acquire any waters required for the purpose of providing a sufficient supply of water for the town, and

(b) acquire by purchase or expropriation any lands adjacent to such waters to prevent pollution of those waters.

(3) For the purpose of exercising its powers under subsection (1) the council may lay out, excavate, dig, make, build, maintain, repair, and improve all such drains, sewers, and water supply pipes as the council deems necessary.

There is no doubt that these provisions authorize the respondent to construct and continue to operate and maintain the sewage system in question. They are, however, permissive as opposed to mandatory. They confer a power; they do not impose a duty. Is this distinction relevant to the question of the respondent's liability in nuisance? To answer this it is necessary to review some of the leading authorities on the subject.

Many of the early cases in which the defence of statutory authority was held to be available to public bodies dealt with the establishment of railways. In *The King v. Pease* (1832), 4 B. & Ad. 30, 110 E.R. 66, *Vaughan v. Taff Valley Railway Co.* (1860), 29 L.J. Ex. 247, and *Hammersmith and City Railway Co. v. Brand* (1869), 38 L.J.Q.B. 265, locomotive railways had been constructed and in each case their operation had caused damage to the plaintiffs. The courts held that if the legislature has sanctioned the establishment of locomotive railways there will be no liability on the part of the defendant provided every precaution has been taken in their operation. In *Vaughan v. Taff Valley Railway Co.*, Cockburn C.J. stated the applicable principle, at p. 247:

... when the legislature has sanctioned the use of a particular means for a given purpose, it appears to me that that sanction carries with it this consequence, that the use of the means itself for that purpose (provided every precaution which the nature of the case suggests has been observed) is not an act for which an action lies, independent of negligence. [Emphasis added].

In *Hammersmith and City Railway Co. v. Brand*, Lord Chelmsford approved this principle and pointed out that the intention of the legislature governed the question as to whether or not there would be liability. He pointed out that an intention to authorize a nuisance would seldom be expressed in legislation; it might, however, be implied from the language of the statute if the damage could be shown to have been the inevitable consequence of the proper doing of what was authorized. He said at p. 276:

With great respect to the learned Baron, we do not expect to find words in an act of parliament expressly authorizing an individual or a company to commit a nuisance or to do damage to a neighbour. The 86th section gives power to the company to use and employ locomotive engines, and if such locomotives cannot possibly be used without occasioning vibration and consequent injury to neighbouring houses, upon the principle of law, that *cuicumque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit* [he who grants something to anyone is deemed to grant also that without which his grant is worthless], it must be taken that power is given to cause that vibration, without liability to an action. The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon the line and shook the houses in the neighbourhood actions might be brought by their owners, which would soon put a stop to the use of the railway.

The early cases in which the defence of statutory authority was held to be available were not, however, confined to the operation of railways. In *Geddis v. Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430, the question arose whether the defendants, who were authorized and empowered to construct a reservoir and redirect the water flow for a particular purpose, were liable for damage to the plaintiff's property caused by flooding. The defendants alleged that all that had been done was done under the authority of an Act of Parliament and that the unhappy consequences therefore had to be borne by the plaintiff. The plaintiff argued that the legislature did not intend the statutory purpose to be attained without regard for the rights and interests of surrounding landowners but that, on the contrary, the defendants were bound to carry out their mandate with due regard to these rights. The court found for the plaintiff and, while the actual basis of liability was a finding that the defendants had been negligent in the exercise of their powers, the statutory authority defence was discussed. Lord Selborne reaffirmed the applicable principle of law. He said at p. 452:

Farther, it appears to me to be clear that if, by this Act of Parliament, power is given to the Defendants to convey by this particular channel to the River Bann, a supply of water which would not otherwise in the same manner naturally pass down that channel, and to do all things proper and necessary for the conveyance and regulation of such supply of water, that power does not enable or authorize them to flood the lands of the neighbouring proprietors, unless it would be impossible to avoid or prevent such flooding by any reasonable and proper use of their statutory powers. For this proposition I do not think it necessary to cite authority; but I may say that it appears to me to be consistent with all the authorities which have been referred to, and to rest upon very evident grounds of reason, justice, and law. [Emphasis added.]

