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THE LIABILITY OF LOCAL AUTHORITIES

FOR ESCAPES

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A thesis submitted for the degree of
Master of Laws
at the University of Otago, Dunedin,
New Zealand.

31 January 1977
PREFACE

To some extent the style adopted in a legal exposition is determined by the object of the work and the nature of the subject matter. I have here attempted a critical restatement of the law relating to the liability of local authorities for escapes, as explained in the Introduction. Several of the leading cases discussed have been particularly troublesome, largely due to the number and complexity of the issues raised, and I have been obliged to devote much time to analysis of judgments not notable for accuracy, clarity or perception. For these reasons also, I have been driven to rely on more extracts from judgments and more detailed descriptions of facts than would otherwise have been necessary.

In discussing the theory of enterprise liability I have purloined the ideas of others and converted them to my own use, without acknowledgment. In this respect, I make no claim either to originality or to have accurately presented or interpreted the views of anyone.

My research commenced in earnest in the third academic term of 1973 and continued during 1974. During that time I had the advantage of a Teaching Fellowship in the Law School. Since 1975 I have practised as a Barrister and Solicitor in Hamilton and have substantially revised and rewritten the early drafts in the time available.
I record my appreciation to several persons. First, to Dr D. E. Paterson, with whose help and advice the topic was settled and with whom early discussions on the project took place. My thanks also to Dr John Smillie and Professor Peter Burns for their encouragement and advice. Their influence has materially affected my thinking on the Law of Torts generally.

I am indebted to the Dean, Professor P.B.A. Sim, for his invaluable guidance and assistance during my tenure at the Law School. Special thanks are due to my wife, Penelope, for carrying out the unenviable task of deciphering the drafts and typing the final copy with meticulous care and for her unflagging support and patience.

This survey is confined to English, Australian and New Zealand law. Current interest was given to the subject matter by the decisions in J.W. Birnie Ltd v Taupo Borough (Unreported, Wellington, 11 June 1975, Haslam J, Hamilton A.153/70, Rotorua A.179/73) some mention of which has been introduced where possible, and Powrie v Nelson City Corporation [1976] 2 NZLR 249 which was reported too late for inclusion, except for footnote references. The latter decision should be referred to on the question of drainage nuisances generally, but particularly in regard to the defence of statutory authority and the availability of statutory compensation.

G.S.M.
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CHAPTER I

INTRODUCTION

A. Subject Matter and Scope

The *raison d'etre* of this work lies in the decisions and judgments in three cases, *Irvine v Dunedin City Corporation*,1 *Smeaton v Ilford Corporation*2 and *Dunne v North Western Gas Board*.3 Those cases concerned, respectively, liability for escapes of water, sewage and gas from the mains of local or regional authorities. A reading of the reports disclosed a number of common problems and apparent inconsistencies. It indicated that the various areas of the common law discussed were fraught with unresolved difficulties and it appeared that many precedents and various lines of conflicting authority were not satisfactorily explained. In *Smeaton v Ilford Corporation* Upjohn J confessed that he found it impossible to reconcile the cases but said that he did not propose to add to the many pages of the law reports which had been devoted to attempts to explain them.4 The writer proposes to take up that task, to attempt to impose some order upon the chaos of contradictory authority.

1. [1939] NZLR 741 CA.
2. [1953] 1 Ch 450. It was reported in the Law Journal (1954) p.169 that the defendant corporation subsequently made a substantial payment to the plaintiff in return for his not proceeding with his appeal to the Court of Appeal.
3. [1964] 2 QB 806 CA.
Whilst a number of diverse issues were raised by the cases, each possibly justifying separate, more widely based research, it seemed that in the context of this particular class of case some confusion existed in relation to the principles applicable to these distinct issues. A comparative approach was justified, if not a necessity. In these circumstances it was thought desirable to make a comprehensive study of all the common law problems relevant to this class of fact situation. The scope of this work, therefore, is most usefully defined in these terms.

The typical fact situation, then, concerns damage arising in consequence of an escape of water, sewage or gas from a piped or channelled system controlled by a local authority. In certain respects this basic test must be read subject to qualifications, of both a limiting and extending nature.

By an "escape" is meant an involuntary loss of the substance causing damage, an unintended flow or leakage from the confines of the pipes or channels, as opposed to a "discharge", a deliberate or intended release. Cases relating to discharges will be considered only where they have some special relevance. Escapes may occur as a consequence of defective pipes or of non-repair, of overloading or fractures caused by persons, climatic conditions, or other external forces which might or might not be within the control of the local authority.
An escape might also be caused by the inadequacy of the whole or part of the system, such inadequacy resulting from defective design, failure to maintain existing capacity, or from failure to expand capacity to meet increasing needs or demands.

The nature of the escaping substance is a significant variable, particularly in regard to risk. It is not proposed to consider cases concerning escapes of substances other than water (including stormwater), sewage and gas, except where the principles discussed are in point.

The criterion of "piped or channelled systems" is somewhat arbitrary. Water and gas supply systems are necessarily piped and modern stormwater drainage and sewerage systems are usually piped. It is intended to include open drainage channels forming part of such systems and to extend the discussion generally to artificial and natural water courses.

The term "local authority" is intended to include all regional authorities and specialist statutory authorities. It includes also commercial enterprises fulfilling either of the functions of water or gas supply.

These, then, are the unifying elements of the diverse problems to be discussed. The legal problems fall into broad categories: the availability of remedies upon
the ordinary principles of the torts of Breach of Statutory Duty, Negligence, Nuisance and the rule in Rylands v Fletcher; the availability of statutory compensation; the effect of the defence of Statutory Authority; the role of the conception of Nonfeasance.

It is also proposed to ascertain the extent to which the development of the law has been affected by considerations of policy, whether arising in regard to the functions of local authorities specifically or in regard to the exercise of statutory powers generally.

B. Liability of Local Authorities In Tort

Local authorities have no general immunity from liability in tort, whether arising from the public nature of their works and services or from their limited powers in respect of the property vested in them. It is irrelevant that such authorities act for public purposes, without reward, and that no profit is derived from the works.

These principles were settled in 1866 by the decision of the House of Lords in Mersey Docks Trustees v Gibbs, where it was held that a corporation under a statutory duty to maintain public docks was liable in damages to persons who suffered from the neglect of their statutory duty, and by the decision of the Exchequer Chamber in Coe v Wise, where the defendant drainage

5. (1866) LR 1 HL 93.
6. (1866) LR 1 QB 171.
commissioners were held liable for negligently failing
to perform a statutory duty to maintain certain drainage
works.

Similarly, urban sewerage authorities are not relieved
from liability in Nuisance by the fact that they are
public bodies and do not have their sewers vested in
them for any purpose of profit. Where sewers are vested
in a local authority and are under its control, it is
under the same liabilities and has the same defences
as any private owner of a sewer and the fact that it is
a public body having public duties and having powers
to perform those duties does not exempt it from liability
for a nuisance caused.

7. A-G v Basingstoke Corporation (1876) 45 LJ Ch 726.
8. Glossop v Heston and Isleworth Local Board (1879) 12 ChD
   102 at 110 per James LJ; Jones v Llanrwst UDC [1911]
   1 Ch 393.
9. (1879) 12 ChD at 124 per Cotton LJ.
CHAPTER II

BREACH OF STATUTORY DUTY

A. Introduction

Where a drainage or sewerage authority is under a statutory obligation to perform certain functions and the failure to perform such duty results in a nuisance to private persons, the authority may be civilly liable for such breach of duty either under the terms of the statute or at common law.

This cause of action was only occasionally the subject of reported decisions prior to the imposition of relevant duties upon urban sewerage authorities by general legislation. The powers of the original drainage authorities in England, the Commissioners of Sewers, did not extend to the construction of new works unless those liable to contribute consented, at least until 1833, but were limited to the repair of existing works. There was no statutory or common law duty on the Commissioners to repair, but common law duties to repair, arising by tenure, by prescription, or from custom, fell upon individuals and the inhabitants of localities. An action for non-repair was properly brought against those bound by common law to repair, before the Commissioners in the Court of Sewers. From time to time, however, specific bodies of drainage Commissioners and other local authorities had such
powers conferred and duties imposed upon them by Local Acts. In 1930 the rural drainage boards created by the Land Drainage Act of that year were granted wide powers in relation to the maintenance and improvement of existing works and the construction of new works, but the imposition of duties, as distinct from mere powers, was confined to the maintenance functions. In contrast, the reforming Public Health legislation of the nineteenth century imposed comprehensive duties upon the sewerage authorities thereby established, the duties to provide such public sewers as might be necessary for effectually draining their district, to make provision for effectually dealing with the contents of their sewers, to maintain, cleanse and empty all public sewers vested in them, and to discharge their functions so as not to create a nuisance.

B. Statutory Right of Action

It may be expressly provided by statute that a breach of statutory duty should render a drainage authority liable in damages to a private individual who suffers damage thereby. There are a few reported instances of actions based upon such provisions. In New Zealand

1. S.34 Land Drainage Act 1930.
2. See now Public Health Act 1936, ss.15, 23 and 31. (26 Geo 5 & 1 Edw 8 c.49).
drainage boards are obliged to cause all water-courses or drains to be constructed and kept so as not to be a nuisance or injurious to health and to be properly cleared and cleansed and maintained in proper order. A remedy in damages was originally given to the owners or occupiers of any land for damage done in consequence of a breach of these duties, but the law was later amended so as to restrict such remedy to damage arising from the disrepair of drains "actually constructed" by the boards, that is, to artificial water-courses. These provisions have been construed as imposing liability only in respect of negligence and as not imposing an absolute duty.

C. The Action Upon the Statute

1. General

A breach of a statutory duty may give rise to a private cause of action in tort for damages. It is a distinct cause of action, not a species of common law negligence and should be pleaded separately.

4. A duty to "repair" may apply to natural water-courses as well as to drains actually constructed: Sefton-Ashley Drainage Board v Gorrie (1909) 29 NZLR 383 at 387 per Sim J; cf. Aitcheson v Waitaki County (1880) OB & F-G (SC) 52, 55 per Williams J.

5. S.25 Land Drainage Act 1908.


7. It seems that these restrictions were a response to the exceptionally adverse economic conditions prevailing at the time of the amendment. The restoration of the original provisions would now be justifiable.

8. Pearce v Manawatu Land Drainage Board (1912) 31 NZLR 985, 997 per Sim J.
In Groves v Wimborne Vaughan Williams LJ stated the principles in this way:

It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.

This tort is of particular importance where no duty arises at common law. Thus, the present enquiry is to ascertain the extent to which an individual is entitled to a remedy against a local authority in respect of a nuisance created as a consequence of a breach of a statutory obligation.

The courts have freely read into penal statutes, particularly those concerning industrial welfare, the implication that an action in tort was also intended by Parliament. But, as Street observes, "[t]he courts will not readily allow an action in tort where public bodies have violated their general statutory duties." Generally, the differing approaches to these classes of statute are attributable to judicial policy.

10. [1898] 2 QB 402.
11. [1898] 2 QB at 415.
13. Street Torts 5th ed 263.
The cases discussed in the following pages clearly indicate that in respect of drainage and sewerage authorities the courts will more readily accept as actionable breaches of duties which duplicate or are analogous to the duties imposed by the common law. These duties relate to the maintenance rather than to the construction of works.

2. Duties of Construction

The courts have consistently rejected attempts to found actions for damages upon the breach by urban authorities of statutory obligations to construct or improve sewerage or drainage works, largely upon the basis that a private action is an inappropriate remedy. The first of the leading cases on this point relates to the situation where a riparian proprietor seeks relief from injury caused by the discharge of sewage into streams rather than from damage caused by escapes. It is significant that in either case, discharge or escape, the plaintiff does not seek the provision of such a system so that he himself might use it, but so that he might be relieved of injury consequent upon the lack of an effectual scheme.

Section 15 of the Public Health Act 1875 has been much litigated in this connection. It was provided therein that "Every local authority ... shall cause to be made such sewers as may be necessary for effectually draining their district ...". The Court
of Appeal first rejected the contention that a private action lay for breach of such duty in 1879 in Glossop v Heston and Isleworth Local Board. The facts were (briefly) that the plaintiff complained of a nuisance to his property caused by the pollution of a river into which the defendants' sewers discharged. The defendants had only recently been constituted. They had to follow an elaborate procedure before they could put into force any of their statutory powers. There were various procedures relating to the compulsory purchase of land, notices to be given and consents to be acquired. Considering that the Board had been in existence for only a few months, the consensus of opinion of the Court was that they had not been guilty of neglect up till the time the action was brought. The Court went on to hold, however, that even if the defendants had been guilty of neglect or refusal to take steps amounting to any *mala fide* delay, that was not a ground of action by any proprietor in the district who might be deprived of the benefit he expected to derive from the performance of the duty. This conclusion was reached upon a ground to be discussed in detail presently, the existence of an alternative remedy, but James LJ was clearly conscious of the wider implications of the plaintiff's argument. He said:

It is said that this is a very serious matter to the Plaintiff and to the public generally. It appears to me that if this action could be sustained, it would be a very serious matter indeed for every rate-payer in England in any district in which there

14. (1879) 12 ChD 102.
is any local authority upon which duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not in a similar manner be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would be very much improved.\(^{15}\)

It is noted that while Brett LJ observed that no district could be said to be effectually drained where any part of the drainage caused a nuisance,\(^{16}\) Cotton LJ preferred the view that the local authority was directed to provide drainage for every house in the district, rather than to divert sewage from running streams, though that might be the result.\(^{17}\)

In 1897 the Court of Appeal again held that the neglect of the duty under s.15 to construct sewers sufficient for the district did not give a right of action to an individual whose property was injured. In Robinson v Workington Corporation\(^{18}\) the injuries in respect of which damages were claimed arose because of the inadequacy of a sewer. The sewer, as constructed by the defendants,\(^{19}\) had been sufficient for the district in which the plaintiff's houses were situated until a number of new houses were built which drained into the sewer. The sewer thereby became inadequate to carry off all the

\(^{15}\) (1879) 12 ChD at 109.
\(^{16}\) 12 ChD at 117, 118.
\(^{17}\) 12 ChD at 129.
\(^{18}\) [1897] 1 QB 619.
\(^{19}\) That the system had been constructed by the defendants appears from the report at (1897) 75 LT at 674.
sewage, some of which was bayed back. It overflowed through the connections into the plaintiff's houses and caused the injury complained of. It was admitted at the trial that the claim was founded on "nonfeasance" in that the defendants had not constructed a sewer, in the place of the existing sewer, of sufficient dimensions to carry off the sewage of the district in which the property of the plaintiff was situated.

Again, the ratio of the decision clearly relates to the existence of an alternative remedy. The judgment of Lopes LJ, however, primarily rests on the wider proposition that no right of action is given in such a case against a local body in respect of an act of nonfeasance; the statute did not create any duty towards any individual in respect of the construction of sewers, but merely to the locality at large.20

The presence of the statutory remedy was treated as a secondary reason.21 The learned judge assessed the utility of a private action in such cases in this way:

There are insufficient sewers, and no doubt this may affect private individuals; but it also affects a whole district. If there is a right of action in individuals affected, there might be a number of actions in which they might obtain damages ... but the mischief might still remain.22

On the other hand, it is pointed out, the statutory remedy would make good the sewerage of the whole district.23

Within a few months of delivering their judgments in Robinson's case24 a similarly constituted Court of Appeal decided Peebles v Oswaldtwistle U.C.25 This case is of interest in several respects. Although the remedy sought was not damages, but mandamus, the facts and issues were sufficiently similar to those in Robinson's case26 for the Court to decide the case on the same principles. Moreover, these principles were discussed by the House of Lords when the case again went on appeal. The facts were that the plaintiff was a manufacturer and he sought a mandamus commanding the defendants to cause to be made such sewers as might be necessary for effectually draining their district under s.15 and to give facilities for enabling the plaintiff to carry the effluent from his factories into the sewers under their control.

The trial judge had granted a mandamus, but the Court of Appeal reversed his decision upon the grounds to be discussed presently. In the House of Lords, where the case was entitled Pasmore v Oswaldtwistle U.C.,27 the decision of the Court of Appeal was affirmed. As to the remedy sought, the Earl of Halsbury LC said that there was no authority to add to the mandamus the requirement that the defendants drain the plaintiff's premises in particular, as well as the district. That was not justified by 'the whole purview, object and purpose of

27. [1898] AC 387.
the statute".\textsuperscript{28} Their Lordships were agreed that the statutory remedy deprived the plaintiff of any other form of remedy. Referring to the Glossop case,\textsuperscript{29} Lord Macnaghten said that he was much more impressed by the language of James LJ in regard to the waste of time and money, and the great inconvenience which would result from ordinary legal proceedings, than by his suggestion of the propriety of an application for a mandamus: "The evils of litigation would, I think, be much the same in the one case as in the other."\textsuperscript{30}

The principles enunciated in Robinson's case were expressly applied in Australia in Madell v Metropolitan Water, Sewerage and Drainage Board.\textsuperscript{31} The defendants were charged by statute with (inter alia) the "improvement and extension" of the works vested in them. The action was brought to recover damages in respect of escaping sewage. The cost of remedial works was approximately £160,000. The court held that:

\[\ldots\ [S]uch an enactment can hardly be read to mean that any person injured by a failure to alter or extend the sewerage system could maintain an action.\textsuperscript{32}\]

The court was clearly sympathetic to the view that the Act conferred a discretion on the defendants as to what works should be carried out.

\begin{itemize}
\item \textsuperscript{28} [1898] AC at 394.
\item \textsuperscript{29} (1879) 12 ChD 102.
\item \textsuperscript{30} [1898] AC at 398.
\item \textsuperscript{31} (1935) 36 SR (NSW) 68.
\item \textsuperscript{32} (1935) SR (NSW) 75.
\end{itemize}
The reasoning of the courts in the cases mentioned is undoubtedly valid where, as in Pasmore's case, the plaintiff seeks the provision of a service, viz. the drainage of wastes from his premises. In Glossop's, Robinson's and Madell's cases the essence of the complaint was very different. In those cases the plaintiffs sought relief from or compensation for damage actually caused by the operation of the sewerage system. They did not seek relief from natural conditions nor some advantage not enjoyed by their neighbours. The courts did not notice the distinction. The actions might reasonably have been allowed, on proof of neglect of duty, without materially affecting the general rule. If this class of action had been admitted, some of the complexities which (as shall be shown in later chapters) subsequently arose in regard to ordinary common law liability might have been avoided. In the circumstances indicated, the statutory remedy provided was an especially inadequate substitute for the compensatory common law remedy of damages.

3. Duties of Maintenance

Duties related to the maintenance of works have been enforced by private action against rural and urban authorities alike. An early and authoritative example of an action against a rural authority is the
decision of the Exchequer Chamber in *Coe v Wise*\(^{33}\)

where it was held that the defendant Drainage Commissioners were liable in respect of a negligent failure to perform a statutory duty to maintain a sluice and a cut whereby the sluice burst and the plaintiff's land was flooded. The Court generally concurred in the dissenting judgment of Blackburn J in the Queen's Bench who had held that the common law gave a right of action against those neglecting a duty cast upon them to those who, in consequence, sustain damage, and stated that the onus was on the defendant to show that the Legislature intended to prevent the right of action.\(^{34}\)

More recently, damages were awarded against the defendants in *Rex v Marshland Smeeth and Fen District Commissioners*\(^{35}\), a case arising from the traverse of a return to a prerogative writ of mandamus. It was held that the empowering (local) Act gave rise to an imperative obligation to "effectually drain" the district although there was a discretion as to how the duty was to be fulfilled. McCardie J described the nature of the duty in this way:

\(^{33}\) (1866) LR 1 QB 711.

\(^{34}\) (1864) 5 B & S at 464, 465.

\(^{35}\) [1920] 1 KB 155.
The imposition of an imperative obligation is not unjust to the defendants. They are not required to do anything which is legally impossible or physically impossible. They are not required to take absurd or unreasonable steps. They are not bound to provide for events of a wholly extraordinary character. Les non cogit ad impossibilia. But they are bound in my opinion to take all such steps as are required to provide for the drainage of the district in a reasonably effectual manner. 36

There was a continuous breach of duty by the defendants:

The drains, which the defendants should have kept clear and in good order and at a proper level, were continuously obstructed and in bad order and at wrong levels, and the contiguous works of the defendants leading to the pumping station have been continuously defective. As a result of these defaults the plaintiff's land has ... been continuously and substantially damaged. 37

The learned judge accordingly issued a preremptory writ of mandamus and held that the breach of duty gave rise to an action for damages upon the principles enunciated by Vaughan William LJ in Groves v Wimborne. 38

In Bohen v Clements 39 the Irish Court of Appeal held the defendant drainage board liable for breach of statutory duty for negligently failing to clean out and repair the bed of a river whereby the plaintiff's land was flooded. It was held that although the defendants were given a discretion as to the mode and manner in which to carry out their duties, they were

36. [1920] 1 KB at 167.
37. [1920] 1 KB at 173. The plaintiff was also entitled to recover upon the traverse of a false return to a mandamus by virtue of the procedure originally laid down in 9 Ann c.20 and 1 Will 4 C.21, see [1920] 1 KB at 170.
38. [1898] 2 QB 402.
under an obligation to maintain the drainage works. The plaintiff had plainly suffered special damage from the defendant's admitted breach of their statutory duty.\textsuperscript{40} The statutory duty was imposed for the benefit of a class, and, there being no specific remedy enacted, an action lay for a breach.\textsuperscript{41} It was affirmed that the principles of law relating to the distinction between misfeasance and nonfeasance, omission and commission, had no application.\textsuperscript{42}

Similarly, in Boynton v Ancholme Drainage and Navigation Commissioners\textsuperscript{43} the English Court of Appeal held that as the defendants had been negligent in maintaining and repairing a drain, they were liable in damages to the plaintiff in respect of injury done to his land by flooding which arose as a consequence.

A more recent illustration of the application of these principles is provided by the decision in AG v St Ives R.D.C.\textsuperscript{44} The plaintiff (and relator) sought a declaration that one or other of the two defendant councils was bound in law to maintain certain drains and keep them in repair, and to recover damages from

\begin{itemize}
\item[40.] [1920] IR at 123 per Ronan LJ.
\item[41.] [1920] IR at 124 per O'Connor LJ.
\item[42.] [1920] IR at 122 per Sir James Campbell C.
\item[43.] [1921] 2 KB 213.
\item[44.] [1960] 1 QB 312.
\end{itemize}
one or other of them in respect of flooding arising from a breach of duty to repair. Salmon J held that the drains in question were part of the land drainage scheme and that the duty to repair originally imposed by an Enclosure Act upon a Surveyor of highways for a parish within the district devolved upon the first defendants. The question then arose whether the breach of duty to maintain and repair gave the plaintiff a personal right to sue, or whether an action could only be brought by the Attorney-General on the relation of the plaintiff. Referring to the criteria laid down by the general law, Salmon J held that as no penalty or other sanction was imposed for non-compliance with the duty to maintain and repair drains, and as the Act was passed and the award under it made for the benefit of the person whose land was immediately adjacent to the drains and through whose land the drains passed, the plaintiff was entitled to a declaration and damages.

In Sephton v Lancashire River Board a statutory duty to maintain an existing drainage system had devolved from certain drainage commissioners (who had inherited

45. Affirmed upon this point [1961] 1 QB 366 CA.
46. [1960] 1 QB at 323.
the obligations of certain trustees in this respect) to a catchment board and hence to the defendant river board. The duty was to "duly maintain" embankments and the drainage system and no sanction for breach of that duty was provided. Because of the defendants' neglect of their duty to maintain it, an embankment broke and the lands of the plaintiff were flooded and damaged. Lawton J rejected the defendants' argument that the breach of duty could not found an action for damages by the plaintiff. He referred to the passage in Lord Simmons' judgment in Cutler v Wandsworth Stadium\(^50\) to the effect that the only rule which in all the circumstances is valid is that it depends upon a consideration of the whole of the Act and the circumstances, including the pre-existing law, in which it is enacted, but that there are indications which point with more or less force to one answer or another.\(^51\) (The indications referred to relate to the presence or absence of an alternative remedy in the Act imposing the duty.) Taking this very broad approach, Lawton J concluded:

For the purposes of this judgment the Act can, I think, be summarised in one sentence: the commissioners were under a duty to take all reasonable steps to protect the protected lands and they were to do what they had to do at the expense of the occupiers. It seems to me fair and just that if they failed to do what they were bound to do and what the occupiers paid them to do, they should be liable to pay damages to any occupier of the protected lands who was injured by their breach of duty.\(^52\)

\(^{50}\) [1949] AC 398.


\(^{52}\) [1962] WLR at 629.
The learned judge was fortified in this view by the fact that it appeared that the trustees whom the commissioners had superceded might have been sued for breach of their duty to maintain the bank, and by the decision of the Exchequer Chamber in **Coe v Wise**.53

Subsequently, a very similar case went to the Court of Appeal. In **Rippingdale Farms Ltd v Black Sluice Internal Drainage Board**54 the plaintiff sought damages in respect of flooding arising from the defendants' failure to embank and keep in repair a certain dyke in accordance with their statutory duty. The trial judge, Paull J, finding negligence, gave judgment in favour of the plaintiffs. The defendants appealed. An express duty to embank the dyke and keep it in repair was imposed by the **Black Sluice Drainage Act 1765** on the **Black Sluice Commissioners**55 and the Court held that the duty devolved upon the defendants by an order made under the **Land Drainage Act 1930**. In the course of his judgment, Lord Denning MR said that he was satisfied that the Act imposed on the Black Sluice Commissioners a positive duty to do the works specified in the Act. Russell LJ referred to the duty to embank and keep in repair the

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53. (1866) LR 1 QB 711.
54. [1963] 1 WLR 1347.
55. S.44 provided: "And be it further enacted, that the said commissioners ... shall ... scour out, deepen, and embank, rode and keep in repair, from time to time and at all times hereafter ... the following drains, dykes or becks ..."
drain or dyke in these terms:

Such duty was imposed to protect land in the area from flooding so as to benefit persons interested in such lands. A breach of this duty causing damage to such person would give him a right of action for damages for breach of the statutory duty.\textsuperscript{56}

The Court rejected certain other arguments to be considered in the following pages and the appeal failed.

It might be noted that it has been recognised in the New Zealand case that a negligent failure to keep drains in repair in breach of a statutory duty will render the drainage authority liable in damages.\textsuperscript{57}

The validity of actions against urban sewerage authorities in respect of maintenance functions has been acknowledged in a number of cases and is now well established, although the absence of proof of negligence has been fatal to the plaintiff's case in most reported instances.

The leading case is \textit{Hammond v Vestry of St Pancras}.\textsuperscript{58}

It is clear from the judgments of the Court of Common Pleas that the Court was concerned only with a cause of action based upon breach of a statutory duty to repair a sewer and not with common law duties. This was emphatically affirmed by Denman J in a subsequent

\begin{itemize}
\item \textsuperscript{56} [1963] 1 WLR at 1356.
\item \textsuperscript{57} Taieri County Council v Hall (1883) NZLR 1 SC 360, 363 per Williams J (obiter).
\item \textsuperscript{58} (1874) LR 9 CP 316.
\end{itemize}
The decision in Hammond's case turned on the construction of a provision in a statute which imposed upon the vestry the duty of properly cleansing the sewers vested in them. The facts were that a sewer which had got out of repair by some means (the action of rats or of natural decay), became choked up and the soil overflowed into the plaintiff's cellar and did damage. The jury found that the existence of the drain was unknown to the defendants but that it might have been known to them by the exercise of reasonable care and enquiry; but that the obstruction in the drain was also unknown and could not have been known by reasonable care. The Court of Common Pleas held that in the absence of negligence the defendants were not liable.

Hammond's case was followed in Bateman v Poplar District Council Board of Works (No.2) a decision on the same statutory provision. Here, the defendants knew of the nuisance but did not know that the drain from which it emanated was a sewer vested in them, nor could they

59. Humphries v Cousins (1877) 2 CPD 329. "The case of Hammond v St Pancras Vestry which was relied upon by counsel for the defendant, appears to us to have no real bearing upon the present case, inasmuch as the whole argument and decision of that case turned upon the effect of the clauses of a particular Act of Parliament imposing certain duties upon a public body; and no question arose as to the common law liability to occupiers of adjoining premises. 2 CPD 245.

60. S.72 Metropolis Local Management Act 1855 (18 & 19 Vict c.120).

61. Brett and Denman JJ.

62. (1887) 37 ChD 272.

63. The drain became a 'sewer' under the Act by reason of another drain being connected with it. The connection was made illegally and without the knowledge of the Board.
have discovered that by the exercise of reasonable care. In the absence of negligence, it was held that the defendants were not liable.

There are several reported decisions relating to actions based upon the duties imposed upon sewerage authorities by s.19 of the English Public Health Act 1857, viz, the duties to keep their sewers so that they should not be a nuisance or injurious to health and to cleanse and empty sewers vested in them. These duties related only to the physical condition of sewers as such and the section did not extend to nuisances caused by the discharge of sewage.64

In Baron v Portslade UC65 the Court of Appeal held the defendant authority liable for a nuisance arising from the escape of sewage from a sewer which the authority had negligently failed to cleanse. The sewer complained of was, in the relevant section, an open sewer which discharged into a pond on the plaintiff's land. The preceding authority had cleansed the sewer at intervals so that no nuisance was caused. The defendants, the present authority, discontinued that practice which had been the usual course taken and the nuisance ensued. It was argued that as the defendants had nothing to do with the construction of the sewer and had done nothing to increase the burden upon it, there had simply been

64. Earl of Harrington v Derby Corporation [1905] 1 Ch 205.
65. [1900] 2 QB 588.
a failure to carry out a duty imposed by the Act; this amounted only to nonfeasance for which no action would lie. The Court rejected this contention. The Earl of Halsbury LC, (A.L. Smith and Vaughan Williams LJ concurring) distinguished between actions based upon duties to construct and actions based upon duties of maintenance in the following terms:

There seems to me to be a wide difference between the obligation or duty to construct a new system of drainage and the obligation on a local authority to use sewers that are vested in them in a proper and reasonable manner. In this case there is no question as to providing any new sewer. The sewer is in existence and under the control of the local authority. The plaintiffs complain that the existing sewer, which from time to time has been cleaned out, is now neglected and uncleansed, and that this has caused the nuisance.

The duty contained in s.19 enjoining local authorities to "cause the sewers belonging to them to be constructed ... and kept so as not to be a nuisance" has received considerable judicial attention. In Stretton's Derby Brewery Co. v Derby Corporation the nuisance complained of was flooding due to the fact that sewers originally adequate had become insufficient to carry off the influx of water during heavy rain as a consequence of increased building. The case is unusual because the flooding occurred via the communications of the plaintiff's premises with the sewers. Romer J

66. [1900] 2 QB at 590.
67. [1894] 1 Ch 431.
held accordingly that the Corporation were not liable as strangers (i.e. for common law nuisance) but only if liability was cast upon them by statute. The plaintiffs contended that the defendants were liable because in failing to keep the sewer so as not to be a nuisance they had infringed the provisions of s.19. Romer J held that in the absence of negligence there was no liability. The nonfeasance issue, though raised by counsel, was not discussed by the learned judge.68

The poorly reported decision of the Court of Appeal in Jones v Barking U.D.C.69 is of particular interest as it shows that the distinction between construction and maintenance was regarded as crucial to the issue of liability. The plaintiff sought to recover damages for injury to a wall caused by an overflow of the defendant's sewer. A heavy fall of rain had filled the sewer with storm water which was forced up a branch drain and flooded the plaintiff's land. It was contended that the defendants were negligent in not keeping the sewer in a proper condition within the meaning of s.19. The plaintiff argued before the Court of Appeal70 that the

68. Although liability based on s.15 (duty to construct) was not argued, Romer J assumed that it was the duty of the defendants to construct a new sewer or drainage system, but held that there was no actual negligence in their failing to do so.


70. A. L. Smith, Rigby and Collins L JJ.
case was not like Robinson v Workington Corporation\textsuperscript{71} or Peebles v Ostwaldtwistle U.D.C.\textsuperscript{72} where a new sewer or sewerage system was required, but that this was only a question of a very small expense for putting in a storm opener in the sewer. The Court found that four such openers were necessary and the facts showed that what was necessary to be done to put these in the sewers amounted to an alteration of, and an improvement in, the system of sewerage of the district for the purposes of carrying off storm water. The case therefore came within Robinson's case and Peeble's case and the only remedy was the statutory remedy.

S.19 was again applied in A.G. v Lewes Corporation\textsuperscript{73} in relation to the occasioning of a nuisance. Swinfen Eady J awarded damages to the relator and granted an injunction in respect of injury sustained by periodic flooding from a sewer out of repair. No question of negligence appears to have been raised.

4. **Statutory Remedy**

In Doe v Bridges\textsuperscript{74} Lord Tenterden laid down two principles; he said:

\begin{itemize}
\item \textsuperscript{71} [1897] 1 QB 619.
\item \textsuperscript{72} [1897] 1 QB 625.
\item \textsuperscript{73} [1911] 2 Ch 495.
\item \textsuperscript{74} (1831) 1 B & Ad 847.
\end{itemize}
(1) Where an Act creates an obligation and enforces the performance in a special manner, we take it to be a general rule that performance cannot be enforced in any other manner.

(2) If an obligation is created, but no mode of enforcing its performance is ordained, the common law may in general find a mode suited to the particular nature of the case.\(^75\)

The first quoted principle has been applied by the courts to deny private individuals a remedy in damages or by mandamus in cases where the gist of the complaint is the failure to fulfil a statutory duty to construct sewers. Thus, where the duty was imposed under s.15 Public Health Act 1875, as in the cases previously discussed, private individuals were precluded from suing by s.299 which provided a remedy by way of complaint to the Local Government Board, the Board having power to make orders enforceable by mandamus or to appoint some person to perform the duty.

The effect of these provisions was first considered in Glossop \(v\) Heston & Isleworth L. Bd\(^76\) where the availability of the alternative remedy was regarded as a factor which did not preclude the granting of a mandamus altogether but which "ought to induce the court to hesitate before granting a mandamus"\(^77\) in such a case. The scope of s.299 was considered by Cotton LJ who concluded:

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75. (1831) 1 B & Ad 847, 859.
76. (1879) 12 ChD 102.
77. (1879) 12 ChD at 116 per James LJ.
It cannot be said that that section could have taken away any jurisdiction, either to grant damages, or an injunction, if the act was one which the Plaintiff could complain of as a legal wrong done to him; nor do I suggest that the existence of that section takes away the power of the Court to interfere by decree to compel the Defendants to do their duty. But ... [it] may influence the Court in deciding whether it will make a decree against the Defendants.\(^7\)

Subsequently, in Robinson v Workington Corporation,\(^7\) the Court of Appeal went further and held that the remedy under s.299 excluded all other remedies in respect of such defaults and specifically affirmed that the principle extended to preclude actions for damages. Lord Esher MR said:

If it were not for the statute, there would be no duty on the defendants to do anything in the matter, and a default on their part is dealt with by a remedy provided by the same statute. I have no hesitation in saying that that is the only remedy which is available. It has been laid down for many years that, if a duty is imposed by a statute which but for the statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy. The remedy in this case is under s.299 which points directly to s.15, and shews what is to be done for default of the duty imposed by that section. That is not the remedy sought for in this action, which is brought to recover damages.\(^8\)

The learned Master of the Rolls made it clear that this reasoning was not to be limited to liability for non-feasance; he said that "if the statute had dealt with acts of misfeasance, and had given a remedy, that would have been the only one available."\(^8\) Chitty LJ concurred

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78. (1879) 12 ChD at 129, 130.
79. [1897] 1 QB 619.
80. [1897] 1 QB at 621.
81. [1897] 1 QB at 621.
in the view that the answer to the complaint that sufficient sewers were not being made was that a remedy was provided by s.299.82

As a mandamus had not been sought in the Glossop case83 nor indeed had any default been shown, the Court's opinion of the effect of a statutory remedy upon the granting of such an order was strictly obiter. The question came squarely before the Court of Appeal in Peebles v Oswaldtwistle U.C.84 where the plaintiff argued that the "actual decision" in Robinson's case85 "was only that an action for damages would not lie in respect of nonfulfilment by a local authority of the duty to make sewers."86 But Lord Esher MR insisted that the case was decided according to the rule of construction that "if a new obligation is imposed by statute, and in the same statute a remedy is provided for non-fulfilment of the obligation, that is the only remedy."87 The judgments of Lopes and Chitty L JJ are consistent with this view.

