Victorian Principles For The 1990s: *Tock* v. *St. John's Metropolitan Area Board*

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Synopsis

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Introduction

Canadian courts have traditionally feared that extensive government liability in tort might harm the general interest in the efficient discharge of important statutory functions by interfering unduly with government decision-making and draining public resources. Recent decisions by the Supreme Court of Canada dealing with the issue of government liability illustrate the continuous and difficult process of reconciling government thrift and efficiency with the individual interests of the victims of injurious government activities.[1] In one of these important cases, *Tock* v. *St. John's Metropolitan Area Board*,[2] the Supreme Court was called upon to reexamine the relevance and scope in Canada of the defence of statutory authority with regard to a claim in nuisance against a public body. The courts have held consistently that the infringement of an individual's interest in land amounting to nuisance, that is a substantial interference with the use or enjoyment of the individual's land,[3] is not actionable if it is the "inevitable" incident of an activity authorized by statute.[4] The activities to which the principle has been applied range from the construction and maintenance of various public works[5] to the spraying of forests.[6] In *Tock*, the Supreme Court unanimously upheld the continued existence of the defence and concluded that the defendant failed to meet the requirements for its application. The significance of this decision lies in the unwillingness of Canada's highest court to do away with a much-maligned rule of immunity with respect to nuisance-creating activities authorized by statute. In this comment, it is shown that despite its readiness to reduce the ambit of the defence, the Supreme Court continues to support the utilitarian policy underlying it. It is argued that the Court should have abandoned the defence thus adapting the law to the demands of contemporary Canadian society. The possibility of a Charter challenge of the immunity is also investigated briefly.

I. The *Tock* Case In Context

The *Tock* case involved a sadly common scenario. On a day of heavy rainfall, the basement of Linda and Neil Tock was flooded as a result of a blockage of a municipal storm sewer. Their property incurred substantial damage which led to a suit against the St-John's Metropolitan Area Board responsible for the operation of the water and sewer system in the area. The basis for the claim was

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[1]For the latest cases, see *Laurentide Motels Ltd* v. *Beauport (City of)*, [1989] 1 S.C.R. 705; *Just* v. *British Columbia* (7 December 1989), no. 20246 [unreported]; *Rothfield* v. *Manolakos* (7 December 1989), no. 20740 [unreported].

[2](7 December 1989), no. 20267 [unreported] [hereinafter *Tock*].

[3]See generally M. Brazier, *Street on Torts*, 8th ed. (London: Butterworths, 1988) at 312-327.

[4]For an authoritative study of the defence of statutory authority, see A.M. Linden, "Strict Liability, Nuisance and Legislative Authorization" (1966) 4 Osgoode Hall L.J. 196.

[5]For a comprehensive review of the cases, see Linden, *ibid.*.

[6]*Friesen* v. *Forest Protection Ltd* (1978), 39 A.P.R. 146, 22 N.B.R. 155 (Q.B.).

threefold. It was first alleged that the Board was liable for negligence in the construction and maintenance of the storm sewer. The plaintiffs also invoked the rule in *Rylands* v. *Fletcher*[7] as well as the tort of nuisance.[8] The question of liability for negligence, however, was not raised on the appeal to the Supreme Court. Their Lordships unanimously found that the rule in *Rylands* v. *Fletcher* had no application to the case . They took the view that the provision of a water and sewer system is such a valuable public service that it cannot be regarded as a "non-natural" use of land within the meaning of the rule.[9] On the other hand, the justices all agreed that the flooding of the Tocks' basement constituted an interference with their property so substantial as to amount to a nuisance at common law. Since the defendant Board purported to be acting pursuant to the *Municipalities Act*,[10] the outcome of the case turned on whether the defence of statutory authority was available to the Board to override the common law rights of the plaintiffs.

The Supreme Court had to resolve the issue in the context of mounting dissatisfaction with the immunity invoked by the defendant. In restricting common law rights with respect to activities which are statutorily authorized, judges claim merely to be obeying legislative commands, even when it is obvious that the legislature has not addressed the issue of civil liability.[11] Courts have thus been able to ascribe any injustice resulting from the immunity to the will of a sovereign Parliament imposed on reluctant courts.[12] Although it was felt by some commentators that the defence was moribund,[13] recent rulings in Canada[14]

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[7](1868), L.R. 3 H.L. 330.