In *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193, the authority granted by the relevant statute, the Metropolitan Poor Act, 1867, 30 Vict., c. 6, differed from the authority granted in the above cases. It authorized the formation of districts and district asylums for the care and cure of sick and infirm poor and created corporations for that purpose. The Act gave authority to the Poor Law Board to issue directions to such corporations enabling them to purchase lands and erect buildings for the purposes of the Act. The defendants built a hospital for patients suffering from smallpox and other contagious diseases near the plaintiffs' properties. The plaintiffs brought an action in nuisance.

The defendants defended on the basis of their statutory authority and relied on *The King v. Pease and Hammersmith and City Railway Co. v. Brand*. The plaintiffs did not question the principle in *Hammersmith and City Railway Co. v. Brand* and agreed that what the legislature has ordered to be done, if done as the legislature has ordered it, cannot be made the subject of an action. They alleged, however, that the governing Act did not order a hospital for patients with contagious diseases to be built next door to them.

The Court agreed with the plaintiffs. Each of the Lords held *Hammersmith and City Railway Co. v. Brand* to be good law but concluded that it was not applicable on the facts of this case. Lord Watson stated at pp. 211-12:

The judgment of this House in *The Hammersmith Railway Company v. Brand* (Law Rep. 4 H.L. 171) determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications, upon a particular site, and for a specific purpose, the use of these works or buildings, in the manner contemplated and sanctioned by the Act, cannot, except in so far as negligent, be restrained by injunction, although such use may constitute a nuisance at common law; and that no compensation is due in respect of injury to private rights, unless the Act provides for such compensation being made. Accordingly the Respondents did not dispute that if the Appellants or Local Government Board had been, by the Metropolitan Poor Act, 1867, expressly empowered to build the identical hospital which they have erected at Hampstead, upon the very site which it now occupies, and that with a view to its being used for the treatment of patients suffering from small-pox, the Respondents would not be entitled to the judgment which they have obtained. [Emphasis added.]

Lord Watson went on to distinguish between the grant of a general power, i.e., to provide hospitals for a community as in this case and the grant of a specific power to build a hospital at a specified location. The defence of statutory authority will only be available in the latter case and not in the former because the public body in the former situation has a discretion as to how and where to build and must exercise that discretion with due regard for private rights. He explained it this way at pp. 212-13:

And I am disposed to hold that if the Legislature, without specifying either plan or site, were to prescribe by statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided

that it were either apparent or proved to the satisfaction of the Court that the directions of the Act could not be complied with at all, without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed.

On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions - in the first place, that such are the imperative orders of the Legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights. If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to shew that the Legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose. [Emphasis added.]

This case clearly illustrates that the language of the statute and what it does in fact order, authorize, or permit is of the utmost importance. It is clear that an "authority" conferred in very specific terms, i.e., specifying the manner and location of any municipal activity is to be treated as the equivalent of mandatory whereas an "authority" conferred in general terms and leaving a broad discretion as to the how and the where to the public body is to be treated as permissive.

Lord Watson's distinction between mandatory and permissive legislation was applied in Canada in *Guelph Worsted Spinning Co. v. City of Guelph* (1914), 18 D.L.R. 73. Middleton J. of the Ontario Supreme Court affirmed that legislative authority which is merely permissive does not permit the abrogation of common law rights. Common law rights will only be abrogated if that which has been ordered to be done or "authorized" to be done in very specific terms cannot be done without their abrogation.