In the House of Lords, the Earl of Halsbury LC confirmed that the statutory remedy deprived the plaintiff of any

82. [1897] 1 QB at 623.
83. (1879) 12 ChD 102.
84. [1897] 1 QB 625.
85. [1897] 1 QB 619.
86. [1897] 1 QB at 626.
87. [1897] 1 QB at 627.
other form of remedy and held that the first principle stated by Lord Tenterden in Doe v Bridges\(^8\) (cited above) was applicable.\(^9\) Lord Macnaghten also expressed his agreement with the passage cited from Lord Tenterden's judgment and in rejecting the notion that the case was exceptional he said:

> Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience. It would be difficult to conceive any case in which there could be less reason for departing from the general rule than one like the present.\(^9^0\)

In more recent times it has been affirmed in the House of Lords that the general rule may be subject to exceptions. In Cutler v Wandsworth Stadium\(^9^1\) Lord Simmonds said:

> It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition\(^9^2\)

It has been shown in the foregoing pages that while the courts have not been prepared to grant a remedy by private action in respect of duties of construction, they have done so in respect of what have been loosely termed duties of maintenance. In the case of urban

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88. (1831) 1 B & Ad 847.
89. [1898] AC at 394.
90. [1898] AC at 398.
sewerage authorities, the courts have been reluctant to admit an exception to the general rule, to concede that an action for damages would lie, notwithstanding the existence of a statutory remedy.

S.299 of the Public Health Act 1875 provided an alternative remedy in respect of the maintenance of existing sewers as well as in respect of the provision of new sewers. S.15 imposed upon the local authority the duty to keep its sewers in repair as well as to construct new sewers. Since s.299 precluded a private action in respect of construction, it might have been contended and appears to have been assumed that a private action in respect of repair was precluded also. For this reason, it seems, the practice was not to sue upon the duty to repair contained in s.15, but to rely instead on s.19 which imposed duties relating to the keeping of sewers so as not to create a nuisance.

In Baron v Portslade U.C.\(^\text{93}\) the trial judge, Mathew J, held that s.299, in dealing with the maintenance of sewers, did not apply to the duty of cleansing sewers imposed by s.19 and consequently did not deprive the plaintiffs of their right of action.\(^\text{94}\) The Court of Appeal agreed. The Earl of Halsbury LC said:

93. [1900] 2 QB 588.
94. [1900] 2 QB at 589.
I agree with the learned judge that the maintenance of a sewer is not the same thing as that which it is the duty of the local authority to do by virtue of s.19 - that is, to keep the sewer so that it shall not be a nuisance or injurious to health, and to see that it is properly cleansed and emptied. Sect.299 does not, in my opinion, touch the duty of the local authority to use proper diligence in the management of existing sewers, and I cannot see either in the section or in the cases cited anything to take away the right of action of a person who has sustained an injury through the neglect of the local authority.

The inapplicability of s.299 to s.19 might, perhaps, have been better explained if it had been held that the duties imposed by s.15 were owed to those who used or who sought to use the drainage system, whereas the duties contained in s.19 were owed to person who might be injured by the use of the system. Clearly, the statutory remedy is much more appropriate in the former case.

It is to be noted that in A.G. v Lewes Corporation Swinfen Eady J rejected the contention that insofar as s.19 included repairing, s.299 applied. It is of particular interest that the learned judge preferred the view that a private action was not precluded as s.299 gave no remedy in damages, although the weight of that consideration may be doubted in light of Robinson's case.

The equivocal approach of the court in Baron's case might be compared with the more direct decision of

95. [1900] 2 QB at 590, 591.
96. [1911] 2 Ch 495.
97. [1911] 2 Ch at 507.
Lawton J in *Sephton v Lancashire River Board*.\(^98\)

The defendants had contended that the provision in the River Boards Act 1948 of a remedy by way of complaint to a Minister (who was given powers of inquiry and direction where a board was in default) by implication removed any right to damages for breach of statutory duty. Referring also to the narrower and less effective remedy contained in the Land Drainage Act 1930 (s.12), Lawton J held that neither provision divested the occupiers of any remedy against the local authority in respect of their breach of duty to maintain the bank.\(^99\)

Finally, it should be noted that Lord Tenterden's second principle probably must be qualified in this respect, that it does not entitle an individual to enforce a duty to construct a sewerage system by private action where no statutory mode of enforcement is provided. When the point was raised in *Pasmore v Oswaldtwistle U.C.*\(^1\) (in regard to the situation prior to 1866 when no statutory remedy was provided) Lord Macnaghten expressed doubt as to whether the absence of a special remedy would justify recourse to legal proceedings and suggested that the case might properly be regarded as an exception to the general rule.

\(^98\) [1962] 1 WLR 623.

\(^99\) [1962] 1 WLR at 630, 631.

\(^1\) [1898] AC 387.
5. The Content of the Duty

It is now well established as a rule of construction that duties imposed upon local authorities by statute in what appear to be absolute terms, require the exercise of reasonable care and are actionable only on proof of negligence.

This view of the law was endorsed in recent English cases relating to rural drainage authorities. In Sephton v Lancashire River Board counsel for the plaintiff submitted that the duty to maintain the drainage system was an absolute duty and that liability was not dependent on the defendants having failed to exercise reasonable care. Lawton J rejected this contention without citing authority:

In my judgment, the duty imposed ... on the commissioners ... and upon the defendants as their successors, was not an absolute one. The section required the commissioners to exercise reasonable care in the performance of their duty and no more. The defendants, as the commissioners' successors, did not exercise reasonable care and it is because of their failure to do so that I adjudge them to have been in breach of their statutory duty.

In the course of his judgment in Rippingdale Farms Ltd v Black Sluice Internal Drainage Board Lord Denning MR said that the duty to embank and keep the dyke in repair was not an absolute duty, but a duty to take reasonable

3. [1962] 1 WLR at 626.
care and said:

The scope of the duty was well put in a case at the Lincoln Assizes, Hardwick v Wiles\(^5\) which arose out of a flood of 1872. The judge left to the jury the question "whether the commissioners took reasonable care that the bank in question should be in a reasonable fit and proper condition to protect the adjacent lands from water and floods reasonable to be anticipated." ... I think that was the right way of putting the question.\(^6\)

This construction of a similar provision had earlier been preferred in a New Zealand case. The Land Drainage Act 1908 (s.66) casts upon drainage authorities a duty to remove obstructions from streams. In McKinley v Whangarei County Council\(^7\) Cooper J declined to give the section its strict literal meaning, upon the ground that it would be manifestly impossible for such an authority to effectively carry out the terms of the section. The learned judge held that liability arose only where the authority had been negligent.\(^8\)

A similar view has been established for a century in regard to sewerage authorities, that is, since the decision in Hammond v Vestry of St Pancras.\(^9\) The decision turned on the construction of a provision imposing upon the vestry the duty of properly cleansing the sewers vested in them. The Court found that the language used was capable of meaning that the defendants

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7. (1913) 32 NZLR 791, 797, 798.
8. See also Tricker v Wellington City Corporation [1920] NZLR 626 CA per Sim J.
9. (1874) LR 9 CP 316.
were under an absolute duty or that they were only bound to exercise due and reasonable care, but preferred the latter view.  

It would seem to me to be contrary to natural justice to say that parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute: but, if so, it ought to be imposed in the clearest possible terms.

This rule was applied in *Bateman v Poplar District Board of Works (No. 2).*

Thus in *Stretton's Derby Brewery Co. v Derby Corporation* Romer J held that it was settled law that liability in such cases, though not in form limited, was in fact limited to cases where the public authority was guilty of negligence.

It is to be noted that the principle that statutory duties impose only an obligation to exercise due care does not extend to negate any strict or absolute duties actually imposed by the common law. The contrary

10. This conclusion was reached with some difficulty. It was acknowledged that this decision seemed to be at variance with the decision of Wilde B (later Lord Penzance) in *Meek v Whitchapel Board of Works* (1860) 2 F & F 144; 175 ER 998. Whether Wilde B intended to lay down a strict duty is not clear from the report. The present writer is inclined toward the view that he did. However, the judges in *Hammond* were prepared to disagree with their learned predecessor.

11. (1874) LR 9 CP at 322.

12. (1887) 37 ChD 272.

13. [1894] 1 Ch 431.
conclusion was reached by Upjohn J in *Smeaton v Ilford Corporation*\(^\text{14}\) in respect of the obligation imposed upon the defendant by the Public Health Act 1936 (s.31) to so discharge their functions as not to create a nuisance. The learned judge referred to Hammond *v Vestry of St Pancras*\(^\text{15}\) and Stretton's *Derby Brewery Co. v Derby Corporation*\(^\text{16}\) as authority for the proposition that:

> So far as this court is concerned, it must be taken as settled that the proper construction to be given to the section is to exclude liability for escapes in the absence of negligence and, therefore, to negative the rule in Rylands *v Fletcher*\(^\text{17}\).

But any immunity of this kind is derived not from such provisions but from the general defence of Statutory Authority. Indeed, to the extent that a duty not to create a nuisance resembles a Nuisance clause,\(^\text{18}\) strict liability is indicated.\(^\text{19}\)

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15. (1874) LR 9 CP 316.
16. [1894] 1 Ch 431.
17. [1954] 1 Ch at 477.\(^1\)
18. See p.215 et seq.
19. Cf. *Pride of Derby case* [1953] 1 Ch 149 - S.109 Derby Corporation Act 1901 was a combination of this kind of provision and a nuisance clause; the Court of Appeal held that it imposed strict liability for nuisance.
6. Mere Powers

Modern statutes constituting rural drainage authorities and authorising them to perform drainage functions typically do not impose duties in relation to the construction and maintenance of works, but merely empower.

It is now well established that no action can be brought for negligent failure to exercise a statutory power. The action upon the statute depends upon the existence of a mandatory duty and unless some basis can be found for the imposition of common law liability, an action brought in such circumstances will fail. There are three clear illustrations of the application of this rule.

In Smith v Cawdle Pen Commissioners\(^\text{20}\) the plaintiff's land had been severely damaged by floods and it was alleged that the flooding was due to the failure of the defendants to keep the drainage works in their area in good repair. It was found that the main and substantial cause of the flooding was that a bank was too low and that there was negligence on the part of the defendants in this respect. Counsel for the plaintiff conceded that certain earlier statutes did not impose duties in respect of the work and du Parcq J held that the Land Drainage Act 1930 did not do so.\(^\text{21}\)

\(^{20}\) [1938] 4 All ER 64.
\(^{21}\) [1938] 4 All ER at 65.
The learned judge held that the action failed
in limine because the defendants were under no duty
to exercise their powers.22

In *Gillett v Kent Rivers Catchment Board*23 the plaintiffs
suffered considerable financial loss as the result of
injury to land and crops as a consequence of flooding
caused by the defendants' failure to clear a drain of
weeds. Stable J held that the action failed. The
plaintiffs had not shown that the defendants were
negligent,24 and the statute did not impose a duty on
the defendants so as to create a right of action.25

Similarly in *East Suffolk Rivers Catchment Board v Kent*.26
The plaintiffs suffered damage by flooding as the
result of the nonrepair of a wall on the bank of a tidal
river. The wall had initially been breached by a very
high tide. The defendants were empowered, but not
obliged, to carry out repairs by the Land Drainage Act
1930. The argument before the House of Lords proceeded
on the basis that the defendants were not under a duty
to undertake the repair of the breach which could be
enforced by action. It was agreed that if the defendants
had remained entirely passive, the plaintiffs could not

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22. [1938] 4 All ER at 69, 70.
23. [1938] 4 All ER 810.
24. [1938] 4 All ER 813.
25. [1938] 4 All ER at 813, 814.
26. [1941] AC 74. If the Act had imposed upon the appellants
the duty of repairing the wall instead of merely conferring
upon them the power of doing so, they would without question
have been liable for the damage: see Lord Romer at p.98.
have succeeded against them for nonfeasance. 27

It follows from these principles that it is crucial to a plaintiff's case to establish that the Act under which the defendant acted imposed a duty and there are cases which have been fought on this issue. 28 The decision of the Irish Court of Appeal in Bohen v Clements 29 is of particular interest in this respect, for as a matter of policy the court appears to have favoured liability. The terms of the statute provided that the defendants were "fully authorized" to carry out certain works and it was argued that the language of the section was, in its terms, permissive. The contention was rejected by O'Connor LJ in these terms:

I am of opinion that this contention is not well founded. To hold otherwise would be to sanction the notion that persons who assume a statutory office can altogether ignore the functions for the performance of which the office was created, and for which they were elected. 30

27. [1941] AC at 83 per Viscount Simon LC.
28. Rex v Marshland Smeeth and Fen District Commissioners [1920] 1 KB 155; Boynton v Ancholme Drainage and Navigation Commissioners [1921] 2 KB 213 CA; Bohen v Clements [1920] IR 117; and see Aitcheson v Waitaki County (1880) OB & F-G 52 (expl'd in Taieri County Council v Hall (1883) NZLR 1 SC 360 at 363).
30. [1920] IR at 123.
CHAPTER III

NEGLIGENCE

A. Meaning of "Negligence"

It is sufficient for present purposes to briefly define the tort of Negligence as the failure to take reasonable care to avoid acts or omissions which it might reasonably have been forseen would have been likely to cause damage to persons to whom a duty of care is owed. In Blyth v Birmingham Waterworks Co. a water escape case, Alderson B laid down the classical formulation of "negligence" as:

... the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

The legal concept of "negligence" has, however, acquired an extended meaning in respect of bodies having statutory powers or duties. In Geddis v Proprietors of Bann Reservoir Lord Blackburn affirmed that an action lies for that which the Legislature has authorised, if it be done negligently, and said:

2. (1856) 11 Ex 781.
3. (1856) 11 Ex at 784.
4. (1878) 3 App Cas 430.
And I think that if by a reasonable exercise of the powers, either given by the statute to the promotors, 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.\(^5\)

Thus in determining whether a statutory body has acted reasonably, without negligence, regard must be had to the availability of any special statutory powers by the exercise of which the damage might have been avoided.

In Geddis' case it appears that the defendants were incorporated under a local Act. Pursuant to their statutory powers, they erected a reservoir, collected the waters of different streams and sent them through a certain channel. After a time they neglected to cleanse that channel, in consequence of which the water overflowed its banks and damaged the adjoining lands. It was held that the defendants were under an obligation to take care that the due execution of the works and operations intended by statute should not be injurious to the adjoining lands. Lord Hatherley said:

I apprehend that the true construction of all such powers given to companies is this: You may carry out your work to its full extent, and in some cases you must carry it out to its fullest extent, in the manner provided by the Act, but in so doing you shall not create any needless injury - you shall use all those precautions against injury to others which you would use against injury to yourselves in carrying on a similar work, and if

\(^5\) (1878) 3 App Cas at 455.
we find that in carrying out your powers damage has been done by you, the law will say that the powers which you can exercise shall be exercised for the prevention of mischief.\textsuperscript{5a}

In \textit{Bligh v Rathangan Drainage Board}\textsuperscript{6} the defendants were expressly held liable upon the principle stated by Lord Blackburn in respect of damage caused by their negligent failure to cleanse a natural stream whereby flooding was caused to the plaintiff's land. The necessity for the cleansing was caused by the defendants' acts, such acts having been authorised. As the defendants had power to cleanse and scour the stream and as by a reasonable exercise of those powers they could have prevented the damage complained of, and by reason of their neglect in putting these powers into operation the damage arose, they were held responsible.\textsuperscript{7}

A different kind of test applies where a local authority is engaged in the construction of public works. In \textit{Provender Millers (Winchester) Ltd v Southampton County Council} \textsuperscript{8} the Court of Appeal accepted the trial

\textsuperscript{5a} (1878) 3 App Cas at 450.
\textsuperscript{6} [1892] 2 IR 205 CA.
\textsuperscript{7} [1898] 2 IR at 214.
\textsuperscript{8} [1940] 1 Ch 131.
judge's view in respect of statutory duties that:

•••"[N]egligence" ... means adopting a method which in fact results in damage to a third person, except in a case where there is no other way of performing the statutory duty. So that it is negligent to carry out work in a manner which results in damage unless it can be shown that that, and that only, was the way in which the duty could be performed.9

This rule must be modified where a statutory body is exercising statutory powers and compensation is provided for persons injuriously affected. In such a case it is not sufficient that if the work had been done in a different way, the plaintiff would not have suffered damage; the decision of the Court of Appeal in Marriage v East Norfolk Rivers Catchment Board10 shows that the standard of care in such a case is that of a reasonably competent person carrying out work of that kind with due regard to the rights of all persons likely to be affected.

Where a statutory body has a discretion in respect of the exercise of its powers or performance of its duties, the forementioned principles are inapplicable. The principle in the Geddis case, that the negligent exercise of statutory powers is actionable, applies only where the act or omission complained of is of a kind which itself would give rise to a cause of action at common law if not authorised by statute, and does not extend to give a remedy by way of civil action for negligence in the mere exercise of a discretion. These modifying principles appear from the recent

9. [1940] 1 Ch at 140 per Farwell J.
10. [1950] 1 KB 284 CA.
decision of the House of Lords in *Dorset Yacht Co. v Home Office*[^11] where Lord Diplock affirmed that the courts will decline to apply ordinary common law conceptions of negligence in cases where damage has been sustained as the result merely of the exercise by a public body of a statutory discretion. In such cases, the public law concept of ultra vires has replaced the civil law concept of negligence as the test of liability.[^12]

### B. Standard of Care

While the formulation of the test for negligence is a question of law, the issue of whether there has been a breach of duty is a question of fact to be determined having regard to all the circumstances of the particular case. But judicial discussion or review of this factual matter is of considerable interest, for it is indicative of the standard of care imposed by the courts - what must be done to satisfy the test of reasonable care - and suggests a code of conduct to which the prudent authority will have regard. There must be a continuing awareness, however, that what is demanded in the way of precaution to achieve the expected degree of safety will tend to increase as the technologies develop and finances improve.

[^12]: [1970] *AC* at 1066 et seq.
At one time the law of tort recognised a special category of things "dangerous in themselves" to which a specific duty and high standard of care applied. In *Dominion Natural Gas Co. v Collins and Perkins*\(^1\) the Judicial Committee brought natural gas and the equipment used in its supply within the ambit of the rule. The duty varied according to the subject matter of the things involved and was never made clear, at least in relation to gas, although it seems that the degree of fault required for liability was minimal. However, after the decision in *Donoghue v Stevenson*\(^2\) where the House of Lords laid down a broad duty of care, the relevance of the classification for practical purposes disappeared. The case of dangerous things may now be regarded as a special instance of negligence where, to adopt the words of Lord Macmillan, "the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety,"\(^3\) and the category no longer attracts special rules.\(^4\)

1. Construction of Works

Probably as a consequence of the availability of a remedy by way of statutory compensation, there are relatively few reported cases relating to negligence in the construction, alteration or modification of

drainage systems and associated works, but there are illustrations of some considerable importance dating from 1858.

In respect of rural authorities, one case only may be cited, and this decision affirms that due care must be taken in the construction of drainage works. In *Collins v Middle Level Commissioners*\(^\text{17}\) the defendants were held liable for negligence in the construction of a sluice whereby tidal water broke through the sluice and flooded the plaintiff's land.

The law relating to urban authorities is more amply illustrated.

(a) **Capacity of Drain Constructed**

It is clear that a drain or sewer must be sufficient for the purpose for which it was constructed. In *Touzeau v Slough U.D.C.*\(^\text{18}\) the plaintiff suffered injury as the result of the irruption of sewage through a manhole which had been made in the vicinity of his home by the defendants. The question of liability was abandoned when in the course of the trial it became apparent that the sewer, the inadequacy of which caused the overflow, was insufficient when made.

\(^{17}\) (1869) LR 4 CP 279.

\(^{18}\) "The Times" 6th February 1896.
In Willoughby Municipal Corporation v Halstead\textsuperscript{19} the High Court of Australia held the defendants liable for the negligent construction of a storm water drain which ran through the plaintiff's land. As a consequence of the drain's original incapacity, water accumulated on the plaintiff's land to her injury.

But in constructing a drain a local authority is not required to provide for all possible eventualities. This is shown by the Australian case of Hawthorn Corporation v Kannuluik, a decision of particular interest as it went on appeal to the Full Court\textsuperscript{20} and to the Privy Council.\textsuperscript{21} The defendants had taken over a watercourse and made it into a public drain. The drain ultimately gave rise to a nuisance by flooding. At first instance Williams J found negligence on the part of the defendants in two respects. (The second ground is discussed below.) He relied principally on the original faulty construction of the main drain.

The learned judge held that there had been a lack of reasonable care on the part of the defendants' engineer in designing and planning the work; the drain was of insufficient size and was badly graded. This ground of liability did not find favour in the Full Court. Hood J went so far as to disregard the

\textsuperscript{19} (1916) 22 CLR 354.
\textsuperscript{20} (1903) 29 VLR 308.
\textsuperscript{21} [1906] AC 105.
finding of negligence in regard to the construction of the main drain and said:

It is going too far to say that there is an absence of reasonable care, calculation, and forethought because a man, in preparing a scheme for an isolated drain, not part of a comprehensive scheme, does not provide for unknown requirements, arising from an unknown use to which this drain may be turned.\(^{22}\)

(b) Capacity of Recipient Drains

Where the construction of a new drain or associated works or the diversion of existing drains will place a burden upon another part of the system, that too must be of sufficient capacity to receive the flow without giving rise to flooding. Thus in 1858 in *Brown v Sargent\(^^{23}\)* a local board of health was held liable for damage sustained as a consequence of the irruption of sewage from sewers which had been improperly constructed. The negligence was in connecting a sewer with and causing it to discharge its contents into a sewer of a smaller bore. The small sewer burst due to its incapacity.

In *Dent v Bournemouth Corporation\(^^{24}\)* the defendant authority was held liable for negligently bringing about the overloading of a sewer. The contents of a sewer had been diverted into another sewer already

\(^{22}\) (1903) 29 VLR at 321.
\(^{23}\) (1858) 1 F & F 111.
\(^{24}\) [1897] 66 LJ QB 397.
operating at capacity and as a result of the consequent surcharging, sewage escaped and did damage to the plaintiff's property.

In New Zealand a highway authority has been held liable in an analogous situation. In Scott v Ellesmere Road Board\textsuperscript{25} the defendants were held liable for negligence in constructing a culvert without any provision for carrying off the additional water which its construction brought onto the plaintiff's land.

In Hawthorn Corporation v Kannuluik\textsuperscript{26} Williams J at first instance held as a second ground of liability that there was a further and more conspicuously manifested lack of care in the formation and construction of tributary channels leading into the main drain.\textsuperscript{27} The Full Court\textsuperscript{28} and the Judicial Committee\textsuperscript{29} agreed.

Various subsidiary drains, gutters and ditches were constructed by the defendant municipality or by individuals with its permission. Building had progressed in the vicinity at varying rates and the quantity of water and wastes discharged into the main drain by the subsidiary channels increased. The defendants became aware that the drain was not sufficient,

\begin{itemize}
\item 25. (1887) NZLR 5 SC 283.
\item 26. (1903) 29 VLR 308; [1906] AC 105.
\item 27. (1903) 29 VLR at 309.
\item 28. (1903) 29 VLR 308.
\item 29. [1906] AC 105.
\end{itemize}
but did not enlarge it or regrade it or improve it in any way, so as to abate the recurring and increasing nuisance. It appeared that the flooding caused might have been relieved by widening a small portion of the drain at the relatively small cost of £100. Lord Macnaghten said, in delivering the Board's opinion:

... [I]t is difficult to imagine a more conspicuous example of negligence than is shewn by repeatedly pouring offensive stuff into a receptacle or channel proved over and over again to be insufficient to hold it and pass it on. 30

Proof that the work was sufficient when the watercourse was turned into a public drain was not sufficient to exonerate the defendants. 31

It may be noted that a drainage authority may be held liable in respect of flooding from an inadequate drain where the works giving rise to the excess burden were constructed in a capacity other than as a drainage authority. Thus in the recent New Zealand decision in the Spa Hotel case 32 the defendant borough was held liable for flooding of a natural watercourse consequent upon the development of the locality which it drained. The defendants had themselves constructed certain works, baths and a highway, which resulted in increased rain-

30. [1906] AC at 108.
32. J.W. Birnie v Taupo Borough Council (1975) (unreported).
fall runoff into the stream. The nuisance might have been avoided by the defendants, had reasonable steps been taken to replace certain highway culverts which had thereby become inadequate and which caused the flooding. No attempt appears to have been made to hold the defendants responsible for development beyond those works actually carried out by themselves.

(c) Failure to Construct Sewers or Drains

It has yet to be authoritatively decided whether a duty to construct or expand a drainage system may arise at common law where the existing system has become inadequate through uncontrolled development and whether a breach of such common law duty is actionable. There is authority in the negative but the point remains open for reconsideration.

The decision of the Court of Appeal in Hesketh v Birmingham Corporation lends some weight to the proposition that such negligence is not actionable. In that case the defendants were the owners of a sewer which ran alongside a natural stream. Forty years earlier they had made a number of storm-water outlets in the sewer to relieve the pressure on it in times of heavy rain by discharging the surplus water into the stream. At the time the outlets were made the stream was of sufficient capacity to carry off all the water that was discharged into it, but in the course

33. [1924] 1 KB 260 CA.
of time, owing to the neighbouring land having been almost entirely built over, it had become insufficient. In consequence of an exceptionally heavy storm so much surplus water was discharged from the sewer into the stream that the adjoining land was flooded and certain houses of the plaintiff on the banks of the stream were damaged.

The plaintiffs alleged, inter alia, that the defendants were guilty of negligence in continuing to discharge the sewage into the stream after it had become of insufficient capacity to carry it in consequence of the growth of population. The defendants were held not liable. Bankes LJ expressed no concluded opinion on the point, but indicated that the plaintiff was in great difficulty, "having regard to the cases which establish the non-liability of a local authority to an action for mere nonfeasance." Scrutton LJ was more confident; he said:

[I]f the system of drainage, originally sufficient, became insufficient by reason of the growth of houses, the neglect of the defendants to improve the system so as to meet the altered requirements cannot be made the subject of an action.

Reference might be made also to the preceding decision of Shearman J in Craib v Woolwich Borough Council. While that case is not of any great authority, it is

34. That is, the cases relating to breach of statutory duty.
35. [1924] 1 KB at 271. Eve J concurred in the opinions of his brethren.
36. (1920) TLR 630.
of interest because it was a true escape case, because negligence was proved and because it shows that "nonfeasance" might successfully be argued even where only a minor structural work was required to abate the nuisance. In brief, the defendants failed to prevent recurrences of periodic flooding from a sewer which had become inadequate. The defect might have been remedied by the enlargement of an outfall pipe from a manhole into which flowed storm-water and sewage. It was held that in failing to make this small improvement the defendants were negligent, but it was further held that the fault was in failing to exercise their statutory powers and for such non-feasance there was no right of action.

The authority of Hesketh's case 37 might be attacked on three grounds; Craib's case 38 may be assailed on the second ground only. First, the Court of Appeal was unanimous in the view that there was in fact no evidence of negligence in the respects alleged and its views on the legal question of liability are therefore obiter dicta. Second, the Court failed to distinguish between causes of action based on statutory duties and those founded on common law duties. Third, it may be doubted that the case was properly regarded as a case of mere omission, for the defendants' conduct might have been described (as alleged) as a continuing

37. [1924] 1 KB 260 CA.
38. (1920) TLR 630.
activity of discharging the surplus water, whereas the court had regard only to their culpability in failing to improve the system.

In contradiction of the principles accepted in these two cases, it is suggested that a common law duty to exercise statutory powers to improve an existing drainage system might properly be derived from the conception of control; control arising from the ownership of the drainage system and the statutory and common law powers arising incidentally to such ownership, control assumed by the construction of the system and by subsequent modifications and maintenance, control derived from their continuing responsibility for the disposal of the town's sewage and storm-water.

In Pride of Derby v British Celanese\(^39\) it was argued by counsel that the neglect of a sewerage authority to construct new sewers was not actionable. Evershed MR considered the problem but preferred to leave the point open:

\[\text{T}he \text{ cases do not seem to me actually to have decided that precise point, and I think that in this case it is unnecessary that I should express a concluded view upon it...}^{40}\]

(d) Proximity to Other Mains

In constructing mains local authorities must, no doubt, take proper precautions in regard to any foreseeable risks, but they are not obliged to take

\[39. \quad [1953] 1 \text{ Ch} 153 \text{ CA.}\]

\[40. \quad [1953] 1 \text{ Ch} at 179.\]
account of an improbable series of events. This point is illustrated by Dunne v North Western Gas Board and Liverpool Corporation 40a where water escaped from the mains of the Corporation and caused the collapse of a sewer and hence the removal of the support of the Board's gas main. Gas escaped in consequence, causing damage. It was argued before the Court of Appeal that the Corporation was negligent in laying the water pipes in close proximity to the gas main and retaining them in that position. It was contended that as it was known that water pipes may leak notwithstanding reasonable care, the sequence of events, as in fact occurred, was forseeable:

The submission was that the water pipes were placed in too close proximity to the gas main and should have been placed far enough away to make it unlikely instead of probably that such an occurrence would take place. 40b

The evidence was that a leakage of water would normally reveal itself by a wet surface above it. Without any lack of care, none was observed in this case and the symptom may not have occurred. The trial judge found that such an accident would have been very difficult to forsee and would have had little weight in the balance of judgment of an engineer in deciding whether a special system of inspection should have been devised at points of such proximity. The appeal court took a similar view in regard to the initial layout.

40a. [1964] 2 QB 806 CA.
40b. [1964] 2 QB at 830.
2. Precautions Against Escapes

There can be little doubt that the common law imposes upon drainage authorities a general duty to take all reasonable precautions to prevent escapes and consequent damage to other persons. There seems to be no reason why such a duty should not protect persons having communications with the drains.

Thus a sewerage authority will be liable if it negligently removes a protective device. In 1858 in Ruck v Williams\textsuperscript{41} the plaintiff recovered damages from the Cheltenham Improvement Commissioners in respect of injury suffered in consequence of the irruption of river water into a burst sewer, whereby water and sewage matter was forced into the plaintiff's premises which were drained by the sewer. The Exchequer Division held that the defendants were liable in negligence for having, in the course of altering the system, removed and not replaced a flap or penstock which had formerly protected the plaintiff's premises from such invasions. It is noted that a plea of "nonfeasance" was not accepted and that nothing was made of the fact that the damage occurred through the plaintiff's communication.

\textsuperscript{41} (1858) 3 H & N 307. Cf. Stretton's Derby Brewery Co. v Derby Corporation [1894] 1 Ch 431 where Romer J suggested that the defendant corporation was liable to the plaintiff company, which suffered damage through its communication with a public sewer, only if liability was cast upon it by the empowering Act.
with the sewer.

3. Maintenance

(a) Cleansing of Sewer and Drains

A negligent failure to keep sewers, drains and natural watercourses cleansed and clear of obstructions may give rise to liability on the part of the drainage authority in which property or control is vested. It has already been noticed that liability in the reported English cases has been based exclusively upon breach of statutory duty. There seems to be no practical difference between that cause of action and that based upon negligence at common law. In the New Zealand and Australian reports there are instances of actions based upon common law duties.

In Tamaki West Road Board v Appleton\(^\text{42}\) negligence was found against the appellant board in failing to remove an obstruction of which they had knowledge from a culvert under a road whereby a portion of the respondent's land was flooded. Despite several clear warnings about the state of the culverts, the board failed to clear them. Then in Ham v Blenheim Borough\(^\text{43}\) the defendant authority was held liable for negligence.

\(^{42}\) [1916] NZLR 183 per Cooper J.
\(^{43}\) [1921] NZLR 358.
in continuing to send drainage into a drain when it was insufficiently cleaned, thereby causing flooding to the plaintiff's land.

The extent of the obligation on a municipal authority to cleanse its sewers has also been considered. In Sargood v Dunedin City Corporation\(^{44}\) the defendant corporation was exonerated of negligence in failing to cleanse a sewer in which silt had accumulated, causing flooding of the plaintiff's basement. Williams J expressed the defendant's duty in this way:

> There seems ... no reason at all why the Corporation might not without negligence have allowed a certain quantity of silt to accumulate in the sewer. Their duty is to keep the sewer sufficiently free to carry off all the water that might be reasonably anticipated would come into it, and it seems to me that if they leave clear the maximum space considered proper under the circumstances by the best authorities they have sufficiently performed their duty.\(^{45}\)

It was argued before the Court of Appeal that Williams J had put the duty too low, but the decision was affirmed on the basis that negligence was not proved.

The Australian cases are of particular interest insofar as they affirm that failure to cleanse and maintain artificial drains is not mere nonfeasance. In Essendon Corporation v McSweeney\(^{46}\) one of the causes of injury to the plaintiff was alleged to be default

\(^{44}\) (1888) 6 NZLR 489.  
\(^{45}\) (1888) 6 NZLR at 499, 500.  
\(^{46}\) (1914) 17 CLR 524.
on the part of the defendant authority in cleaning and maintaining the relevant drain so that debris accumulated and caused a nuisance by flooding. The High Court held that the defendants were bound to maintain the drain as originally constructed in an efficient condition and clear of obstructions and were liable for negligent maintenance. Isaacs J said:

For a breach of its obligation to cleanse the drain within its own territory, Essendon, on ordinary principles, must repair any damage arising by reason of the consequent overflow of water reasonably anticipated, up to the limit of the drain's capacity.47

The restriction of liability to water flow within the drain's designed capacity is logical, for any nuisance in excess does not arise from the obstruction but from the incapacity itself which may not be actionable.

In Willoughby Municipal Council v Halstead48 the High Court referred to the Essendon case as authority for the proposition that:

...[I]f a constructing authority, although not in default in the original construction of a work, allows the work to fall into a defective condition, it is guilty of misfeasance and not mere nonfeasance.49

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47. 17 CLR at 534.
49. 22 CLR at 356 per Griffith CJ.
In that case too, liability turned on negligent maintenance. The nature of the defects does not appear from the report, but the defects appear to have affected the capacity of the drain to allow the free flow of the water.

In *Campisi v Water Conservation and Irrigation Commission*\(^50\) the defendants were held liable for a negligent failure to prevent a drain from becoming choked, whereby the plaintiff's land became flooded. There was evidence that the drain had not been cleaned out for several years. It had become full of paspalum grass and watercouch, with a considerable amount of silt. Jordan CJ distinguished those cases where the authority had failed to provide a sewerage or drainage system, or had failed to extend it when it became inadequate, from the case where the authority constructs such a system but fails to take reasonable care to prevent damage arising from the water thus collected, and held:

> If [the authority] negligently allows its drain to become obstructed, and if, in the result, the water which has been collected into the drain overflows before reaching its destination and floods the other land, the owner of the land which has been damaged may maintain his action. This is not mere nonfeasance.\(^51\)

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50. (1936) 36 SR (NSW) 631.

51. (1936) 36 SR (NSW) at 639.
However, the learned judge went on to suggest that in relation to the land actually drained, the landowner has no action where through nonrepair, the drain becomes "less ameliorative" in its operation.\(^{52}\)

Where, however, the watercourse in question is a natural watercourse and not artificially constructed, there is no duty at common law upon a drainage authority to cleanse the bed. But where the obstruction is brought about by the acts of the authority, such a duty may arise.