[8]The Newfoundland Court of Appeal dismissed the claim against the Board on the basis of the defence of statutory authority: *Tock and Tock* v. *St. John's Metropolitan Area Board* (1986), 190 A.P.R. 133, 62 Nfdl & P.E.I.R. 133.

[9]*Supra*, note 2 at 4-6, La Forest J., and 1-2, Wilson J.

[10]S.N. 1979, c. 33, s. 154 (1), (2), (3).

[11]It was correctly observed by one commentator that "[T]he statutes did not and still do not, deal expressly with this question [of tort liability], an omission which is totally injustifiable": see K. Davies, *Law of Compulsory Purchase and Compensation*, 4th ed. (London: Butterworths, 1984) at 169. Another writer noted: "[T]he technique of granting statutory immunity despite, rather than because of, the words of the statute has a long, if not distinguished history": see S. Tromans, "Nuisance — Prevention or Payment" (1982) Can. L.J. 87 at 107. See also Linden, *supra*, note 4 at 220.

[12]Thus, Lord Blackburn in *London, Brighton and South Coast Railway Company* v. *Truman* (1885), 11 H.L. 45 at 60 justified displacing common law rights by insisting that "effect must be given to the intention of the legislation. No doubt when compensation is not given to those interested in the neighbouring land, this is, as against them, harsh legislation". See also *C.P.R.* v. *Roy*, [1902] A.C. 220 at 231.

[13]J.P.S. McLaren, "Nuisance in Canada" in A.M. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) 320 at 372. See also Linden *supra*, note 4 at 202.

[14]*Torino Motors (1975) Ltd* v. *Kamloops (City of)*, [1988] 6 W.W.R. 762 (B.C.C.A.).

and in England[15] demonstrated its continuing vitality. It is now widely acknowledged that the doctrine of statutory authority serves as a vessel for a long-standing judicial policy of giving priority over individual rights to the collective benefit to be drawn from the unhindered and cost-efficient functioning of valuable public services.[16] In *Allen* v. *Gulf Oil Refinery Ltd*,[17] Lord Roskill aptly summed up a long series of judicial pronouncements by observing that the philosophy behind the doctrine of statutory authority is that "the lesser individual right must yield to the greater public interest".[18] The burden of nuisance-causing activities of public bodies carried on in the interest of the community must lie where it falls, namely, on the shoulders of the unfortunate individual. Lord Denning has rightly denounced the "injustice of the Victorian rule",[19] and it has become apparent that this immunity is founded upon a utilitarian calculus of costs and benefits that may no longer be suitable to modern conditions. The cautious attitude of the judiciary might have been justified in the Victorian era. It is possible that there was at that time a need to protect fledgling industries and underfunded public bodies which played an important pioneering role in social and economic development.[20] This rationale for the defence, however, does not appear as pressing at the close of the 20th century. An economically and technologically developed community can today more easily provide redress to the victims of nuisances which are the inevitable result of the provision of services benefitting the public at large.

The problem could also be viewed in its broader contemporary context. The recent extension of government liability, especially for negligent exercise of discretionary powers,[21] conveys a growing sense that individual interests ought not to be too lightly sacrificed to governmental thrift and efficiency. The availability of monetary redress for the infringement of an individual's constitutional rights reinforces this trend.[22] Moreover, the idea of development, regardless of its effect on the environment and the quality of life of the citizens,

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[15]*Allen* v. *Gulf Oil Ltd*, [1981] 1 All E.R. 353 (H.L.); *Tate & Lyle Industries* v. *Greater London Council*, [1983] 1 All E.R. 1159 (H.L.).

[16]H.W.R. Wade, *Administrative Law*, 5th ed. (Oxford: Clarendon Press, 1982) at 691; C. Harlow, *Compensation and Government Tort* (London: Sweet & Maxwell, 1982) at 8-11; A.M. Linden, "Public and Private Law: the Frontier from the Perspective of a Tort Lawyer" (1976) 17 C. de D. 831 at 848.

[17]*Supra*, note 15.

[18]*Ibid.* at 365.

[19]Lord Denning, *The Closing Chapter* (London: Butterworths, 1983) at 148-49.