The importance of the statutory provisions was also emphasized by the English courts in *London, Brighton, and South Coast Railway Co. v. Truman* (1885), 11 App. Cas. 45. In that case the defendant railway company had erected cattle pens and a dockyard for the purpose of loading and unloading livestock. The plaintiffs claimed in nuisance and argued that the case was governed by *Metropolitan Asylum District v. Hill* because the statutory authority was merely permissive. The railway argued that it was expressly authorized to acquire lands alongside the

railway for loading and unloading cattle and that the judges in the court below misunderstood Lord Watson's judgment in *Metropolitan Asylum District v. Hill*. They contended that the relevant legislation in *Metropolitan Asylum District v. Hill* authorized a smallpox hospital to be provided only if it could be set up without creating a nuisance. The defendant had a discretion as to where to locate the hospital and could have located it where no nuisance would have been created. In the present case, however, the cattle traffic on the railway necessarily involved a nuisance to occupiers of houses in the vicinity of the railway.

The Court agreed with the submissions of the defendant. Each of the Law Lords construed the statute as giving specific authority to the railway to carry cattle in their trains and to load and unload them on the land adjacent to the railway acquired for the purpose without liability for any nuisance necessary and incidental to the authorized use.

Lord Halsbury distinguished *Metropolitan Asylum District v. Hill* as follows at p. 53:

Broadly stated, the distinction taken amounted to this, that a small-pox hospital might be built and maintained if it could be done without creating a nuisance, whereas the Railway Acts were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not.

The principles established in these cases were followed in *City of Manchester v. Farnworth*, [1930] A.C. 171, the case usually cited for Viscount Dunedin's articulation of the "inevitable consequences" doctrine. In that case the Manchester Corporation Act, 1914, 4 & 5 Geo. 5, c. 146, conferred various powers on the corporation with reference to the supply of electricity. The Act required the corporation to construct a generating station on 12 1/2 acres of land situate in a rural district a considerable distance from the city. The Act also gave the corporation power to supply certain areas with electricity and to make connections by electrical mains between existing stations of the corporation and this station. The station was erected in the place specified by the legislation and the fumes from it caused a nuisance to the plaintiff who had a farm in the area.

The Court found the defendant corporation liable for the damage, the main ground of liability being negligence. The officers of the corporation never directed their minds at the time of construction of the generating station to the prevention of nuisances which it was quite obvious might occur but proceeded on the basis that, so long as their plant was efficiently and successfully run, the neighbours must endure their consequent injuries. Because this was their approach the corporation had not used reasonable care and skill to prevent the nuisance to the plaintiff and was accordingly unable to show that the generating station could not be operated without creating it.

When dealing with the statutory authority defence Viscount Dunedin noted that the defendant claimed that the generating station was a thing specifically authorized by an Act of Parliament, that the emission of deleterious fumes was a necessary consequence of the operation of the authorized station, and that, accordingly, they were not liable for any nuisance created thereby. The defendant placed its reliance on the early railway cases. The plaintiff responded that the onus of proving that the creation of the nuisance was an inevitable consequence of the

construction and operation of the generating station was on the corporation and it had not discharged it.

Viscount Dunedin stated at p. 183 that the effect of the railway cases could be stated in a very few sentences:

When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense. [Emphasis added.]

Viscount Dunedin found on the facts that the defendant's callous indifference to the rights of others in planning the construction of the station resulted in its inability to discharge its onus.

The principles to be derived from the foregoing authorities would seem to be as follows:

- (a) if the legislation imposes a duty and the nuisance is the inevitable consequence of discharging that duty, then the nuisance is itself authorized and there is no recovery in the absence of negligence;
- (b) if the legislation, although it merely confers an authority, is specific as to the manner or location of doing the thing authorized and the nuisance is the inevitable consequence of doing the thing authorized in that way or in that location, then likewise the nuisance is itself authorized and there is no recovery absent negligence.