In *Bligh v Rathangan Drainage Board\(^{53}\)* the Irish Court of Appeal held the defendant board liable in respect of damage caused by flooding arising from their negligent failure to periodically cleanse a river bed, the necessity for which was wholly or mainly caused by the diversion into it of another stream and certain other alterations made by the defendants. The Court held that the case did not fall into the category of cases where mere nonfeasance was held to establish a ground of immunity on the grounds that the common law rights of the riparian proprietors and occupiers had been infringed by the acts of the board.\(^{54}\)

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52. (1936) SR (NSW) 631.
53. [1898] 1 IR 205.
54. [1898] 2 IR at 213 per O'Brien LCJ.
(b) Repairs of Sewers and Drains

The duty to maintain existing sewers and drains extends to the physical condition of the sewer or drain itself and it extends also to works constructed by the authority's predecessors, even to the extent of repairing defects in the original construction. But it is not clear how far an authority must go to determine the condition of a drain. In Fleming v. Manchester Corporation\(^ {55} \) a sewer had burst during a violent thunderstorm. The water flooded the cellar and lower rooms of the plaintiff's house, finally causing the whole house to fall down. The sewer, built some forty years previously by the defendant's predecessors, burst because of defects in its original construction. The trial judge held\(^ {56} \) that the defendants were under a common law duty to exercise their statutory powers to keep the sewer in repair, and to take reasonable means to inform themselves of its condition. Upon the jury's findings of negligence in these respects, the judge entered judgment for the plaintiff, but this was subsequently reversed by the Court of Appeal on the ground that there was no evidence of negligence to go to the jury.\(^ {57} \)

Then in Whitfield v. Bishop Auckland U.D.C.\(^ {58} \) the plaintiff

\(^{55}\) (1881) 44 LT 517; "The Times" 27 June 1882 CA.

\(^{56}\) (1881) 44 LT 417.

\(^{57}\) "The Times" 27 June 1882.

\(^{58}\) "The Times" 22 November 1897.
sought to recover damages in respect of the flooding of his houses by sewage which escaped from the defendants' sewer. The jury found that the defendants' sewer had been badly constructed by their predecessors and that the sewer was improperly and negligently maintained by the defendants because in effecting earlier repairs to the sewer, they did not open up and examine the whole of the sewer. It was contended that this was nonfeasance for which no action would lie. Wright J said "he saw no ground of liability except misfeasance in the sense that there was something improper or negligent in the way in which the works of maintenance or repair were done." Judgment was entered for the plaintiff on the basis of the jury's finding that "it was negligent to do part of the work and not the whole".

4. **Natural Conditions**

In constructing and maintaining its reticulation systems, a local authority must make provision for ordinary conditions but not for extraordinary natural phenomena against which it cannot reasonably be expected to provide. The borderline may be difficult to discern. In *Blyth v Birmingham Waterworks Co*\(^59\) the defendants were exonerated from liability as the escape was due to an abnormal phenomenon of nature, an unprecedented frost which caused a water main to burst despite all ordinary precautions. A large quantity of water escaped from the

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59. (1856) 11 Ex 781.
neck of a main at a fire-plug and forced its way through the ground into the plaintiff's house. Such plugs operated as safety-valves to prevent the bursting of pipes, but on this occasion an accumulation of ice, resulting from a frost of extreme severity, prevented the plug from acting properly. The court held that this was a contingency for which the defendants could not reasonably be expected to provide. Alderson B said:

The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855 which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. 60

In more recent times, a gas supply authority has been excused from liability in respect of an escape resulting from the effects of frost.

In Pearson v North Western Gas Board 61 the plaintiff sued in respect of an explosion which injured herself and her husband and which destroyed their home. The gas had escaped from a three inch metal gas main and had accumulated under the floor boards of the house. On the evidence, the cause of the escape of gas was the fracture of the gas main owing to the movement of earth caused by severe frost. The pipes were at a depth of two feet nine inches beneath the flagstones of the public footway. The main had been laid in 1878,

60. (1856) 11 Ex at 784.
61. [1968] 2 All ER 669.
the metal was in good condition and the expectation of life of such a pipe was 120 years. The expert evidence adduced by the defendant gas board was that no reasonable steps were open to safeguard the public from the consequences of fractured gas mains. It was held that even if the doctrine of res ipsa loquitur applied so as to establish a prima facie case of negligence against the defendants, the expert evidence rebutted it and accordingly the action failed.

It has been held that drainage authorities are not bound to provide for extraordinary rainfall. In Brown v Sargent counsel contended for the defendant board that they were only bound to construct sewers capable of carrying off ordinary drainage and not to bear the pressure of floods caused by extraordinary storms. Erle J held that the point was not raised by the evidence but indicated that if it had, he would have ruled that defendants were not bound to provide for such storms, for such a storm would be an Act of God. The evidence merely showed that no such storm as on the day in question had occurred for six years previously and that was not sufficient to establish that it was "extraordinary".

Then in the New Zealand case of Sargood v Dunedin City Corporation Williams J held that the defendant corporation was not liable for flooding of the plaintiff's basement from a sewer which had become overloaded as the

62. (1858) 1 F & F 112.
63. (1888) 6 NZLR 489.
result of an "exceptionally heavy" rainfall. It was argued on appeal that this was not a case of vis major, but the decision was affirmed on the basis that negligence was not proved.

Only limited precautions can be taken against such phenomena as earthquakes. It may be noted that in 1930 in the New Zealand Supreme Court Myers CJ held in an action against the Wellington City Corporation⁶⁴ that the Corporation was not liable for the escape of sewage from a sewage main into the basement of premises fronting the street under which the main was laid, as on the evidence the trouble had been caused by an earthquake.

5. Inspection of Pipes

It seems clear that in normal circumstances an authority will not be required or expected to excavate and inspect pipes laid under streets in order to detect defects. In Snook v Grand Junction Waterworks Co.⁶⁵ the plaintiff sought damages in respect of injury caused to goods in his cellar by water which had escaped from the defendants' mains as the result of a fracture or burst. It was suggested that it was negligence on the part of the defendants not to have some system for inspecting and testing their pipes. In his address to

⁶⁴. Unreported - mentioned in Irvine v Dunedin City Corporation [1939] NZLR at 767 by Myers CJ.

⁶⁵. (1886) 2 TLR 308.
the jury, Huddleston B asked whether water companies could seriously be expected to do this:

The defendants' pipes, it was proved, extended to some 300 or 400 miles in length. It was also proved that their inspection of the exterior of a pipe gave no reliable indication as to strength or weakness. How often such inspection should be carried out was not suggested; but as things now were the frequent disturbance of London streets - from various causes - was bad enough without aggravating the evil by establishing such a practice as was suggested.\(^66\)

The jury found in favour of the defendants and the learned judge intimated that he considered their verdict proper.

However, while an authority may not be required from time to time to open up and inspect the total length of its system, the occurrence of escapes in a particular section may be sufficient indication that inspection is warranted. Thus in Whitfield v Bishop Auckland U.D.C.\(^67\) the defendant authority was held liable for having failed to open up and examine a sewer when executing repairs to part.

6. Detection and Abatement of Escapes

In Mose v Hastings and St Leonards Gas Co.\(^68\) the plaintiffs, who had no gas laid on in their house, detected a strong smell of gas on three successive days. At noon on the third day they sent word to the gas works. Workmen arrived in the afternoon and discovered that

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66. (1886) 2 TLR at 310.
68. (1864) 4 F & F 324.
there was an escape of gas from the main into the house, but before repairs could be executed an explosion occurred in the plaintiff's and two adjoining houses. It was found that gas had escaped from a hole at a junction pipe. The company was held liable for negligence. When summing-up, Pollock CB said that there was evidence from which the jury might come to the conclusion that there had not been due and reasonable care. Without saying that the company ought every day to send men over the entire district to ascertain whether there was any escape from the mains, it was for the jury to say whether the not sending anyone for several days during which, according to the evidence, the escape was discoverable, was reasonable care. It was clear that there ought to be some system of supervision and that men should always be in readiness to repair any leakage which might be discovered, and that anything short of those precautions against accidents amounted to neglect for which the defendants were liable.

In *Manchester Corporation v Markland* the House of Lords gave a firm indication of just how effective a system of detection of escapes must be in relation to a water supply authority. In that case, the defendants were held liable for failing for three days to attend to a leak from a service pipe whereby some of the escaped water froze and caused a traffic accident. It was not disputed that the defendants were under a duty to

69. [1936] AC 360.
take all reasonable precautions to ensure that leaks in their system should be brought to their knowledge and be repaired with promptitude. The question at issue was whether they had failed in that duty. The area of supply was 130 square miles in extent. It contained 1,250 miles of mains and 200 miles of lead service pipes. There was said to be an average of about 50 bursts per week. The defendants took certain precautions; in the words of Lord Tomlin (delivering the judgment of the House):

They had certain periodical examinations and tests made at the various stop-cocks and hydrants involving a visit to any given spot about once in nine days, but beyond this they did nothing. I adopt the words of Talbot J 70: "But as to anything more, they rely entirely on chance that some policeman or road officer, or other servant of another authority, or some householder or other person may give them information." This was a system or want of system which the appellants' own officer... did not apparently regard as satisfactory. 71

Expressing his agreement with the majority in the Court of Appeal, Lord Tomlin held that the trial judge was entitled to come to the conclusion that these precarious, unreliable and unco-ordinated methods of receiving information did not exonerate the defendants. 72 It is of interest to note, however, the strong dissent of Scrutton LJ in the Court of Appeal, who held that there was no negligence in taking the precautions

70. [1934] 1 KB 585.
71. [1936] AC at 364.
72. [1934] AC at 364.
usually taken by water authorities and relying on the probability of information from other interested authorities; it was a failure of their precautions, their sources of warning, but not a failure due to negligence on their part.73

The approach of the High Court of Australia might be compared. In *Cox Bros (Australia) Ltd v Commissioner of Waterworks*74 the plaintiff sought to recover damages in respect of injury caused to premises as the result of the bursting of a water-main. The defendant had no system of supervision or inspection of watermains, but relied on the public to report leaks and bursts, and paid rewards to those reporting them. The majority held that although the arrangements for the detection and abating of escapes was capable of improvement, there was no negligence either in the management or in the time taken to discover and shut off an escape. A less sympathetic view was taken by Starke J, dissenting, who said:

> It will not do for the Commissioner to allege that a better system of supervision and inspection is impracticable, because it would cost too much. In an undertaking in which dozens of bursts occur in mains every week, a good deal of supervision and inspection appears to be necessary. But the Commissioner trusts to the public to report leakages and bursts. They are under no duty to do so. The Commissioner takes the risks and must abide by them.75

73. [1934] 1 KB at 574.
74. (1953) 50 CLR 108.
75. (1933) 50 CLR at 120.
It may be noted also, that in *Burniston v Bangor Corporation*\(^7_6\) the defendants were held liable for negligently failing to stop flooding caused by a burst water main once they had been notified that the main had burst and was flooding the plaintiff's premises.

The judgment of Rees J in *Pearson v North Western Gas Board*\(^7_7\) contains an interesting discussion of the duties of gas authorities in regard to the detection of escapes. Evidence was given that fractures of gas pipes due to extreme cold were common. The evidence was that there was no known method of ascertaining in advance whether a gas main would be likely to fracture, nor of preventing such a fracture from taking place. The defendants took precautions. Maintenance men stood by ready to go to the scene of an escape. Whenever work was undertaken which involved the exposure of a main, the length of pipe so exposed was inspected for visible defects. Mains were routinely tested to detect the escape of gas by the insertion into the earth of probes sensitive to gas at six-foot intervals. The learned judge commented:

> It perhaps hardly needs to be stated that neither the fortuitous inspection of small portions of some pipes by workmen, for the routine tests for leakage of gas from fractures which have already occurred or from existing defects in joints, is a practical

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\(^7_6\) [1932] NI 178.

\(^7_7\) [1968] 2 All ER 669.
means of safeguarding the public from death or injury arising as it did in this case. It may be that in some future case expert evidence coming from foreign gas engineers or drawn from experts in soil mechanics or other scientific fields may be available to contest the assertion of a gas board's experts that no reasonable steps are open to them to safeguard the public from the dire consequences which may follow from a fractured gas main. It might then appear that there are practical means of identifying the presence of cavities or voids close to gas mains or of protecting a gas main from the effects of frost, or of constructing a main of material which will accept without fracture the degree of earth movement capable of being set up by frost. 78

The judge went on to express the hope that the case might have practical consequences:

At least this case will have served the public interest to the extent of drawing attention to the dangers to which a fractured gas main may give rise, and also to possible lines of enquiry which may lead to the discovery of a means of safeguarding the public from them or, possibly as a last resort, or enabling those injured in future to establish liability and to recover compensation from gas undertakers. 79

7. Activities of Third Persons

It is well established that where a local authority knows or ought to know that its mains might be disturbed by third persons, it must take stringent precautions to preclude the possibility that damage might occur in consequence of an escape.

78. [1968] 2 All ER at 671.
79. [1968] 2 All ER at 671.
In *Price v South Metropolitan Gas Co.* a gas main fractured as the result of excavations by the Commissioners of Sewers. Their failure to carefully replace the soil beneath the gas main deprived it of its support and the weight of traffic on the road caused a fracture. Escaping gas accumulated for two or three days and an explosion resulted by which the plaintiff was injured. The defendants employed men to go all over the district and to report escapes as soon as they could be detected. There was no evidence of a smell of escaping gas. The company was not aware of the escape, nor was it aware of the excavation of which it had no notice. Nevertheless, the court, Russell LCJ and Grantham J, held that there was evidence of negligence, that the company ought to have known that the ground had been excavated and that the soil had not been replaced, that the escape ought to have come to the knowledge of the company and the fracture repaired. Lord Russell was most emphatic that stringent precautions ought to be taken in the inspection and maintenance of gas pipes under highways.

A similarly stringent duty was laid down by the Judicial Committee of the Privy Council in *Northwestern Utilities v London Guarantee and Accident Co.* In that case a hotel was destroyed by fire when gas escaping from a welded joint in a main percolated through the soil and

80. (1895) 65 LJQB 126.
penetrated into the hotel basement and ignited. The fracture was caused by the excavation and construction of a storm sewer under the gas main by the City authorities. The Board found that despite the tremendous responsibility of the appellants in carrying their highly inflammable gas at high pressure under the streets of the city, they did nothing at all in all the facts of the case. They owed a duty to the respondents to exercise reasonable care and skill to prevent damage by the escape of gas and the degree of care which that duty involved is proportional to the degree of risk involved. It was held that they were negligent in failing to foresee and guard against the consequences to their main of the operations of the City. Lord Wright said:

If they did not know of the City works their system of inspection must have been very deficient. If they did know they should have been on their guard: they might have ascertained what work was being done and carefully investigated the position, or they might have examined the pipes likely to be affected so as to satisfy themselves that the bed on which they lay was not being disturbed. Their duty to the respondents was at the lowest to be on the watch and vigilant.82

As it appeared that the appellants had given no thought to the matter, that they had left it all to chance, they were liable.

82. [1936] AC at 118.
This decision was applied by the Irish Court of Appeal in *Shell-Mex B.P. Ltd v Belfast Corporation*\(^83\) where an explosion which damaged the plaintiff's premises resulted from gas escaping from a fracture in a gas main which the defendant Corporation had laid under the surface of a private road. The fracture was due to the fact that subsequent to the laying of the main the owners of the road had excavated and placed a sewer running under the main, and after this excavation was filled in a certain amount of subsidence had taken place. It was proved that the defendant corporation had no system of collecting information about excavations in the vicinity of its mains under private roads, but it was content to rely on casual information and complaints to learn of excavations (which an inspector would attend and supervise) or escapes. The Court held that there was evidence on which a jury could find the Corporation negligent. Porter LJ said that earlier escapes from the same section of main "should have served as a warning to the Corporation to take stringent precautions to prevent any further escapes from the main."\(^84\) Further, the fact that there was no system of inspection to ascertain whether or not private streets were being

\(^83\). [1952] NI 72 (CA).

\(^84\). [1952] NI at 82.
opened showed a "complete misapprehension" of the defendants' duty to take every possible precaution to prevent injury to persons or damage to property by an escape of gas from the main. Nor could any reason be given why the Corporation should not have asked the local authority carrying out the excavation for information of any work which might disturb the main. If subsidence of the soil was inevitable, some method of underpinning or supporting the main might have prevented or lessened the possibility of a fracture. It was the duty of the Corporation to prevent damage from an escape of gas whether the main be in a private or a public street. Since, according to the evidence, the risk of a fracture in the main was greatest where the pipeline was laid under and across the road, that was the part which called for special care and vigilance.

Where it is known that the lawful actions of third parties may cause subsidence of the soil beneath gas mains, but cannot be supervised, it may be necessary to make appropriate provision by the adoption of suitable materials and techniques. In Hanson v Wearmouth Coal Co. and Sunderland Gas Co. the plaintiff's

85. [1952] NI at 82.
86. [1952] NI at 84. As to the latter point see also p.89 per Black LJ.
87. [1939] 3 All ER 47.
house was damaged by explosion of gas which had escaped from the fracture of a gas main in a street. The fracture was caused by the subsidence of soil caused by the working by the first defendant of a seam of coal 1,600 feet beneath the surface. The evidence showed that the second defendant took no steps to prevent the escape of gas in the event of subsidence. Goddard LJ said that the defendants had laid their pipe in a place from which they knew support might be withdrawn, thus deliberately taking the risk of fracture by the subsidence of the soil. In producing no evidence that they did or tried to do anything or even considered whether or not there was anything they could do such as the use of mild steel pipes or flexible joints, the defendants failed to prove that they were not guilty of negligence.

8. **Service Pipes**

   It would seem beyond question that supply authorities are under a duty to take all reasonable care in regard to the supply and maintenance of service pipes even where they extend into a consumers premises and whether or not there is a current supply.

88. *Lloyde v West Midlands Gas Board* [1971] 2 All ER 1240 CA.
Thus it was acknowledged in *Bienkiron v Central Gas Consumers*\(^ {99} \) that in connecting service pipes with mains a gas supply authority must take all proper precautions, although it was held on the facts that the failure to cut off the mains supply while the main was tapped to admit a service pipe was not negligent.

But in *Burrows v March Gas Co.*\(^ {90} \) where the defendant company negligently supplied a faulty service pipe and gas escaped and exploded, it was held liable for the ensuing damage.

The defendant gas supply authority was also held liable in *Paterson v Blackburn Corporation*\(^ {91} \). In that case a service pipe had been left protruding into a consumer's cellar on discontinuance of the supply instead of being cut off at the main. The pipe was accidentally broken by third persons and a large quantity of gas escaped. In the resulting terrible explosion seven people were killed and much damage was caused. In the course of his judgment, Lord Esher MR said that "gas was so dangerous a thing that it required the greatest precautions, whether the supply

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89. (1860) 2 F & F 436.
90. (1870) LR 5 Ex 67; aff'd (1872) LR 7 Ex 96.
91. (1892) 9 TLR 55.
was intended to be cut off permanently or even only temporarily."

9. Control of Connections with Sewers and Drains

Although the law in this respect is more amply illustrated in Nuisance, it would seem that control of communications by drainage authorities may also give rise to liability in Negligence. A typical instance would be the sanctioning of new connections where the recipient drains are insufficient to receive the additional flow.

The decision in the Australian case of Madell v Metropolitan Water, Sewerage and Drainage Board93 shows that proof of the origin of the excess flow and of the means of control is a prerequisite to the imposition of liability under this head. In that case, the defendants' sewer, which had been constructed some thirty years previously by a predecessor, served a low-lying area in which the plaintiff's property was situated. Surcharging and flooding through a manhole on the plaintiff's property occurred after heavy rains. The flooding was serious, causing sewage to be carried in quantities through the property and causing damage. There was no evidence indicating any want of capacity in the existing pipes for the sole purpose of conveying

92. (1892) 9 TLR at 56.
93. (1935) 36 SR (NSW) 68.
sewage, or of failure to keep the pipes free from obstruction; the only explanation of the surcharging was that it was caused by the flow of storm water from some undefined source. The defendants contended that the only method of dealing with the trouble was by means of a pumping plant costing about £160,000 and nothing could be done. It was claimed that the Board might, by the exercise of reasonable care, have found and remedied the cause of the damage, but there was no evidence to show how the storm water came into the sewers or how it might have been prevented.

The court held that there was no evidence of negligence.

It has not been decided whether a power to make by-laws, as distinct from the enforcement of existing bylaws,\(^4\) constitutes sufficient control for these purposes. This question was raised, though not resolved, in Madell's case\(^5\) where it was suggested as a basis of liability that under its power of making bylaws, the defendant board might have prohibited the inhabitants from allowing stormwater to be carried into the sewers. The court noted that the power of making bylaws was subject to the approval of the Governor and held that in any case there was no evidence

\(^5\) (1935) 36 SR (NSW) 68.
that the Board had failed to have such bylaws made.\textsuperscript{96} The judgment offers no firm indication of how the contention would have been treated as a matter of law had it been substantiated by the evidence. While it seems doubtful that the negligent exercise or non-exercise of a legislative power alone could be actionable, it may be different where the legislation relates to the control of property and is a formalised substitute for the exercise of equivalent common law powers.

10. \textbf{Intervening Cause}

The damage consequential upon an escape of gas from the mains of a gas authority is commonly disastrously extensive and on two occasions gas companies were driven to contending that such damage or part of such damage was too remote. In the result, the courts declined to admit that an intervening cause excused the defendants from liability; in the first instance in the case of an omission, and in the second in the case of an act. In modern terminology, these cases may be seen as instances of the application

\textsuperscript{96} (1935) 36 SR (NSW) at 74.
of the general rule that "the operation of an intervening force will not ordinarily clear a defendant from further responsibility, if it can fairly be considered a not abnormal incident of the risk created by him ...." 97

Thus in Blenkiron v Great Central Gas Consumers 98 the defendant company contended before the Queen's Bench that the physical damage suffered by the plaintiff was too remote. In that case a fire resulting upon the escape of gas might have been extinguished by the adjoining occupier but it was allowed to spread to the plaintiff's premises. Without actually deciding the point, the Court resorted to general principle and expressed the strong opinion that "a person against whom an action is brought for an injury which flowed naturally from his wrongful act cannot be heard to say that, but for the intervention of another party, the wrongful act might have been prevented." 99

Subsequently, in Burrows v March Gas Co. 1 the Court of Exchequer declined to allow the defendant to avoid liability where gas escaped as a result of the defendant's negligence but was ignited by a third person who

98. (1860) 3 LT 317.
1. (1870) LR Ex 67; Aff'd (1872) LR 7 Ex 96.
negligently sought the source of the escape whilst carrying a naked light.

11. Contributory Negligence

The question of contributory negligence has been considered in two cases of relevance in the present context.

In Brown v Sargent it was suggested that the plaintiff might have protected his premises from irruptions of sewage by constructing "sills" to his windows. Erle J ruled, however, that if there had been any want of due care on the part of the defendant board [in constructing their sewers] the plaintiff would not be bound to take any precaution to protect his premises from such possible consequences, nor to incur any expense for such purpose.

The situation may be different where there is a foreseeable possibility of flooding through the plaintiff's communications with the defendants' sewers. Thus in Sargood v Dunedin City Corporation the plaintiff failed to recover damages in respect of injury to goods kept in a cellar which was flooded by the flow of water from the defendants' surcharged sewer. It was held that

2. (1858) 1 F & F 112.
3. (1888) 6 NZLR 489.
there was contributory negligence in failing to install valves to prevent such an occurrence and (on the law as it then stood) recovery was precluded.

12. **Res Ipsa Loquitur**

The question of the applicability of the so-called doctrine of res ipsa loquitur so as to establish a prima facie case of negligence against a gas authority in respect of any escape has been raised in two relatively recent cases.

In *Pearson v North Western Gas Board*⁴ the plaintiff's case in negligence was based on the doctrine. It was argued that the offending gas main was under the control of the defendants and that it would not have fractured, in the ordinary course of things, if those responsible for it had used proper care. Rees J assumed, but did not decide, that the doctrine applied, but held that the defendants' evidence rebutted it. The learned judge found on a balance of probabilities that the explanation for the explosion put forward by the defendants had been established (frost damage) and that this explanation did not connote negligence but pointed to its absence as being more probable.⁵

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⁴ [1968] 2 All ER 669.
⁵ [1968] 2 All ER 673.
The doctrine was discussed at greater length by the Court of Appeal in *Lloyde v West Midlands Gas Board*. In that case the gas apparatus from which an escape allegedly took place was actually on the plaintiff's premises. The applicability of res ipsa loquitur in such circumstances was considered in detail by Megaw LJ. The learned judge adopted the modern view that the "doctrine" is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances:

It means that a plaintiff prima facie establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stand, at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper case for the plaintiff's safety.

Applying these principles, Megaw LJ held that the application of res ipsa loquitur is not necessarily excluded merely because there has been a possibility of outside interference with the thing through which the accident happened. However, where the apparatus said to have been defective was in his own house and could have been interfered with by someone for whom

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6. [1971] 2 All ER 1240 CA.
7. [1971] 2 All ER at 1246.
the defendant was not responsible, the plaintiff would at least have to establish the improbability of such interference having caused the relevant defect in order to achieve the res ipsa loquitur situation.\textsuperscript{8}

8. [1971] 2 All ER at 1247.
CHAPTER IV

NUISANCE

An eminent judge once remarked that the answer to the question, What is a nuisance? "is immersed in undefined uncertainty". The establishment of a cause of action in the Tort of Nuisance depends upon the satisfaction of certain reasonably well-defined conditions of liability.

There are two kinds of private action. A private nuisance is an indirect invasion of an occupier's interest in the beneficial use and enjoyment of land. A public nuisance is an interference with certain rights common to a substantial portion of the public; a private individual may sue in public nuisance for "particular" damage, that is, a loss suffered over and above that suffered by the public. The interference must in either case be substantial and unreasonable.

Whether an invasion or interference is unreasonable turns on the fact of each case, but it may be observed that the damage to person or property usually sustained in cases of escapes of gas, water and sewage will usually be sufficient. Such damage is also sufficiently "particular" to enable a plaintiff to sue in public nuisance. Illustrations are provided by the cases discussed in the following pages.

1. Erle CJ in Brand v Hammersmith Ry (1867) LR 2 QB 223, 247.
It must also be proved that the defendant is in law responsible for the nuisance complained of. As shall be shown, it may be difficult or even impossible to establish a causal nexus between the defendant authority's conduct and an escape from its mains.

Responsibility in Nuisance devolves upon anyone who actively "creates" a nuisance, whether or not that person is in occupation of the land from which is emanates, and continues so long as the offensive condition continues, regardless of ability to abate the harm.

An occupier of land from which a nuisance emanates will also be liable if he "continues" a nuisance not created by him; he continues a nuisance if, with knowledge or means of knowledge of its existence, he fails to take reasonable steps to abate it, or if he "adopts" the nuisance by making use of the thing which gives rise to it.²

In Sedleigh-Denfield v O'Callaghan³ Lord Atkin sought to reduce the uncertainty as to the degree of responsibility required by the terms "created" or "caused" and "continued" by reference to the conception of "use. His Lordship said:

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3. [1940] AC 880.
The occupier or owner is not an insurer; there must be something more than mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient but some degree of personal responsibility is required, which is connoted in my definition by the word "use". This conception is implicit in all the decisions which impose liability only where the defendant has "caused or continued" the nuisance.  

The conception of "use" also serves to make clear the idea that the defendant need not have directly caused the nuisance by his immediate acts, but it is sufficient that he has brought into existence or maintained a state of affairs which has given rise to the nuisance.

Supply authorities and drainage authorities will be considered separately.

A. Gas and Water Supply Authorities

The responsibility of gas and water supply authorities in regard to escapes has invariably been considered by the courts in terms of the "creation" of nuisances, although a case of "continuance" might occur. It may be noted that in this context at least, the terms "create" and "cause" may be used indifferently; it has been stated in a New Zealand case that there is

4. [1940] AC at 897.
no sufficient difference between the terms to warrant the conclusion that a water supply authority may "cause" an escape, but not "create" it.5

Where an escape occurs as the consequence of a spontaneous burst of a main, due to a latent defect or some such similar cause and not the result of interference by some extraneous force, the supply authority will be liable for a resulting nuisance.

In Charing Cross Electricity Supply Co. v Hydraulic Power Co.6 the defendant company was held liable for damage sustained by the plaintiffs' cables in consequence of several bursts of the defendants' hydraulic mains. In the Court of Appeal, Lord Sumner made it clear that liability is not dependent upon an unlawful accumulation:

It is not having the water in the pipes that is the legal wrong; it is not even submitting the water in the pipes to the very high pressure necessary for the defendants' undertaking that is the legal wrong; it is letting the water escape ...7

In Irvine v Dunedin City Corporation8 the New Zealand Court of Appeal held the defendant corporation liable for damage caused to goods stored in a cellar, which damage was the result of the escape of water

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5. Irvine v Dunedin City Corporation [1939] NZLR 741 at 778 per Smith J (CA). See also the terminology of Lord Atkin in Sedleigh-Denfield v O'Callaghan [1940] AC 880.

6. [1914] 3 KB 772 CA.

7. [1914] 3 KB at 782.

8. [1939] NZLR 741 CA.
from a burst main forming part of the municipal supply. Smith J said that, viewing the whole of its operations, the defendant corporation should be said to have "created" the nuisance. 9

Where a nuisance results from the escape of water at high pressure from a fracture of a main; then, in the absence of any other relevant cause, the maintenance of the pressure in the main is a sufficient ground of liability. That is the effect of the Charing Cross case, 10 as explained by Lord Goddard CJ in Hanson v Wearmouth Coal Co. and Sunderland Gas Co. 11 It is noted that in Benning v Wong 12 Windyer J would have held the defendants liable for the escape of gas from their mains upon the ground that "... by keeping up the pressure of gas in its pipes the Gas Company created and maintained a nuisance."

It is not sufficient to negate liability that there were "jointly operating causes" as well as the defendant's own acts which led to the breakdown. In the Charing Cross 13 Lord Sumner acknowledged that through subsidence of the adjacent soil, the immediate

10. [1914] 3 KB 772.
11. [1939] 3 All ER 47 at 49.
13. [1914] 3 KB at 782.
cause of the fracture, though conduced to by traffic and vibrations caused by traffic, was the pipe's own weight when charged with water and suspended between two points instead of being continuously supported. But the cause of the discharge under pressure, "the thing which actually caused the water to squirt out", was the working of the defendants' engines:

... [I]f at the time of the fracture the engines had not been working, or if it had been possible to cut off the pressure instantly, the damage would have been done in a very different way and to a very different extent, and much of the damage would have been of a very different kind.¹⁴

Where, however, the fracture is solely and effectively caused by some extraneous force, the supply authority will not be liable for damage caused by a consequent escape. The development and application of this competing principle by the Court of Appeal has greatly diminished the potentially wide liability formerly derivable from the Charing Cross case,¹⁵ particularly as the issue of causation falls to be determined as a question of fact and such a finding of fact, however lacking in perception, is virtually unchallengeable. As a result, it is difficult to discern the respects in which the defences raised and upheld in subsequent cases were any more meritorious than that based on the

¹⁴. [1914] 3 KB at 782.
¹⁵. [1914] 3 KB 772.
latent contributing causes referred to and excluded by Lord Sumner.

In *Hanson v Wearmouth Coal Co. and Sunderland Gas Co.* the Court of Appeal held, reversing the trial judge on this point, that the fact that the escaping substance was held under pressure is not a sufficient ground of liability where the escape was caused by the tortious act of another. In that case the defendant coal company had, in working its coal beneath the mains of the gas company, tortiously interfered with and broken the main. In delivering the judgment of the court, Lord Goddard interpreted the *Charing Cross* case¹⁷ in this way:

> We think that the court meant no more than that the nuisance which resulted from the fracture in that case was the escape of water at high pressure, and that, as the hydraulic company maintained this pressure, they were responsible for the resulting nuisance. They had not in mind the possible liability of another party who, by a tortious act, enable the water to escape.¹⁸

The court accordingly rejected the trial judge's view that the *Charing Cross* case¹⁹ showed that the escape of gas must be regarded as proximately caused by the pressure of gas which the gas company maintained in the pipe and not by the fracture. Such a doctrine, it was said, would have "startling results"²⁰ but no indication was given as to the nature of such results.

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16. [1939] 3 All ER 47.  19. [1914] 3 KB 772.
17. [1914] 3 KB 772.  20. [1939] 3 All ER at 49.
18. [1939] 3 All ER at 49.
Similar reasoning was adopted by the Court of Appeal in Dunne v North Western Gas Board and Liverpool Corporation,\textsuperscript{21} the facts of which have already been referred to. In regard to the liability of the Gas Board, the Charing Cross case\textsuperscript{22} was distinguished upon the basis of the trial judge's finding that the leakage of the water from the Corporation's mains was the sole and effective cause of the accident, "an occurrence completely beyond the control of the gas board".\textsuperscript{22a} In regard to the liability of the Corporation, the trial judge attached importance to the water being under pressure. On appeal, Sellers LJ disposed of the point in a superficial and unsatisfactory manner, commenting that there was no abnormal pressure and it was in accordance with the Corporation's statutory powers.\textsuperscript{22b}

B. Sewerage and Drainage Authorities

The Law of Nuisance as it applies to urban drainage authorities is in an undeveloped and unsatisfactory state. It is frequently misunderstood and is subject to the unjustifiable intrusion of the immunity-conferring conception of "nonfeasance". It is perhaps uncertain because there has been no general statement of principle in an appellate court capable of being read as giving direction to the law relating to escapes. In particular, it is subject to or influenced by principles established in the pollution cases of last century when quite different conditions prevailed.

\textsuperscript{21} [1964] 2 QB 806 at 835. \textsuperscript{22} [1914] 3 KB 772.
\textsuperscript{22a} [1964] 2 QB at 833,835. \textsuperscript{22b} [1964] 2 QB at 838.
Although drainage systems are outwardly similar to supply systems - both kinds of reticulation involve the conveyance of a potentially injurious substance through a network of pipes laid beneath the surface of public streets, highways and other land - the law of Nuisance has not yet taken cognisance of the resemblance. There are, of course, significant differences; in the one case the authority is concerned with the supply of the substance conveyed and in the other with receipt and disposal. In the case of drainage systems the impetus of flow is provided largely by gravity and only exceptionally by mechanical means.

As shall be shown, the common law has imposed a strict liability upon occupiers for the escape of sewage from private premises or sewers but not upon local authorities for escapes from public drains. The courts have hitherto declined to treat local authorities as the "user" of sewers or drains vested in them, or as otherwise responsible for the flow therein. If liability for an escape is to be established, it must be founded upon some anterior act, or upon some control which it has, or upon some other such responsibility; such factors as the construction of sewers, interference with existing sewers, control of private connections with public sewers and control of building in the locality, will suffice. Where direct cause on "creation" of the nuisance complained of cannot be proved, the plaintiff must show liability in terms of "continuance"
or the action will fail. It will become apparent that there may be no liability in Nuisance in two principal situations, where the defendant authority has "inherited" the system (and possibly the nuisance) from a predecessor, and where the nuisance has arisen as a consequence of usage of the sewers by the inhabitants which usage is beyond the local authority's control.

1. Liability of Private Owners

It is of interest to consider, as a basis for comparison, the common law liability of private owners of sewers and drains for escapes. This particular area of the law has received very little judicial attention during the last century and it is conceivable that the courts may yet restate the law of Nuisance so as to take account of the modern reorientation towards fault liability. While there is authority directly in point which holds occupiers liable without evidence of fault for escapes from sewers and drains, there are also broad dicta pronounced on high authority which indicate that negligence may yet become an essential element of liability.