[20]Linden, *supra*, note 4 at 199-200; J.P.S. McLaren, "Nuisance Law and the Industrial Revolution — Some Lessons from Social History" in F.M. Steel & S. Rodgers-Magnet, eds, *Issues in Tort Law* (Toronto: Carswell, 1983).

[21]See cases cited *supra*, note 1 and also *Kamloops (City of)* v. *Nielsen*, [1984] 2 S.C.R. 2.

[22]M.L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can. Bar Rev. 517; K. Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy" (1988) 52 Sask. L. Rev. 1. See in particular, *Lord* v. *Allison* (1986), 3 B.C.L.R. (2d) 300 (S.C.) and *R.* v. *B.B.* (1986), 69 A.R. 203 (Alta Prov. Ct).

is increasingly under attack. It must be remembered that typical examples of injuries potentially covered by the defence of statutory authority include the emission of smells, noise, fumes and smoke; the degradation of land through flooding; the contamination of soil and water by toxic substances; and the destruction of crops and other vegetation.[23] Canadian society is now more anxious that public authorities, just like private businesses, should not carry on activities which are substantially detrimental to the environment without being prepared to pay for it and take, whenever feasible, measures to minimize the damage.

The common law is not static. As a distinguished New Zealand judge wrote: "Of its very nature the common law is an instrument of principled justice capable of fresh life and vigour."[23A] In the same vein, the High Court of Australia has recently emphasized its responsibility "to reconsider in appropriate cases common law rules which operate unsatisfactorily or unjustly."[23B] The *Tock* case afforded the Supreme Court the opportunity to reassess, in the light of modern conditions, the policies underlying the defence of statutory authority. It was open to their Lordships to strike a balance between individual rights and collective interests that would reflect the values and priorities of the 1990s. But as is explained in the next section, the Court has on the whole shown unfailing adherence to the Victorian rule.

II. The Supreme Court's Coutinning Snpport For The Victorian Rule

Separate opinions were written by three justices thus revealing the divergence of views within the Court as to precisely where the line should be drawn between collective responsibility and individual sacrifice. Justice Wilson, speaking for herself and two other members of the Court,[24] rejected at the outset the idea that municipalities exercising statutory authority should be made liable for nuisance in the same way as private individuals.[25] She had no difficulty in defending the doctrine of statutory authority with regard to inevitable damage as

> ... 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.[26]

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[23]See generally J.P.S. McLaren, "The Law of Torts and Pollution" (1973) Lectures L.S.U.C. 309; B. Morrison, "The Nuisance Action: A Useful Tool for the Environment Lawyer" (1974) 23 U.N.B.L.J. 21; P.S. Elder, "Environmental Protection through the Common Law" (1973) 12 West. Ont. L. Rev. 107.

[23A]Sir Robert Cooke, "Dynamics in the Common Law" in *Ninth Commonwealth Law Conference: Papers* (Auckland: C.C.H., 1990) 1 at 5.

[23B]*Trident General Insurance Co. v. McNiece Bros Pty Ltd* (1988), 165 C.L.R. 107 at 118.

[24]Justices Lamer and L'Heureux-Dubé.

[25]*Supra*, note 2 at 2 of her reasons for judgment.

[26]*Ibid.* at 14.

After a review of early English authorities,[27] she concluded that the availability of the defence depends on the wording of the statute pursuant to which the defendant body is acting. If the enabling legislation requires or authorizes a body to carry on an activity in a specified manner, or at a specified location, no liability can arise from a nuisance inevitably flowing from such a "mandatory" authorization.[28] But when a statute is "permissive", in that it gives the body wide discretion as to how and where it should operate, it must be construed as requiring strict compliance with common law rights.[29] In those cases, the relevant test of "inevitability" is that laid down in the famous case of *Manchester* v. *Farnworth*[30] where the House of Lords stated that:

> ... 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 could not be rigidly defined, of practical feasibility in view of situation and expense.[31]

Justice Wilson characterized this test as one of negligence.[32] In the case at hand, she found that the Board could not rely on the defence since the *Municipalities Act* conferred discretion as to how and where the sewer system could be constructed and operated. It was consequently not open to the defendant to plead an absence of negligence on its part in the construction and operation of the system. Her Ladyship was ready to distance herself from recent Canadian authorities and to use this mandatory/permissive distinction to restrict the scope of government immunity.[33] But she unambiguously declined to go further in the direction of securing redress for those injured by nuisance-generating public services. Justice La Forest, in his concurring reasons,[34] agreed that the defence of statutory authority should not be abolished, even if he was critical of the way it has been applied traditionally. However, his approach to the problem of liability for nuisances created by public bodies differs markedly from