However:

- (c) if the legislation confers an authority and also gives the public body a discretion, not only whether to do the thing authorized or not, but how to do it and in what location, then if it does decide to do the thing authorized, it must do it in a manner and at a location which will avoid the creation of a nuisance. If it does it in a way or at a location which gives rise to a nuisance, it will be liable therefor, whether there is negligence or not.

In other words, in the situations described in (a) and (b) above the inevitability doctrine is a good defence to the public body absent negligence. In situation (c) it is no defence at all and it is unnecessary for the plaintiff to prove negligence in order to recover.

In my view, these principles make a great deal of sense. The inevitability doctrine represents a happy judicial compromise between letting no one who has suffered damage as a consequence of the statutorily authorized activities of public bodies recover and letting everyone so suffering damage recover. Recovery will be allowed unless it is shown that the interference with the plaintiff's rights was permitted by either:

- (1) express language in the statute such as a provision specifying that no action for nuisance may be brought for any damage caused: see, for example, the decision of this Court in *District of North Vancouver v. McKenzie Barge & Marine Ways Ltd.*, [1965] S.C.R. 377; or
- (2) by necessary implication from the language of the statute coupled with a factual finding that the damage was the inevitable consequence of what the statute ordered or authorized the public body to do.

Have these principles been consistently applied in the more recent cases?

The Ontario Court of Appeal considered the defence of statutory authority in *Stephens v. Village of Richmond Hill*, [1956] O.R. 88, in the context of an interference with the rights of riparian owners to have the waters of a stream on their property flow to them in their natural state and unpolluted. Damage had been caused due to the discharge of effluent from the municipality's sewage system. Laidlaw J.A., for the Court, found that the defendant could not rely on the defence as it had constructed the sewage project without prior approval as was required by the statute. However, Laidlaw J.A. went on to state that even if it were assumed that the defendant had lawful authority to construct the sewage project at the specified location shown on the plans submitted to the appropriate department, the defendant had failed to discharge its onus of showing that the nuisance complained of was the inevitable consequence of the construction and operation of the sewage system.

In my view, the principles derived from the early cases were, although obiter, properly applied by Laidlaw J.A. in this case.

This Court considered whether a municipal corporation could be found liable in nuisance and the appropriate test to apply in *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150. Later courts have held this case to be the leading authority on the defence of statutory authority in Canada: see, for example, *City of Campbellton v. Gray's Velvet Ice Cream Ltd.* (1981), 127 D.L.R. (3d) 436. The case involved damage to the plaintiff's premises (on which it operated a seed-cleaning mill and farm) through the escape of effluent from a sewage lagoon constructed and operated by the City of Portage la Prairie. The City alleged, *inter alia*, that it was not liable for the creation of a nuisance as it was acting under statutory authority and relied upon provisions in the Charter for the City of Portage la Prairie, S.M. 1907, c. 33, that empowered it to construct a system of waterworks and sewerage. The relevant provisions of that Act authorized the defendant to do the work it did but did not specify the manner in which sewage disposal was to be carried out and was silent as to the location in which the sewage system was to be constructed.

At trial, in addition to claiming that seepage from the lagoon had caused damage to its property, the plaintiff also claimed that the noxious odours emanating from the lagoon constituted a nuisance. Nitikman J. ((1963), 45 W.W.R. 513) made several findings of fact regarding the defendant's liability in nuisance. He found that seepage from the defendant's sewage lagoon had caused the damage to the plaintiff's property and that this constituted a nuisance. He also found that the authority under which the defendant proceeded to create the sewage system was merely permissive and that there was no requirement that it be done by means of a sewage lagoon.

Nitikman J. then stated the applicable law at p. 525:

It is trite law that where statutory authority is conferred in permissive terms, there is no authority to ignore the common-law rights of others. If a municipality has a discretion as to the exercise of a particular power and it decides to do so, that power must be so exercised that no nuisance or injury is created unless the damage is an inevitable result of the carrying out of such work.

