

WHAT A NUISANCE

Municipal Liability For Sewer Backup



“The following program is rated P, for ‘poop.’”

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"For Pete's sake—ask somebody!"

A Brief History of Sewage Systems

The term "nuisance" is derived from the latin word "nocere", which means "to hurt". The French coined the term as "noisance" or "nuisance", which means an act which causes offence, annoyance, trouble or injury. A nuisance occurs when the right of quiet enjoyment is being disrupted to such a degree that a tort is committed.

The concept is exemplified in the latin maxim "*sic utera tuo ut alienam non laedas*". This Roman phrase means "to use your property in such a fashion as not to disturb your neighbours".

Under the common law, land owners and lease holders of real property were entitled to the quiet enjoyment of their lands. If a neighbour interfered with this quiet enjoyment by creating smells from a privy, or by dumping waste beyond the boundaries of their own property, the affected party was entitled to make a claim in nuisance.

Traditionally, the term nuisance has been used in three contexts:

- 1) to describe an activity or condition that is harmful or annoying to others. The classic example of this is a rubbish or waste heap that offends by either odour or unsanitary condition;

- 2) to describe the harm caused by this activity or condition, such as the risk of disease or illness caused by untreated waste; and
- 3) to describe a legal activity that arises from a combination from the two. This could include activities taking place on another person's land that affected the enjoyment of the land, such as dumping unwanted waste.

The tradition law of nuisance has recognized two general areas of "bothersome conduct".

When activities or conduct unreasonably interfere with the rights of private land owners, it is considered a private nuisance. When it impacts the rights of the general public, it is a public nuisance.

A public nuisance is an unreasonable interference with the public's right to property. This can include any conduct that interferes with public health or safety, such as the backup of a municipal sewer or water line. Whether the conduct is reasonable or not can be set out in a statute such as the Municipal Act, or by the nature of the act itself.

Accordingly, whether any aspect of sewage disposal is reasonable or unreasonable may be set out in a municipal by-law or provincial or federal statute, the nature of the act and the effects of the activity.

In contrast, a private nuisance is a violation of the use of an individual's quiet enjoyment of land. To be a nuisance, the interference needs to "rise above the aesthetic", if it is part of the everyday life or activities.

The fact that an act may annoy one particular, sensitive individual will not necessarily be considered a nuisance. As an example, most "ordinary" citizens would be offended by the smells of an open latrine, while only rare individuals would be perturbed by the smell of a flower garden.

Some of the oldest records of legal actions arising from complaints over sewage backup come from the Assize of Nuisance, which is a list of grievances that were made by the citizens of London against their neighbours during the time between 1301 and 1431.

The Assize of Nuisance reveals numerous complaints regarding misdirected leaking or odiferous privies. Medieval European cities initially had no sewer infrastructures to deal with the disposal of human waste. Before municipalities instituted public sewers in an effort to avoid the spread of communicable diseases, human waste was dumped into rivers and tributaries or stomped into the ground.

The Black Death or Bubonic Plague famously forced city officials in London to act in 1349. This gave rise to a new form of employment for what were early municipal sanitation workers.

These included “Muckrakers” who collected human filth and took it by cart or boat beyond the city walls, “Surveyors of the Pavement”, who kept the thoroughfares clear by removing filth and “Gong Farmers”, who cleaned out cesspits, latrines and privies.

By the 19th Century, in most Commonwealth countries, the position of “Inspector of Nuisance” had been created to deal with complaints about sanitation. This was the equivalent of the first Department of Public Health and Sanitation. All of these positions are still with us in one form or another.

Modern land use planning and zoning by-laws (which describe the activities that are acceptable in an area), developed in response to the proliferation of nuisance law suits in the 19th and early 20th century. Similarly, environmental statutes and by-laws dealing with waste management provide modern guidelines for what is acceptable and what is unacceptable in waste treatment and disposal.

The Canadian law of nuisance is largely based on the British common law, with the influence of certain American legal theorists.

In America, the Restatement (2nd) of Torts suggests that a public nuisance can include the following issues related to sanitation concerns:

- a) whether the conduct involves significant interference with the public health, the public safety, the public comfort or the public convenience;
- b) whether the conduct is prescribed by a statute, ordinance or administrative regulation;
- c) whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and as the actor knows or has reason to know, has a significant effect on the public right.