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[27]*R.* v. *Pease* (1832), 4 B. & Ad. 30, [1824-34] All E.R. Rep. 579; *Vaughan* v. *Taff Valley Railway Co.* (1860), 29 L.J. Ex. 247, [1843-60] All E.R. Rep. 474; *Hammersmith and City Railway Co.* v. *Brand* (1869), L.R. 38 Q.B. 285; *Geddis* v. *Proprietors of the Bann Reservoir* (1878), 3 A.C. 430; *Metropolitan Asylum District* v. *Hill* (1881) 6 A.C. 193; *London, Brighton and South Coast Railway Co.* v. *Truman, supra*, note 12; *Manchester (City of)* v. *Farnworth*, [1930] A.C. 171.

[28]*Supra*, note 2 at 13 of her reasons for judgment.

[29]*Ibid.* at 13-14.

[30]*Supra*, note 27.

[31]*Ibid.* at 183.

[32]*Supra*, note 2 at 13-14 of her reasons for judgment.

[33]Recent cases have not consistently applied the mandatory/permissive dichotomy. See for example, *Portage La Prairie (City of)* v. *B.C. Pea Growers Ltd*, [1966] S.C.R. 150; *Royal Ann Hotel Co.* v. *Ashcraft*, [1979] 2 W.W.R. 462 (B.C.C.A.); *Temple* v. *Melville (City of)* (1979), [1980] 105 D.L.R. (3d) 305 (Sask.C.A.); *Campbellton (City of)* v. *Gray's Velvet Ice Cream Ltd* (1981), [1982] 127 D.L.R. (3d) 436 (N.B.C.A.); *Buysse* v. *Shelburne (Town of)* (1984), 6 D.L.R. (4th) 734 (Ont. Div. Ct); *Torino Motors (1975) Ltd, supra*, note 14.

[34]Mr. Justice La Forest wrote for himself and Chief Justice Dickson.

that of Justice Wilson. He candidly conceded that the traditional argument of legislative intent used to justify the restriction of liability represents no more than a convenient vehicle for a judicial policy of favouring the general interest in public utilities and services to the detriment of individual rights.[35] Refusing to don "the cloak of a soothsayer to plumb the intent of the legislature",[36] he proposed to "reformulate the law in more functional terms"[37] in order to meet modern conditions and values. By virtue of this functional approach, the applicable principles are to be articulated overtly through a balancing exercise designed to effect a fair apportionment of the burden of nuisances occasioned by the provision of public services, thus minimizing the injustice for the injured party. In each case it will be necessary to ask whether, given all the circumstances, it is reasonable to refuse to compensate the aggrieved party for the damage he or she has suffered.[38] In accordance with this pragmatic method, Justice La Forest dismissed the traditional mandatory/permissive dichotomy. In his opinion:

> Whatever statutory route is taken will result in the construction of sewage 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.[39]

Justice La Forest recognized that the mandatory/permissive dichotomy constitutes yet another judicial device that obfuscates the true nature of the balancing process involved.[40] Similarly, the fact that damage inevitably results from the operation of public works cannot, in his view, militate in favour of immunity.[41] It must still be determined if asking the individual to support the cost of an unavoidable nuisance is reasonable in the circumstances.[42] It is apparent that Justice La Forest's objective was not to abandon the cost/benefit calculus but to demystify it. His Lordship should be commended for facing the real

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[35]*Supra*, note 2 at 10 of his reasons for judgment. Further in his reasons, Mr. Justice La Forest writes: "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." *Ibid.* at 15.

[36]*Ibid.* at 18.

[37]*Ibid.* at 15.

[38]*Ibid.* at 19.

[39]*Ibid.* at 16 and at 15.

[40]He had observed earlier, at page 11, that the mandatory/permissive dichotomy was one of "a number of techniques developed by the courts for eliciting the supposed intent of the legislature".