He went on to find that the defendant had failed to establish that the seepage was the inevitable result of the construction or operation of the lagoon and concluded that the defence of inevitability failed on this ground. However, he concluded that the odours and smells were necessarily incidental to and an inevitable result of the lagoon's operation and therefore held that the plaintiff could not succeed on that phase of its claim.

The City appealed and the decision of the trial judge was upheld by the Court of Appeal ((1964), 50 W.W.R. 415). In addition to sustaining the findings of the trial judge, Freedman J.A. noted that even if the statute was mandatory and not merely permissive it would only protect the City from consequences which were the necessary or inevitable result of the construction of the lagoon and in the instant case the seepage was neither necessary nor inevitable.

On appeal to this Court Martland J., for the Court, first found that the seepage from the sewage lagoon constituted a nuisance and then proceeded to an analysis of the Municipal Act, R.S.M. 1954, c. 173, under which the City operated the lagoon. He stated at p. 154:

The combined effect of these sections, in relation to the circumstances of this case, is that the appellant was granted the power to build and maintain a sewerage system, with a duty imposed upon its council to devise the necessary plans for the object of providing a water supply and to carry them out, including the provision of sewers. There was no direction to adopt any particular method of sewage disposal. The appellant was given the power to construct a sewage lagoon but it was not subject to a specific mandate to do so irrespective of whether a nuisance was thereby created or not. There is nothing in the City Charter expressly providing that it was to be exempted from its common law liability for maintaining a nuisance if, in fact, a nuisance did result. Nor is this a case in which the appellant can contend successfully that the creation of a nuisance was an inevitable consequence of the exercise of its statutory powers and that, in consequence, the statute would provide a defence to a claim in respect of it. The learned trial judge has made a specific finding to the contrary. [Emphasis added].

He continued at p. 156:

My conclusion, in respect of the first point raised by the appellant, is that the appellant, having created a nuisance which caused damage to the respondent, is liable therefor, because that which is complained of as a nuisance was not expressly or impliedly authorized by the statute in accordance with which the lagoon was constructed, and was not the inevitable consequence of that which the statute authorized and contemplated. [Emphasis added.]

Martland J. held that it was not necessary to establish negligence on the part of the City or its employees in order to fix it with liability for the creation of a nuisance.

From these passages it is clear that Martland J. found that the legislative provisions in this case merely conferred an authority upon the defendant to do the work it did and did not specify any particular method of sewage disposal. The defendant, therefore, was liable for the damage caused by the nuisance it had created. Martland J.'s decision in this respect is entirely consistent with the earlier authorities. However, the learned justice went on to refer to the trial judge's factual finding that the damage was not inevitable. Whether the damage was inevitable or not was, of course, of no account once it was found that the City had a discretion as to the method of providing the sewage system. This would only have been relevant to the defence of statutory authority had it been found that the City was obliged to provide the sewage system in the way it did. To this extent then it might be said that this case marks a point of departure from the principles enunciated earlier. The inevitable consequences doctrine would only have been relevant had the legislation specifically authorized the City to provide a sewage system by means of a lagoon but it was found by the Court not to have done so.

It is the application of the inevitable consequences doctrine to purely permissive legislation, i.e., the kind of legislation involved in *Metropolitan Asylum District v. Hill* and *City of Portage La Prairie v. B.C. Pea Growers Ltd.* which my colleague fears may close the door to many valid claims for recovery.

The British Columbia Court of Appeal applied the inevitable consequences doctrine to purely permissive legislation in *Royal Anne Hotel Co. v. Ashcroft*, [1979] 2 W.W.R. 462. The plaintiffs were landowners and occupiers in the village of Ashcroft. Their premises were substantially damaged as the result of a backing-up of a municipal sewer caused by a "random blockage" in the main sewer not far from their property. As a result of the blockage raw sewage escaped from the sewer and entered the plaintiffs' premises. The defendant defended on the basis that what it did was done under statutory authority. However, the provisions of the Municipal Act, R.S.B.C. 1960, c. 255, which they relied upon did not impose a duty on the municipality nor did they confer specific authority on it to construct and operate the sewage system in a particular manner or in a particular location.