In America, the concept of what constitutes a public nuisance has been the subject of legal debate for more than a century. It has been described as “notoriously contingent and unsummarizable” and “a wilderness of law”. The noted legal scholar William Prosser, described nuisance law as “an impenetrable jungle” and a “legal garbage can full of vagueness, uncertainty and confusion”.

The Canadian courts have struggled with similar uncertainty about when a municipality can and should be considered immune from tort actions for public nuisance. Many of these claims have dealt with the back up of municipal storm or sanitary sewer systems under a variety of circumstances.

In Canada, under the common law, municipalities could defend a nuisance claim on the basis that the duty it was carrying out when it caused the nuisance was created pursuant to the exercise of a statutory authority. The courts would then inquire whether the statute “expressly or impliedly authorized” the damage complained of, and whether the public authority had established that the damage was “inevitable”.



Modern Canadian courts have considered this defence of inevitability to be “a legacy from the Victorian age”. The courts of the 19th Century held that in the absence of negligence, “no action would lie for damage occasioned by a public body acting within the confines of its statutory authority”.

Negligence was understood to be a failure on the part of the municipality to observe all precautions consistent with the carrying out of the activity in question.

Lord Blackburn articulated this rule in a case called *Geddis v. Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430 (H.L), at pp. 455-56:

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

In "Strict Liability, Nuisance and Legislative Authorization" (1966), Professor Linden pointed out that the courts had to struggle to determine the "likely intent" of the legislation since the statutes which authorized municipal undertakings were normally silent as to the effect of the legislation on tort liability.

The courts have also noted that there was a specific rationale behind the doctrine that conferred substantial immunities on public authorities during the industrial revolution. The single most important policy reason for immunity was to ensure that public authorities were not discouraged from building important works such as sewers, drains, canals and hospitals. These types of enterprise were considered to be vital to the public health and welfare and deserving of additional protection from civil liability.

The courts were also concerned that the imposition of tort liability would nullify the ability of public bodies to carry out their statutory duties.

This outlook waned in the 20th Century, giving way to the notion that it is unreasonable to immunize public authorities from tort liability. The rationale for this change in attitude lay in the perception that when an individual suffers damage attributable to the acts of a public authority, it is only just that the cost of this damage should be absorbed by the public and "thus become a charge on all those who benefit from the service, rather than being laid at the feet of the hapless individual who has been injured or incurred damage".

The courts moved on to consider whether the statute that enabled a public authority to do certain works should be characterized as "mandatory" or "permissive".

Where the legislature has "merely accorded a power" as opposed to "having mandated the doing of a particular thing in a given locality", the power is meant to be exercised in strict conformity with individual rights.

In other words, the courts were more likely to grant immunity if a statute or by-law specified exactly how they were to carry out their duties.

Acknowledging that in certain cases, a statute may empower a public authority to potentially infringe on individual rights, the courts have attempted to determine whether the nuisance would "inevitably arise" from the operation of the authorized work.

Damage is said to be "inevitable" when the municipality can prove that it was "demonstrably impossible to avoid the damage inasmuch as it had carried out its operations with a degree of skill and care commensurate with current scientific and technical knowledge, but with due allowance for practical considerations bearing on time and expense".

If the municipality could provide proof of the inevitability of the nuisance, a plaintiff would be denied redress by the courts.

This doctrine was set out in the famous decision of Viscount Dunedin in *City of Manchester v. Farnworth*, [1930] A.C. 171 (H.L.):

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

The Tock Decision

In Canada, the applicability of these common law principles was put to the test in the historic decision of the Supreme Court of Canada in *Tock v. St. John's Metropolitan Area Board* [1989] 2 S.C.R. 1181.

The plaintiffs Neil and Linda Tock had a house in East Meadows in the St. John's Metropolitan Area. The St. John's Metropolitan Area Board, operated the water and sewer system in the area.

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

The Tocks brought an action against the Board in the District Court of Newfoundland. They claimed that the Board was negligent in the construction and maintenance of the storm sewer, relying on the doctrine of *res ipsa loquitur*. They also argued that the collection and drainage of water from rain or other sources rendered the Board a "non-natural user of land" within the meaning of the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330. If the Board was held to fall into that category, it would be subject to strict liability.

In the alternative, the Tocks alleged that the Board was liable for nuisance.