Strict liability was imposed upon private owners of sewers in the nineteenth century. Authority was ostensibly derived from the decision in 1704 in Tenant v Goldwin\(^{23}\) the first reported decision where

\(^{23}\) (1704) 2 Ld Raym 1090. The plaintiff's declaration is set out at 3 Ld Raym 324; Also reported: 1 Salkeld 360; 6 Mod 311; Holt KB 500.
an occupier was held liable in an action on the case for damages resulting from the escape of sewage through the disrepair of premises.\textsuperscript{24} The plaintiff complained that the defendant had negligently failed, although requested to do so, to repair the wall of his privy and that filth flowed out of the privy through the decayed parts and breaches of the wall and overflowed the plaintiff's cellar and caused him damage.\textsuperscript{25} Since, in the legal terminology of the times, this was a case of "nonfeasance", the plaintiff could only succeed if he could show that the defendant was under a legal duty to repair. No duty to repair arising by way of easement was pleaded nor formed the basis of the decision.\textsuperscript{26} But Holt CJ held that the defendant was "of common right" bound to repair the wall:

\begin{quote}
[Every man] must keep in the filth of his house of office, that it may not flow in upon and damnify his neighbour.\textsuperscript{27}
\end{quote}

A general tortious duty to prevent escapes of sewage and other harmful substances was thus recognised.

The first reported case relating to escapes from sewers was Russell v Shenton\textsuperscript{28} also an action on the case, decided in 1842. The plaintiff complained that

\begin{itemize}
\item \textsuperscript{24} Holdsworth History of English Law Vol.8 p.471.
\item \textsuperscript{25} 3 Ld Raym 324, 325.
\item \textsuperscript{26} 2 Ld Raym at 1093.
\item \textsuperscript{27} 2 Ld Raym at 1093.
\item \textsuperscript{28} (1842) 3 QB 449.
\end{itemize}
the defendant had failed to cleanse and repair certain sewers on premises which he owned and that large quantities of sewage consequently flowed into the plaintiff's house, causing damage. As the cause of action was not properly pleaded, the action failed.

That negligence was pleaded and admitted in Tenant v Goldwin was overlooked or ignored in subsequent cases, notably by Blackburn J in Hodgkinson v Ennor and in Fletcher v Rylands and the duty laid down by Holt CJ was taken to be strict. A similar error is apparent in the two cases now to be discussed.

In Broder v Saillard the defendant was held liable for (inter alia) a leakage of a soil pipe on his premises, which leakage caused a nuisance by way of dampness to the plaintiff's adjacent house. This state of affairs was described by Jessel MR, in the course of his judgment, as an "act of omission". The leakage itself was not discovered until during the course of the trial, on investigation by a referee, and the defendant had no prior knowledge of it. Although the case was one of extreme hardship to the defendant, this was considered by the learned Judge to be irrelevant to the question of law.

29. (1863) 4 B & S 229 at 241; 32 LJ KB at 326.
30. (1866) LR 1 Ex 265.
31. (1876) 2 ChD 692.
In 1877 in *Humphries v Cousins*\(^{32}\) the Common Pleas Division clearly laid down the principles of liability applicable as between adjoining occupiers for the escape of sewage. The plaintiff was the occupier of a public-house and the defendant occupied an adjoining house. An old drain commenced on the defendant's premises, passed under and received the drainage of several other houses, turned back under the defendant's house, thence under the cellar of the plaintiff's premises and ultimately into a public sewer. That part of the return drain which passed through the defendant's premises had decayed, water and sewage escaped and flowed into the plaintiff's cellar and did damage. The defendant was not aware of the existence of the return drain and consequently of its want of repair. At the trial before Blackburn J, the jury found that the defective state of the drain was not attributable to any negligence on the part of the defendant. The plaintiff moved for judgment before Denman and Lindley JJ. The nature of the rights of the plaintiff were described by Denman J, in delivering the judgment of the Court, and it was thus made clear that the conduct of the defendant is irrelevant:

\(^{32}\) (1877) 2 CPD 239.
The prima facie right of every occupier of a piece of land is, to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. 

... [T]his right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it. 33

The court also made it clear that the fact that the defendant was bound to receive the sewage or part of the sewage did not affect his liability:

... [W]e are of opinion that, as between the plaintiff and defendant, it was the defendant's duty to keep the sewage which he was himself bound to receive from passing from his own premises to the plaintiff's premises, otherwise than along the old accustomed channel. This duty is incidental to the defendant's possession of land (see Russell v Shenton), and is the necessary consequence of the right of the plaintiff. That duty, like its correlative right, is independent of negligence on the part of the defendant, and independent of his knowledge or ignorance of the existence of the drain. The duty of the defendant himself to receive the sewage evidently did not depend on such knowledge; and the fact that he unknowingly received it affords no justification for allowing it to escape in a manner in which he had no right to let is pass. 34

Judgment was therefore entered for the plaintiff. The defendant appealed to the Court of Appeal and in consequence of the defendant's contention that the sewer was vested in the local authority, a stet processus was assented to. 35

33. (1877) 2 CPD at 243, 244.
34. (1877) 2 CPD at 244, 245.
35. (1877) 2 CPD at 247 n(2).
The notions of strict liability laid down in Broder v Saillard\textsuperscript{36} and Humphries v Cousins\textsuperscript{37} may not escape the pervasive influence of the doctrine of "no liability without fault". It is suggested by Fleming\textsuperscript{38} that these two decisions impose a "more rigorous standard" than that which prevails today.

Certainly, liability founded upon mere occupation of land does not easily accord with the modern formulation of the principles of responsibility in Nuisance. The conception of "continuance" is inappropriate, for negligence is an element of liability; an occupier only continues a nuisance if with knowledge or presumed knowledge of its existence he fails to take reasonable steps to bring it to an end.\textsuperscript{39} Nor do such circumstances amount to "creation" unless the notion of "user" (of the land or the sewer by the defendant occupier) is imported in order to show that the nuisance arose as an incident of active conduct on the part of the defendant. Knowledge on the part of the "creator" of a nuisance has never been required.\textsuperscript{40}

In Sedleigh-Denfield v O'Callaghan\textsuperscript{41} Lord Atkin

\begin{itemize}
\item \textsuperscript{36} (1876) 2 ChD 692.
\item \textsuperscript{37} (1877) 2 CPD 239.
\item \textsuperscript{38} Torts 4th ed 354.
\item \textsuperscript{39} Sedleigh-Denfield v O'Callaghan [1940] AC 880.
\item \textsuperscript{40} In modern law all that is required is that the nuisance should be foreseeable: The Wagon Mound (No.2) [1967] 1 AC 617 (PC).
\item \textsuperscript{41} [1940] AC 880.
\end{itemize}
evidently thought that the two older decisions were inconsistent with the modern principles of continuance, but did not overrule them. He concluded merely that it was possible that the question how far a person is liable for injury to a neighbour's land from a cause emanating from his own land where he himself is ignorant of the cause or effect has still to be determined. Where a nuisance was created by a previous occupier, a stranger, or a phenomenon of nature, an occupier's liability rests on "continuance"; but the general question whether latent defects fall into the same class remains open.

In Wringe v Cohen the Court of Appeal imposed strict liability for non-repair of premises, but the decision in the Sedleigh-Denfield case left the law in an unsettled state.

The principles of law stated in Humphries v Cousins have, however, since been applied in Canada, as recently as 1962. In the Ontario High Court in Esco v Fort Henry Hotel Co. the defendant was held strictly liable for

42. [1940] AC at
43. Torette House v Berkman (1940) 62 CLR 637.
44. Sedleigh-Denfield v O'Callaghan [1940] AC 880.
46. [1940] 1 KB 229.
47. Lord Wright, for instance, indicated that where a nuisance is due to a latent defect, liability rests on continuance: [1940] AC at 904.
48. (1877) 2 CPD 239.
49. (1962) 35 DLR (2d) 206.
the escape of sewage from a drain on private premises.

On the authority of Humphries v Cousins\(^{50}\) McRuer CJ held:

> It is no answer to the plaintiff's claim to say that the corporate defendant did not know of the condition [of the drain] or the means by which the sewage was conveyed across its property to the plaintiff's premises.\(^{51}\)

Whether liability in such terms will now be accepted in other jurisdictions is a matter of speculation. These principles may yet yield to a lower standard of responsibility.

2. Duty to Confine as "User"

On no reported occasion have the courts imposed upon drainage authorities a strict duty to confine the contents of their sewers or drains. In contrast to the case of water and gas supply mains and to the case of private sewers, it has yet to be held that a mere escape from public drains may be sufficient to attract liability in Nuisance. The apparent result of two decisions of the English Court of Appeal to be discussed shortly is that drainage authorities are not necessarily responsible in law for the accumulation of

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50. (1877) 2 CPD 239.
51. (1962) 35 DLR (2d) at 211.
sewage or drainage water in their mains, nor for the flow therein; in the idiom of the law of Nuisance, a drainage authority is not per se the "user" of sewers or drains vested in it. This notion, which is implicit in the reasoning in the judgments of the cases mentioned, may confer immunity in two respects. First, in respect of nuisances inherited from a predecessor authority. Second, in respect of nuisances arising upon increased flows of sewage due to urban development. Such immunity is confined to the exceptional case where the local authority itself does or permits nothing which contributes to the nuisance. The nuisance must be due to usage beyond the local authority's control and not to the actual physical condition of the mains.

The development of this aspect of the law, culminating in a solitary decision of the High Court where this reasoning was applied in respect of an escape of sewage from a local authority's sewer, is traced in the following paragraphs. The earlier decisions concerned nuisances caused by the discharge of sewage.

There is some indication that the courts had previously assumed that sewerage authorities were legally responsible for the flow of sewage through their sewers. For example, in A-G v Basingstoke Corporation liability

52. (1876) 45 LJ Ch 726.
was imposed upon the defendant corporation for having "conducted" and "allowed" sewage to pass through a drain under their control.\textsuperscript{53}

Similarly, in Glossop v Heston & Isleworth Local Board\textsuperscript{54} Malins V-C at first instance found that there was good ground for complaint and granted an injunction restraining the defendants from (inter alia) "causing or permitting any sewage or other offensive matter to flow through the drains under their control into the river ... [so as to cause a nuisance]."

The notion that the responsibility of a sewerage authority for the flow of sewage through its sewers was restricted, was introduced by the Court of Appeal in the Glossop case.\textsuperscript{55} It was held that the defendants had done no "act" of which the nuisance was a consequence and it was suggested that the nuisance was in fact caused by the inhabitants who had connections with the sewers. It will be recalled that the defendant board had been constituted for only a few months when this action was brought and that the plaintiff complained of pollution to a stream. Reversing the decision of Malins V-C primarily on other grounds, the Court of

\textsuperscript{53} The attempt by Brett LJ in Glossop v Heston & Isleworth L. Bd (1878) 12 ChD 102 to explain this decision as probably turning on some enactment that carried down the obligation of what their predecessors had done to the defendants, is without foundation.

\textsuperscript{54} (1878) 12 ChD 102.

\textsuperscript{55} (1878) 12 ChD 102.
Appeal also indicated that the plaintiff was not entitled to damages or to an injunction on the ground of a common law nuisance. James LJ took the view that the action was not based on any act whatsoever done by the defendants; the nuisance was caused by certain persons who, largely in the exercise of prescriptive rights, used the sewer to discharge into the sewer. Brett LJ agreed that the defendants had not been guilty of any wrongful act. Similarly, Cotton LJ observed that it was not said that the defendants had done any act the consequence of which was to bring sewage down into the river.

The principles laid down in the Glossop case were affirmed in A-G v Dorking Guardians. The plaintiff and relator alleged that the defendants discharged the sewage of the town of Dorking into a river and that because of the increase in size of the town, the quantities of sewage had increased and caused a nuisance. The defendants had originally inherited the sewers from their predecessors. At first instance Hall V-C held, on the authority of the Glossop case,

56. (1878) 12 ChD at 102.
57. (1878) 12 ChD at 110, 111.
58. (1878) 12 ChD at 117.
59. (1878) 12 ChD at 124.
60. (1878) 12 ChD 102.
61. (1882) 20 ChD 595.
62. (1878) 12 ChD 102.
that the defendants were not liable; it had not been shown that they were "using" the sewers. This decision was affirmed by the Court of Appeal. Jessel MR pointed out that, as in the Glossop case, there were prescriptive rights to send drainage down the sewers and there had been a gradual increase in the nuisance because people who did not have prescriptive rights drains their houses into the sewer in question. Again, the defendants had done nothing as regards the particular sewer causing the nuisance.

While in both the Glossop and the Dorking decisions the local authorities had "inherited" their sewerage systems, in the Dorking case the problem had arisen in the defendants' time due to "development" in the locality. The "development" problem may appear alone, as where a sewerage system constructed by a local authority was sufficient when built, but later becomes inadequate.

The extension of the immunity from the "inheritance" situation to the "development" situation is significant. In the former case, the local authority avoids immediate liability for a nuisance which arose before it assumed general control over the drainage system; in the latter case, it avoids immediate liability notwithstanding its control.

63. (1878) 12 ChD 102.
64. (1882) 20 ChD at 601, 602.
The reasoning which found favour with the Court of Appeal was extended to the case of an escape from the sewer of a local authority in Smeaton v Ilford Corporation. That case illustrates the "development" problem in isolation. The plaintiff complained that on increasingly frequent occasions sewage erupted from a manhole in a street near to the house and flowed into his premises. The excess flow arose upon the exercise by the inhabitants of their statutory rights to make connections with the sewer and was beyond the control of the defendant authority. Upjohn J pointed out that the nuisance did not arise from the physical condition of the sewers, nor from any act on the part of the Corporation:

It is not the sewers that constitute the nuisance; it is the fact that they are overloaded. That overloading, however, arises not from any act of the defendant corporation but because ... they are bound to permit the occupiers of premises to make connexions to the sewer and to discharge their sewage therein ....

It seems, therefore, that where connections are made pursuant to statutory rights so as to cause overloading of an existing sewer, the sewerage authority may not be liable for "creation" of a nuisance caused thereby.

Cases in which drainage authorities may disclaim liability upon these grounds must today be rare. In the "inheritance" situation liability is now usually carried down by statute. In the "development" situation it is likely that liability might be founded upon one or more of the grounds appearing in the pages immediately following. Furthermore, in either situation a recurring nuisance may, by the effluxion of time, fall within the principles of "Continuance".

Where a sewer is wholly under the control of the local authority, however, the courts may take an entirely different view. In the *Pride of Derby* case the defendant sanitary authority was held liable for a nuisance by pollution arising from the discharge of effluent from a treatment station. Distinguishing the *Glossop/Dorking* line of cases, Evershed MR said:

> We are concerned, not with a drain or sewer down which there is sent by local inhabitants (having the right so to do) sewage matter which passes accordingly into a river; we are here concerned with sewage disposal works built on the corporation's own land.

This reasoning is capable of considerable development. In the absence of a statutory or prescriptive right of inhabitants to make or maintain connections, ordinary common law liability might be applied. Moreover, it is anticipated that the existence of such rights may be eventually disregarded as immaterial.

67. [1953] 1 Ch 149 CA.
68. [1953] 1 Ch at 179.
3. Creation of Drainage Nuisance

(a) Construction of Sewers and Drains

If a local authority constructs sewers or drains, or additional sewers or drains, it will be liable for any escape caused and nuisance created thereby.

The act of construction must be shown to have been causally related to the nuisance complained of. The construction of a tributary drain, for instance, may impose an excess burden upon a recipient sewer and thereby cause an escape. It is not sufficient to prove merely that the local authority constructed the sewer from which the sewage escaped; in Smeaton v Ilford Corporation \(^{69}\) it was admitted for the purposes of the action that the defendant corporation had constructed the sewer in question, but the cause of the nuisance was not the act of construction but the subsequent inadequacy of the sewer, \(^{70}\) and the defendants were not held liable on the ground of construction.

That construction of sewers may give rise to liability in Nuisance is well established by the pollution cases where the development of sewerage systems directly resulted in increasing quantities of effluent being discharged into streams or the sea.

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69. [1954] 1 Ch 450.
70. [1954] 1 Ch at 463.
There are many illustrations of cases at nisi prius where liability for such nuisances was imposed or was apparently imposed upon the ground of constructions and these cases are cited below. \(^{71}\) It will suffice for present purposes to point out that three of these decisions were affirmed by the Court of Appeal, \(^{72}\) and to refer briefly to the facts of the leading case, *A-G v Birmingham Corporation*, \(^{73}\) where the defendants had constructed a new drainage system, providing additional sewers for the town and constructing a large sewer from the town to the river through which the whole of the town’s sewage was discharged.

Certain observations may be made in respect of the pollution cases - or discharge cases - which are relevant to the escape situation. The fact that the inhabitants made and maintained connections with the

\(^{71}\) Oldaker v Hunt (1854) 19 Beav 485; A-G v Luton Local Board (1856) 2 Jur NS 180; Manchester, Sheffield Ry v Worksop Board of Health (1857) 23 Beav 198; A-G v Birmingham Corporation (1858) 4 K & J 528; Bidder v Croydon Local Board (1862) 6 LT 778; Goldsmid v Tunbridge Wells Improvement Commissioners (1865) LR 1 Eq 161; A-G v Richmond (1866) LR 2 Eq 306; 35 LJ Ch 597; A-G v Halifax Corporation (1869) 39 LJ Ch 129; A-G v Leeds Corporation (1870) 39 LJ Ch 254; A-G v Tunstall Local Board (1875) WN 66; Harrington v Derby Corporation [1905] 1 Ch 205 (Liable for proportion of nuisance attributable to construction of new sewers.); Hobart v South-end-on-Sea Corporation (1906) 75 LJKB 305; Foster v Warbleton U.D.C. [1906] 1 KB 649; Owen v Faversham Corporation (1908) 72 JP 404; Jones v Llanrwst U.D.C. [1911] 1 Ch 393.

\(^{72}\) Goldsmid v Tunbridge Wells Improvement Commissioners (1866) LR 1 Ch App 349; A-G v Leeds Corporation (1870) LR 5 Ch 583; Foster v Warbleton U.D.C. [1906] 1 KB 649.

\(^{73}\) (1858) 4 K & J 528.
sewers constructed by the local authority, whether pursuant to statutory or prescriptive rights or otherwise, was not admitted as a defence. Furthermore, no distinction was drawn between nuisances arising immediately upon construction and nuisances subsequently arising as a consequence of increased usage due to development of the locality. It is to be noted also, that this line of case extends before and after the Glossop/Dorking decisions of 1878 and 1882.

Where a nuisance has been caused by the construction of sewers by a defendant authority, the principle of nonfeasance has no application.

In Foster v Warblington U.D.C. 74 Vaughan Williams LJ rejected a plea of 'nonfeasance' as there was ample evidence that the defendants had brought about the nuisance by their own acts as distinguished from any omission of duty. 75 The sewer from which the sewage was discharged had been constructed by the previous authority but the defendants had constructed new sewers and connected them to the old sewers so that the nuisance was greatly increased. 76

In Jones v Llanrwst U.D.C. 77 Parker J took the view that

74. [1906] 1 KB 649 CA.
75. [1906] 1 KB at 663.
76. See also Owen v Faversham Corporation (1908) 72 JP 404 which appears to have been a similar case.
77. [1911] 1 Ch 393.
as the defendant council had themselves laid new and enlarged sewers, this alone took the case out of the class where only nonfeasance could be shown.

(b) **Defective Construction**

Liability will also be imposed upon a local authority for the creation of a nuisance where such nuisance is the result of defective construction, whether such defect should manifest itself in the form of insufficient capacity, the lack of some protection against blockage by debris, or other similar fault.

Thus, if a local authority constructs a sewer, drain or culvert which is inadequate at the time of construction, it may be liable for the damage caused thereby. In the Scottish case of Hanley v Edinburgh Corporation\(^78\) it was established that by reason of the insufficiency of a culvert constructed by the defendant Corporation, sewage was damned back and flowed onto the appellant's land. In the House of Lords, Lord Shaw said that:

... [I]t could hardly be doubted that the construction of such an obstacle necessarily followed by the creation of such a nuisance, were things which the person injured thereby had a good right of action. There was nothing peculiar by the law of Scotland in the situation

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78. (1913) 29 TLR 405.
of a Corporation in this regard. They had no title at common law to divert the course of a sewage drain so as to make it overflow the property of any citizen. 79

The principles upon which this case were decided are undoubtedly of general application.

The failure to provide effective grids and gratings where appropriate to prevent the accumulation of silt and debris is also actionable as the creation of a nuisance. This principle is illustrated by the recent decision of the Court of Appeal in Pemberton v Bright. 80 In that case a local authority was held liable for damage arising from flooding caused by the blocking by debris of an extension made some thirty years previously to an ancient culvert. The court held that the defendant County Council's failure to provide a grid or grating to protect the mouth of the culvert had created a potential nuisance and the Council was liable for the damage resulting when the potential nuisance became an actual nuisance.

Support for the decision in Pemberton v Bright may be derived from the definitive judgments of the House of Lords in Sedleigh-Denfield v O'Callaghan, 81 indeed,

79. (1913) 29 TLR at 406.
81. [1940] AC 880.
Sellers LJ applied certain dicta which appeared therein. In the earlier case, a local authority, which was not a party to the proceedings, had placed a pipe or culvert in a natural ditch. A grating was provided, but it was placed in such a position as to be useless for the purpose of excluding debris and flooding resulted. In the course of his judgment, Lord Atkin observed that "the laying of a 15-inch pipe with an unprotected orifice was in the circumstances the creation of a nuisance or of that which would be likely to result in a nuisance."82 The speeches of Lord Wright83 and Lord Romer84 are to like effect.

(c) Interference with the Drainage System

Interference by a local authority with an existing drainage or sewerage system whereby a nuisance is created or increased may give rise to liability.

Liability was first imposed upon this ground in a pollution case: In A-G v Metropolitan Board of Works85 the relators (Conservators of the River Lea) complained that the defendants had diverted the contents of a sewer, which had formerly been discharged into the

82. [1940] AC at 895, 896.
83. [1940] AC at 902.
84. [1940] AC at 912, 913.
85. (1863) 9 LT 140.
river Thames, into a sewer which discharged into the river Lea. The court granted an injunction to restrain the defendants from continuing the nuisance thus caused.

A similar principle has also been applied in escape cases, in England and Australia: In Dent v Bournemouth Corporation the plaintiff recovered damages in respect of a nuisance caused by the escape of sewage from a drain vested in the defendants. The Corporation had diverted the contents of a sewer so as to cause them to flow down a sewer already full and incapable of absorbing the increased flow.

The decision of the New South Wales Supreme Court in Smith v Penrith Municipal Council is an even clearer illustration of the rule. In that case the plaintiff complained of flooding of his land by a drainage system. There was no evidence as to who originally constructed the drains, but it was proved that the defendant council made alterations to it and cleansed the main drain and thereby facilitated the flow of water on to the plaintiff's land. Long Innes CJ held the council liable for that portion of the damage which could be attributed to the alterations and cleansing.

86. (1897) 66 LJ QB 397.
87. (1936) 12 LGR 162.
88. See also Ham v Blenheim Borough [1921] NZLR 358.
(d) Physical Condition of Sewers and Drains

It has been shown that the common law has imposed strict liability upon private persons for escapes from sewers out of repair. It is not clear whether drainage authorities are also under a strict obligation to ensure that their drains and sewers are kept free of obstructions such as accumulated silt and debris and in good repair. There are no reported cases where liability in Nuisance has been imposed for escapes arising upon such defaults. The cases of nonrepair noticed under the head of Breach of Statutory Duty indicate that strict liability for nonrepair has been viewed with some disfavour by the courts. Some support for a strict obligation may nevertheless be derived from the cases where the injury from a sewer or drain out of repair was sustained, not in consequence of an escape, but from the actual physical condition of the structure.

Thus in two decisions of authority, strict liability was imposed the defendant local authorities in respect of the disrepair of a sewer or drain whereby injury was sustained by the plaintiff users of the superjacent highway. In White v Hindley Local Board89 Blackburn J imposed liability upon the defendant Board for a "common law nuisance" and made no specific finding of negligence. Similarly, in Borough of

89. (1875) LR 10 QB 219.
Bathurst v MacPherson\textsuperscript{90} the Privy Council allowed recovery on the ground of Nuisance and negligence appears not to have been an essential element of liability.

It is conceded, however, that some doubt has been cast upon the position by subsequent cases. In Lambert v Lowestoft Corporation\textsuperscript{91} a decision upon similar facts, Lord Alverstone CJ declined to hold the defendants liable in the absence of proof of negligence, distinguishing the Bathurst case on most unsatisfactory grounds.\textsuperscript{92} If liability for nonrepair is strict in regard to the actual physical condition of drains, (and the preponderance of authority is in favour of that conclusion), it would be illogical and inconsistent if a contrary conclusion were to be reached in respect of escapes.

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\textsuperscript{90} (1879) 4 App Cas 256. \\
\textsuperscript{91} [1901] 1 KB 590. \\
\textsuperscript{92} See also Hocking v A-G where the trial judge ([1962] NZLR 118) seems to doubt the strictness of the Bathurst test. Sawer has suggested that if the duty laid down in Bathurst was a strict duty, it has now been "reduced" to a duty to take reasonable care: Nonfeasance Under Fire 2 NZULR 115 at 125; Nonfeasance in Relation to "Artifical Structures" on a Highway 12 ALJ 231 at 233. But if that is so, which is doubtful, the "reduction" logically ought to be in terms of the defence of statutory authority. Alternatively, it may be that knowledge of the disrepair is sufficient: cf. Gilchrist v Oamaru Borough (1913) 32 NZLR 902.
(e) Control of Connections

Urban sewerage and drainage may retain common law powers or have been granted statutory powers in respect of the connection of private or domestic drains with the public drains under their control. Such common law powers, however, are commonly limited or abrogated by the statutory right of householders to make and maintain connections. But where a local authority might prevent or abate a nuisance by the exercise of its powers in this regard, it may be liable for its failure to do so. This aspect of the law is illustrated by pollution cases and is summarised in the following two paragraphs. It may, however, provide a ground of liability in escape case and is potentially useful to plaintiffs in the "development" situation.

Thus, the authorisation\textsuperscript{93} or direction\textsuperscript{94} of the making of new connections where such connections cause a nuisance is a ground of liability for damages and the failure to stop up an illegally made connection may be a ground for an injunction,\textsuperscript{95} as may be the sanctioning of future connections.\textsuperscript{96}

\textsuperscript{93} Earl of Harrington v Derby Corporation [1905] 1 Ch 205.
\textsuperscript{94} Gibbings v Hungerford and York Corporation [1904] IR 211 CA.
\textsuperscript{95} Charles v Finchley Local Board (1883) 23 ChD 767.
\textsuperscript{96} A-G v Richmond (1866) LR 2 Eq 306. See also A-G v Acton Local Board (1882) 22 ChD 221.
Where, however, the inhabitants have prescriptive rights to maintain connections with public drains, the local authority cannot be held liable for failing to stop up such drains.97 Similarly, a statutory right to make and maintain such connections precludes the imposition of liability on the ground of authorising such connections unless any conditions of the exercise of such right have not been fulfilled.98 These limiting principles clearly apply where the nuisance complained of is caused by the discharge of sewage,99 but the decision in Smeaton v Ilford Corporation1 indicates that they are equally applicable in the case of an escape.2

(f) Control of Building

The development of urban areas almost invariably increases the rate and volume of surface runoff as more of the land surface becomes impervious to rainfall and as increasing quantities of water are drawn off into public drains. The expansion of urban areas and the increasing density of settlement in existing built up areas affects the sewerage problem as the volume of sewage is proportionate to the population.

98. Charles v Finchley Local Board (1883) 23 ChD 767.
1. [1954] 1 Ch 450.
2. A private person who connects his drain to a public sewer may himself be liable for an ensuing nuisance, notwithstanding that he was directed to make the connection by the local authority - Gibbings v Hungerford and York Corporation [1904] 1 IR 211 CA - and a statutory right to make such connection may not be a good defence at least where the terms of the right are not complied with - see Graham v Wroughton [1901] 2 Ch 451 CA.
It seems that the legal responsibility of local authorities for drainage nuisances arising in consequence of such development may not stop at the construction of additional drains by the local authorities or with their permission, but may extend to the anterior construction of buildings.

The English urban drainage and sewerage authorities of the nineteenth century were by and large special purpose authorities. Such authorities have since been superceded by municipal authorities having multiple functions. These new authorities have greatly extended powers of construction of public works and housing. They have acquired, through town planning legislation, the power to control building within their boundaries. Both of these functions provide possible new grounds of liability. A local authority may be held to have created a nuisance arising from an overloaded drainage system where it caused or contributed to the problem by itself constructing buildings or where it permitted the construction of additional buildings in the locality when the existing drains were insufficient to absorb the increased flow.

There is as yet no authority directly in point in regard to either aspect, but some judicial support may be derived from the Pride of Derby case.³

³ (1953) 1 Ch 149 CA.
No evidence had been adduced in that case as to the building or planning activities of the Derby Corporation, but Denning LJ said by way of obiter dictum:

[When the local authority themselves do the increased building, or permit it to be done ... they are then themselves guilty of the nuisance. They know (or ought to know) that the increase in building will cause the existing sewers to overflow, yet they allow it to go on without enlarging the capacity of the sewerage system. By so doing, they themselves are helping to fill the system beyond its capacity, and are guilty of the nuisance.]

The only reported attempt to found liability on such a ground failed on the evidence. In Smeaton v Ilford Corporation it was contended that the overflow from a surcharged sewer was in part due to the construction by the defendant corporation of an estate of over 300 houses. It was held that there was no evidence that this sensibly increased the flooding complained of.

4. Continuance of Drainage Nuisance

Liability in Nuisance may devolve upon a person who, not having "created" the nuisance, "continues" it. A person may "continue" a nuisance by "adopting" it or in some circumstances by omitting to remedy it.

4. [1953] 1 Ch at 190.
4a. See now J.W. Birnie Ltd v Taupo Borough Council (Unreported, Wellington, 11 June 1975, Haslam J. Construction of baths and highway by defendant authority causing increased runoff into stream, culverts inadequate to take additional flow. Liable for misfeasance.)
5. [1954] 1 Ch 450.
(a) Application

Although the earlier cases are perhaps inconclusive, it is now apparent that the continuance principle applies to sewerage and drainage authorities to the same extent as to private individuals and that it applies in both the "inheritance" and the "development" situations.

It seems from the brief record of the case that the liability of the defendants in A-G v Barnsley Corporation was based on continuance. The original local board of health had constructed sewers and drained the district into a river, causing pollution. When the borough of Barnsley was incorporated, the Corporation "continued" the same system of drainage. Hall V-C granted an injunction, restraining the defendants from draining the sewage of the borough into the river. The decision was affirmed on appeal.

There is a strong implication in the judgments of the Court of Appeal in A-G v Birmingham, Tame and Rea Drainage Board that the rule that a new owner of land will be liable if he continues an existing nuisance, applies to a local sanitary authority.

7. (1873) WN 228.
8. (1874) WN 37.
9. (1881) 17 ChD 685, see esp. Jessel MR at p.692.
Express consideration has been given to the point by the English Court of Appeal and High Court and also by an Australian State Court and these decisions provide clear authority for the proposition that a drainage authority may be liable for continuing an existing nuisance, whether the nuisance arose in consequence of development in the locality or had been created by a preceding authority.

In the *Pride of Derby* case the defendant corporation were held liable for continuing a nuisance which had resulted from increased building in the locality as they had treated the sewage in their treatment works and discharged the effluent into the river. Denning LJ said:

> Their act in pouring a polluting effluent into the river makes them guilty of nuisance. Even if they did not create the nuisance, they clearly adopted it within the principles laid down in *Sedleigh-Denfield v O'Callaghan*, and they are liable for it at common law ....

In *Smeaton v Ilford Corporation* Upjohn J referred to the continuance principle as laid down in *Sedleigh-Denfield v O'Callaghan* in considering the defendant

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10. [1953] 1 Ch 149 CA.
corporation's liability in respect of flooding from an overloaded sewer and clearly accepted that they would be liable if they knew of an existing nuisance emanating from their sewer but continued it by failing to take reasonable steps to abate it.

The applicability of the principles in Sedleigh-Denfield v O'Callaghan\(^{15}\) to the "inheritance" situation was considered by McLelland J in the New South Wales Supreme Court in Stephenson v Ku-ring-gai Municipal Council.\(^{16}\) In that case an increase in the flooding of the plaintiff's land was brought about by works - in the surrounding area - for which the defendant council was responsible. The learned judge affirmed that the principles of "adoption" and "continuance" are applicable to a case where a nuisance has been created by a predecessor in title of the person on whose land the nuisance exists and held that such principles extend to a local government authority.

(b) **Nature of Default**

It is not clear whether a drainage authority may continue a nuisance merely by doing nothing to enlarge or improve a system which has become inadequate building which the authority cannot control. In the *Pride of Derby* case\(^ {17}\) the court proceeded upon the

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15. [1940] AC 880.
16. (1953) 19 LGR 137.
17. [1953] AC 880 at 894 per Viscount Maugham.
the assumption that such conduct did not amount to continuance. While Denning LJ suggested that this accounted for the decisions in the drainage nonfeasance cases, in none of the cases cited was the point actually considered and the inference is totally without support in this respect. Furthermore, this reasoning is out of accord with the affirmation in Sedleigh-Denfield v O'Callaghan that a mere refusal or neglect to remove a nuisance may constitute a sufficient default.

Quite apart from the question whether passive conduct is sufficient to amount to continuance, there is a difficulty as to the need for an available remedy to which the defendant authority may resort. In Smeaton v Ilford Corporation Upjohn J said:

"In order to establish liability for continuing a nuisance by failing to prevent it, one must necessarily prove that the person so failing must be in a position to take effective steps to that end."

The application of that relatively uncontentious statement of principle to the facts of the case is questionable. The flooding complained of had been known to exist by

18. [1953] 1 Ch at 190.
19. [1940] AC 880 at 894 per Viscount Maugham.
the corporation for at least twenty years, although it had worsened in the last two years. Applying the test quoted above, Upjohn J concluded that the corporation could not be said to have continued the nuisance, for they had no power, by reason of the householders' statutory rights to make connections with the sewers, to prevent the ingress of sewage into the sewer in question. It may be doubted, however, whether the lack of a power to prevent the ingress of sewage is necessarily determinative in such a situation, for it is clear that the nuisance might have been abated by the exercise by the defendants of their statutory powers to construct new sewers.

The proposition that a prima facie case of continuance may be established where the defendant authority might have abated the nuisance by the construction of new sewers is supported by the judgment of Shearman J in Craib v Woolwich Borough Council. In that case, the immediate cause of the nuisance was the inadequacy of an outfall sewer of a manhole which, during heavy rainfall, could not cope with the inflow into the manhole from sewers of larger capacity. Periodic flooding of increasing frequency had occurred as a result of the development of the locality. The outfall sewer had been constructed by the defendants'
predecessors, and was evidently defective when built, but the defendants failed to remedy the defect despite complaints over a period of twenty years. Shearman J considered that the nuisance resulting from the recurring escapes had been continued by the defendants; he said:

I am satisfied that by not exercising their statutory powers [the defendants] permitted the continuation of a nuisance which arose owing to the misfeasance of their predecessors. 24

A bold approach to the question of continuance of drainage nuisances, based upon the continued operation of the system, would be justified. Such an approach is suggested in relation to the inheritance situation by the words of Hosking J in Fortescue v Te Awamutu Borough25 where, in the course of denying the relevance of the nonfeasance principles, he said:

...[N]either Glossop's case nor any other warrants, with regard to local authorities, the proposition that apart from statutory provision, where a work is a nuisance from the outset, a successor in title who makes use of it by suffering it to continue in operation is free from responsibility for damage resulting from its continued operation.26

Such an approach has the advantage of simplicity and would recognise that the day to day functioning or "use" of a sewerage or drainage system is sufficient to attract the principles of strict liability.

24. (1920) 36 TLR at 634.
25. [1920] NZLR 281 CA.
CHAPTER V

THE RULE IN RYLANDS v FLETCHER

A. The Rule

The modern tortious doctrine of Rylands v Fletcher has its origin in the leading case of that name which went to the Exchequer Chamber (as Fletcher v Rylands)\(^1\) and to the House of Lords.\(^2\) The facts were that the defendants employed a firm of independent contractors to construct a water reservoir on their land for the purpose of supplying water to their mills. On the site of the reservoir there were disused shafts of an abandoned mine and the passages of this mine communicated with those of the plaintiff's mine. Water broke through these shafts, flooding the mine and flooding also the plaintiff's mine. It was found by an arbitrator that the defendants themselves were not negligent but they were held liable on the principle laid down by Blackburn J in the Exchequer Chamber:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of vis major or the act of God;

\(^1\) (1866) LR 1 Ex 265.
\(^2\) (1868) LR HL 330.
but as nothing of that sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just.  