[41]His Lordship quite properly remarked that "[T]he 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." *Supra*, note 2 at 16 of his reasons for judgment.

[42]*Ibid.* at 18-19.

policy issues squarely. It is by no means certain however, that his proposed solution is satisfactory. The practical application of his method caused him to accept the possibility of government immunity. Although he was clearly intent on placing significant restrictions on such immunity, he insisted that his approach does not abrogate the defence:

> This does not denude the defence of statutory authority of all vigour. If... 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 sewage 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.[43]

He thus suggested that immunity should be accorded in the case of ongoing nuisances which affect several individuals and which necessarily derive from the construction or operation of public works that have been authorized by statute.[44] By contrast, isolated nuisances inflicting heavy random damage on a single individual would attract the liability of a public body even if its activity is statutorily mandated.[45] In the latter situation, Justice La Forest thinks governmental liability is reasonable since denying redress would have the effect of visiting a disproportionate share of the cost of the beneficial service on the hapless individual who suffered the damage. Applying this reasoning to the Tocks' claim, he concluded that the flooding of property attributable to a random blockage of a municipal sewer system constitutes an instance of a "calamitous event" the cost of which must be shouldered by the community. The cost-benefit analysis behind this approach can easily be discerned. The public expense required to compensate isolated nuisances is likely to be limited and can be treated as a running cost of a public service.[46] Furthermore, because there is no ongoing tortious conduct, the continued delivery of the service is not threatened by the possibility of the victim obtaining an injunction to block the activity. On the other hand, government responsibility for continuing nuisances affecting several individuals could prove costly to the community. First, the financial burden of compensating the injured parties might exert pressure on government funds. Second, there would be a real risk that a court order enjoining the public body from pursuing its tortious activity would thwart a socially desirable service.

Justice La Forest has by no means departed dramatically from the Victorian utilitarian creed. He has simply tempered its harshness in some cases. But it is difficult to understand why the victims of nuisances that are not isolated

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[43]*Ibid.* at 19.
[44]*Ibid.* at 21.
[45]*Ibid.*
[46]*Ibid.* at 17-18.

should be left without a remedy. Are they not also paying a disproportionate price in the name of the greater common welfare? Why should government escape liability in relation to activities which are particularly injurious in the sense that they afflict more victims over a more protracted period of time?

Justice Sopinka was unable to subscribe to the views of his colleagues and therefore set forth his own reasons for judgment. He rejected both the mandatory/permissive distinction propounded by Justice Wilson and the reasonableness test advocated by Justice La Forest as being too restrictive of the defence of statutory authority. In his opinion, these solutions would open the floodgates and expose public bodies to excessive liability.[47] Whenever work is carried out in accordance with a statute, whether permissive or mandatory, immunity should be given to the defendant who can demonstrate that the nuisance was inevitable in that there was no other practically feasible method of carrying out the work[48]. However, his Lordship held the Board liable because it had failed to meet this test of inevitability. In summary, although a majority of the Supreme Court felt sufficiently uncomfortable with the existing rule of immunity to search for means of attenuating it, their Lordships were not prepared to make an unequivocal break from it.

The subsisting scope of the defence of statutory authority may indeed be more considerable than it first appears. Despite their differences over other issues, a clear majority of the Court in *Tock* agreed that a claim of immunity can only be allowed if all reasonable care has been used in the operation authorized by statute. But in several cases this limitation on the defence might well prove difficult for the courts to enforce. The planning and management of public services may involve decisions dictated by financial, social and political factors. The building and operation of a public work, for instance, may be subject to budgetary allocations and constraints as to the availability of resources. In order to increase funds for the maintenance of roads a municipality could, in a *bona fide* exercise of discretion, deem it expedient to reduce the funds for the inspection of the sewer or water system. In the context of suits based on the tort of negligence, the courts would generally be expected to refrain from using tort principles to review the reasonableness of government decision-making with respect to such difficult policy matters.[49] The problem of justiciability that has given rise to the policy/operational distinction in the law of negligence will almost certainly have to be addressed in the application of the defence of statutory authority in connection with nuisance.[50] It is difficult to see how the judi-

[47]*Supra*, note 2 at 1-2 of his reasons for judgment.

[48]*Ibid.* at 4.

[49]See *Kamloops (City of)* v. *Nielsen*, *supra*, note 21 and cases cited *supra*, note 1.