The trial judge agreed that the flooding was caused by the blockage in the storm sewer and not by the exceptionally heavy rainfall. He dismissed the claim in negligence, holding that the Board had not been negligent in the construction, maintenance or operation of the storm sewer.



"Let's not panic till we know whether it's coming in or going out."

He did agree that the escape of the water into the Tock residence constituted a "serious interference with their right of enjoyment of their property" and, in consequence, allowed the claim in nuisance. He awarded the Tocks a total of \$13,456.11 in damages.

The Newfoundland Court of Appeal reversed this judgment. It held that the rule in *Rylands v. Fletcher* had no application. The provisioning of an indispensable service such as a water and sewer system could not be held to constitute a "non-natural user of land" within the meaning of the rule.

The Court of Appeal expressed the view that a claim in nuisance would not lie against a municipal corporation for damage resulting from a service provided under statutory authority if that body could establish that the occurrence complained of was inevitable in the sense that it could not have been avoided by the exercise of all reasonable and available expertise and care in the design, construction and operation of the service.

It concluded that the Board had satisfied the onus of demonstrating that it had done everything that could reasonably be expected to avoid the occurrence.

On appeal to the Supreme Court of Canada, the panel agreed that the rule in *Rylands v. Fletcher* did not apply. It noted that public sewerage and drainage systems are an indispensable part of the infrastructure necessary to support urban life. They would presumably have been constructed pursuant to sound principals of urban planning. As such, the user would be ordinary and proper for the general benefit of the community.

Since negligence had not been dealt with on the appeal, the Court was left with the question of whether the Municipality could be considered to be liable in nuisance. While the Court was unanimous in holding that it could, the three justices who wrote the decision reach their conclusions by slightly different methods.

Justice La Forest discussed which consequences would be considered inevitable and which would be avoidable. He ultimately concluded that this historic test is flawed. He accepted that a municipality can only be found liable for nuisance where it would have been possible to avoid the creation of a nuisance, while still carrying out the service described in the language of the statute.

He also reasoned that absolutely “failsafe systems” are not always possible given the potential cost and technical feasibility. Some amount of damage always follows as a consequence.

Justice La Forest reformulated the test, suggesting that the best way to resolve the problem is “to proceed... as one does when facing a claim in nuisance between two private individuals, and ask whether, given all the circumstances, it is reasonable to refuse to compensate the aggrieved party for the damage he has suffered.”

The other judges of the panel raised concerns about Justice La Forest’s approach. Proceeding as if a matter were a dispute between two private individuals would effectively abolish the defence of statutory authority for public bodies. Justice La Forest responded that shifting towards a test of reasonable/unreasonable compensation would not open the proverbial floodgates.

In most cases where municipalities cause a nuisance, “the interests of the private citizen yield to those of the public at large”. Damages caused by a public service or project might still be defensible only under narrow circumstances where the public body is not negligent, and the damage does not unduly effect an individual or small group of claimants.

Madam Justice Wilson disagreed slightly with Justice La Forest, and asserted that a defence of statutory authority must be allowed under some circumstances. She considered that the correct legal test should determine when a public body – a creature of statute – is carrying out a consequence that is authorized by statute, versus a consequence that is an “unauthorized” nuisance.

If a nuisance is an inherent to the project or service that the statute authorizes, the court can only conclude that the statute is authorizing the nuisance itself.

Justice Wilson also outlined nuisances by public bodies that would be actionable and those that would be indefensible (even in the absence of negligence). This would include cases where a municipality exercises discretion in carrying out services authorized by statute, and chooses an option that fails to mitigate a nuisance that could have been avoided.

Adopting this approach, public bodies would be permitted to raise a defence of statutory authority as a shield against claims for nuisance, but only where the statute creates a mandatory set of consequences. A defense of statutory authority would be only available when the nuisance was an unavoidable consequence of following a statutory mandate.

Justice Wilson concluded that the statute authorized the municipality to construct the sewage system, but the legislation was “purely permissive” as opposed to mandatory. No defence of statutory authority was available where the municipality was merely exercising a discretionary power permitted by statute.

In turn, Justice Sopinka largely agreed with Madam Justice Wilson that the defense of statutory authority depends on whether a private interference is a necessary consequence of following a statutory instrument. However, Justice Sopinka interpreted the principle of “inevitable consequences” in a way that offered broader protection to municipalities.