This broad formulation was expressly approved by the House of Lords in affirming the decision, but Lord Cairns said that the rule applied only where the defendant's use of land was a "non-natural" use, and subsequent judicial interpretation of this phrase has substantially limited the scope of the rule.

A number of doctrinal difficulties are associated with the rule. The case did not fall precisely within the established categories of tort liability of the time. It was not trespass, because the damage by flooding was not a direct and immediate consequence of the defendant's activity. Nor was it an actionable nuisance because, apart from there being only an isolated escape and not a continuous or recurring invasion, it was not contemplated for another decade that the employer of an independent contractor might in some circumstances become liable for a nuisance created in the course of a job.

In the words of Newark:

What was novel in Rylands v Fletcher, or at least clearly decided for the first time, was that as between adjacent occupiers an isolated escape is actionable.

3. (1866) LR 1 Ex at 279, 280.
4. (1868) LR 3 HL at 338-339.
The rule might have been absorbed by the law of Nuisance as an extension of liability under that head; indeed, for some purposes the law so regards it. But generally the two heads of strict liability are kept separate, although there is a great deal of overlapping.

The trend of development of the Rylands v Fletcher doctrine has in general been toward the limitation of the wide and strict liability which it was seen as establishing. In the context of the liability of local authorities, there are two factors which have influenced this trend. The first is the general judicial hostility towards strict liability and the second is the more specific aversion toward the imposition of strict liability on local authorities and other statutory bodies.

B. Negligence

No negligence was imputed to the defendants in Rylands v Fletcher. That negligence was not an essential element of liability under the rule was affirmed in Dunn v Birmingham Canal Co.\(^7\) and that principle was not challenged until Dunne v North Western Gas Board.\(^8\) In that case Sellers LJ drew attention to the fact that there had been no negligence on the part of any of the parties and said:

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7. (1872) LR 7 QB 244.
8. [1964] 2 QB at 831.
It is not a case of an independent contractor having been negligent, as was the case of Rylands v Fletcher.\footnote{9} Jolowicz has quite rightly pointed out that if this were a valid ground of distinction, it would leave nothing of the rule in Rylands v Fletcher at all.\footnote{10} The dictum is inconsistent with the many cases which have been decided upon the basis that negligence is irrelevant and it has not received any reported judicial support in the decade since it was uttered.

C. Applicability to Statutory Bodies

The question of the applicability of the rule will be considered in the chapter relating to the defence of statutory authority. It will suffice to say at this point that the weight of authority favours the view that statutory authorities are prima facie within the rule, subject to the defence of statutory authority, and are not entirely excluded by the mere fact that they exercise statutory powers.

The significance of the prima facie application of the rule arises in three respects: First, where the defence of statutory authority is pleaded, the burden of proof in respect of negligence falls upon the defendant authority. Second, where the defence of statutory

\footnote{9}{[1964] 2 QB at 831.} 
\footnote{10}{ Liability for Accidents [1968] CLJ 50, 52.}
authority is precluded by special provision, the rule applies in full strictness. Third, the rule may bring within the ambit of strict liability instances to which the law of Nuisance does not apply.

The third aspect warrants further comment. In regard to Nuisance it has been made clear that in the case of sewage escapes it is necessary to go beyond the mere fact of escape from the defendant's sewer and consider responsibility for the factors which gave rise to or caused the escape. It has also been shown that questions of causation may also arise in regard to escapes of gas and water. However, if the rule in Rylands v Fletcher applies, then it is necessary only for the plaintiff to prove the escape. Causation is relevant to the rule, it seems, only insofar as the defences of Act of a Stranger or Act of God can be made out. Thus in Jones v Llanrwst U.D.C.11 Parker J expressed the view that the principle in Rylands v Fletcher would apply to the owner of a sewer, whether he made the sewer or not. His duty at common law would be to see that the sewage in his sewer did not escape to the injury of others and mere neglect would give any person injured a good cause of action.12 If these principles apply

11. [1911] 1 Ch 393.
12. [1911] 1 Ch at 405.
to local authorities, then the difficulties arising from the "inheritance" and the "development" problems are avoided. The mere vesting of a sewerage system in a local authority would be sufficient to give rise to a strict duty to prevent escapes.

D. The Terms of the Rule

A number of attempts have been made to withdraw statutory authorities from the ambit of the rule in *Rylands v Fletcher* by persuading the courts to construe the various words and phrases used by Blackburn J so as to preclude their application to the activities carried on by such authorities. None of these attempts has been successful, although in some respects an element of uncertainty has been introduced. The courts have also declined to accept that such activities amount to a "natural use" within the meaning of the qualification placed upon the rule by Lord Cairns.

Reference should be made to the full statement of the rule quoted at the beginning of this chapter.

1. "Own Purposes"

On four occasions it has been contended that the defendant authority did not bring the substance (which subsequently escaped) within its control for its "own purposes". This phrase has been seen as the obverse of the defences of consent, common interest or
benefit, and as the obverse of the phrase "general benefit to the community."

In the Northwestern Utilities case the Privy Council rejected a defence based on the contention that the appellants and the owners of the properties destroyed had a "common interest" in maintaining the potentially dangerous installation, or that these owners had "consented" to such danger. Delivering the opinion of the Board, Lord Wright said:

It is true that in proper cases such may be good defences, but they do not seem to have any application to a case like the present, where the appellants are a commercial undertaking, though no doubt they are acting under statutory powers, while those whose property has been destroyed are merely individual consumers who avail themselves of the supply of gas which is offered. These facts do not constitute a common interest or consent in any relevant sense.

In Irvine v Dunedin City Corporation Smith J in the Court of Appeal expressly extended this reasoning to the case of a municipal water supply authority. Referring to Lord Wright's judgment, he said:

Similar reasoning applies, I think, to a municipal Corporation under our statute. Each citizen has to take his supply from the only available source. That negates the notion of consent. The Council may sell its surplus water for motive power: s.252 of the Municipal Corporations Act 1933. That gives the Corporation the character, in some measure, of

13. "Common benefit" is a defence in domestic water-supply cases, notably as between tenants in the same building: Castairs v Taylor (1871) LR 6 Ex 217; Anderson v Oppenheimer (1880) 5 QBD 602; Prosser & Son v Levy [1955] 1 WLR 1224.
15. [1936] AC at 120.
a commercial undertaking, and negatives the idea of a common interest. I am of opinion that the doctrine of Rylands v Fletcher is not excluded by the qualification that the user must be for the defendant's own purposes...\[17\]

It may be doubted, however, that the introduction of a commercial element in the activities of the defendant authority is necessary to negative the idea of a common interest. If the plaintiff is a consumer, and that may not be the case, his interest is in the receipt of a supply sufficient for his purposes whereas the authority's interest is in a supply to the community at large.

In Rickards v Lothian\[18\] Lord Moulton indicated that where the defendant's activity amounts to such use of land "as is proper for the general benefit of the community" it would fall outside the rule in Rylands v Fletcher. Insofar as this phrase was intended to state the antithesis of the phrase "for his own purposes", as distinct from "non-natural user", it has been the subject of one judicial comment. In Irvine's case Smith J expressed the view that Lord Moulton's phrase did not establish that a municipal corporation carrying water in bulk under statutory authority would be doing so for purposes other than its own.\[19\]

In Smeaton v Ilford Corporation\[20\] defence counsel drew

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17. [1939] NZLR at 776-777.
attention to the use of the words "for his own purposes" in *Fletcher v Rylands* and in some subsequent cases, and he also contrasted that with uses "beneficial to the community". Considering this contention, Upjohn J saw much difficulty in drawing a line between the two types of user. He observed that:

"[W]hat is beneficial to the community" cannot depend on the personality of the owner of the land who brings the substance on to it, but must depend entirely on the act under discussion. To collect and dispose of sewage is clearly beneficial to the community: so is the provision of water, and that must be so whether the undertaker providing the water does so as a local authority or for his own purposes in the sense of making a private profit.

But the learned judge considered the authorities and concluded that they did not establish the proposition that a local authority is exempt from the principle of absolute liability on the ground that the use of land for sewage collection purposes is such a use as is proper for the general benefit of the community.

The point was again raised in the more recent case of *Dunne v North Western Gas Board* in the Court of Appeal. In the course of delivering the judgment of the court, Sellers LJ observed that:

22. [1954] 1 Ch at 469.
23. [1954] 1 Ch at 470, 471.
... [I]n all the circumstances it scarcely seems accurate to hold that this nationalised industry collects and distributes gas for its "own purposes."25 Gas, water and also electricity services as well nigh a necessity of modern life, or at least are generally demanded as a requirement of the common good .... It would seem odd that facilities so much sought after by the community and approved by their legislators should be actionable at common law because they have been brought to the places where they are required and have escaped without negligence by an unforseen sequence of mishaps.26

The question whether the doctrine applies to local authorities was expressly left open at the instance of the defendants. It was accepted that there were to be found observations which might preclude the court from saying that the doctrine or rule may not apply.27

2. "His Lands"

The rule in Rylands v Fletcher, as originally enunciated by Blackburn J, applied as between occupiers of adjacent closes. The application of the rule to the case of escapes from mains laid in or beneath highways required a deliberate extension of liability. Three kinds of situation may be identified: (a) Liability as between co-licensees of the subsoil of the highway; (b) Liability as between an occupier or licensee of the highway and an occupier or licensee of adjacent land; (c) Liability as between an occupier and a licensee of the same land.

25. [1964] 2 QB at 832.
27. [1964] 2 QB at 838.
(a) The decision of the Court of Appeal in *Charing Cross Electricity Supply Co. v Hydraulic Power Co.*

is relevant to all three kinds of situation. The case affirms that where an authority lays or maintains mains in land vested in another authority, it is to be regarded as a licensee. The plaintiff company and the defendant company were licensees. It will be recalled that the defendants' hydraulic mains had burst and damaged the plaintiffs' cables which had been laid under the same street. Lord Sumner held that the doctrine in *Rylands v Fletcher* extended to the case of licensees and that the ownership of the soil was not material.

(b) In the *Northwestern Utilities* case gas escaped from the defendants' main and damage was sustained by an occupier of adjacent land. The facts are accordingly closer to those of *Rylands v Fletcher* than the facts of the *Charing Cross* case but the case at least illustrates and affirms the rule that a statutory supply authority will, as licensee of the subsoil of a highway, be liable to an occupier of adjacent lands. Delivering the opinion of the Judicial Committee of the Privy Council, Lord Wright held on the authority of the *Charing Cross* case that:

28. [1914] 3 KB 772.
29. [1914] 3 KB at 779-781.
The rule [in Rylands v Fletcher] is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land: it applies equally in a case like the present where the appellants were carrying the gas in mains laid in the property of the City (that is in the sub-soil) in exercise of a franchise to do so ... 31

(c) The decision of the House of Lords in Read v Lyons 32 established that an occupier will not be liable under the rule in Rylands v Fletcher to a licensee of his land and it would seem on the principle of reciprocity that neither will a licensee be liable to the occupier under the Rule. It follows that where a local authority lays its mains through the land of a private person pursuant to a statutory or contractual license, it will not be liable under the Rule to the occupier.

A difficulty might arise, it is envisaged, where one of two parties having mains laid in the subsoil of a highway is also the highway authority. It is doubtful whether the mere vesting of a highway in a local authority makes it the "occupier" of the highway for these purposes. Even if it does, the courts may be prepared to draw the familiar distinction between functions and in respect of its public utility function treat the local authority as a licensee, 33 or, alternatively, as the "occupier" of that part of the land actually occupied by its mains.

31. [1936] AC at 118.
32. [1947] AC 156.
33. We are not here concerned with damage to the highway which is likely to be governed by statute or contract.
Support may be derived from Read v Lyons for a broad approach to such problems; in the course of his speech, Viscount Simon, on the authority of the Charing Cross and Northwestern Utilities cases, said that for the purpose of Rylands v Fletcher there must be an "escape from a place where the defendant has occupation or control over land to a place which is outside his occupation or control." 34

3. "Collect and Keep"

In Smeaton v Ilford Corporation 35 it was contended that the defendants did not "collect" sewage in their mains within the meaning of the rule in Rylands v Fletcher, but merely laid a pipe into which others discharged sewage. Upjohn J preferred the view that as the sewer had been constructed by the defendants for the purpose of receiving sewage, was their property and under their control, they "collected" the sewage although they may have been under a duty to do so. 36

The New Zealand case of Simpson v A.G. 37 appears to be the only case in which the rule has been found

34. [1947] AC at 168.
35. [1954] 1 Ch 450.
applicable to an open drain. The drain in question was used to carry off surface water from an airfield. It was held that there is no special significance in the length of time that the substance (which escapes) has been kept on the defendant's land. Although, for instance, there is no desire to keep water in a drain any longer than is necessary but to get rid of it as soon as possible, it is sufficient that the water is kept in the drain for as long as it takes to convey the water from the point of intake to the point of discharge. Thus, "[f]or the purposes of the rule in Rylands v Fletcher there is no difference in principle between a drain and a reservoir." 38

4. "Likely To Do Mischief"

Blackburn J's formulation of the rule extends strict liability to "anything likely to do mischief if it escapes". Although sewage might be described as "noxious" 39 or "poisonous and harmful" 40 and gas as "inflammable and explosive" or even an "extraordinary danger", 41 the phrase "likely to do mischief" has not been taken to include only those substances which are inherently dangerous, and it seems devoid of any operative meaning. Whether a substance creates a risk of damage should it escape must depend on all the

38. [1959] NZLR at 549.
39. Hobart v Southend-on-Sea Corporation (1906) 75 LJ(KB) 305.
40. Pride of Derby v British Celanese [1952] 1 All ER 1326, 1337.
circumstances of the case and there must be very few substances which could never create some risk. In any event the identity of a substance is alone not a criterion of liability, but its qualities and its quantity are factors to be considered.

5. **Non-Natural User**

Whatever the correct answer to the question of what Lord Cairns actually meant by "non-natural" user the Privy Council in *Rickards v Lothian* preferred a restrictive view and it was laid down that:

It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of land or such use as is proper for the general benefit of the community.

Although this decision "withdrew a wide range of activities from the ambit of strict liability", the activities of local authorities in relation to gas and water supply, sewerage and probably drainage, have remained within it. However, what is a natural or non-natural user of land awaits authoritative definition.

(a) **Gas**

In *Batcheller v Tunbridge Wells Gas Co.* the defendant company was held liable under the rule in

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43. [1913] AC 263.
44. [1913] AC at 280.
46. (1901) 84 LT 765.
Rylands v Fletcher for an escape of gas. It was reported of Farwell J's judgment that:

...[T]he learned judge considered that the gas pipe was clearly within the words of Lord Cairns in *Rylands v Fletcher*, where "gas" might be added after the words "beasts or water or filth or stenches." It was clearly a non-natural use of land to put gas pipes there, so that the defendants must keep them at their own peril.47

The *Northwestern Utilities* case 48 supports the view that gas suppliers are to be regarded as non-natural users. It was held that the appellants were prima facie within the rule and it was emphasised by Lord Wright that they were carrying in their mains an inflammable and explosive gas which constituted an "extraordinary danger".49

In his dissenting judgment in *Benning v Wong*50 Windeyer J expressed the view that the condition of liability on "non-natural user" did not depend on any certain objective criteria, "but on whether it is a use of such a character that the defendant ought, in the opinion of the court determining the particular case, to take the risk of having a dangerous thing where it was."

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47. (1901) 84 LT at 766.
49. [1936] AC at 118.
Although he thought that putting gas mains under streets was today a natural and ordinary user of land, (and thus within Lord Moulton's words in *Rickards v Lothian*\(^{51}\)) he held (following *Batcheller's case*\(^{52}\)) that "for present purposes ... bringing upon land something of a kind not naturally found there is to be called a non-natural use of the land," and that gas pipes and escapes of gas were within the rule.

(b) **Water**

In the *Charing Cross case*\(^{53}\) Scrutton J, at first instance, suggested in a different context that "... it is now an ordinary use of a road to carry mains of water, ordinary or hydraulic, gas and electricity ...,"\(^{54}\) but the "natural user" point was not taken and both courts merely accepted that the hydraulic mains were a source of danger.

Similarly, in *Irvine v Dunedin City Corporation*\(^{55}\) it was said that nothing could be more usual in New Zealand than the use of streets or of the land beneath them for the laying of water mains, but the carrying of water in bulk renders its use dangerous and water carried for that purpose is not a natural or ordinary use.\(^{56}\)

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51. [1913] AC 263.
52. (1901) 84 LT 765.
53. [1913] 3 KB 442; [1914] 3 KB 772 (CA).
54. [1913] 3 KB at 449.
55. [1939] NZLR 741 (CA).
56. [1939] NZLR at 775 per Smith J and see p.790 per Johnston J.
It is to be noted that a distinction has been drawn in relation to "natural user" between the use of water for domestic purposes, which is a natural use, and the keeping of water in bulk or in mains, which is a non-natural use.57

(c) Sewage

In the Pride of Derby case,58 Denning LJ doubted whether the Rylands v Fletcher doctrine applied to sewerage authorities on the ground that the use of land for drainage purposes by a local authority is "such use as is proper for the general benefit of the community" and therefore within the definition of "natural user" laid down in Rickards v Lothian59 by Lord Moulton.60 But in the same case Evershed MR said that he was not satisfied that local authorities have any special immunity from the rule.61

In Smeaton v Ilford Corporation62 Upjohn J expressed the view that:

To collect into a sewer a large volume of sewage, inherently noxious and dangerous and bound to cause great damage if not properly contained, cannot be described ... as a natural user of land.63

57. Western Engraving Co. v Film Laboratories Ltd [1936] 1 All ER 106 (CA); Collingwood v Home and Colonial Stores Ltd [1936] 3 All ER 200 (CA); Irvine v Dunedin City Corporation [1939] NZLR 741.
58. [1953] 1 Ch 149.
59. [1913] AC 263.
60. [1953] 1 Ch at 189.
61. [1953] 1 Ch at 176.
63. [1954] 1 Ch at 472.
(d) Drainage

In Sedleigh-Denfield v O'Callaghan Viscount Maugham suggested that the Rule does not apply to the "escape of water from an artificial watercourse", such as an agricultural ditch or culvert, as such is an ordinary user of land. But it appears that the familiar distinction must be drawn between the drainage of "natural" waters, waters which would naturally flow onto the plaintiff's land, and "foreign" waters, waters introduced from another watershed.

As has been mentioned, in Simpson v A-G Barrowclough CJ held that an open artificial drain fell within the Rule. The drain in question had been constructed for the sole purpose of carrying water from an airfield and was carrying foreign and artificially introduced water when it overflowed.

E. Defences : Act of God and Act of Stranger

It was accepted by Blackburn J in Fletcher v Rylands.

64. [1940] AC 880.

65. [1940] AC at 887, 888.


68. (1866) LR 1 Ex 265.
that liability under the principles there enunciated would be excluded if it could be shown that the escape was due to an Act of God or an Act of a Stranger. 69

1. Act of God

The phrase "Act of God" is devoid of theological significance. This defence has been successfully invoked in the case of an extra-ordinary storm of unprecedented violence which could not reasonably have been anticipated by the defendant, 70 but more authoritative view is that the defence will not be made out unless the phenomena would not upon human foresight and prudence have been recognised as a possibility. 71

2. Act of Stranger

The defence of "Act of Stranger" is subject to a less stringent test. It was applied in Box v Jubb 72 and, by the Privy Council, in Rickards v Lothian. 73 The degree of volition at first required on the part of the third person was malice, but subsequently the Board slightly relaxed its earlier test and in Northwestern Utilities v London Guarantee and Accident Co. 74 indicated that it is sufficient if the act was concious

69. Both defences are also available in Nuisance: Sedleigh-Denfield v O'Callaghan [1940] AC 880 at 889 per Viscount Maugham.
70. Nichols v Marsland (1876) 2 Ex D 1.
72. 4 Ex 76.
73. [1913] AC 263.
74. [1936] AC 108.
or deliberate. This terminology was subsequently adopted by the English Court of Appeal in Hanson v Wearmouth Coal Co.\(^7\) and by the Irish Court of Appeal in Shell-Mex & B.P. Ltd v Belfast Corporation.\(^6\)

Thus, by way of illustration, it has been held sufficient to prima facie exonerate a defendant gas authority from strict liability for damage caused by an escape where the fracture was caused by the construction of a sewer in the vicinity of the defendant's mains, as in the Northwestern Utilities case\(^7\) and the Shell-Mex B.P. case\(^8\) or the working of mines beneath the surface, as in Hanson's case.\(^9\)

\(^7\) [1939] 3 All ER 47 CA.
\(^6\) [1952] NI 72 CA.
\(^7\) [1936] AC 108.
\(^8\) [1952] NI 72.
\(^9\) [1939] 3 All ER 47.
CHAPTER VI

STATUTORY COMPENSATION

Where a local authority is authorised by statute to carry out public works or to carry on activities whereby private property rights may be interfered with, the Legislature commonly provides a right of compensation in respect of such interference. Whether statutory compensation is available in any given instance depends upon the scope of the particular provisions, but there are certain principles of general application which may be referred to. In addition there are specific aspects of the law which are of special relevance to escapes in the present context.

As might be anticipated, the question of compensation has arisen in respect of drainage authorities, but its applicability in the case of water supply authorities has also been considered. Statutory compensation is in general confined to damage arising upon the construction and maintenance of works, but, as shall be shown, at least in the case of drainage works, the remedy may extend to consequential damage such as flooding. The availability of a statutory remedy is of particular interest insofar as its abrogates the common law rights of a person injured by public works to seek a remedy by action for damages.

Although the point cannot be said to have been finally determined, modern judicial opinion seems to be that
where a person suffers damage which prima facie falls within a compensation provision, there is no necessity to show that the damage would have been actionable at common law. In *Marriage v East Norfolk Catchment Board*¹ Singleton LJ said:

> I am not sure that it matters whether a violation of a legal right was shown or not: my impression is that the intention of Parliament was to avoid lengthy and costly litigation of this kind and to ensure that anyone who suffered damage in consequence of work done under the powers given by the section should have a right to compensation.

A. Nuisance

Where there is a compensation clause, the courts will be more ready to hold that the creation of a nuisance is authorised. This is particularly so where wide statutory powers are given to the defendant, having a discretion as to the work undertaken, the time and manner of undertaking it, and where it is clear from the nature of the work that the doing of it will cause a nuisance to a number of people.²

Compensation does not, however, extend to damage caused in contravention of the provisions of the empowering Act. It does not, for instance, extend to nuisances created where there is a provision prohibiting the creation of a nuisance.³ While the New Zealand courts

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1. [1950] 1 KB 284, 298.
have struggled to resolve an apparent conflict between a compensation clause and a nuisance clause, contained in a series of local government Acts, the better view is that such conflict is illusory and that the compensation clause has no application to nuisances. This aspect has been discussed elsewhere in this work.4

B. Negligence

1. Construction of Drains

It has been shown that at common law negligence in the exercise of statutory powers is actionable. It is to be noted that in determining the issue of negligence in the exercise of statutory powers, (as opposed to negligence in the actual operation of carrying out of work) the courts review the reasonableness of the actions taken. Where, however, statutory compensation is provided for damage caused in the exercise of statutory powers, the courts will treat the common law action for negligence as being excluded. In the earlier cases, to be noted presently, the common law remedy is excluded upon the basis that the "negligence" alleged does not amount to an excess of the statutory powers. The more recent approach is to infer that the statute confers a discretion upon the local authority as to the exercise of the powers, so far as the statutory remedy extends to the damage resulting. Thus, what might be regarded as a negligent exercise of statutory powers and therefore

4. See p.228.
actionable in the absence of a compensation provision, may be regarded as within the local authority's discretion where there is such a provision.

The earlier approach is illustrated by two drainage cases which went on appeal to the Privy Council. Both of these cases, it is to be noted, and also a subsequent New Zealand case to be discussed presently, illustrate the application of compensation provisions to damage caused by flooding resulting from the construction of drains by local authorities.

In Colac Corporation v Summerfield the plaintiff sought statutory compensation in respect of damage caused by the construction of a drain by the defendants whereby water escaped and flooded his land. The jury found that there was negligence in the design and construction of the drain. Judgment was entered for the plaintiff and an appeal to the Full Court was dismissed. On appeal to the Judicial Committee the appellant authority argued that the finding of negligence in the design and construction of the drain showed that the works which occasioned damage were not constructed or maintained within their statutory powers and that the respondent could not, therefore, recover statutory compensation. The Board held that the respondent's averments of negligence were not intended to charge and were not understood to charge the appellants with excess of their statutory powers, thus:

5. [1893] AC 187.
As long as the [Appellants] act within their statutory powers, negligence is, in any question of compensation, immaterial, and cannot affect the extent of their liability, which is for all damage resulting from the construction or maintenance of their works.  

It is to be noted that the case "was conducted upon the footing that what the appellants had done was done in the exercise of the powers conferred upon them" and has no application to a case where the action is framed on the basis that the defendants' actions were an abuse or excess of statutory powers.

[Colac Corporation v Summerfield] is not authority for the proposition that a careless and negligent exercise of a statutory power is a lawful exercise of that power.

In the same year, a differently constituted Board came to a similar conclusion in Raleigh Corporation v Williams.  

It was contended by the respondents that if a drainage work was constructed with an insufficient outlet or with some other defect which a competent engineer ought to have forseen and guarded against, or if it caused flooding, then this was actionable negligence on the part of the municipal authority. The opinion of the Board was delivered by Lord Macnaghten. It was held, reversing the decision of the Supreme Court of Canada, that this argument was "wholly untenable", that persons

6. [1893] AC at 191 per Lord Watson.
7. Metropolitan Water, Sewerage and Drainage Board v O.K. Elliot Ltd (1934) 52 CLR 134 per Starke J.
9. 21 Sup. Court Rep 103.
whose property may be injuriously affected by the construction of a drainage work must seek their remedy in the manner prescribed by the statute.\(^\text{10}\)

The authority of these two decisions of the Privy Council was accepted in a number of New Zealand cases in the Supreme Court\(^\text{11}\) and in the Court of Appeal.\(^\text{12}\)

A distinction was drawn between negligence in the design or mode of construction of public works, which is compensatable, and negligence in the operation of construction of public works, which is actionable.

Thus in *Palmerston North Borough v Fitt*\(^\text{14}\) Edwards J said:

> The statutes authorise the construction of public works; and for damages caused by such public works, although the public body may have proceeded negligently in the design, or in the mode of constructing the work itself, the only remedy is a claim for compensation, because the public body has done, though negligently, that which it was authorised to do under the statutes. But the statutes do not authorise the public body, in the operation


11. *Inhabitants of Le Bon's Bay Road District v Oldridge* (1898) 17 NZLR 321 per Denniston J; *Grey County v Frankpitt* (1899) 18 NZLR 111 per Edwards J; *Lyttele v Hastings Borough* [1917] NZLR 910 at 916 per Edwards J.

12. *Farrelly v Pahiatua County Council* (1903) 22 NZLR 683 at 691; *Fortescue v Te Awamutu Borough* [1920] NZLR 281; And see *Irvine v Dunedin City Corporation* [1939] NZLR 741 at 770 per Ostler J. (Only remedy for negligent acts compensation unless local authority acted beyond statutory powers.)

13. For an illustration of the latter kind of case, see *Clothier v Webster* (1862) 12 CBNS 798; 142 ER 1353; 31 LJCP 316 (Defendants liable for negligent construction of sewer whereby plaintiff's property damaged by subsidence.)

14. (1901) 20 NZLR 396 - See also *Inhabitants of Le Bon's Bay Road District v Oldridge* (1898) 17 NZLR 321 at 326 per Denniston J; *Grey County v Frankpitt* (1899) 18 NZLR 111 at 114 per Edwards J.
constructing the public works, to negligently injure the property of others. If they do so negligently injure the property of others they are not operating under the authority of the statutes, and are consequently liable to an action at law.\textsuperscript{15}

In that case, the appellant local authority had constructed additional drainage works and negligently failed to enlarge existing works which, originally sufficient, became insufficient to carry off the additional flow, whereby the respondent's land was flooded. The statutory remedy of compensation was held to apply.\textsuperscript{16}

It has been held also, that where a work is authorised and statutory compensation provided it is not sufficient to establish a ground of action at common law to show that the scheme adopted caused injury to private persons whereas another scheme might have avoided the damage, but the remedy is compensation.\textsuperscript{17}

Where, therefore, a local authority has powers which might properly be viewed as discretionary and where a remedy by compensation is provided, a remedy by common law action for negligence is available only in

\textsuperscript{15} (1901) 20 NZLR at 404, 405.
\textsuperscript{16} Cf. Hawthorn Corporation v Kannuluik (1903) 29 VLR 308; \[1906\] AC 105 where a common law action for negligence succeeded on very similar facts. The question of compensation appears to have been raised.
\textsuperscript{17} Farrelly v Pahiatua County (1903) 22 NZLR 683.
exceptional circumstances.

In Marriage v East Norfolk Catchment Board\(^{18}\) Jenkins LJ suggested that the limits outside which the ordinary rights of action remain are these:

(a) The injury must be the product of an exercise of the defendants' powers as such, as opposed to the product of some negligent act occurring in the course of some exercise of the defendants' powers but not in itself an act which the defendants are authorised to do.

(b) The injury must be the product of the operation which the defendants intended to carry out, and not some unintended occurrence brought about in the course of carrying out of the work owing to negligence in carrying it out.

(c) The operation must not be one which on the face of it is so capricious or unreasonable, or so fraught with manifest danger to others, that no defendant acting bona fide and rationally, no recklessly, would ever have undertaken it.\(^{19}\)

Thus an error of judgment or lack of foresight on the part of the statutory authority in the planning of an operation within their powers does not suffice to make an injury resulting from the operation, when completed as planned, a matter for action, but it is a matter for compensation.\(^{20}\)

2. Escapes from Mains

The applicability of a compensation clause to damage caused by an escape from the mains of a local

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18. [1950] 1 KB 284 CA.
19. [1950] 1 KB at 309.
20. [1950] 1 KB at 310.
authority was considered _obiter_ by the High Court of Australia in _Metropolitan Water, Sewerage and Drainage Board v O. K. Elliot Ltd._\(^21\) In that case the Court held (and this was the main issue) that the action was an action in tort and not for statutory compensation. The plaintiff alleged nuisance and negligence in respect of damage caused to its property through an invasion of water which had escaped from a burst water-main, situated under a public road and constructed some forty years previously by the defendants' predecessors. But the Court clearly indicated that it preferred the view that the statutory remedy did not extend to this kind of case and imposed a restrictive construction upon the compensation clause:

While the clause provided full compensation to all parties interested for all damage sustained by them through the exercise of the powers conferred, Dixon J confined the remedy to the exercise of the powers of construction and maintenance and held it inapplicable to the case, as:

> An outburst of water in the street results, not from some active work of maintenance, but from the failure of the pipe to withstand the pressure of the water with which it is charged.\(^22\)

\(^{21}\) (1934) 52 CLR 134.

\(^{22}\) (1934) 52 CLR at 150.
The learned judge preferred the view that while a compensation clause may extend to maintenance of works as well as their construction, it does not follow that a local authority incurs an absolute statutory liability to make compensation to the occupiers of premises adjoining streets for damage sustained to their goods or premises by reason of outbursts of substances from mains in a roadway. Clear expression would be needed before such provisions would be construed "to impose an absolute liability upon an Authority for every accidental loss which may be suffered in the course of its daily conduct." Starke J, it is to be noted, preferred the view that the appropriate remedy for damage caused by the escape of water from mains alleged to have been negligently constructed, managed or maintained, was by way of action. Furthermore, as was observed by Dixon J, the remedy by way of compensation was confined to those having a specific interest in land or proprietary right and did not extend to injuries which were merely personal.

A similar view was taken by Myers CJ in Irvine v Dunedin City Corporation who held, in relation to a clause

23. (1934) 52 CLR at 150.
24. (1934) 52 CLR at 151.
25. (1934) 52 CLR at 142 et seq.
26. (1934) 52 CLR at 150 and 155.
27. [1939] NZLR 741.
providing full compensation for damage suffered by lands in the exercise of the powers given, that the possibility of damage resulting by reason of water escaping from mains under a street into adjacent premises was too improbable, speculative and remote a ground to form the subject of compensation.\(^{(28)}\) Furthermore, as the remedy was confined to injury to land, no claim lay in respect of injury to goods.

3. **Nonfeasance**

Where a statutory remedy is provided for a particular class of damage or damage arising in a particular way, the courts will assume that the common law remedies remain in respect of damage falling outside the statute. This is strikingly illustrated by the decision of the Exchequer Chamber in *Coe v Wise*\(^{(29)}\) where it was held that where a statutory right to compensation is given in respect of "acts", the appropriate remedy for an "omission" is by way of common law action which is not thereby excluded.

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29. (1866) 1 LRQB 711.
CHAPTER VII

NONFEASANCE

In Hesketh v Birmingham Corporation Scrutton LJ said:

The general rule is that a local authority is liable for misfeasance but not for nonfeasance.

This proposition, it shall be shown, insofar as it suggests that local authorities have a special general immunity from tortious liability, is not good law. The extent of its validity will be determined in the following pages.

This enquiry will include a brief introduction to the theoretical basis and historical origins of the conception of nonfeasance. Various aspects of the concept will be examined insofar as is relevant to the context, the general principles of nonfeasance will be considered in relation to the conclusions to be drawn from the principles of liability discussed in earlier chapters. Particular attention will be paid to the categorisation of cases in terms of the causes of action upon which they were pleaded, argued and decided, with an assessment of the extent to which such categorisation defines the

1. [1924] 1 KB 260.
2. [1924] 1 KB at 271.
limits of immunity upon the ground of nonfeasance. In the light of this discussion the question of the existence of a special drainage nonfeasance rule may be answered. There will also be a discussion of the effect and relevance of the special highway nonfeasance rule and of the extent to which the liability of drainage authorities in the inheritance situation has been affected by statutory provision.

A. Theoretical Basis

Common law duties are generally duties of forbearance, duties not to do harm to one's neighbour but not duties to do him positive good. Only exceptionally have the courts imposed duties upon persons which have the effect of conferring a benefit upon others. Judges have refrained from introducing such rules for fear of placing an undue burden upon the resources of the individual and in their reluctance to fetter freedom of action. In the context of the law relating to local authorities, these considerations appear in the guises of "limited resources" or "undue burden" and "discretion". The analogy between individuals and local authorities is not wholly apposite; an important difference is that local authorities are usually established to provide benefits to the inhabitants. But the courts' antipathy toward imposing liability for inaction has in this context found expression in the conception of nonfeasance.
The terms "misfeasance" and nonfeasance" are used in law to denote the wrongful exercise and the wrongful non-exercise, respectively, of legal powers. The distinction between the two terms reflects the philosophical distinction between "acts" and "omissions" and attracts similar difficulties in respect of the as yet inadequate theories of causation and responsibility. The terms may refer to a particular act or omission or to course of action or inaction.

The distinction between misfeasance and nonfeasance does not conclusively mark the boundary between liability and nonliability, for there may be liability for nonfeasance. Nonactionable nonfeasance is often referred to as "mere" nonfeasance. As a matter of formulation of legal principle, the immunity for nonfeasance may be expressed as an absence of a legal duty to act (including the absence of an obligation to exercise a statutory power), or as an absence of liability for breach of a duty to act. Duties to act may be derived from the common law in respect of such factors as the ownership and occupation of property, action, and the control of property and activities, or they may also be imposed by statute. The determination of the existence of such a duty or of the actionability of breach of duty is affected by various considerations of judicial policy.