[50]On this important policy/operational dichotomy, see in particular: P.P. Craig, "Negligence in the Exercise of a Statutory Power" (1978) 94 L.Q. Rev. 428; S.H. Bailey & M.J. Bowman, "The Policy/Operational Dichotomy — A Cuckoo in the Nest" (1986) Can. L.J. 430; D. Cohen & J.C.

ciary could consider themselves better equipped to adjudicate upon the merits of policy-making when the question of reasonable care arises in a suit for nuisance as opposed to negligence *per se*.

The Supreme Court in *Tock* has not taken due account of modern Canadian values in ruling on the impact of statutory public services on common law rights. Their Lordships could have regarded legislation providing for public services as running in tandem with the common law of nuisance. The existence of legislative authority need not lead incontrovertibly to the exclusion of legal redress. It would be consistent with sound policy to hold that common law rights are only displaced to the extent required to enable the public body to fulfill its statutory functions without hindrance. An injunction should not interfere with a body's operations where they conform strictly to relevant statutory prescriptions. On the other hand, common law rights should be upheld where the statutory objective of securing a valuable public service is not undermined. This is the case when the right to compensation is the only common law right to survive statutory authority so that there is no threat of judicial disruption of the service[51]. It is submitted that this partial reconciliation of statutory powers and the common law constitutes a true compromise between individual rights and collective interests in the 1990s.

In view of the regrettable timidity of the Supreme Court, Canadian courts cannot be expected in the short term to abandon openly the rule of immunity. The *Tock* decision should, however, encourage legislatures to address the issue of common law rights explicitly when entrusting public authorities with the execution of public works likely to give rise to nuisances. Unfortunately, experience shows that legislative recommendations of this nature cannot realistically be expected to be followed.

What avenue is then available to a nuisance victim when faced with a government body that seeks refuge in the defence of statutory authority? In some cases, the courts can be trusted to pay lip service to the defence while having recourse to such techniques as the mandatory/permissive distinction or the inevitability test in order to avoid granting immunity. The injured party should also consider a constitutional attack against the defence. The next section deals briefly with this point.

Smith "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64 Can. Bar Rev. 1; J.A. Smillie, "Liability of Public Authorities for Negligence" (1985) 23 U.W.O. L. Rev. 213; P.P. Craig, "Negligence, Discretionary Powers and the Privy Council" (1988) 104 L.Q. Rev. 185; P.W. Hogg, *Liability of the Crown*, 2d ed. (Toronto: Carswell, 1989) at 123-30.

[51]For similar proposals, see in particular Linden, *supra*, note 4 at 215-16 and Tromans, *supra*, note 11 at 103-08.

III. The Possibility of a *Charter* Challenge

A challenge to the immunity may be based upon section seven of the *Canadian Charter of Rights and Freedoms*[52] which guarantees everyone the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". It was established in *R.W.D.S.U.* v. *Dolphin Delivery Ltd*,[53] that the *Charter* applies not only to statutes but also to rules of common law when there is governmental reliance on such rules.[54] The defence of statutory authority must therefore conform to *Charter* dictates when it is invoked by public bodies. However, it would appear that in view of the ruling in *Irwin Toy Ltd* v. *Attorney General for Quebec*,[55] no serious constitutional issue could be raised with respect to a large number of government-created nuisances. In that decision, the Supreme Court narrowed the ambit of section seven considerably by holding that it gives no right to corporations as such[56], and that it does not afford any direct protection to property or purely economic rights.[57] Nuisances flowing exclusively from physical injuries to property therefore do not affect the security of the person or any other right enshrined in section seven. But the same can probably not be said of nuisances involving an impairment of health or serious threat of physical injury to individuals. There is no question here of purely economic rights. Indeed, the majority of the Supreme Court in *R.* v. *Morgentaler*[58] took the view that state interference with physical health may in some circumstances infringe an individual's right to security of the person within the meaning of section seven[59].

A cogent argument could also be made to the effect that the denial of any appropriate redress to the victim of a nuisance affecting the security of the person contravenes the substantive principles of fundamental justice. The Supreme Court has so far attached considerable weight to common law principles in ascertaining the contents of fundamental justice.[60] This approach at first seems to bolster the constitutionality of the defence of statutory authority since the

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[52]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), (1982), c. 11 [hereinafter *Charter*].