He suggested that the defence of statutory authority is made out if the nuisance is authorized expressly or by implication. He argued that Justice Wilson’s approach might effectively limit the defence of statutory authority only to mandatory works, which would ignore the fact that legislation may incidentally permit nuisances that are an inevitable consequence.

Justice Sopinka appeared to reject the reasoning of his fellow Justices that “inevitable consequences” test is ambiguous. He noted that most modern public works are not mandatory under statutory law, and reasoned that a statute that grants permission to undertake a public work effectively authorizes any “necessary” consequence of the permitted activity.

The Aftermath of *Tock*

Justice La Forest had expressed concerned that an overly broad test would allow municipalities to justify nearly any failure as a hidden cost of administering a system with scarce resources. He argued that “the mere fact that [the chosen method] is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance.”

Public bodies must always select a method that would avoid nuisance and conform with private rights, unless it were impossible given the work described by the statute and the practical considerations in implementing it. A public body would be liable even in the absence of negligence.

In *Tock*, the municipality ultimately failed to discharge their onus of proof that they had no other recourse but to cause the flood (or allow it to be caused). Accordingly, they were liable for the nuisance, as they failed to show that the flood was a necessary consequence of following the empowering statute.



"I adore the beauty and tranquillity of these raw-sewage days."

The *Tock* decision in 1989 created an ambiguous area of law around municipal nuisance and the defence of statutory authority, which prevailed for a full decade. While some cases attempted to resolve the ambiguity by applying the most salient test, many other cases side-stepped the issue by making a ruling that would be the same regardless of which test is applied.

In *Canada (Attorney General) v. Ottawa-Carleton (Regional Municipality)*, 5 O.R. (3d) 11, [1991] O.J. No. 1428, (On C.A.), the Ontario Court of Appeal went to some lengths to distinguish nuisance from negligence. Under the facts of this case, it was not defensible for the municipality to say that they were not responsible for a waterworks system dating back to 1917, when a defective pipe was installed.

The court acknowledged that the appellant was not negligent, but noted that "negligence is not a prerequisite to an action for nuisance". The nuisance occurred under the municipality's responsibility, even though the defect was created under a different public body.

The court was able to sidestep the ambiguity of the *Tock* test, because no statute would authorize the construction and maintenance of a defective system. The municipality could not rely on the defence of statutory authority, because "that onus has not been met on the application of any of the judgments in *Tock*".

There have been other instances where a Defendant was considered liable under all three of the *Tock* interpretations. The most famous example was the case of *Oosthoek v. Thunder Bay (City)*, 30 O.R. (3d) 323, [1996] O.J. No. 3318, On C.A..

In *Oosthoek*, the municipality made alterations to the road, the rainwater leaders, and the tiling system, which incidentally exacerbated the overflow of the sewer system. The court concluded that the flooding was not a necessary consequence of the original construction of the sewer system years ago.

According to the court, the municipality would have been liable under any of the three tests in *Tock*, and “there is not even the beginning of a basis for establishing inevitable consequence on the facts of this case”. The nuisance was not authorized by statute, even under the most generous interpretation of *Tock*.

Eagle Forest Products Inc. v. Whitehorn Investments Ltd., [1992] O.J. No. 1762, 12 M.P.L.R. (2d) 18, (On C.J.) was a distinguishable case where the municipality of Richmond Hill contracted a public work out to a private entity. One of the municipality’s culverts overflowed and flooded the plaintiff’s premises, due to a nearby land-raising project.

This was a prima facie case of nuisance and negligence, considering that the municipality had received warnings that the culvert needed to be removed or enlarged.

Although the municipality raised the defence of statutory authority, the court stated that there is “no mandatory or permissive legislation which details how and where the sewage works were to be constructed”. Since the operations that caused the nuisance were not described under any regulation, there was no protection from liability via statutory authority.

There are other cases where the courts have “chosen favourites”, selecting one of the three tests under *Tock* to apply to the facts at hand.

In *Ratko v. Woodstock (City) Public Utilities Commission*, 17 O.R. (3d) 427, the Ontario Divisional Court based its decision on the reasons of Justice La Forest. The Court concluded that the flooding of the Plaintiff’s basement was an unreasonable interference with the use and enjoyment of their property which was clearly actionable in nuisance, and the municipal body should thus pay the cost.

In coming to this decision, the court relied on the opinion of Justice La Forest to conclude it would be unfair to expect the Plaintiff to pay for the damages to their basement, as in an ordinary action of nuisance between two private parties.