3. Cf. "Malfeasance", which is the commission of some act which is in itself unlawful.
B. Historical Origins

The concept of "nonfeasance" has a long history in English common law and a glance of this history shows that whilst failure to perform a duty to repair public works has traditionally been classified as "nonfeasance", the courts have for centuries admitted private claims based on such public wrongs.

In mediaeval times, duties to repair roads, bridges, ditches, sewers, sea-walls etc. were imposed by custom, were prescriptive incidents of tenure and were also conditions of royal grants or charters. A failure to perform such an obligation to repair was remediable by the quasi-criminal procedure of presentment, indictment and distress. But, due to the inadequacies of the then existing tortious remedies, private individuals had no general right to recover damages until the development of the Action of Trespass on the Case. This action came to be widely used to establish civil liability in such cases. It extended civil liability for nonfeasance and

4. See Kiralfy The Action on the Case 59.
5. Trespass did not lie because there was no direct interference with possession. The Assize of Nuisance did not lie for omissions. There were special writs of Nuisance for nonrepair of ditches and sea-walls, but these were available only where the repairs were to be executed on the defendant's own land. (Kiralfy pp.55, 56, 59.)
6. For the origins of the Action on the Case, see Kiralfy, Chapter 1.

"And a man shall have an action of trespass upon the case against his neighbour who hath lands betwixt him and the sea and ought to make banks and mound certain ditches and sewers betwixt him and the sea, and he doth not cleanse them as he ought to do, by reason whereof his land is surrounded etc.; he shall have his action upon the case for this nonfeasance." - Fitzherbert: New Natura Brevium, Writ de Trespass sur le Case, (93 G), see Fifoot History and Sources of the Common Law Tort and Contract p.88. See also the cases cited by Kiralfy at p.61.
gave a remedy where previously there was none. 8 Liability was first based on duties arising at common law; the first example, relating to the nonrepair of sea-walls, arose in the fourteenth century. 9 From the sixteenth century the Action on the Case superceded an earlier kind of action 10 and the courts allowed actions based on criminal wrongs created by statute.

The action on the case was eventually extended to render individuals civilly liable for breach of a duty to repair a road, 11 but where the duty lay not on any particular individual or individuals but on the inhabitants at large, there was no civil remedy. Thus where, as became the general rule, 12 the parish was the body liable for the repair of highways, this duty could be enforced by presentment and indictment, but no civil action could be brought. 13 When the Legislature

8. "[T]he method of the Action on the Case was to take some ancient remedy, the value of which was impaired by some technical restrictions, and cut away those restrictions, by making the remedy universally applicable under the guise of analogy, or 'like case'.": Jenks A Short History of English Law 94, 95.

9. "In 1342 it was wrong for a riparian owner not to maintain a sea-wall, but there was no civil remedy provided for his neighbours (Y.B. 18 Edw III, T pl 6, f23. It was held that he was liable civilly for failure to repair since 'by right he ought to do so')." Kiralfy p.11. The pleadings (1341) (Y.B. 16 Edw III, vol 1) are set out by Kiralfy at p.208.

10. Previously, actions based on statutory duties were of "trespass and contempt against the form of the Statute". Kiralfy p.10.


12. This general principle was introduced by legislation, beginning with a statute of 1555: see 10 Holdsworth p.311.

13. Thomas v Sorrell (1674) Vaughan at 340–341; Russell v Men of Devon (1788) 2 TR 667.
transferred the duty to repair from the parish to some other body, that body, the courts held (with little justification), inherited the immunity. But the reasons for the immunity of the parish from civil action have limited or no application in respect of the liability of individuals or corporations.

Reference may also be made to the dozen or so cases relating to the nonrepair of ditches and sea-walls cited by Kiralfy from the Year-Books and Plea Rolls, and to Keighley's Case where Coke LCJ held that an action on the case would lie against one bound by prescription or otherwise to repair a sea-wall "if any fault is in him" and that those damaged should recover according to their loss. In 1774 in Lynn v Turner it was held that the defendant corporation was bound by prescription to repair and cleanse a creek, and that an action on the case lay even though

14. Young v Davis 2 H & G 197; Cowley v Newmarket Local Board [1892] AC 345; Cf. Borough of Bathurst v MacPherson 4 App Cas 256.

15. Holdsworth summarises the various reasons given for this rule at different periods: that the complaint concerned a matter which affected the public; that no action will lie against unincorporated bodies; the law had always been so; that a further remedy could only be given by the Legislature; that it would be difficult to collect damages from each individual in the parish. - History of English Law Vol.10 p.315. And see Denning (case note) (1939) 55 LQR 343.


17. 10 Co Rep 139a; 77 ER 1136.

18. 10 Co Rep at 139b.

19. (1774) 1 Cowp 86; 98 ER 980.
special damage was not pleaded. In 1834 in Lyme Regis v Henley the defendant borough was held to be in breach of a duty imposed by charter to repair a sea-wall and was held liable to the plaintiff in damages. It was said:

[I]t is clear and undoubted law that, wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any particular damage.

It may be concluded, therefore, that actions against local authorities (other than highway authorities) for nonrepair have a sound historical basis in law, whether the duty to repair is imposed by statute or otherwise.

C. Aspects of Nonfeasance

There are various aspects of the doctrine of Nonfeasance, or rather, there are various classes of case in which local authorities are not liable for failing to exercise their powers or to perform their duties. Some allusions to nonfeasance have been made incidentally to the discussion of the principles of liability, but here an attempt will be made to determine the extent and limits of the immunity in its several contexts.

20. (1834) 2 Cl & F 331; 6 Er 1180.
21. Per Park J delivering the opinion of the judges; affirmed by the House of Lords.
1. "Primary" Nonfeasance

Nonliability for inaction has taken various forms, but the principal form is not confined in its application to local authorities. The "primary" or "basic" nonfeasance rule may be expressed thus:

Where a person (including a public body) has a legal power (whether common law or statutory) to take certain action but is under no legal duty to act, a failure to act is not actionable at the suit of a person who suffers loss in consequence of such inaction.

Liability for inaction, therefore, depends upon the establishment of a legal duty to act, whether such duty be imposed by statute or derived from the common law.

(a) Failure to Exercise Statutory Power

The mere failure to exercise statutory powers, or inadequate exercise of such powers, is not actionable at the suit of a person who suffers loss in consequence. This principle applies in respect of the powers of drainage authorities to maintain and repair drainage works and is illustrated by cases already referred to.

Thus in Smith v Cawdle Fen Commissioners the defendants were held not liable in respect of their alleged failure to keep drainage works in good repair whereby the plaintiff's land was flooded.

22. [1938] 4 All ER 64.
Similarly, in *Gillett v Kent Rivers Catchment Board*\(^2^3\) it was held that the defendants' failure to clear a drain of weeds was not actionable.

The decision of the House of Lords in *East Suffolk Rivers Catchment Board v Kent*\(^2^4\) not only endorses the principles upon which the two preceding cases were decided, but authoritatively lays down the rule that if the authority embarks upon an execution of its powers, it is not liable for negligence unless it adds to the plaintiff's damage. There, the plaintiffs suffered damage in consequence of a breach of a tidal wall. The defendants were empowered, though not under a duty, to repair the wall. It was agreed that if the defendants had remained entirely passive, if they had taken no steps at all to repair the breach, the plaintiffs could not have succeeded.\(^2^5\) But the defendants had in fact attempted to repair the breach and, as the result of their failure to exercise reasonable skill, the time taken to effect the repair was greatly lengthened. The plaintiffs sought damages in respect of the period of flooding which would not have occurred

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23. [1938] 4 All ER 810.
25. [1941] AC at 83 per Viscount Simon LC.
had the defendants not been negligent. Thus, the main issue in the case was whether the defendants, having commenced the work of abatement owed a duty to the plaintiffs to conduct the work with reasonable dispatch. The majority rejected the proposition that a public body which owed no duty to provide a service, may become liable, if it takes upon itself to render a service, for negligently failing to fully provide that service.26

Viscount Simon LC concluded:

It is admitted that the respondents would have no claim if the appellants had never intervened at all. In my opinion, the respondents equally have no claim when the appellants do intervene, save in respect of such damage as flows from their intervention and as might have been avoided if their intervention had been more skilfully conducted.27

Lord Romer said:

Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If in the exercise of their discretion they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages that he would have suffered had they done nothing.27a

The majority of the Law Lords gave weight to the

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26. [1941] AC at 87 per Viscount Simon LC at p.97 and p.102 per Lord Romer; at p.105 per Lord Porter.
27. [1940] AC at 88.
27a. [1940] AC at 102.
consideration that local drainage authorities have limited resources and favoured an approach which gave a discretion to the authority in deciding the choice, time and extent of the exercise of its powers. Such a decision, it was said, involves matters of policy and a balancing of the rival claims of efficiency and thrift.\textsuperscript{28} It may be objected that these considerations are more appropriately regarded as matters affecting the standard of care demanded in such circumstances,\textsuperscript{29} and not the duty issue. Furthermore, as Lord Atkin pointed out,\textsuperscript{30} it is in the public interest that local authorities should be under a duty to act with reasonable dispatch as part of the duty to act without negligence or not carelessly or improperly.

(b) Causation

In the case of nonfeasance it is more difficult to support the assertion that the damage complained of was actually caused by the defendant's conduct. The defendant's activities may not have been a link in the mechanical chain of events which resulted

\begin{itemize}
\item \textsuperscript{28} [1941] AC at 86 per Viscount Simon LC at p.103 per Lord Romer, at p.106 per Lord Porter.
\item \textsuperscript{29} See [1941] AC at 95 per Lord Thankerton.
\item \textsuperscript{30} [1941] AC at 91.
\end{itemize}
in the damage. Thus, in the East Suffolk case\textsuperscript{31} three Law Lords of the majority of four took the view that the defendants had not caused the flooding which gave rise to the damage, they merely failed to abate it. In the words of Viscount Simon LC:

In the present case the damage done by the flooding was not due to the exercise of the appellants' statutory powers at all. It was due to the forces of nature which the appellants, albeit unskilfully, were endeavouring to counteract.\textsuperscript{32}

But, to adopt the words of Hart and Honore, "... this is no reason for denying in an attributive context that the damage was the consequence of the defendant's carelessness, or even that the defendant's failure to do the work properly was the cause of the flooding lasting so long ...."\textsuperscript{33} Indeed, Lord Atkin (dissenting) was prepared to accept that the extra damage was caused by the defendants' failure to repair with reasonable dispatch.\textsuperscript{34}

(c) Special Relationship

In the East Suffolk case\textsuperscript{35} Lord Atkin took the view that there was a special relationship between the defendant board and the plaintiff which

\begin{itemize}
\item \textsuperscript{31} [1941] AC 74.
\item \textsuperscript{32} [1941] AC at 85. See also p.96 per Lord Thankerton, at p.105 per Lord Porter.
\item \textsuperscript{33} Causation in the Law p.133.
\item \textsuperscript{34} [1941] AC at 93.
\item \textsuperscript{35} [1941] AC 74.
\end{itemize}
gave rise to a duty to exercise reasonable care in affecting repairs to the tidal wall. The relations between the board and the plaintiffs were closer than the general relations of members of the public to a local authority, for the board was endeavouring to repair the wall to prevent flooding of the plaintiffs' land. Although this view did not find favour with the other members of the House, it has a great deal of merit.

(d) Anterior Acts

It is clear that where drainage authority has failed to carry out remedial works which it might have executed by a reasonable exercise of its statutory powers, they cannot avail themselves of the nonfeasance principle as applied in the East Suffolk case where the defect complained of arose as a result of their own (authorised and non-negligent) acts. It is sufficient that their acts interfered with the common-law rights of the plaintiff.

Thus in Bligh v Rathangan Drainage Board the defendants were held liable for failing to periodically cleanse a river bed, the necessity for which was caused by their acts. As was indicated in that case, the application

36. [1941] AC at
37. [1941] AC 74. The obverse of this proposition, that where the damage was not inflicted by the exercise of statutory powers the Geddis principles do not apply, was explained by Lord Romer at P.99.
38. [1898] 2 IR 205.
of the principle in Geddis v Proprietors of the Bann River Reservoir,\textsuperscript{39} is not affected by the cases relating to mere nonfeasance:

It will be observed that in Geddis' Case in the House of Lords there is no word said about commission or omission, misfeasance or nonfeasance. The only question was, was there a power to do the particular thing?\textsuperscript{40}

2. Nonfeasance in Relation to Specific Torts

(a) Breach of Statutory Duty

A breach of statutory duty is commonly not actionable by private persons and where the conduct which comprises such breach is inaction a person who suffers damage in consequence may be without a remedy. The conception of non-actionable duties supplements the primary nonfeasance rule. In a situation where the courts are not disposed to impose a common law duty to act though the defendant has power to act, as in the basic nonfeasance situation, there may be equally cogent reasons for the denial of a private right of action in respect of an equivalent statutory duty imposed by the Legislature. It is convenient and useful to refer to the principles which admit this line of defence as the "secondary" nonfeasance rules and the situation in which they apply as the "secondary" nonfeasance situation.

\textsuperscript{39} 3 App Cas 430.

\textsuperscript{40} [1898] 2 IR at 216.
Thus, where the performance of a statutory duty requires the expenditure of large sums of public moneys and the construction of public works such as drainage and sewerage systems, the courts will not admit private claims for damages where the essence of the action is the mere failure to provide a public service. Persons so aggrieved must instead avail themselves of such extra-ordinary remedies as may be available or of any statutory remedy provided.

The proper application of these principles is sufficiently illustrated by the decision of the House of Lords in Pasmore v Oswaldtwistle U.C.\textsuperscript{41} Their inappropriate application is illustrated by Robinson v Workington Corporation\textsuperscript{42} in which case the plaintiff complained of damage actually caused by the operation of the sewerage system.

The secondary nonfeasance rules do not apply to all actions against drainage authorities where inaction is the gist of the complaint. Actions founded upon duties relating to the maintenance of such public works have succeeded where the plaintiff proved positive damage arising from the condition of the works. In such a case, the negligent failure to fulfil such obligations is not mere nonfeasance.

Thus, rural drainage authorities were held liable in Coe v Wise,\textsuperscript{43} Rex v Marshland Smeeth and Pen District

\textsuperscript{41} [1898] AC 387.\textsuperscript{42} [1897] 1 QB 619.\textsuperscript{43} (1866) LR 1 QB 711.
Commissioners, 44 Boynton v Anholme Drainage and Navigation Commissioners, 46 A-G v St Ives RDC, 47 Sephton v Lancashire River Board, 48 and Rippingdale Farms Ltd v Black Sluice Internal Drainage Board. 49

Urban sewerage authorities were held liable for non-repair in A-G v Lewes Corporation 50 and Baron v Portslade UC 51 and that there is liability for negligence in such cases was acknowledged in Hammond v Vestry of St Pancras, 52 Bateman v Poplar District Council Board of Works (No.2) 53 and Stretton's Derby Brewery Co. v Derby Corporation. 54

(b) Negligence

Breaches of duties derived from the tort of Negligence are invariably actionable as misfeasance at the suit of the person to whom such duty is owed. In this class of case the determination of the existence of the duty is subject to considerations of judicial policy, rather than the question whether such duty is actionable. Common law duties of care have been imposed in respect of the actual construction of drains and in respect of the maintenance of artificial drains.

44. [1920] 1 KB 155.
45. [1920] IR 117.
46. [1921] 2 KB 213.
49. [1963] 1 WLR 1347. 53. (1887) 37 ChD 272.
50. [1911] 2 Ch 495. 54. [1894] 1 Ch 431.
Negligence in actual construction, whether in regard to the condition and capacity of the drain constructed or in regard to the additional burden placed upon recipient drains, is actionable misfeasance; See Collins v Middle Level Commissioners, Touzeau v Slough UDC, Willoughby Municipal Corporation v Halstead, Brown v Sargent, Dent v Bournemouth Corporation, Scott v Ellesmere Road Board and Hawthorn Corporation v Kannuluik.

A duty of care in regard to the physical condition of drains is incidental to their ownership and control and negligent maintenance is actionable: Ruck v Williams, Tamaki West Road Board v Appleton, Ham v Blenheim Borough, Sargood v Dunedin City Corporation, Essendon Corporation v McSweeney, Willoughby Municipal Council v Halstead and Campisi v Water Conservation and Irrigation Commission. In the three last-mentioned cases, the plea of nonfeasance was expressly and specifically rejected by the courts.

The ownership and control of sewers have not hitherto been regarded as sufficient to support a general duty

57. (1916) 22 CLR 354. 64. [1921] NZLR 358.
58. (1858) 1 F & F 111. 65. (1888) 6 NZLR 489.
60. (1887) NZLR 5 SC 283. 67. (1916) 22 CLR 354.
to improve an inadequate system, although damage to private persons is the foreseeable consequence of such incapacity; Hesketh v Birmingham Corporation\footnote{[1924] 1 KB 260 CA.} is a case in point.

In Negligence, therefore, in the absence of sufficient ground for the imposition of a legal duty, the basic nonfeasance situation arises.

(c) Nuisance

In the context of the tort of Nuisance there may be discerned a tendency to treat the nonfeasance/misfeasance issue as turning of the question whether the defendant authority's conduct may be categorised as inaction or action. The inaction/action dichotomy has influenced legal reasoning most markedly in regard to the "inheritance" and "development" situations. It is apparent that there has been a lack of appreciation of the principles upon which the secondary nonfeasance cases were actually decided and that those decisions have unduly influenced the courts in dealing with cases in which the cause of action was pleaded in Nuisance. For some considerable time the possibility of liability arising for "continuance" was not explored and even now that that possibility has been acknowledged, there is some doubt as to whether mere passivity is sufficient. There has been no clear and authoritative recognition of the possibility that the ownership and control of a sewerage system may be
a sufficient basis for the imposition of liability for an escape arising in consequence of inaction, not merely in regard to the physical condition of sewers but also in regard to inadequacy not itself due to the acts of the local authority.

Where the nuisance complained of may be attributed to the construction of sewers by the local authority, it will be liable, notwithstanding that it was inactive in the sense that it did not construct additional works to cope with the increased burden thus arising; the act of construction is misfeasance: Foster v Warblington UDC,70 Jones v Llanrwst UDC.71

Defective construction has also been treated as misfeasance, as in Hanley v Edinburgh Corporation72 and Pemberton v Bright,73 and the modification of an existing system so as to cause a nuisance has been similarly treated: see A-G v Metropolitan Board of Works74 and Dent v Bournemouth Corporation.75

Liability has been imposed upon private owners for "nonfeasance" in failing to keep premises and sewers in repair and it seems likely that a similar liability will be imposed upon local authorities.

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70. [1906] 1 KB 649.
71. [1911] 1 Ch 393.
72. (1913) 29 TLR 405.
73. [1960] 1 WLR 436.
74. (1863) 9 LT 148.
75. (1897) 66 LJ QB 397.
Where a local authority may prevent a nuisance arising due to inadequate sewers by the exercise of control over connections or control over building in the locality, a failure to exercise such control may constitute misfeasance.

It now seems clear that a local authority may "continue" a drainage nuisance. A failure to remedy a recurring nuisance by improving the system may be sufficient: Craib v Woolwich Borough Council, but cf. Smeaton v Ilford Corporation. The point awaits review.

(d) Rule in Rylands v Fletcher

It has never been suggested that the nonfeasance rules have any application to the rule in Rylands v Fletcher.

It might be contended that where private persons have the right to make connections to the sewers of the local authority, the local authority should not be liable for an escape caused merely by the exercise of those rights, as where the existing drains are inadequate to carry the additional flow; in terms of the Rule, it might be said that the local authority does not, in those circumstances, "collect" the sewage. It has been shown that this argument was specifically rejected by Upjohn J in Smeaton v Ilford Corporation. To that

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76. (1920) 36 TLR 630.
77. [1954] 1 Ch 450.
78. [1954] 1 Ch 450.
extent, it appears liability for mere inaction may be wider under the Rule than in Nuisance.

(e) Distinguishing Causes of Action

The secondary nonfeasance rules have no application where a cause of action is made out for misfeasance in some respect other than the mere failure to perform a statutory duty.

It has been expressly held that the principles upon which Glossop v Heston and Isleworth Local Board\textsuperscript{79} do not extend to cases of negligent commission, even where the abatement of the nuisance complained of requires the exercise of statutory powers.

In Dent v Bournemouth Corporation\textsuperscript{80} the immediate cause of the nuisance was the insufficiency of a sewer, but the excessive burden had arisen in consequence of the acts of the defendants. Vaughan Williams J said:

If it be true that the damage was caused by the negligence of the defendants, an action will lie against them for negligence in the execution of their statutory powers. It is said that Glossop is a decision to the contrary, but in my judgment this is not so. That decision only shews that if the complaint be that the local authority have insufficiently carried out the duties imposed upon them by the statute, no action will lie; but it does not shew that were a local authority in the course of their work create a nuisance, no action

\textsuperscript{79} (1879) 12 ChD 102 (CA).

\textsuperscript{80} (1898) 66 LJ QB 397.
will lie against them. On the contrary, the
judgment in that case is that if a legal wrong
has been done an action will lie unless the
legal wrong has been justified by statute .... 81

Similarly, it has been held that the principles applied
in Robinson v Workington Corporation 82 are inapplicable
where a common law right has been infringed, as where
a nuisance has been created by the exercise of
statutory powers.

In Bligh v Rathangan Drainage Board 83 it was contended
by the defendants before the Irish Court of Appeal
that on the authority of Robinson's case the only
means of redress in respect of their failure to cleanse
the bed of a stream was the statutory remedy. The
Court rejected that contention. The Lord Chief
Justice said:

[That] doctrine ... applies to a wholly different
class of cases - it applies to cases where there
was no original right, no common law right.
It applies merely to cases where a new right if
conferred and a remedy for its infraction
prescribed by statute. Here, however, in the
case before us there was an original common law
right infringed. 84

81. (1897) 66 LJ QB at:
82. [1897] 1 QB 619 CA.
83. [1898] 2 IR 205 CA.
84. [1898] 2 IR at 217 per Sir P. O'Brien LCJ.
See also Gibbings v Hungerford and York Corporation
[1904] 1 IR 211 CA where Fitzgibbon LJ suggested that
the remedy under the public health legislation was
inappropriate where the cause of action related not to
the want of sufficient sewers but to an active
'trespass' by the discharge of sewage.
3. Drainage Nonfeasance Rule

The area of nonliability indicated in the preceding pages is confined to the situation where the nuisance complained of arose in consequence of the inadequacy of sewers or drains, where the drains in question were inherited by the defendant authority in an inadequate state or where the inadequacy was caused by an uncontrollable increase in usage of existing sewers which were adequate when built (or inherited), such nuisance having been incapable of abatement by the taking of such action as might reasonably have been expected. To this limited extent, there is no liability for inaction, but the use of the term "nonfeasance" is hardly justified and might be dispensed with without disadvantage.

In one respect, however, a vestige of reasoning associated with nonfeasance remains. It arises in respect of the question whether, where the inadequacy is not otherwise attributable to the acts or omissions of the defendant authority, it is obliged to abate the nuisance by the construction of new drains. The decisions in Hesketh v Birmingham Corporation\(^85\) and Craib v Woolwich Borough Council\(^86\) have been discussed and criticised in this regard. The view preferred here is that the ownership and control of a drainage system and its operation by the local

\(^{85}\) [1924] 1 KB 260 CA.

\(^{86}\) (1920) 36 TLR 630.
authority ought to be regarded as sufficient to attract strict liability for escapes as well as a duty of care in the same respect. If, however, the dicta of the Court of Appeal in Hesketh's case are good law, then it must be concluded that there is a special drainage nonfeasance rule. Such a principle would confer upon drainage authorities an immunity not enjoyed by private persons. It goes beyond the basic and secondary nonfeasance rules and is comparable in effect to the now equally anomalous highway nonfeasance rule.

4. The Highway Nonfeasance Rule

(a) Application in Drainage Context

The immunity of highway authorities from civil liability, whether in Nuisance, Negligence or for Breach of Statutory Duty, for damage suffered by an individual in consequence of the nonrepair of roads, while abrogated in England, survives in New Zealand and Australia. In appropriate circumstances a highway authority may invoke the immunity in respect of the disrepair of drains or culverts, even where the damage is sustained by an adjacent occupier and where it is caused by flooding from the drain in question.

87. [1924] 1 KB 260.
89. See generally, Sawer Nonfeasance Under Fire 2 NZULR 115.
Thus in *Irving v Carlisle RDC*\(^90\) the defendants negligently failed to clean out a ditch which ran alongside a highway and in consequence the plaintiff's fields were damaged by flooding. It was held that the defendants' conduct was nonfeasance and not misfeasance and that as they were the highway authority, they were not liable.

In *Fortescue v Te Awamutu Borough*\(^91\) the appellant sued in respect of damage suffered from flooding due to the inadequacy of a culvert under a road. The function of the culvert and the tributary channels was the drainage of the street. The road and culvert had been constructed by a sub-divider and subsequently vested in the respondents. It was held that this was nonfeasance for which the defendant authority was not liable.

(b) **Capacity and Function**

A local authority may avail itself of the immunity only in respect of its capacity as a highway authority and only in respect of drains fulfilling a highway function. These principles were first established in cases relating to the dangerous condition of drains and were later extended to cases of escapes and flooding.

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90. (1907) 71 JP 212.
91. [1920] NZLR 281 CA.
Thus where a local authority performs both a highway and a separate drainage function, it cannot shelter behind the highway immunity in performing its drainage function.

This rule was laid down in White v Hindley Local Board\(^92\) where the plaintiff sued in respect of injury sustained by his horse when it put a hoof through a defective grating over a sewer when travelling along a highway. The defendants were both the surveyors of the highways and the local board of health and, as the latter, had all the sewers in the district vested in them. The defective grid had two purposes; it prevented the road from being dangerous and it prevented stones from falling into the sewer. Blackburn J held that the defendants, so far as they were surveyors of the highways, were not liable for the nonrepair of the grid. They were, however, under an obligation as proprietors of the sewers to keep the grids in order. Counsel for the defendants submitted that the cause of action was not misfeasance but nonfeasance and for that the defendants were not liable; Blackburn J said:

> The question is not whether the act was one of omission only or of commission; but whether there is any duty on the defendants for the violation of which an action will lie at the suit of the person injured by it.\(^93\)

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\(^92\) (1875) LR 10 QB 219.

\(^93\) (1875) LR 10 QB at 220.
This decision was affirmed by the English Court of Appeal in *Blackmore v Vestry of Mile End Old Town*.\(^94\)

The rule was accepted by the High Court of Australia in *Buckle v Bayswater Road Board*\(^95\) where a divergence of judicial opinion on the facts illustrates the difficulty of determining whether a particular drain serves a highway or agricultural purpose. This case left unresolved the question whether the drainage function must be a substantial function of the drain in question, or whether it is sufficient that a drainage function is incidental to the highway function.

These principles have found approval in New Zealand also. In *St Kilda Borough v Smith*\(^96\) Williams J held that the drain in respect of which the action for nonrepair was brought was made for the purpose of draining the borough and not a road and that accordingly the highway nonfeasance rule did not apply. More recently, in *Petone Borough v Daubney*\(^97\) Cooke J affirmed that a local authority may be both a highway authority and a drainage authority and that its liability depends on the particular

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94. (1882) 9 QBD 451 CA (Nuisance caused in capacity of water authority). Cf. *Thompson v Brighton Corporation* (1894) 1 QB 332 CA. (Defendant road authority and sewerage authority - disrepair of road around manhole relating to highway capacity.)

95. (1936) 57 CLR 259 (Injury to user of highway).

96. (1902) 21 NZLR 205.

97. [1954] NZLR 305 at 324 CA.
capacity in which it committed the act or omission complained of. 98

A similar rule was laid down, without reference to earlier authority, in A-G v St Ives RDC. 99 In that case the plaintiff (and relator) sought damages in respect of flooding arising from a breach of statutory duty to repair certain drains. It was contended that the failure to maintain and repair the drains was nonfeasance and that the plaintiff had no cause of action. Salmon J traced the history of the highway nonfeasance rule and said:

This rule has long been established in our law, and no doubt has the soundest historical justification. It is, however, an archaic and anomalous survival into modern times. It would be difficult indeed to think of any sound reason why today highway authorities should enjoy this immunity. Nevertheless, there can be no doubt that in law they do enjoy the immunity, and I must apply the law; but I am not obliged to extend it. 1

It was held that the drains in question formed part of a land drainage scheme and not part of the drainage of the highway. The learned judge indicated that if the drains had been designed to drain the highway, he

98. These principles appear to have been overlooked in J. W. Birnie v Taupo Borough Council ((1975) (unreported) Haslam J) where it appears to have been assumed that the highway nonfeasance rule applied. While the culverts in question lay under a highway, there is every indication that the problem arose out of the defendant borough's drainage function. It was so treated by the borough itself and by the Waikato Valley Authority which exercised general supervisory powers in respect of the drainage functions of local authorities in the district. The highway itself was unaffected by the inadequacy of the culverts.


1. [1960] 1 QB at 323.
would have felt bound to apply the highway nonfeasance rule, but there was only a tenuous connection between the rule and the facts of the case. The duty of repairing the drains had formerly fallen on the highway authority, but the duty had originally been cast on the Surveyor of highways and not on the inhabitants at large from whom the Surveyor derived his immunity in respect of highways. Accordingly, Salmon J could "see no reason for extending the immunity from liability for non-feasance to the defendants."²

(c) Artificial Structures

A more doubtful restriction upon the immunity is the imposition of liability for disrepair of "artificial structures" constructed in the highway. This proposition has its genesis in Borough of Bathurst v MacPherson³ where the Judicial Committee held the defendants liable for damage resulting from their failure to repair a drain which they had constructed under a street. This principle - that having constructed or obtained control of a drain, a municipality is bound to keep it in such a condition that no nuisance would be created - was applied in Tamaki West Road Board v Appleton⁴ where the defendants had negligently failed

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² [1960] 1 QB at 323.
³ (1879) 4 App Cas 256.
to clear a choked culvert under a road in their district and were held liable for damage caused by flooding of the plaintiff's land. But that case was subsequently disapproved by the Court of Appeal in Fortescue v Te Awamutu Borough. The weight of authority for and against the "artificial structure" rule has been thoroughly canvassed by Sawer and need not be gone into here. It might be noted, however, that more recently the New Zealand Court of Appeal has expressly held that a culvert under a highway is not an "artificial structure" but part of the highway and the Court indicated that the Bathurst case may no longer be regarded as good law.

5. **Transfer of Tortious Liability by Statute**

A local authority which succeeds to the property and functions of another local authority does not at common law inherit the tortious liability of its predecessor. Such liability may be transferred by statutory provision. Statutes relating to local authority succession usually provide for the transfer of powers, rights, duties, capacities, liabilities and obligations as well as for the transfer of property and functions and it is a question of construction in each case whether liability is transferred in respect

5. [1920] NZLR 281 CA.


of the torts of the predecessor.

The possibility of such a transfer was acknowledged by the Court of Appeal in *Glossop v Heston and Isleworth Local Board* \(^8\) although it is not apparent why the principle was not actually applied in that case.\(^9\)

In that case the transfer of (inter alia) liabilities was effected by s.12 Public Health Act 1875 which provided that liabilities incurred by the predeccessing authority might be enforced against the succeeding authority. In the course of his judgment Brett LJ acknowledged in regard to an earlier case\(^10\) the possibility that responsibility for the predecessors' act might have been carried down by an enactment to the defendants and so made them liable under the ordinary rule, and said:

So, indeed, I am inclined to think that in the present case, under this statute, if the former board had done an act that would have given the Plaintiff a right to damages or some other remedy, and the effect of that act continued in the Defendants' time, the Defendants would have been liable for the continuance of the consequences of that act, and would have been liable to an injunction.\(^11\)

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8. (1879) 12 ChD 102.
9. The point appears not to have been raised in the pleadings or in argument, it may not have been supported by the evidence.
10. *A-G v Basingstoke Corporation* 24 WR 817; 45 LJ Ch 726.
11. (1879) 12 ChD 102. The word "continuance" is not used here in its technical sense.
Cotton LJ specifically referred to s.12 and affirmed that if the former body had by any done by them given a right of action, or incurred any liability, then that could be enforced against the defendants.\(^{12}\)

The decision in *Jones v Llanrwst Urban Council*\(^ {13}\) illustrates the application of the principle of transferance in regard to liability arising under the rule in *Rylands v Fletcher*. The defendants' liability was derived from the acts of two predecessors. The sewerage system had been constructed by the Guardians of the Poor of the Llanrwst Union. The Guardians were succeeded as the sanitary authority for the district by the Llanrwst Rural District Council and their liabilities transferred.\(^ {14}\) Subsequently, part of the district was transferred to the Llanrwst Urban Council, the present defendants\(^ {15}\) and the relevant liabilities also passed. Parker J held that on both instances of succession common law duties and liabilities were transferred, as well as statutory duties and liabilities.\(^ {16}\)

The point is also illustrated by *Haigh v Deudraith Rural District Council*, also a river pollution case. The

\(^{12}\) (1879) 12 ChD at 129.

\(^{13}\) [1911] 1 Ch 193.

\(^{14}\) S.25 Local Government Act 1894.

\(^{15}\) By virtue of an Order under the Local Government Acts.

\(^{16}\) [1945] 2 All ER 661.
sewer giving rise to the nuisance had been constructed some seventy years previously by a rural sanitary authority, the liabilities of which the defendants had succeeded by statute. The sewer had become inadequate through greatly increased usage and was in urgent need of reconstruction. Upon the authority of the Llanrwst case, Vaisey J held the defendant authority liable.

A similar principle was acknowledged in Smeaton v Ilford Corporation. In that case the soil sewer in question had been constructed by the defendants' predecessors, the Urban District Council of Ilford. On the basis of the charter which incorporated the district council into the borough, the terms of which obliged the borough to assume all the liabilities of the council, the action proceeded on the footing that the defendant corporation were to be treated as the builders of the sewers vested in them as sanitary authority.

In two cases the relevant provision has been construed restrictively, so as to preclude liability where the cause of action did not arise until after the transfer.

18. [1911]
The first case was a decision of the English Court of Appeal. In *Nash v Rochford Rural Council*\(^{21}\) it was contended that the defendants were liable for the negligent construction by their predecessors of a drain under a highway. The liabilities of the former authority had been transferred by statute\(^{22}\) to the defendants. The Court held, having regard to the interpretation section,\(^{23}\) that the meaning of "liabilities" did not include a case where the damage and hence the cause of action, had not arisen until the former authority had gone out of existence, that negligence not followed by damage does not create a "liability" to be transferred. The effect of this decision is anomalous, for it means that recovery may depend on the fortuitous event of damage occurring prior to the transfer. This restrictive construction may be explained, though not justified, by reference to the court's clear expression of its reluctance to hold the defendant authority liable in a case of "nonfeasance".

In *Craib v Woolwich Borough Council*\(^{24}\) the defendants were sued in their capacity as sewerage authority. The predecessor authority had permitted and approved the construction of a sewer which discharged into a manhole with an outflow drain of insufficient size,

\(^{21}\) [1917] 1 KB 370.
\(^{22}\) S.25 Local Government Act 1894.
\(^{23}\) S.100 Local Government Act 1888.
\(^{24}\) (1920) 36 TLR 630.
thus causing flooding of the plaintiff's property by the escape of sewage. The damage evidently did not occur until after the defendants took office. Shearman J held that the defendant authority was not liable for the misfeasance of its predecessors, this advantage having been conferred on the defendants by the Rochford decision, the relevant provisions being similar.