[53][1986] 2 S.C.R. 573.

[54]*Ibid.* at 599.

[55][1989] 1 S.C.R. 927.

[56]*Ibid.* at 1002-03.

[57]*Ibid.* at 1003. On property rights and the *Charter*, see J. McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 Alta. L. Rev. 548; R.G. Doumani & J.M. Glenn, Note, "Property, Planning and the *Charter*" (1989) 34 McGill L.J. 1036.

[58][1988] 1 S.C.R. 30.

[59]*Ibid.* at 56 (Dickson C.J.), 90 (Beetz J.) and 173 (Wilson J.).

[60]See for example *Reference Re Section 94(2) of the B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R.* v. *Beare*, [1988] 2 S.C.R. 387; *R.* v. *Potvin*, [1989] 1 S.C.R. 525.

resulting immunity is rooted in the common law tradition. But traditional common law solutions are not the ultimate yardstick of fundamental justice. The *Charter* does not constitute a purely backward-looking instrument. On the contrary, it is, as the Supreme Court has itself repeatedly stated, a modern evolutionary document capable of meeting the changing needs and values of Canadian society.[61] As was argued above, a modern conception of justice would seem to require that the collectivity take responsibility for the harm suffered by nuisance victims and indemnify them. It can be argued that the elimination of all form of redress for government-created health injuries is arbitrary since it completely fails to achieve a proper balance between individual rights and collective interests. Canada's highest court has indicated that arbitrary governmental action may offend the principles of fundamental justice.[62]

In keeping with the practice of the Supreme Court, it is also appropriate to look at other legal systems for guidance as to the requirements of fundamental justice.[63] One of the most highly respected systems in the field of government liability is undoubtedly that developed in France as part of its sophisticated administrative law regime. Distinguished common law scholars have looked to France as a source of inspiration in their quest for a just system of public liability.[64] French law has developed a doctrine referred to as *égalité devant les charges publiques*.[65] This principle of equality of all citizens in bearing public burdens is based on the recognition that what is done in the general interest, even if done lawfully, may still give rise to a right to compensation when a substantial burden falls on particular persons. Thus, substantial damage attributable to public works may fall within the purview of the *égalité* rule.[66]

It is submitted that both a careful consideration of the evolution of the law of public liability in Canada and a comparative law approach should lead the Canadian courts to cast aside the traditional rule of immunity as being at odds with fundamental justice. By extending a citizen's access to monetary redress, they would not be conferring *purely* economic rights despite the presence of a

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[61]*Re B.C. Motor Vehicle Act*, *supra*, note 60 at 509; *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357 at 366-67.

[62]*R.* v. *Lyons*, [1987] 2 S.C.R. 309 at 409ff; *R.* v. *Jones*, [1986] 2 S.C.R. 284 at 303 (La Forest J.).

[63]See for example *R.* v. *Lyons*, *ibid.*; *R.* v. *Beare* and *R.* v. *Potvin*, *supra*, note 60.

[64]For a sample of academic writings see Wade, *supra*, note 17 at 665 and 687; J.D.B. Mitchell, "The State of Public Law in the United Kingdom" (1966) 15 Int. & Comp. L.Q. 133; J.F. Garner, "Public and Private Law" (1978) P.L. 322; C.J. Hamson, "Escaping Borstal Boys and the Immunity of Office" (1969) Can. L.J. 272.

[65]See generally P. Devolvé, *Le principe d'égalité devant les charges publiques* (Paris: L.G.D.J., 1969).

[66]*Ibid.* at 289-96. See also R. Chapus, *Droit administratif général*, vol. 2, 4th ed. (Paris: Montchrestien, 1988) c. 3. A distinction is generally made, however, between users of public works and non-users. In the case of users, the public body may in some cases escape liability by showing that no fault was committed.

pecuniary element. It is not realistic to separate neatly an individual's right to security of the person in relation to health from the remedial measure necessary to give practical meaning to such an intangible right.[67]

It will be left to a public body defending the constitutionality of the immunity to show that it represents a "reasonable limit" for the purpose of the limitations clause contained in section one of the *Charter*. This may be a difficult task given that the courts will be loath to regard as reasonable governmental action which does not accord with fundamental justice.[68] Pursuant to the test laid down in *R.* v. *Oakes*[69] and its progeny,[70] it will have to be established that the immunity serves an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom".[71]