The plaintiffs framed their claim in both negligence and nuisance. Macdonald J. ((1976), 1 C.C.L.T. 299) found that there was no negligence in the design, installation or maintenance of the sewer but held that the municipality was liable in nuisance. When considering the defence of statutory authority he stated at p. 309 that the question to be answered was "has the defendant satisfied me that the back-up of sewage into the premises of the plaintiffs was the inevitable consequence of the construction or operation of the sewage system?" The trial judge found that the escape of sewage caused by the random blockage was not an inevitable consequence of the construction and maintenance of the sewer. He concluded that the defendant had not met the onus set out by Viscount Dunedin in *City of Manchester v. Farnworth* and an actionable nuisance had therefore been proved.

On appeal, McIntyre J.A., for the British Columbia Court of Appeal, upheld the decision of the trial judge. He found that the damage caused to the plaintiffs' property constituted a nuisance and therefore, in the absence of a defence of statutory authority would be actionable. The Court was of the view that the defendant was in no better position than a private citizen because it was merely empowered, and not required, to install and operate a sewer for the benefit of the community. McIntyre J.A. found that the test laid down in *City of Manchester v. Farnworth* was the correct test and that it had been correctly applied by the lower court.

It is my view that the test set out in *City of Manchester v. Farnworth* was not the appropriate test to be applied on the facts of this case which called rather for a straight application of Lord Watson's analysis of the defence of statutory authority in *Metropolitan Asylum District v. Hill*.

The inevitable consequences test was applied to the same effect in *Wiebe v. Rural Municipality of De Salaberry* (1979), 11 C.C.L.T. 82, by Kroft J. of the Manitoba Court of Queen's Bench. The damage in that case was caused by the operation of a waste-disposal ground across the road from the plaintiff's property. The court concluded that the legislation was purely permissive. It contained no specific direction as to the location to be chosen or method to be used in constructing and operating such a disposal facility. The plaintiff should accordingly have succeeded in his claim. The municipality should have selected a location and means with due regard to private rights. Although Kroft J. did find the municipality liable for the damage it caused to the plaintiff's property, he did so on the basis that the municipality had not shown that the nuisance was an inevitable result of exercising its permissive authority. He stated at p. 95 that the applicable principle is:

If the enactment is permissive, rather than mandatory, in that there is a choice as to location and method of operation, or if the directed undertaking is capable of being carried out within [sic should read "without"] the creation of a nuisance, then private rights must be considered. Such permissive authority will only justify a nuisance if the defendant can discharge the onus of establishing that the nuisance is the inevitable result of exercising the authority.

For further cases in which the courts seem to have applied the inevitable consequences doctrine in inappropriate circumstances see also: *Temple v. City of Melville* (1979), 105 D.L.R. (3d) 305; *Fairview Suede and Leather Specialists Ltd. v. City of Dartmouth* (1980), 40 N.S.R. (2d) 313; *City of Campbellton v. Gray's Velvet Ice Cream Ltd.*, supra; *Buyse v. Shelburne* (1984), 28 C.C.L.T. 1; and *Schenck v. The Queen in Right of Ontario* (1981), 34 O.R. (2d) 595 (H.C.), aff'd (1984), 49 O.R. (2d) 556 (C.A.), aff'd sub nom. *Schenck v. Ontario (Minister of Transportation and Communications)*, [1987] 2 S.C.R. 289.

What the more recent cases reveal, it seems to me, is that the inevitable consequences doctrine is now being applied without regard to the type of statutory authority conferred on the public body. In other words, two distinct tests seem to have developed for relieving public bodies from liability for nuisance, the one to find in the authorizing legislation express or implied authority to create the nuisance, and the other to find that the damage was the inevitable consequence of what the legislation has authorized regardless of the form of the authorizing legislation.