25. [1917] 1 KB 370.
26. Metropolis Management Act 1855.
27. It will require very clear expression before the courts will be prepared to accept that a provision vesting the liabilities of a former authority in a succeeding authority, will pass an obligation attaching under an injunction. A-G v Birmingham, Tame and Rea Drainage Board (1881) 17 ChD 685.
CHAPTER VIII

THE DEFENCE OF STATUTORY AUTHORITY

The effect which legislative authority for the nuisance-creating enterprise has on the rights of an injured individual as often raises the delicate problem of delineating the spheres between administrative discretion and judicial control as the question to what extent the public interest may legitimately demand a private sacrifice from the affected individual. These difficulties in point of policy, no less than variations in the relevant legislative scheme, account for the rather uncertain and complex pattern of legal rules.¹

Modern local authorities are invariably creatures of statute and their special powers, duties and liabilities are defined in the relevant empowering Act. Their civil liability for escapes rests upon the general law of Torts except in rare instances where statutory liability is imposed. The courts have admitted, however, a defence to this tortious liability which is based upon mere inferences drawn from the grant of statutory powers to a nuisance-creating enterprise. From provisions clearly intended to regulate the affairs of statutory bodies and having nothing to do with tortious liability, the courts have sought to discover a non-existent Legislative intention in order to overcome an apparent conflict between the provision of such powers and the imposition of strict liability by the common law.

Even where by express provision the Legislature has sought to affirm the applicability of the rules of strict liability, such provisions, in some instances, have been read restrictively.

The defence thus developed has precluded recovery in actions based upon strict liability where private individuals would have been held legally responsible. Thus from at least 1888 commercial gas undertakings have found protection. In that year Denman J applied the rule, as did Lord Russell CJ in 1895 and more recent decisions shown that gas companies have retained the immunity. Within the last decade, regional gas boards have found protection. The applicability of the immunity to water supply companies had been affirmed by the Court of Appeal in 1894 and was also endorsed in the decision just mentioned.

2. Jackson v Carshalton Gas Co. (1888) 5 TLR 69, see the argument of Jelf QC.
authorities have also sheltered behind the rule.

However, there are instances also where the defence has been rejected in favour of strict liability, though upon specific statutory provision. Thus a commercial supplier\(^{10}\) and a municipal authority\(^{11}\) have been held liable without fault for the escape of gas. A similar liability has been imposed upon the supplier of water for hydraulic power\(^{12}\) and upon a municipal water supply authority\(^{13}\). Similarly, strict liability was imposed upon a municipal authority in a drainage case by the House of Lords.\(^{14}\)

A. Negligence

Although, as has been noted earlier in this work, attempts have been made from time to time to establish immunity from actions for negligence in the case of statutory bodies, such attempts were consistently rejected by the courts in decisions culminating in Coe v Wise\(^ {15}\) and the Mersey Docks\(^ {16}\) cases. Thus in 1878 Lord Blackburn was able to authoritatively state

\(^{10}\) Batcheller v Tunbridge Wells Gas Co. (1901) 84 LT 365.
\(^{11}\) Shell-Mex B.P. Ltd v Belfast Corporation [1952] NI 72 CA.
\(^{12}\) Charing Cross Electricity Supply Co. v Hydraulic Power Co. [1914] 3 KB 772.
\(^{13}\) Irvine v Dunedin City Corporation [1939] NZLR 741.
\(^{14}\) Hanley v Edinburgh Corporation (1913) 29 TLR 404.
\(^{15}\) (1866) LR 1 QB 171.
\(^{16}\) (1866) LR 1 HL 93.
in the leading case of Geddis v Bann Reservoir: 17

... I take it, without citing cases, that it is now thoroughly 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. 18

The principle that an action will lie for the negligent execution of statutory powers has never since been seriously challenged. It has been applied or implicitly accepted in all those cases mentioned in Chapter III where liability was imposed for negligence and which need not again been referred to. It is, however, in effect partly qualified by the rule that the courts will not review the exercise of discretionary powers for negligence where statutory compensation is provided for the resulting damage. 19

It is noted that the Geddis principle has sometimes been treated by the courts as exhaustively stating the principles of tortious liability, including the exclusion of the principles of strict liability, 20 but this is incorrect. As shall be explained presently, in cases of strict liability a different and more complex

17. (1878) 3 App Cas 430.
18. (1878) 3 App Cas at 454.
19. See Chapter VI.
20. E.g. Burniston v Bangor Corporation [1932] NI 178; Benning v Wong (1969) 43 ALJR 741 (Majority of High Court.)
formulation of liability is applicable and it is observed that the Geddis case was neither pleaded nor argued as a case of strict liability.

B. Nuisance

The courts might have taken the view that mere general legislative authorisation of an enterprise no more provided immunity from action at common law for nuisances than for negligence. Express authorisation might have been demanded. However, the introduction of railways on a large scale in the mid-nineteenth century, at a time when the prevailing economic doctrine was lassez faire, presented the courts with the problem of proceedings taken against the railways in respect of nuisances by smoke, noise, vibration and sparks which were an unavoidable concomitant of the enterprise. The running of locomotives and nuisances were synonymous. Immunity from strict liability was established in criminal proceedings\(^21\) and was extended to civil liability.\(^22\)

It was with less justification that the immunity was extended to the case of escapes from the works of public utilities, for unavoidable as some escapes may be, there is nothing like the same degree of certainty in frequency or in time, place and circumstance, that

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21. R v Pease (1832) 4 B & A 30 (Criminal prosecution for public nuisance for frightening of horses on highway.)

a nuisance will occur. Nor do awards of damages or injunctions threaten to bring the enterprise to an end.

If one thing is clear from the multitude of cases, it is that there has been no authoritative and exhaustive formulation of the scope of the defence. Indeed the process of determining the issue is the weighing of various factors. The following pages are an attempt to state within a short space the law as it applies to the case of escapes from the works of public utilities.

1. Variations in the Legislative Scheme

In their attempts to elicit from the general provisions of empowering statutes the Legislature's intention regarding liability for nuisances, whether interference with private rights was impliedly authorised or whether the authorised activity was to be carried on in strict conformity with private rights, the courts have relied on certain features of the statutory provisions as indicia of authorisation. It is to be noted that although there has been a tendency to treat the presence or absence of one of these indicia as conclusive of the question, the better approach and that which more accurately reflects the actual effect of the decisions is that preferred by Bowen LJ in London, Brighton Ry v Truman23 and expressly adopted by Lord

23. 29 ChD 89 at 109.
Blackburn on appeal. Bowen LJ said:

I do not ... think that the absence of one particular indication of an intention to interfere with private rights, or the presence of any one indication of such an intention, is necessarily decisive.

Of such indicia, the two most important here are these, the granting of the statutory powers in the mandatory or permissive form and the presence or absence of compensation provisions in respect of damage done.

(a) Mandatory or Permissive Powers

The adoption of the mandatory (duty) or permissive (power) form in the conferring of statutory authority was a distinction which was treated by the courts as a weighty factor in determining whether or not a nuisance was impliedly authorised in several cases decided in other contexts in the second half of the nineteenth century and notably in Metropolitan Asylum Districts v Hill.25 Thus it was held by the House of Lords that a duty to operate a railway indicated authorisation of a nuisance by vibration from passing trains and of a nuisance caused by the noise of cattle traffic in a station yard whereas it was held that a nuisance was not authorised where there was a mere power to provide a fever hospital.28 Similarly,

24. 11 App Cas 45 at 64.
25. (1881) 6 App Cas 193.
27. London, Brighton Ry v Truman (1885) 11 App Cas 45.
28. Metropolitan Asylum Districts v Hill (1881) 6 App Cas 193.
the Privy Council held that a mere power to bring water on to land for the purposes of irrigation did not authorise a nuisance caused by run-off.29

The distinction between mandatory and permissive powers was noticed in Dixon v Metropolitan Board of Works,30 a drainage case, where Lord Coleridge CJ held that as the duty of making and maintaining the sewer in question was absolutely imposed upon the defendants, they were not liable in respect of inevitable damage. But the point does not appear to have been at issue.

It is of interest that the distinction was not referred to in either of the two earliest water-supply cases of Blyth v Birmingham Waterworks Co.31 or Snook v Grand Junction Waterworks Co.32 where the defendant companies were held not liable in the absence of negligence for the escape of water from their mains, but in both cases there was a statutory obligation to keep the mains charged with water. The decision in Green v Chelsea Waterworks33 may be explained upon similar ground. It was there held by Mathew J at first instance and by the Court of Appeal that there

30. (1881) 7 QBD 418.
31. (1856) 11 Ex 780; 156 ER 1047.
32. (1886) 2 TLR 308.
33. (1894) 70 LT 547.
was no liability for an escape in the absence of negligence. It is evident from the report that in both courts counsel for the plaintiff placed a great deal of reliance on the distinction between mandatory and permissive authorisation in this respect, but the argument failed. It seems, however, that although there was a mere power to construct the works, once they were constructed there was an obligation to continue to supply the public.\textsuperscript{34} Accordingly, the decision need not be read as authority against strict liability where all the relevant powers are permissive in form.\textsuperscript{35} The decision of Lord Russell CJ in Price v South Metropolitan Gas Co. \textsuperscript{36} is distinguishable upon a similar ground. It was held that the defendant gas supplier was not liable for escapes in the absence of negligence and no qualification was made in respect of permissive powers. Again, although this does not appear from the report, the defendant company appears to have in fact been under a duty to lay pipes and to supply gas to consumers.\textsuperscript{37}

\noindent \textsuperscript{34} See (1894) 70 LT at 548 per Mathew J.

\noindent \textsuperscript{35} See also the decision of Kekewich J in National Telephone Co. v Baker [1893] 2 Ch 185 where the defendants were held protected by their statute from liability in respect of the escape of electricity from their tramway. Plaintiff's counsel raised the mandatory/permissive powers distinction but Kekewich J accepted the defendants contention that the use of electricity being expressly authorised, injury arising from a reasonable exercise of the powers was condoned - [1893] 2 Ch at 203.

\noindent \textsuperscript{36} (1895) 65 LJQB 126.

\noindent \textsuperscript{37} See ss 14-17 Metropolitan Gas Act 1860 (23 & 24) Vict c 125.)
The distinction between mandatory and permissive powers was first adopted (in actions of this kind) as a point of distinction between cases where there was no strict liability and cases where there was strict liability in 1914. In *Charing Cross Electricity Supply Co. v Hydraulic Power Co.* 38 the Court of Appeal held that the defendant company was strictly liable for damage caused by the escape of water from its hydraulic mains. Lord Sumner said:

[The defendants] are not incorporated as waterworks supply companies with an obligation to supply water to the public, but they are given powers of taking water and of laying mains without being under an obligation to keep their mains charged at high pressure or at all. This serves at once to distinguish the class of cases of which *Green v Chelsea Waterworks* 39 was an illustration, where the principle is that if the Legislature has directed and required the undertaker to do that which caused the damage, his liability must rest upon negligence in his way of doing it, and not upon the act itself. 40

The distinction asserted by Lord Sumner was rejected in *Burniston v Bangor Corporation* 41 where it was pointed out that in *Green v Chelsea Waterworks* the defendants

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38. [1914] 3 KB 772.
39. 70 LT 547.
40. [1914] 3 KB at 781, 782.
41. [1932] NI 178 at 187 CA.
were not compelled to lay down pipes, but merely to keep them charged with water when laid, as in the instant case.

The only comment noticed in the New Zealand cases is against the distinction. In Irvine v Dunedin City Corporation Ostler J expressed the opinion that the law relating to the defence of statutory authority is the same, whether the authority is a command or a permission.

More recently in Dunne v North Western Gas Board the Court of Appeal maintained the distinction drawn by Lord Sumner between the Charing Cross case and the Chelsea Waterworks case and held that where there is a mandatory obligation there is no liability without negligence. However, the court extended this principle to the case where there is a "nuisance" clause and, as shall be shown, it is extremely doubtful whether this extension was sound.

Outside of this series of cases, which indeed forms a weighty line of authority, there is a little noticed

42. [1939] NZLR at 769.
43. The judge noted that in Green's case the Court of Appeal did not advert to this point or endeavour to found its judgment upon it.
44. [1964] 2 QB 806.
45. [1914] 3 KB 772.
46. 70 LT 547.
47. [1964] 2 QB at 835.
drainage decision of the House of Lords in 1913 upon a Scottish appeal which is out of accord with it. In *Hanley v Edinburgh Corporation*[^48] it seems that the appellant's market had been flooded on two occasions by reason of an insufficient culvert constructed by the respondents. Delivering the judgment of the House, Lord Shaw was of the opinion that the statute, which imposed a duty upon the corporation to provide effective drainage for the city, was no defence for such a nuisance. Rather than relieving the corporation of its common law obligations, the statute imposed a statutory obligation to provide effectual drainage. In the judge's view, authority was to be found in two decisions of high authority[^49] which, it might be noted, were cases concerning permissive powers.

It is difficult to find a satisfactory rationale for the extension of the mandatory/permissive powers distinction as a determinant of liability to the present context. It is not sufficient to say that the imposition of a duty is an indication that the legislature intended the powers to be exercised notwithstanding inevitable damage or that the granting of a discretionary power allows the person or body authorised to avoid a nuisance even to the extent of non-exercise of the powers. The imposition

[^48]: (1913) 29 TLR 404.
[^49]: Canadian Pacific Ry v Parke [1899] AC 535; Metropolitan Asylums District v Hill (1881) 6 App Cas 193.
of duties clearly arose out of the need to ensure that commercial enterprises fulfilled the conditions of the monopolies granted and did not simply take up statutory powers to service large areas in order to exclude competitors or to service only the more lucrative suburbs. Duties were imposed upon local authorities in respect of drainage and sewerage and water-supply and upon commercial water undertakers to ensure that the objects of the public health reforms (of which the supply of water was part) were realised. So far as the liability of these bodies for nuisances by escapes was concerned the form of the power conferred was fortuitous and irrelevant.

(b) **Statutory Compensation**

The second indication of the implied authorisation or non-authorisation of nuisances is more soundly based. If there is a compensation provision in the empowering Act capable of applying to nuisances this affords some indication that such damage was contemplated by the legislature and that the common law remedy is abrogated. In 1881 Lord Blackburn said:

> [I]f no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others.50

50. Metropolitan Asylum Districts v Hill (1881) 6 App Cas 193 at 203.
There is some English authority for the proposition that if no compensation is provided, there is a presumption against authorisation of a nuisance or to otherwise affect private rights. But the existence of such a presumption has also been denied. It has also been declared that where there is no compensation clause, a court will be vigilant to see that an injured party is not deprived of his remedy unless such a conclusion is necessitated. However, in a New Zealand case the view has been expressed that the legal position relating to the defence of statutory authority is the same, whether or not there is a right to compensation, but a more flexible approach is to be preferred.

2. "Inevitableness"

Proof that a nuisance is the inevitable result of the exercise of statutory powers is relevant to the defence of statutory authority in two respects. First, it is an indication that interference with private rights in this manner is authorised. Second, it is a condition of the applicability of the immunity in any case. Emphasis on this second function has obscured

51. Price's Patent Candle Co. v London County Council [1908] 2 Ch 526 at 544 per Cozens Hardy MR; approved Farnworth v Manchester Corporation [1929] 1 KB 533 at 540 per Scrutton LJ.

52. Edginton v Swindon Corporation [1939] 1 KB 86 at 90 per Findlay LJ.

53. Marriage v East Norfolk Catchment Board [1950] 1 KB 284 at 294 per Tucker LJ.

54. Irvine v Dunedin City Corporation [1939] NZLR at 754 per Myers CJ.
the significance of the first and has obscured also the criteria discussed in the foregoing pages,

(a) Indication of Immunity

The courts have been prepared to infer, with little justification, that an inevitable nuisance would have been contemplated by the Legislature in granting the relevant statutory powers and that the nuisance is therefore impliedly condoned. Although inevitableness and authorisation are commonly equated\textsuperscript{55} it has been held on high authority that although a nuisance could not be avoided, that was not a sufficient ground to legalise the injury.\textsuperscript{56} It must be conceded, however, that in escape cases inevitableness (or the absence of negligence) has often been treated as a sufficient condition of the applicability of the immunity without regard to any other criteria. An attitude so entrenched may be difficult to displace.

(b) Limit of Immunity

Insofar as the immunity, where made out, extends only to inevitable nuisance, the reasoning would seem to be that while the authorised enterprise


\textsuperscript{56} Metropolitan Asylum Districts v Hill (1861) 6 App Cas 193 HL; Canadian Pacific Ry v Parke [1891] AC 335 PC.
is to be carried on notwithstanding the creation of a nuisance or nuisances, such injury must be minimised and where it is not shown to be inevitable - in the required sense - then the local authority will be held liable.

It has yet to be affirmatively stated by the courts whether in the case of an isolated escape the test of inevitableness applies to the class of escape (bursting of mains generally) or whether it applies to the particular escape complained of. The rule has been expressed, in the case of water, gas and sewage as if it were the former. Indeed, it was specifically held in Irvine v Dunedin City Corporation that the escape of water is not the inevitable consequence of the construction and maintenance of a water supply. The better view and that which is more in accord with Manchester Corporation v Farnworth is that the defendant authority must prove that the particular nuisance complained of was inevitable. The Northwestern Utilities case supports that conclusion.

57. Irvine v Dunedin City Corporation [1939] NZLR 741.
58. Benning v Wong (1969) 43 ALJR 714 Windeyer J.
60. [1939] NZLR 741.
61. [1930] AC 183 (Smoke from electricity station).
63. See also Powrie v Nelson City Corporation [1976] 2 NZLR 247.
(c) **Definition**

It remains to determine what is meant, in this context, by "inevitable". In *Manchester Corporation v Farnworth*[^64] Viscount Dunedin authoritatively defined the term in this way:

> [T]he 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 expense.

Proof of the absence of negligence falls upon a defendant authority sued in the torts of strict liability[^65] and (upon the predominant view that the test of inevitability applies to individual cases and not to classes of case) it is clear that the absence of negligence is an essential element of proof of inevitableness. The one term might simply be regarded as the obverse of the other, provided that "negligence" bears the extended meaning which it has acquired in relation to the exercise of statutory powers.

3. **Nuisance Clauses**

From about the middle[^66] of the nineteenth century the legislature commonly expressly qualified the empowering

[^64]: [1930] AC 171 at 183.
[^65]: See p. 242.
[^66]: Nuisance clauses can be traced back to 1817, to the Act for better Lighting the Streets and Houses of the Metropolis with Gas, 57 Geo III c23 s55 and thence to the Lighting and Watching Act 1833.
provisions of public service enterprises by adding a proviso to the effect that the Act was not to be construed as authorising a nuisance. Thus the Towns Improvements Clauses Act 1847 provided:

Nothing in the Act contained shall be construed to render lawful any act or omission on the part of any person which is, or but for this Act would be, deemed to be a nuisance at common law.67

Similar provisions were inserted in the Gas Works Clauses Act of 1847 68 and 1871 and in the Public Health Acts of 1848, 1872 and 1875, but notably omitted from the Waterworks Clauses Act 1847. The practice was adopted in Australia 69 and also in New Zealand, at first only in relation to drainage works,70 but later extended to all "public works" of municipal authorities.71

(a) "Duty Clause" Distinguished

Provisions imposing or retaining liability for nuisances are to be distinguished from those which merely impose a statutory duty not to create a nuisance. The former limit the powers given so as to impose strict liability whereas the latter impose only a duty of care.72

67. 10 & 11 Vic c34.
68. S29 10 Vict c15. But see Price v South Metropolitan Gas Co. (1895) 65 LJQB 126 where this provision appears to have been overlooked.
69. See Benning v Wong (1969) 43 ALJR 467.
70. Municipal Corporations Act 1876
71. Municipal Corporations Act 1900. No nuisance clause ever appears to have been inserted in the Public Works Acts, nor in the Counties Act until 1956.
Thus English public health authorities have imposed upon them the duty to "so discharge their functions under the ... Act as not to create a nuisance".\(^73\)

An academic writer\(^74\) has written of this particular provision as if it were an example of a nuisance clause, but that is not the case. As has already been shown in this paper\(^75\), only negligent breaches of such duties are actionable, but the effect of such provisions is not to exclude strict liability\(^76\) where it would otherwise apply.

(b) **Strict Liability Imposed**

From the outset the various authorities acting under statutory powers qualified by a nuisance clause have sought to persuade the courts to read such provisions restrictively, to hold that there is liability only for negligence and that the authority is exonerated from liability for nuisances necessarily or inevitably arising from the exercise of the statutory powers. Until recently the courts consistently rejected all such arguments, taking the view that if the powers provided could not be exercised without creating a nuisance, then the authority should seek additional

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\(^73\) S31 Public Health Act 1936.

\(^74\) Jennings *Local Government Law* at 276.

\(^75\) See Chapter II.

\(^76\) Contra Smeaton *v Ilford Corporation* [1954] 1 Ch 450 at 477 per Upjohn J. See p.38.
powers from the legislature which would undoubtedly make provision for compensation in respect of interference with private rights.

The principle of strict liability was established and repeatedly reasserted in those cases where a sewerage authority was authorised or compelled to effectually drain its district and empowered to drain into the sea, rivers or streams, but with a proviso against causing a nuisance. Of these decisions, the leading cases might be specifically mentioned.

In A.G. v Birmingham Borough Page-Wood V.C. held that if it should prove impossible to drain the town without creating a nuisance by pollution, then the town must remain undrained or the defendant would have to obtain additional powers.

A similar view was taken in A.G. v Leeds Corporation by James VC at first instance and by the Court of

77. Oldaker v Hunt (1854) 19 Beav 485; A.G. v Luton Local Board of Health (1856) 2 Jur NS 180; A.G. v Birmingham Borough Council (1858) 4 K & J 528; Manchester, Sheffield, etc. Ry Co. v Workop Board of Health (1857) 23 Beav 198; Bidder v Croydon Local Board of Health (1862) 6 LT 778; A.G. v Metropolitan Board of Works (1863) 9 LT 139; A.G. v Kingston-on-Thames Corporation (1865) 34 LJ Ch 481; Cator v Lewisham Board of Works (1864) 5 B & S 115 127; Goldsmid v Tunbridge Wells Improvement Commissioners (1866) 1 Ch App 349 352; A.G. v Richmond (1866) LR 2 Eq 306; A.G. v Leeds Corporation (1870) 5 Ch App 583; A.G. v Dorchester Corporation (1905) 93 LT 290; Harrington v Derby Corporation [1905] 1 Ch 205; Foster v Warblington Urban Council [1906] 1 KB 468 CA; Owen v Faversham Corporation (1908) 72 JP 404; 73 JP 33 CA; Price's Patent Candle Co. v London County [1908] 2 Ch 526 CA.

78. (1858) 4 K & J 528 at 543.

79. (1870) 39 LJ Ch 254; LR 5 Ch 587 (n.).
Appeal. 80 Lord Hatherley LC said that it would be inconsistent with the powers given (to drain into the river without creating a nuisance) to hold that the parties were not to be restrained from creating a nuisance. 81 The Lord Chancellor observed that according to the contrary construction of the Act, there may have been a number of people who might have had a serious injury inflicted upon them and said that that was not a rational or reasonable construction. 82

In a third river pollution case, Price's Patent Candle Co. v London County Council 83 Neville J rejected the argument that the defendants could rely on a case of necessity, for they were expressly prohibited from creating a nuisance. The Court of Appeal agreed. Cozens-Hardy MR said:

[If a] statute expressly confers a power but adds a proviso that no nuisance must be created, it is no defence to say that the work, in truth, cannot be done without creating a nuisance. 84

Kennedy LJ observed that if it were impossible or very difficult for the defendants to maintain the drainage without statutory powers, such powers would probably be

80. (1870) LR 5 Ch at 583.
81. (1870) LR 5 Ch at 593.
82. (1870) LR 5 Ch at 593.
83. [1908] 2 Ch 526.
84. [1908] 2 Ch at 544.
given by the legislature subject to compensation for interference with private rights. 85

The principle that a nuisance clause imposes strict liability has been applied by the Court of Appeal 86 and recognised by the House of Lords 87 in cases concerning nuisances created by producers of gas or electricity.

In Shelfer v City of London Electric Lighting Co. 88 Lord Halsbury LC expressly declined to accept the contention that notwithstanding a nuisance clause, the use of all skill and care was sufficient or that nuisances necessarily created by the carrying on of the statutory undertaking were authorised.

Lord Halsbury's view was expressly applied by Collins MR in Midwood v Manchester Corporation. 89 That case closely resembles the kind of case with which we are here concerned. The defendant Corporation - the under-

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85. [1908] 2 Ch at 550.
86. Shelfer v City of London Electric Lighting Co. [1895] 1 Ch 287; Jorideson v Sutton, Southcoates and Drypool Gas Co. [1899] 2 Ch 217; Midwood v Manchester Corporation [1905] 2 KB 597.
88. [1895] 1 Ch 287 at 309.
89. [1905] 2 KB at 606, 607.
takers of the electricity supply - had their mains in the streets. Somehow the insulation of the conductors failed; a short circuit took place and the heat so generated volatilized the bitumen in which the main was laid, which gave off an inflammable gas. The gas accumulated and presently found its way into the house adjoining the plaintiff's, where it exploded and caused the fire by which the plaintiff's property was damaged. Collins MR said: "If that was not a nuisance, I do not know what would be one." The defendants were held liable though negligence was not relied on.

In the course of delivering his judgment in Midwood v Manchester Corporation, Mathew LJ explained the imposition of strict liability upon the defendants by the legislature in the following terms:

A concession is granted to the undertakers, giving them the right to carry on a dangerous business, to which latent risks may be incidental that cannot be prevented by any degree of care; and, that being so, it was thought reasonable that those who are empowered to carry on that business for their profit should have to bear the inevitable loss arising from such risks.

90. [1905] 2 KB at 605.
91. [1905] 2 KB 597.
92. [1905] 2 KB at 610.
Strict liability first appears to have been imposed on a gas supply authority for an escape of gas upon the basis of a nuisance clause in *Batcheller v Tunbridge Wells Gas Co.* where Farwell J rejected evidence tendered to show that the escape of a certain amount of gas was unavoidable and held that the defendants had no statutory authority to create a nuisance.

Liability was imposed without proof of negligence upon the defendant company for the escape of water from its mains in *Charing Cross Electricity Supply Co. v Hydraulic Power Co.* where the Court of Appeal followed its earlier decision in *Midwood v Manchester Corporation.*

The nuisance clause provided, in brief, that nothing in the empowering Act should exempt the company from any proceedings in respect of any nuisance caused by them. Bray J held that the effect of the section was

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93. (1901) 84 LT 765.
94. Following Jordeson v Sutton, Southcoates and Drypool Gas Co. [1899] 2 Ch 217.
95. [1914] 3 KB 772.
96. [1905] 2 KB 597.
97. The full text read: "Nothing in this Act shall exempt the company from any indictment, suit, action, or other proceeding at law or in equity in respect of any nuisance caused by them."
You may put your pipes on this land, but you are not to be entitled by reason thereof to any protection against claims by other persons who have sustained injuries arising from any actionable nuisance which you may commit, and, therefore, if it be shown that the plaintiffs have sustained an injury by an actionable nuisance committed by the defendants, then they have no protection.98

A similar view of the law has been taken in Ireland and applied in respect of the escape of gas from a Corporation's mains. In Shell-Mex v Belfast Corporation99 Porter LJ referred to the nuisance clauses contained in the Gasworks Clauses and Electricity Supply Acts and said:

Our law regards gas and electricity as dangerous things which cannot be manufactured, transmitted or used without very considerable risk of injury and damage, and therefore undertakers who cause a nuisance in the exercise of their statutory powers, privileges and duties, are subject to the same common law liability as an ordinary citizen.1

However, in the face of the English courts' refusal to compromise private rights, Australian2 and

98. [1914] 3 KB at 786.
99. [1952] NI 72 CA.
1. [1952] NI at 75.
2. Fullarton v North Melbourne Tramway and Lighting Co. (1916) 21 CLR 181 at 188 per Griffith CJ.
New Zealand courts have suggested that a nuisance which "necessarily" results from the exercise of statutory powers is not prohibited by a nuisance clause.

Thus in Irvine v Dunedin City Corporation Myers CJ held that a nuisance clause could not apply without modification to every public nuisance, for "it would be in hopeless conflict with the statutory provisions authorising the construction and maintenance of public works". The illustrations given of such a conflict are not convincing. In any event, the court held that the escape of water from burst mains was not a "necessary" incident of the exercise of powers to provide a water supply. On this view, the limitation, even if sound, is of no importance in the present context.

3. Irvine v Dunedin City Corporation [1939] NZLR 741 (obiter); Referred to, but not actually applied (cf. headnote) in Nobilo v Waitemata County [1961] NZLR 1064 at 1069 per Haslam J. See also Powrie v Nelson City Corporation [1976] 2 NZLR 247.

4. The headnote suggests that an "inevitable" nuisance is similarly not prohibited and this appears to have been accepted by Haslam J in the case just noted, but this is supported only by the judgment of Smith J, and the learned judge was clearly in error in thinking that the principle of non-liability for inevitable nuisances, propounded in the Farnworth case, applies where there is a nuisance clause.

5. [1939] NZLR 741.


7. The erection of poles in streets, the construction of sewerage or drainage systems, the laying of water mains under private lands; the first simply need not be a nuisance, the second is in direct conflict with the English cases previously discussed in this paper, the third is more in the nature of a trespass for which compensation would be available.
It is of interest to note in passing that the Court of Appeal appears to have been influenced by reasoning found in earlier cases which it had in other respects overruled. The court seems to have adopted in relation to "necessary" nuisances the reasoning used by earlier courts in a wider context in relation to nuisances generally:

If the act done is authorised by the statute then, although apart from the authority given by the statute it would be a nuisance, it cannot be a nuisance within the meaning of [the nuisance clause].

The fallacy here lies in the failure to recognise that the nuisance clause qualifies the general authorisation granted by the statute; if an act creates a nuisance, it is not authorised, whether or not the nuisance is "necessary".

(c) Mandatory Powers

The long line of cases already cited concerning sewerage authorities shows that a statutory body is strictly liable under a nuisance clause, whether its powers are granted in the mandatory or permissive form, for the Public Health Acts imposed upon the local health authority a duty to drain the district.

8. See p.228 n.22.
In *A.G. v Birmingham Borough Council* Page-Wood VC said in an oft-cited passage:

> It is true that [the Defendants] are compelled by the Act thoroughly to drain the town; but they are also compelled so to drain it as to bring themselves within the provisions of the Act, which says that it shall not be lawful for them to do anything which at common law would be deemed to be a nuisance. How the town is to be thoroughly drained without causing a nuisance is the business of the Defendants to discover.

That a statutory duty to carry on a nuisance creating enterprise does not derogate from the strict liability imposed by a nuisance clause was not questioned until doubt was cast upon the rule, less than convincingly, by the Court of Appeal in 1963.

In *Dunne v North Western Gas Board* the court held that notwithstanding the presence of a nuisance clause, in familiar form, the defendant Board was not liable in the absence of negligence for damage caused by the escape of gas from its mains. The Court in effect extended the scope of the mandatory/permissive powers distinction supported by only meagre authority, as has been shown, where there is no nuisance clause, to the quite difference case where there is such a clause. It said:

10. (1858) 4 K & J 528.
11. (1859) 5 K & J at 543.
Where there is a mandatory obligation with a saving or nuisance clause, as here, or without one as in the Chelsea Waterworks case, there would be, in our opinion, no liability if what had been done was that which was expressly required by statute to be done or was reasonably incidental to that requirement and was done without negligence.\textsuperscript{14}

The court distinguished Midwood v Manchester Corporation and Charing Cross Electricity Supply Co. v Hydraulic Power Co.\textsuperscript{16} on the ground that the defendants in those two cases had permissive and not mandatory powers. It appears to have been influenced by the decision in Smeaton v Ilford Corporation,\textsuperscript{17} where, as recorded earlier,\textsuperscript{18} it was held that a duty not to create a nuisance imposed only a duty of care; but a provision of that kind is quite different from a saving clause and Smeaton's case is of no authority on the point. Thus the opinion expressed by the Court of Appeal in Dunne's case is without authoritative support; indeed, it runs counter to the construction placed on nuisance clauses for over a century.

Some judicial support for this criticism of Dunne's case may be found in the subsequent case of Pearson v North Western Gas Board\textsuperscript{19} where the plaintiff also sought to recover damages against the North Western

\textsuperscript{13.} 70 LT 547 CA.
\textsuperscript{14.} [1964] 2 QB at 835.
\textsuperscript{15.} [1905] 2 KB 597 CA.
\textsuperscript{16.} [1914] 3 KB 772.
\textsuperscript{17.} [1954] 1 Ch 450.
\textsuperscript{18.} See pp 38 and 217.
\textsuperscript{19.} [1968] 2 All ER 669.
Gas Board in respect of injury caused by the escape of gas from mains. In the fact of the decision in Dunne's case, counsel for the plaintiff felt obliged to concede that he could not succeed under the rule in Rylands v Fletcher or on the ground of Nuisance. The action for negligence failed. Referred to counsel's concession, Rees J commented in the course of his judgment:

> Whether at another time and in the highest tribunal the Dunne case will find favour as a matter of principle and when examined afresh in the light of the decision also of the Court of Appeal in Charing Cross, West End and City Electricity Supply Co. Ltd v London Hydraulic Power Co. is not for me to express an opinion.20

Accordingly, Dunne v North Western Gas Board21 awaits review.

(d) Private Nuisance

Prior to 1939 there were a number of New Zealand decisions in which it was stated by way of dicta that the nuisance clauses in the Municipal Corporations Act did not extend to private nuisances (for which, it was thought, statutory compensation was available) but prohibited only public nuisances.22

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20. [1969] 2 All ER at 672.
22. Bank of New Zealand v Blenheim Borough (1885) NZLR 4 SC 10 at 12 per Prendergast CJ; Lyttle v Hastings Borough [1917] NZLR 910 at 917 per Edwards J; Fortescue v Te Awamutu Borough [1920] NZLR 281 at 288 per Stout CJ; O'Brien v Wellington City Corporation [1933] NZLR at 1114, 1115 per Ostler J.
However, these *dicta* must now be taken to have been overruled by the decision of the Court of Appeal in *Irvine v Dunedin City Corporation*\(^23\) where the court considered the weight of the earlier cases and the majority preferred the contrary view, that the nuisance clauses extend to both public and private nuisances.\(^24\)

The restriction of nuisances clauses to public nuisances has not found favour in the English courts. The point was argued before the Court of Appeal on one occasion\(^25\) but appears to have been summarily rejected by Lindley MR as a 'minor contention' to which the court found it unnecessary to refer in view of the wide view taken of the nuisance clause.\(^26\)

However, it is noted that a distinguished Australian judge has expressed the view that liability under a nuisance clause is limited to plaintiffs who have an interest in land,\(^27\) but this view appears to be without foundation.

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24. [1939] NZLR at 752 et seq.
26. [1899] 2 Ch at 237.
Specific Authority

The New Zealand Court of Appeal has imposed a limitation upon nuisance clauses which might conceivably affect the kind of case with which we are here concerned and which should not in any event be overlooked.

The effect of the decision in New Brighton Borough v A-G\(^{28}\) is that the true effect of a nuisance clause is that general authority to construct public works is not a statutory authority to construct any work which apart from that authority would be a nuisance, but where specific authority or consent is given under any statute for the construction of a particular work in a particular place and where the creation of such nuisance is a criterion in the granting of or in imposing conditions on such authorisation, then the nuisance will be regarded as authorised and outside the nuisance clause.\(^{29}\) Thus, an express prohibition is negatived by an implied authorisation. Such a construction grants to the local authority or government department, as the case may be, a discretion as to the creation of nuisances and pays scant regard to the conservation of private rights. The strong dissenting judgment of MacGreagor J is to be preferred.

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29. Thus where consent had been given by the Governor, pursuant to the empowering Act, to the construction of a bridge which would otherwise amount to a public nuisance, such nuisance was held to be authorised and outside the nuisance clause, although such clause prevented the construction of the bridge under the general powers to construct public works.
(f) Benning v Wong

In Benning v Wong the High Court of Australia declined to hold the defendant gas company strictly liable for the escape of gas from its mains, notwithstanding the presence of a nuisance clause in the empowering Act. While Windeyer J, dissenting, was prepared to hold that a nuisance clause prevented the gas company from sheltering behind its statute, the majority preferred the view that there was no liability without negligence. The principles upon which this aspect of the decision was determined warrant specific mention.