The goals of government thrift and efficiency fostered by the defence should not be belittled. The Supreme Court has nonetheless voiced reservations as to whether factors related primarily to cost and convenience could justify setting aside the fundamental rights protected by section seven[72]. Even when the

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[67]In *Irwin Toy*, *supra*, note 55, the Supreme Court has certainly not ruled out a distinction between rights that are *purely* economic and rights that simply have some economic component. The Chief Justice thus wrote at 1003:

> The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property — contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous.

There are cases where the distinction has been applied in order to protect rights with some economic content. See for example: *Wilson* v. *B.C. Medical Services Commission* (1988), [1989] 53 D.L.R. (4th) 171 (B.C.C.A.); *Re Maritime Medical Care Inc. and Khaliq-Kareemi* (1989), 57 D.L.R. (4th) 505 (N.S.C.A.). In *Whitbread* v. *Walley* (1989), 51 D.L.R. (4th) 509 (B.C.C.A.), the Court rejected the argument that section seven protects an "economic interest that is based on a loss of life, liberty and security of the person"; *ibid.* at 521. Assuming this ruling is correct, a point which is not conceded, it must be pointed out that in *Whitbread* the actual loss of security of the person was not caused by government. The situation is quite different when the state at once directly inflicts a tortious health injury and denies all effective redress to the victim of its harmful conduct.

[68]See T. Christian, "The Limited Operation of the Limitations Clause" (1987) 25 Alta L. Rev. 264 at 273-74.

[69][1986] 1 S.C.R. 103.

[70]See in particular *Black* v. *Law Society of Alberta*, [1989] 1 S.C.R. 591; *Irvin Toy*, *supra*, note 55; *United States of America* v. *Cotroni*, [1989] 1 S.C.R. 1469.

[71]*R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 352. See also *Oakes*, *supra*, note 69 at 138.

[72]*Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 218-19; *Reference Re Section 94(2) of the B.C. Motor Vehicle Act*, *supra*, note 60 at 518.

governmental objective is sufficiently important, there must be proportionality between that objective and the means employed to achieve it.[73] The exclusion of all legal remedies with regard to statutorily authorized nuisances endangering health does not seem to interfere as little as reasonably possible with constitutional rights. By denying injunctive relief but maintaining the right to compensation, the law could attain the goal of safeguarding the continuity of public services while interfering in a less drastic way with constitutionally guaranteed rights. It therefore appears fair to conclude that a *Charter* challenge of the defence of statutory authority should be taken seriously by the courts in the case of nuisances affecting the health of individuals.

Conclnsion

The dispute that led to the *Tock* decision raised the old problem of adjusting the general law of tort to the particular situation of government bodies exercising statutory powers in the general interest. Dating back to the 19th century, the defence of statutory authority has been increasingly perceived as unjust and anachonistic insofar as it denies compensation to the victims of serious nuisances. The Supreme Court in *Tock* should have seized the opportunity to modernize the law by reconciling the need for continued public services and the rights of injured citizens. This could have been done by recognizing the entitlement of nuisance victims to monetary compensation while allowing public bodies to proceed with their important functions whenever they are acting in accordance with statute. Even though a majority of the Court in *Tock* were anxious to diminish the scope of the immunity, they were not willing to do away completely with Victorian perceptions of the general interest.

The diversity of opinions expressed in the *Tock* ruling makes it very difficult for public bodies to determine when the defence of statutory authority can be invoked successfully. Yet at the same time, persons suffering nuisances at the hand of public bodies can still be denied a remedy on the basis of an ill-defined doctrine. Faced with the prospect, individuals whose health has been affected by a government-created nuisance should turn to the *Charter*. Failing to redress tortious health injuries caused by the state probably infringes the right to security of the person in a way that violates fundamental justice within the terms of section seven. The *Charter*, as an instrument of modern public law, should help to bring this area of government liability in line with contemporary Canadian values.

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[73] *Oakes*, *supra*, note 69 at 139. See also the cases *supra*, note 70 in which the Supreme Court appears to have relaxed the proportionality test that was put forward in *Oakes*.