Perhaps this has occurred because the courts have tended to make the inevitable consequences doctrine the starting point of their analysis. Once they find that the damage was not inevitable, they appear to see no purpose in examining the precise language of the statute. Certainly some text-writers approach the issue in this way. For example, Linden in *Canadian Tort Law* (4th ed. 1988), at p. 514, begins his discussion of the defence of legislative authority by stating that "If a nuisance is the inevitable consequence of an activity which has been legislatively authorized, no action will lie". To the same effect, Fleming in *The Law of Torts* (5th ed. 1977), at p. 423, states that "Customarily cited as axiomatic is the principle that, if the nuisance is an inevitable consequence of the authorized undertaking, it is implicitly legalized and, in the absence of a compensation clause, all legal redress is barred". It seems to me that these statements are too broad. As we have seen from the early cases, the inevitable consequences doctrine will only protect the public body if the statute ordered the thing to be done or authorized it to be done in a particular manner or location. In all other cases, where the statutory authority is purely permissive the public body, if it decides to exercise its authority, must do so with due regard to private rights and the inevitability or otherwise of the damage is irrelevant except to the extent perhaps that it shows that the public body did not have due regard to private rights. It should have located its facility elsewhere.

In my view, to the extent that some of the more recent cases are inconsistent with the early principles, they should not be followed. I find no acceptable rationale for the extension of the inevitable consequences doctrine to cases where the public body was perfectly free to exercise its statutory authority without violating private rights. It is only in cases where the public body has no choice as to the way in which or the place where it engages in the nuisance-causing activity that the inevitable consequences doctrine protects it. For only in such cases can it be said that the legislature has authorized any nuisance which is the inevitable consequence of the public body's carrying out its mandate.

The early principles, it seems to me, are rooted in common sense and logic. There is no need to throw the baby out with the bath water. Let us rather return the law to where it once was. Placing the dominant emphasis on the inevitability doctrine, as some of the more recent cases have done, may result in an undue restriction on the right of private citizens to recover for damage caused by the public body's failure to give adequate consideration to private rights when deciding how and where to locate public facilities. *Hammersmith and City Railway Co. v. Brand*, *Metropolitan Asylum District v. Hill* and *City of Manchester v. Farnworth* set out the principles in crystal clear fashion and, in my respectful view, should be followed.

The legislation in this case was purely permissive within the meaning of these cases. It authorized a sewage system to be constructed but did not specify how or where it was to be done. The respondent was accordingly obliged to construct and operate the system in strict conformity with private rights. It did not do so. The defence of statutory authority is not available to it and the appellants are entitled to recover. The case calls for a straightforward application of *Metropolitan Asylum District v. Hill*.

For these reasons I would allow the appeal, set aside the judgment of the Court of Appeal, and restore the judgment of the trial judge. The appellants are entitled to their costs both here and in the courts below.

//Sopinka J.//

The following are the reasons delivered by

SOPINKA J. -- I have had the privilege of reading the reasons for judgment of my colleagues Justice La Forest and Justice Wilson. Regrettably I am unable to agree with the reasons of either. I agree with Wilson J.'s comment that the approach proposed by La Forest J. would virtually abrogate the defence of statutory authority and would do "nothing to assist public bodies to make a realistic assessment of their exposure in carrying out their statutory mandate".

On the other hand, I am concerned that her approach would have the same consequences for the defence of statutory authority. She would eliminate it in respect of legislation that is permissive. Modern legislation authorizing the provision of the type of works which frequently give rise to nuisances is almost invariably permissive. This would expose public authorities to the same liability for nuisance as private enterprise. While this might assist them in estimating their exposure, that exposure would open the floodgates to the same extent as the approach proposed by La Forest J.