McTiernan and Owen JJ were of the opinion that the issue of the construction of the nuisance clause was not raised by the pleadings, that the declaration raised counts of Negligence and Rylands v Fletcher, but not Nuisance. But the better view is that the Rule is a species of Nuisance and the nuisance clause was accordingly relevant.

Owen and Menzies JJ also took the view that statutory bodies are altogether beyond the scope of strict liability and from this doubtful premise the learned

32. The pre-Judicature Act form of pleadings then survived in New South Wales.
33. This point is discussed at p.234.
judges reasoned that as the nuisance clause did not "create" a cause of action where none existed at common law, only negligence was actionable. Again, the better view is statutory bodies are prima facie within the rules of a "nuisance clause" precludes the body from invoking the statute as a defence to an action in Nuisance.

Barwick CJ conceded that little, if any, significance would attach to a nuisance clause unless it was read as maintaining strict liability, but nonetheless suggested that there was no liability for nuisance proven to be unavoidable even by the use of due care and skill and that a nuisance clause was merely "a useful emphasis included in a statute for more abundant caution". It is to be noted, however, that the Chief Justice found it unnecessary to decide the point.

It will be seen, therefore, that insofar as the decision turned upon a point of pleading, it is of little relevance, and that insofar as the case was determined upon alleged principles of substantive law, it is unsatisfactory.

34. Owen J at p.496; Menzies J at p.481.
35. (1969) 43 ALJR at 469.
C. Rylands v Fletcher

1. Prima Facie Liability

It is of interest that in *Cattle v Stockton Waterworks Co.* 37 Blackburn J passed over an opportunity to express an opinion on the question whether the rule in *Rylands v Fletcher* applies to a statutory water supply authority. In that case water had escaped from a main which had been laid under a turnpike road. The plaintiff had been engaged by the owner of the land adjoining the road to construct a tunnel under the road. As a consequence of the escape the work was slowed and the plaintiff suffered financial loss. It was contended for the plaintiff before the Court of Queen's Bench that according to the doctrine laid down in *Fletcher v Rylands*, the defendants were under an obligation to keep in the water in the pipes and therefore it was not necessary to prove negligence in fact in the defendants, though negligence was also alleged. Defendants' counsel contended that the doctrine of *Fletcher v Rylands* did not apply to such a case, where the defendants were authorised by statute to make and maintain the pipe.

The judgment of the Court was delivered by Blackburn J who said that if it were necessary to decide these questions, the Court would require further time to

37. (1875) 10 QB 453.
consider, as the judges were not as then quite agreed as to the principle of law applicable to such a case. The question whether the landowner might himself have maintained an action was purposely left undecided. The case was determined upon the ground that the damage complained of, financial loss, was in any event too remote.

The questions left open in Cattle v Stockton Waterworks have not been finally resolved by judicial decision. In particular, it is not clear whether a local authority exercising statutory powers is altogether outside the rule, or whether it is prima facie within the rule, subject to the defence of statutory authority. In Smeaton v Ilford Corporation Upjohn J declined to express a concluded view on this question. However, the law may be inferred from the approach which the courts have actually taken in determining the question of liability where the rule has been pleaded.

There are two decisions which are inconclusive in this regard. In Green v Chelsea Waterworks the defendants' water main had burst, flooding the plaintiff's premises. The Court of Appeal held that the rule in Rylands v Fletcher did not extend to companies having statutory authority to carry water. In Price v South Metropolitan Gas Co. Lord Russell CJ stated that the rule had no

38. [1954] 1 Ch 450 at 478.
39. (1894) 70 LT 547.
40. (1896) 65 LJ QB 126.
application to a gas company having statutory authority to lay pipes. Even if these cases are read as excluding the rule altogether, there is, as shall be shown, later authority against it.

The preponderance of authority supports the view that statutory authorities are prima facie liable under the rule, subject to the defence of statutory authority. That was the terminology used by Lord Coleridge CJ in Dixon v Metropolitan Board of Works\textsuperscript{41} a case concerning a drainage authority. It is clearly the approach adopted by the Privy Council in Northwestern Utilities v London Accident and Guarantee Co.\textsuperscript{42}

In that case the liability of the defendants was ultimately based on a plea of negligence, but in the course of delivering its opinion, the Judicial Committee made certain observations on the question of liability which made it clear that the statutory gas undertaker was to be treated as prima facie within the Rule in Rylands v Fletcher, though proof that the damage was not brought about by negligence would be a good defence.\textsuperscript{43}

The judgment of Evershed MR in the Pride of Derby case also follows this reasoning.\textsuperscript{44} Furthermore, liability has actually been imposed under the rule

\textsuperscript{41} (1881) 7 QBD 418.
\textsuperscript{42} [1936] AC 108.
\textsuperscript{43} [1936] AC at 118 119.
\textsuperscript{44} [1953] 1 Ch 149.
(pursuant to nuisance clauses) against statutory authorities for escapes in three cases. Thus it was applied against a company for an escape of gas in Batcheller v Tunbridge Wells Gas Co.\(^{45}\) and against a municipal authority in Irvine v Dunedin City Corporation\(^{46}\) and a commercial supplier in the Charing Cross case\(^{47}\) for escapes of water. In addition, the rule has been applied against sewerage authorities on at least four occasions where liability was imposed for injury caused by the discharge of sewage.\(^{48}\)

Particularly having regard to the Northwestern Utilities case\(^{49}\) the point might have been taken as settled. However, an element of uncertainty was introduced into the law by the decision of the High Court of Australia in Benning v Wong.\(^{50}\) The Court was sharply divided. The minority preferred the approach taken by the Privy Council. The majority, with less than persuasive reasoning and deriving support from Green and Price, concluded that the rule had no application whatever to statutory authorities such as the defendant gas company.

45. (1901) LT 765. See also Pearson v North Western Gas Board [1963] 3 All ER 196.
46. [1939] NZLR 741.
47. [1914] 3 KB 772.
48. Hobart v Southend-on-Sea Corporation (1906) LJ KB 305; Foster v Warblington UDC [1906] 1 KB 648 (CA); Jones v Llanrwst UC [1911] 1 Ch 393; Haigh v Deudraeth RDC [1945] 2 All ER 661.
49. [1936] AC 108.
2. Nuisance Clauses

Whether a nuisance clause imposes or retains liability under the rule in Rylands v Fletcher should logically depend on whether the Rule is to be regarded as a species of Nuisance or as a distinct tort. In this context, however, it seems that the differences between the two kinds of liability are irrelevant; the Rule and the law of Nuisance (public and private) have similar effect and may be invoked indifferently, even in the case of an isolated escape. This is shown by the Charing Cross case, where the Court of Appeal held the defendant hydraulic power company liable for the escape of water on the grounds of both Rylands v Fletcher and Nuisance. Although the Court did not expressly state that the nuisance clause applied to the Rule, this is clearly implied, for the Court held that Rylands v Fletcher applied and rejected two grounds of distinction suggested.

In Irvine v Dunedin City Corporation the Rule was applied in similar circumstances. Smith J said that "the very presence of a nuisance clause seems to imply that the Legislature regards a municipal corporation as a fit subject for the application of the doctrine of Rylands v Fletcher". Support for this view may

51. Conveniently listed by Winfield Torts 8th ed at 435.
52. [1914] 3 KB 772.
53. [1939] NZLR 741.
54. [1939] NZLR at 777.
be derived from the judgment of the Privy Council in Northwestern Utilities v London Guarantee and Accident Co.\textsuperscript{55} where it was held that it was a question of construction whether a statutory undertaker remains subject to the strict and unqualified rule in *Rylands v Fletcher*\textsuperscript{56}. In Irvine's case, Johnston J went so far as to hold that the Privy Council had "determined" that the inclusion of a nuisance clause in such a statute limits the immunity statutory authority would otherwise give and re-establishes the common law doctrine as determined by *Rylands v Fletcher*\textsuperscript{57}.

This is also the view rejected by the majority of the High Court in *Benning v Wong*\textsuperscript{58} (on grounds mentioned earlier\textsuperscript{59}) but substantially taken by Windeyer J (dissenting), who rejected the contention that the relevant nuisance clause related only to actions for nuisance as understood at the time of the passing of the relevant empowering Acts, 1837 or 1858, and did not comprehend the *Rylands v Fletcher* kind of nuisance as expounded by the Exchequer Chamber in 1866. The learned judge said:

\textsuperscript{55.} [1936] AC 108.  
\textsuperscript{56.} [1936] AC at  
\textsuperscript{57.} [1939] NZLR at  
\textsuperscript{58.} (1969) 43 ALJR 471.  
\textsuperscript{59.} See p. 231.
... [T]hat is, I think, contrary to principle and in conflict with authority. Moreover, it does not fit the facts of this case; for by keeping up the pressure of gas in its pipes the Gas Company created and maintained a nuisance. It is true that every case now falling within the principle of Rylands v Fletcher would not before that decision have been considered an actionable nuisance. But nuisance and Rylands v Fletcher overlap. ... Such distinctions as there are, appear to me irrelevant to the immediate question. 60

Barwick CJ disposed of the same point by saying that "as of the date of the decision in Rylands v Fletcher, the suggested distinction would have no substantial validity." 61

The absence of continuity or recurrence in the escape of the dangerous thing or substance which might distinguish the cause of action from nuisance, strictly so-called, having no bearing whatever, in my opinion, upon the requisites of a defence or justification. 62

This also seems to be the law in Northern Ireland. In Shell-Mex & B.P. Ltd v Belfast Corporation 63 it was held by the Court of Appeal, following the Midwood and Charing Cross cases, that as the defendants were subject to the provisions of a nuisance clause, they could not claim exemption on the ground of statutory authority from the strict liability imposed by the rule in Rylands v Fletcher. 64

60. (1969) ALJR at 492.
63. [1952] NI 72 CA.
64. [1952] NI at 75 per Porter LJ at p.86 per Black LJ.
It seems too, that a nuisance clause will extend to all escapes which will found an action in Rylands v Fletcher, even where the acts of the defendant do not in the strictest sense amount to the "creation" of a nuisance. 65

D. Special Statutory Defences

Quite apart from the general defence of statutory authority, the Legislature may specifically provide that the risk of damage from an escape from a public utility service should be borne not by the local authority but by the persons whose property is at risk.

In New Zealand the Legislature has granted protection of this kind to municipal corporations. It is thus provided that a corporation may grant its consent (where required) to the construction of any cellar subject to a condition that neither the owner nor the occupier, nor their successors in title, shall be entitled to claim against the corporation for "any damage caused to the cellar or any property therein arising, whether directly or indirectly, from any defect in any water-supply system, sewerage system, or other public utility service under the control of the Council." 66


66. S203A Municipal Corporations Act 1954. (A memorandum must be registered against the title; for the procedure, see s203A(2).)
Such statutory protection might be thought justifiable upon the grounds that the extra-ordinary risk created by cellars, particularly where used for the storage of valuable goods, ought to be born by the owner or occupier. Such escapes may be guarded against by design, in construction, and by special precautions, such as the provision of automatic pumps. Moreover, risks of this kind are insurable and the owner has notice of the risk recorded on the title.

E. Burden of Proof of Negligence

Where negligence is pleaded as the cause of action, then, following the general rule, the burden of proof falls upon the plaintiff. But where the cause of action is pleaded in the torts of strict liability and statutory authority is pleaded as a defence, the defendant must affirmatively establish that defence by proving that the damage complained of was an inevitable consequence of the exercise of the statutory powers, that there was an absence of negligence.67

This rule, which gives a valuable tactical advantage to a plaintiff who pleads his case carefully, was affirmed by the House of Lords in Manchester Corporation

67. Failure to distinguish these two kinds of case led to the patently erroneous decision in Madell v Metropolitan Water, Sewerage and Drainage Board (1935) 36 SR (NSW) 68.
v Farnworth.\textsuperscript{68} The rule was applied by the Privy Council in the Northwestern Utilities case\textsuperscript{69} and by the English Court of Appeal in Hanson v Wearmouth Coal Co. and Sunderland Gas Co.\textsuperscript{70} and received support in the New Zealand Court of Appeal in Irvine v Dunedin City Corporation.\textsuperscript{71}

In Benning v Wong,\textsuperscript{72} however, the majority of the High Court of Australia preferred the view that statutory authority precluded the application of strict liability altogether and that accordingly the burden of proof of negligence fell on the plaintiff.

\textsuperscript{68} [1930] AC 171 at 183 per Lord Dunedin, at p.187 per Viscount Sumner, at p.206 per Lord Blanesburgh. Applied Provender Millers (Winchester) Ltd v Southampton County Council [1940] 1 Ch 121 CA.

\textsuperscript{69} [1936] AC 108 at 119, 121 per Lord Wright.

\textsuperscript{70} [1939] 3 All ER 47.

\textsuperscript{71} [1939] NZLR 741 at 784 per Smith J.

\textsuperscript{72} (1969) 43 ALJR 467.
In addition to the general exposition of the law which forms the foundation of this work, two features of judicial reasoning have become apparent which also justify some comment by way of conclusion, viz. the limitations of tortious remedies in this context (as evidenced by the various aspects of the doctrine of nonfeasance) and the differing attitudes toward strict liability. These factors, upon which there has been much difference of opinion, have, in various guises, affected or determined the decisions in particular cases.

A. Conclusions of Law

1. Breach of Statutory Duty

The courts have consistently refused to allow actions for breaches of statutory duties to construct sewerage systems. It has been held in such cases that the statutory remedy usually provided is more appropriate, notwithstanding that the statutory remedy does not provide compensation for damage caused. The courts foresaw that if such actions were allowed, many actions might be brought by persons seeking to compel local authorities to provide their properties
with drainage, whereas their obligation is to the community at large. It was implicitly recognised in these cases that the provision of satisfactory drainage and sewerage for all inhabitants was then beyond the resources of most local authorities. This problem has now been greatly diminished, but the economic and political factors associated with the expenditure of large sums of public moneys make it unlikely that the courts will ever be prepared to review these questions in context of an action in tort. These rules, and the reasoning upon which they are based, are inappropriate where a person has suffered positive damage in consequence of an escape due to the local authority's neglect. They have nonetheless been applied to that kind of situation.

A different attitude has prevailed in regard to actions for breaches of statutory duties relating to the maintenance of sewerage and drainage systems. These duties were readily recognised as having been imposed in order to protect private persons from unnecessary damage. In the case of artificial drains, the common law duty to take care is duplicated. In the case of natural watercourses, such duty goes beyond what the common law requires. There could be no suggestion that the admission of such actions would confer any advantage upon the plaintiff, except to compensate him for loss caused. Such duties are enforceable against urban and rural drainage authorities.
Whatever the nature of the obligation, statutory duties are almost invariably expressed as requiring strict compliance, but the courts have held that breaches of duty are actionable only upon proof of negligence. The reasoning leading to this rule illustrates the continuing pre-occupation with fault.

It is now well established that the mere failure to exercise statutory powers, as distinct from duties, is not actionable. Where, however, it is not clear whether the statute granted a power or imposed a duty, it seems that the courts will be ready to find that an obligation was intended.

2. Negligence

In regard to statutory bodies there is an extended meaning of negligence which in essence means that the question of negligence is to be determined having regard to any special statutory powers granted. Where the acts of a sewerage authority give rise to the possibility of damage, this principle would seem to require the authority to exercise its powers of construction; an unreasonable failure to do so would amount to culpable negligence. This broad principle might be prayed in aid of the view that arguments based on nonfeasance have no application where some basis for the imposition of a common law duty is established.
In constructing additional drains and sewers, local authorities must pay proper regard to the consequences of the acts of construction for the whole system. The drain constructed must be of sufficient capacity for its intended purpose and the recipient drains must be of sufficient capacity to receive the additional flow. This responsibility extends to all alterations in or modifications of the system. Where, however, the system becomes inadequate in consequence of development beyond the control of the local authority, it is a matter of some doubt whether the authority is bound to improve the system to meet the increased burden. There is English authority against liability, but the point is open for reconsideration. Where negligence is proved, there is no substantial reason why a private individual should be denied a remedy for damage suffered. The only satisfactory explanation for the fact that the question was ever raised at all appears to be that the Courts failed to perceive the limited scope of the so-called nonfeasance rules. Ordinary principles of liability are applicable in regard to the maintenance of drainage systems, whether in regard to the physical state of the drain itself or to its state of cleanliness. A drain need not be kept entirely free of silt, so long as it is sufficiently free to carry any flow that might be reasonably anticipated. The requirement of cleanliness extends to all artificial drains, whether urban or rural, and to natural watercourses where the
necessity for the cleansing was caused by the acts of the authority.

In constructing and maintaining its various systems, a local authority must make provision for ordinary conditions but not for extraordinary natural phenomena, such as frosts of extreme severity or extraordinary storms or earthquakes.

An authority is not ordinarily required to excavate and inspect underground pipes for defects. Clearly gas and water authorities must promptly attend to any escape which might be discovered. The weight of authority indicates that regular inspections should be made of water mains for escapes and that authorities are not entitled to rely on reports from the general public. Periodic tests for escapes from gas mains might now be expected and authorities will no doubt be required to take advantage of any technological advance which improves their ability to detect escapes of gas.

Where a local authority knows or ought to know that its mains might be disturbed by the activities of third persons, it must take stringent precautions. It must keep itself informed of excavations which might affect its mains and ensure that the mains are properly protected. It is apparent in all the decisions relating to escapes of gas that in view of the danger created by...
escapes, every possible precaution must be taken. This obligation extends to service pipes as well as to mains.

In the case of drainage authorities, the negligent exercise of powers to control communications with the public drains, may give rise to liability.

3. Nuisance

Where an escape of gas or water occurs as the consequence of a burst main, due to a latent defect or some such similar cause, the authority will be prima facie liable for any resulting nuisance. The maintenance of pressure in the main is a sufficient ground of liability, and jointly operating causes, such as subsidence, do not exonerate the authority. But if it can be shown that the fracture was solely and effectively caused by some extraneous force, such as the acts of activities of third persons, that may be a good defence. This state of law represents an unsatisfactory resolution of the conflicting demands of the strict liability associated with Nuisance and of fault liability. The fact that the immediate cause of an escape was the act of a third person is not a compelling reason not to impose liability upon the authority as part of the risk taken in the operation of the system. The principle of compensation would be better implemented by the imposition of liability, leaving the authority
to recover, if it can, from the third party, for the person injured may not have a good cause of action against the third party. ¹

A different view has been taken of sewerage and drainage authorities. While it seems that an escape arising due to the physical condition of drains will attract strict liability, where a nuisance arises due to the inadequacy of the drain or system, it must be shown that the local authority is actually responsible for that state of affairs. An authority is not necessarily responsible for an excess flow through its drains, but such responsibility may be proved. The authority may itself be guilty of acts of which the excess flow is a consequence, or it may be held responsible upon the basis that its control of the system or of building in the locality enabled it to prevent or abate the nuisance. In those limited situations where the local authority is not liable for the creation of such a nuisance, as where it takes over a system from another authority or where the increased usage is uncontrollable, it may become liable if, having the ability to do so, it fails to abate the nuisance. The applicability of the ordinary principles of Nuisance to sewerage authorities has been acknowledged hesitantly, principally because of the

¹. Note that in respect to strict liability the usual form of defence based on the acts of third persons is "Act of a Stranger"; for the more stringent requirements of that defence, which is available in Nuisance, see p.
association of passive conduct with nonfeasance. More will be said on this aspect later, but it is to be noted that the conclusions reached here to some extent anticipate the direction of the law, for in certain respects there is presently no degree of certainty.

4. Rylands v Fletcher

Local authorities are prima facie within the rule in Rylands v Fletcher, subject to the defence of statutory authority. The fact that the plaintiff is a recipient of the service provided does not constitute a common interest in or consent to the activity and recovery is not precluded on either of those grounds. The enterprise may be of general benefit to the community but that does not take it outside the ambit of the rule. The rule applies where both parties are licensees, or where one party is a licensee, except where the parties are occupier and licensee of the same land. Sewerage authorities are not exempt merely because they are under a duty to receive sewage, nor are drainage authorities exempt merely because the water remains in the drain for only so long as it takes to pass it on. Gas, water and sewage are substances the escape of which has attracted liability. The supply of gas and water are not activities which can be described as the "natural use" of land, nor is the provision of sewerage, nor land drainage other than the natural flow. Until recently,
the courts have shown a willingness to apply, prima facie, the rule in *Rylands v Fletcher* to local authorities. It is significant that in one material respect the scope of the rule was extended in this context. This tendency may be attributable to an implicit recognition that strict liability is appropriate to enterprises engaged in the bulk supply of gas and water and having a high risk of damage due to escapes. However, the English Court of Appeal has lately indicated that it has some aversion to applying the rule to a gas authority. Furthermore, antipathy toward strict liability is manifest in the law relating to the defence of statutory authority. In these respects, therefore, a conflict of judicial attitude is clearly discernable.

5. **Statutory Compensation**

The scope of compensation provisions is always a matter of construction in each case, but certain principles emerge from the cases which are probably of general application. Compensatable damage need not otherwise have been actionable at common law. Where statutory compensation is provided, the courts will be more ready to hold that the creation of a nuisance is authorised, but compensation does not extend to damage caused in contravention of a nuisance clause. Compensation may extend to damage caused by negligence in the construction of drainage works, including consequential
flooding. But there is a distinction between negligence in the mode of construction, which is compensatable, and negligence in the operation of construction, which is actionable. Where compensation is provided for damage caused in the exercise of statutory powers, common law remedies are available only in exceptional circumstances.

A compensation clause which provides a remedy for damage caused in the maintenance of public works, is not applicable to damage caused by bursts of water mains. In this respect, the courts have sought to avoid construing compensation provisions so as to impose absolute liability for accidental loss. Furthermore, damage caused by escapes from mains may be too remote to be compensatable. In certain limited circumstances, therefore, where a nuisance results from the active construction of drainage works, compensation may be available. Otherwise, it seems, compensation is not available for escapes from the mains of local authorities.

6. Nonfeasance

The courts have resisted all attempts to establish a cause of action in tort against drainage authorities for mere failure to provide drainage works and maintain them in efficient operation. Such inaction (or inadequate action) is categorised as nonfeasance for which no action will lie. The doctrine
is applicable where the damage complained of is properly attributable to the natural situation, whether or not the local authority has made some attempt to deal with it. A different situation arises where artificial drains are brought into existence, for such drains are a potential source of damage and the duty of the authority is to take reasonable care to prevent the escape of water thus accumulated. To provide a drain and fail to take due care of it is negligence in the exercise of statutory powers. The effect of the doctrine is that special statutory powers and duties relating to the provision of drainage do not, in themselves, attract tortious responsibility. Not only is there ordinarily no super-added common law duty to exercise a statutory power, but there is no right of action for breach of a statutory duty. The reasons for these rules have already been discussed.

In the context of the tort of negligence, the actual effect of the doctrine is, upon an analysis of the cases, debatable. The question whether control of a drainage system is sufficient to create a duty to improve an inadequate system, at least where damage is suffered, has yet to be decided. The preferable view is that control gives rise to a common law duty to exercise statutory powers to prevent damage.

In regard to maintenance functions, the position is clear. Nonfeasance is not a good plea, if negligence
is proved, whether the action is upon the statute or upon common law duties.

In Nuisance the problem whether control is a sufficient basis for liability again appears. The imposition of strict liability for creation of a nuisance usually involves some active conduct on the part of the local authority. But where the complaint relates to non-repair, mere passivity, without negligence, may be sufficient. In respect of the inadequacy of drains, not due to active conduct, it seems probable that the courts will hold that liability rests upon continuance, that passive conduct is sufficient but that there must be negligence. In fact, mere passivity in regard to continuing escapes resulting from inadequacy due to development has been admitted as a good defence, but recent cases indicate that that view is no longer tenable, if it ever was.

It seems that some advantage may be gained by pleading the rule in *Rylands v Fletcher*, for the rule may be sufficiently wide and sufficiently rigid to preclude the introduction of notions of nonfeasance. It would be remarkable, however, if, on the broadest view of the doctrine, nonfeasance ruled out the possibility of liability in Negligence or Nuisance but if liability could be established via the route of *Rylands v Fletcher*. 
The number of opportunities for invoking the doctrine of nonfeasance have been considerably diminished by widening conceptions of what is sufficient to constitute misfeasance. In this respect, the various elements of control have provided the key.

Two additional matters might be mentioned. First, where a drain performs a highway function, the highway nonfeasance rule may be invoked. That rule provides an immunity from ordinary principles of liability. Unlike the drainage rules, it excuses local authorities from duties of maintenance; there is no liability for a failure to repair, whether or not negligence is shown. Second, a local authority which inherits a nuisance from its predecessor may be liable notwithstanding its inaction if such liability is transferred by statute.

7. Defence of Statutory Authority

Statutory authority is not a good defence to negligence in the exercise of statutory powers or in the performance of statutory duties. Negligence is not authorised.

In regard to strict liability, the law is difficult and confused. The following conclusions as to the present state of the law are drawn according to the predominance of authority and are confined to the liability of statutory bodies for escapes.
Certain features of the empowering Acts have been taken as indicia of whether interference with private rights is authorised. There is authority for the proposition that where a local body acts pursuant to permissive powers, there is strict liability, whereas if the authority acts pursuant to a mandatory obligation to carry on the enterprise in question, it is liable for negligence only. In contrast, there is a competing rule which indicates that where a drainage authority is under an obligation to provide effectual drainage, that duty cannot be called in aid in reduction of common law liability. The point is subject to considerable doubt. The view is commonly taken that statutory authorisation, whether in the mandatory or permissive form, may be a defence to the torts of strict liability and, to the extent that any trend in the cases is discernable, it seems that this view is likely to prevail. The explanations attempted of these rules are unsatisfactory and the conflicting decisions may be seen as the product of opposing viewpoints as to the merits of strict liability.

In respect of compensation provisions, the predominant view is that the provision of compensation is an indication that the nuisance was authorised. For reasons already mentioned, this factor is likely to arise only in regard to drainage works.
The inevitability of a nuisance occurring in consequence of the exercise of statutory powers also suggests that the damage was contemplated by the Legislature and accordingly impliedly authorised. The criterion of inevitableness also governs the extent of the defence and the weight of authority favours the view that the onus is on the defendant to prove that the nuisance was inevitable, in the relevant sense, in the particular case.

A critical assessment of the decisions relating to escapes from water and gas mains, having in mind the utility of strict liability in providing compensation for loss, leads to the conclusion that the courts have been too ready to imply authorisation of nuisances from express authorisation of the activity giving rise to the nuisance. Insufficient attention has been paid to the nexus between the activity and the nuisance. It is one thing to hold\(^2\) that where a nuisance is the intrinsic direct, immediate and continuous result of the authorised activity, that it is impliedly authorised; it is another to hold that the relatively remote and uncertain prospect of spontaneous escape from gas and water mains justifies the implication that such nuisances are condoned by the Legislature. There is

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2. As in the railway cases.
some (though not conclusive) justification for the rule in the former case insofar as an injunction might be obtained and accordingly the legislature's intention (that the activity should be carried on) might be defeated, but in the latter class of case there would be insufficient grounds for an injunction. Even if there is any actual inconsistency between statutory authority and a continuing liability to an injunction, or even to damages, there is little or none in regard to occasional awards of damages arising from isolated escapes. That there is no necessary or unresolvable inconsistency in the respects indicated is shown by the fact nuisance clauses may be given full effect without any apparent illogicality.

The insertion of a nuisance clause in the empowering Act puts the question of strict liability beyond question. Nuisances, such as escapes, are thereby actionable without proof of negligence. It is no defence that the powers conferred cannot be exercised without creating a nuisance. The courts have from time to time noted that the effect of such clauses is that the authority must bear the inevitable loss arising in consequence of the risks taken incidentally to carrying on the enterprise. There is a long line of sewerage cases which supports the view that there is strict liability under a nuisance clause even where the defendant carries on the activity under mandatory powers. A recent decision
to the contrary was apparently decided per incuriam as
to this aspect and in any event awaits review.

The preponderance of authority supports the view that
local authorities are prima facie liable under the rule
in *Rylands v Fletcher*, subject to the defence of
statutory authority. For the purposes of the construction
of nuisance clauses, the rule is regarded as a species
of the law of Nuisance and a nuisance clause imposes
liability under the rule.

Finally, in regard to the defence, where the defence
is pleaded the onus is on the defendant to prove the
absence of negligence. That rule confers on the
plaintiff a major tactical advantage.

**B. Limitation of Tortious Remedies : Nonfeasance**

The doctrine of nonfeasance is primarily concerned with
the failure to provide a public service, a convenience
or a benefit, in exercise of a statutory power or duty.
The refusal of the courts to admit actions in tort
based on the mere failure to exercise powers (or to
perform duties) to construct sewerage systems is
justifiable having regard to the factors which may
affect such a decision on the part of a local authority.
On the other hand, whilst a remedy in damages may be
inappropriate, proven neglect on the part of a local
authority to its statutory duties may, in the absence
of a satisfactory statutory remedy, legitimately be
made the subject of a mandatory order.

In considering the attitude of the courts to actions brought by private persons seeking the provision of public sewers, appropriate weight must be given to the administrative and financial difficulties faced by public authorities, particularly in the nineteenth century when modern drainage and sewerage systems were first developed. Sawer has rightly concluded that the courts have "shown sociological as well as doctrinal acumen" when handling the large volume of litigation consequential upon such development. 3

Where a nuisance is created in consequence of the operation of a sewerage system, a private person should not be deprived of his common law remedy merely because expenditure upon capital works to improve the system is the only practical alternative to the cessation of the service provided to the community or part of it. The fact that the abatement of a nuisance may require the exercise of statutory powers of construction is of itself not a sufficient ground for the denial of a remedy. In such a case the reasoning adopted in the nonfeasance situation is inappropriate.

If a public body takes over from another the control of a badly constructed or inadequate drainage system, the doctrine of nonfeasance may reasonably be invoked where

the only effectual course of action open is the provision in whole or in part of a new system, provided that the authority has not been guilty of such delay as would justify a finding of negligence.

In the case of public roads, historical reasons have led to the adoption of the general rule that in relation to the state of repair, the local authority is liable for misfeasance but not for nonfeasance. But there is no reason why such a plea should be available to exempt sewerage and drainage authorities from liability for damage caused by a failure to give proper attention to normal maintenance. There is no reason in principle why an authority which has the control of a system of drains or pipes should not be obliged to take reasonable care to see that they do not cause a nuisance so far as this can be done by ordinary upkeep and repair.

In regard to the non-exercise of statutory powers, the courts may now be less receptive to arguments founded upon nonfeasance than formerly. The common law conception of control has gained an as yet limited acceptance as a basis for the imposition of a duty to exercise statutory powers. It remains to be seen whether this reasoning will be extended from inspectorial functions to functions relating to the construction and maintenance of public works. Such extension may be precluded by the relatively high administrative and financial burdens

involved in the exercise of the latter kind of power.

It was a feature of judicial thinking of the nineteenth century, influenced by the prevailing economic doctrine of lassez faire, that injury to person and property is bound to occur as part of the price of an increasingly industrialised society and that the only persuasive reason for shifting losses is fault. It was thought that only where a person had shown an intention to cause such damage, or was negligent in failing to exercise a due standard of care in his activity, should an action against him succeed, lest productive enterprises be discouraged. Compensation for morally culpable conduct aside, it was argued that strict liability for incidental damage would be financially too burdensome. This latter argument was especially persuasive in the case of local authorities, which were notoriously short of funds.

However, while it is accepted that some losses to person and property will inevitably occur in modern society but the notion is rejected that the criterion of fault is appropriate or wholly appropriate for the legal determination of how these losses ought to be borne, such losses ought to be borne by the agency which is in the best position to absorb them or spread them across the community.
C. Strict Liability Appraised

What is needed ... is a reappraisal of the scope and function of strict liability in the law today and the imposition of strict liability upon a defendant whenever the risk of injury or damage ought rightly to be his.

What must be got rid of is the false corollary of liability for fault, that there should not be liability without fault.⁵

1. Enterprise Liability

It is apparent from the cases discussed that the risk of escapes is incidental to the supply of gas and water and that such escapes commonly occur without negligence on the part of the supplier. Escapes from public sewers and drains are, it seems, mostly caused by inadequacy in some form and are not unavoidable. But escapes due to the physical condition of drains may occur without negligence. To the extent that escapes are the inevitable result of the operation of such systems, the operators wittingly create the risk of escapes. The degree of risk is acceptable having regard to the object of the operation, whether commercial profit or for the benefit of the community. It is appropriate, therefore, that losses suffered in consequence of escapes should be regarded as part of the cost of the provision of the service and should be absorbed as such.

The inevitability of damage is not a sufficient reason for depriving persons suffering damage of a remedy.

If a scheme for the benefit of a community cannot be established and carried on without injury to individuals then they ought to be compensated by the community and their right to recover should not be dependent on their loss having been caused by negligence. These are the principles of enterprise liability.

Losses imposed upon local authorities are not usually absorbed by the local authority itself; in the long term, it suffers no irrecoverable depletion of its resources. Local bodies are financed by various forms of taxation and, in the case of trading activities, by selling its commodity at a price. Losses incurred in providing services are ultimately passed on to the community at large, as taxpayers or consumers. The true financial cost of the provision of the service includes the payment of compensation for damage caused and the taxing and pricing mechanisms facilitate the distribution of such losses or, to look at it another way, provide a form of social insurance.

An additional reason for imposing strict liability on an enterprise is that it provides an economic incentive, for those best able to do so, to minimise accidents.

It is apparent that in a number of respects, but notably in the regard to the expansion of the defence of statutory
authority, the courts have sought to accommodate the precepts of the doctrine of fault at the expense of strict liability. This trend has greatly diminished common law protection from losses caused by the activities of local authorities. It is appropriate at this point to consider whether the risk of damage from escapes ought rightly to be borne by the local authority regardless of negligence.

2. Compensation

The primary object of an award of damages is to compensate the victim of a tort, not to punish the tortfeasor. The availability of a compensatory remedy in the situation where morally culpable conduct is proved probably indicates a tacit acceptance of the principle of "ethical compensation", as explained by Glanville Williams. That principle emphasises that the payment of compensation is a benefit to the victim of a wrong and declares that justice requires that the victim should receive compensation, but it fails to recognise that compensation may also be due to the victim of a morally acceptable risk. Modern conceptions of justice require that moral culpability should no longer be regarded as the sole criterion of liability. Strict liability more consistently provides compensation for those who would otherwise bear a loss for no better

6. The Aims of the Law of Torts (1951) 4 CLP 137, 140-144.
reason than that that where the loss fell.

It is of particular interest that the courts have expressly recognised that a grant of statutory authority, with the retention of strict liability by means of a nuisance clause, represents an acceptance by the Legislature of the principles of enterprise liability. But there is in any event no basis for believing that a Legislature which refrains from expressly granting an immunity from strict liability, meant to do so by implication. There is no logical inconsistency in granting statutory powers and permitting strict liability for damage caused in exercise of those powers to remain.

Furthermore, there is no real justification for exempting a local authority from strict liability merely because it is a statutory body, or because it is carrying out something beneficial to the community, or even because it is providing a service pursuant to a statutory duty. If the rationale of strict liability in the common law is accepted, it would be illogical to allow that those best able to bear it, public corporations proceeding under statutory authority, should be exempted.

D. Final Comment

The matters studied in this work are, taking the broadest perspective, aspects of the increasingly important public law problem of dealing with loss arising in consequence of the exercise of administrative
functions. The arguments and issues relating to discretion and compensation, familiar in the wider context of the execution of public works by governmental agencies, are relevant here.

The case of damage arising in the due exercise of powers has been brought into contrast with the situation where such powers are exceeded and it is suggested that a reassessment of the dividing line, in respect of the torts of strict liability, is warranted. Furthermore, a full reappraisal is needed of the position, in tort, of local authorities which neglect to exercise their statutory powers.

In the present context, the lack of an elaborate and coherent review and evaluation of the various considerations has no doubt conduced to the formulation by the courts of unsatisfactory principles. The present work, because of its comparatively narrow scope, goes only part of the way toward this end, but it may at least provide an advanced starting point for further, more comprehensive research.