Both of my colleagues propose changes in the law as it is being applied at present. Change should not be made for its own sake or to solve a particular case unless the change constitutes an improvement in the law as generally applied. In my opinion, the changes proposed are not an improvement on the present law of nuisance, imperfect though it may be. The defence of statutory authority which is applied in Canada is based on the statement of Viscount Dunedin in *City of Manchester v. Farnworth*, [1930] A.C. 171, at p. 183:

When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

It has been adopted by our Court in *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150, and *Schenck v. Ontario (Minister of Transportation and Communications)*, [1987] 2 S.C.R. 289, and in a number of decisions of other courts including *Royal Anne Hotel Co. v. Ashcroft*, [1979] 2 W.W.R. 462 (B.C.C.A.), *Temple v. City of Melville* (1979), 105 D.L.R. (3d) 305 (Sask. C.A.), and *City of Campbellton v. Gray's Velvet Ice Cream Ltd.* (1981), 127 D.L.R. (3d) 436 (N.B.C.A.)

The rationale of the defence is that if the legislature expressly or implicitly says that a work can be carried out which can only be done by causing a nuisance, then the legislation has authorized an infringement of private rights. If no compensation provision is included in the statute, all redress is barred. See Fleming *The Law of Torts* (6th ed. 1983), at p. 407 and *City of Campbellton v. Gray's Velvet Ice Cream Ltd.*, supra, at p. 439. There is no question that legislation may expressly authorize an interference with private rights by so providing in explicit language. Where the only reasonable inference from the legislation is that such interference is authorized, then the same result obtains by implication. Hence the language in the cases that the defence is made out if the nuisance is authorized expressly or by implication.

A work is authorized by statute whether the statute is mandatory or permissive, if the work is carried out in accordance with the statute. The distinction between mandatory and permissive, which Wilson J. makes to eliminate, in the latter case, the defence of statutory authority, has not been accepted in Canada or, apparently, in England. (See *Allen v. Gulf Oil Refining Ltd.*, [1981] 1 All E.R. 353 (H.L.), and *Tate & Lyle Industries Ltd. v. Greater London Council*, [1983] 1 All E.R. 1159 (H.L.))

The criticism of the present state of the law which is the springboard for the desire to change it is largely based on the fact that the term "inevitable consequences" is too vague and uncertain. That term is the expression of the factual conclusion that the necessary causal connection exists between the work authorized and the nuisance. If the necessary connection exists, then it follows that the legislature authorized that which is the inevitable consequence of the work described in the statute.

The burden of proof with respect to the defence of statutory authority is on the party advancing the defence. It is not an easy one. The courts strain against a conclusion that private rights are intended to be sacrificed for the common good. The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

If we are to depart from this state of the law, so recently confirmed by two decisions of this Court, there should be very strong ground for so doing. Moreover, there should be substantial unanimity. It is apparent from the reasons in this appeal that there is little unanimity as to whether we should retrench, advance or stay the same.

The change proposed by La Forest J. subsumes the defence of statutory authority within the test as to when it is reasonable to compensate the plaintiff. Trial judges will still have to grapple with the elements of the defence of statutory authority but in the context of a test of reasonableness. This will simply add uncertainty to any uncertainty which is said to exist.

Nor do I agree that it is logical or practical to distinguish between public works that are required and those that are permitted. While it was fashionable to require such works in the railway building age, mandatory public works are a feature of a by-gone era.

The disagreement with the result reached in the Court of Appeal is not because the law is defective but because it was incorrectly applied. As La Forest J. points out, the Court of Appeal exonerated the respondent from liability in nuisance on the basis that there was an absence of negligence. In my opinion, the heavier onus which must be discharged was not met in this case. The trial judge so found. I therefore would dispose of the appeal as proposed by my colleagues.

Appeal allowed with costs.

Solicitors for the appellants: Martin, Whalen, Hennebury & Stamp, St. John's.

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* McIntyre J. took no part in the judgment.

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