Legislative Immunity In Ontario

In response to the proliferation of nuisance claims against municipalities, the Ontario Legislature announced that it would be moving to close the door on claims for water and sewer back-up.

An Ontario Government Bulletin released on October 17, 2006 summarized the legislative intention:

Until 1989, Municipalities were not generally held responsible for damage that occurred as a result of undertaking Public Works they were legally permitted to do, unless they were negligent in carrying out the activity. A 1989 court decision changed that. Since then, Municipalities have been paying out large amounts of money for damages as a result of nuisances, most often sewer backups and water main breaks.

Municipalities have asked for immunity from nuisance liability arising from the operation and maintenance of roads, public utilities, dykes, ditches and dams. Concerns have been raised about nuisance liability arising from sewer backups and water main breaks, especially since homeowners insurance usually cover these.

These changes were eventually implemented by the Government of Ontario first through Sections 331.1, 331.2 and 331.3 of the *Better Government Act, 1996* and subsequently through amendments to the *Municipal Act*, S.O. 2001, CHAPTER 25, Part XV.

In the same way that the courts moved to pass the cost burden of cleaning up sewer back-ups from the individual to the public at large, the legislature attempted to transfer the cost from municipalities to private insurers.

Part XV of the *Municipal Act* currently states:

Immunity

448. (1) No proceeding for damages or otherwise shall be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority. 2001, c. 25, s. 448 (1).

Liability for torts

(2) Subsection (1) does not relieve a municipality of liability to which it would otherwise be subject in respect of a tort committed by a member of council or an officer, employee or agent of the municipality or a person acting under the instructions of the officer, employee or agent. 2001, c. 25, s. 448 (2).

Liability in nuisance re: water and sewage

449. (1) No proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against,

- (a) a municipality or local board;
- (b) a member of a municipal council or of a local board; or
- (c) an officer, employee or agent of a municipality or local board. 2001

The “Ryan” Clarification: 1999 Onward

While the legislature went about removing municipal liability for nuisance by way of statute, some of the questions left unanswered by the disparate approaches in *Tock* were clarified by the Supreme Court of Canada in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201. The Court ultimately adopted the approach of Justice Sopinka in the original *Tock* decision.

The *Ryan* case explored the liability of a municipality in the maintenance of a railroad system. The court considered liability for negligence, as well as nuisance. On the issue of nuisance, the court concluded that “in the absence of a new rule, it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue and the simplest to apply. That approach was expressed by Sopinka J. in *Tock*”.

In applying Sopinka’s test, the Court found that the gaps in the flangeways that were left by the Railways had caused a hazard on the railroad, and gave rise to liability for nuisance. These gaps were not the inevitable consequence of following the statutory regulations around the Railways, since the regulations recommended a smaller minimum distance in the flangeways.

The court also weighed the possibility that the Railways could install flange fillers, which had become available after 1982, which they did not. The nuisance could not be considered an inevitable result or inevitable consequence of complying with the regulations, and the municipality was not entitled to assert a defence of statutory authority.

This approach to municipal nuisance and inevitable consequences has also been affirmed by the Supreme Court of Canada as recently as 2008 in *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392.

In *Canada (Attorney General) v. TeleZone Inc.*, [2010] S.C.J. No. 62, the Supreme Court reiterated the doctrine of inevitable consequences. Although the Defendant did not utilize this defence in this particular case, the court noted that this argument is always available to a Defendant in both provincial and federal court.

Moving into the 21st century, the Sopinka test remains the most salient test for municipal nuisance. Claims against municipalities and public bodies for nuisance usually involve a question of whether the damage was a necessary consequence of following the statute – explicit or implied, mandatory or permissive. Municipalities are held liable when they cause a nuisance that is seen as avoidable or discretionary.

The Courts Deal With Statutory Immunity

Most of the cases in the past decade have focused on statutory interpretation, and whether a municipality can rely on regulations to show that any nuisance that they created was authorized by law. In addition, the courts have dealt with post-*Tock* amendments to statutes that grant protections from liability to municipalities and public bodies for specific kinds of activities.

The P.E.I. Supreme Court in *Rollins v. Charlottetown (City) Water and Sewer Commission*, [2003] P.E.I.J. No. 2, noted that Provincial legislation and Municipal by-laws were created in response to the *Tock* case in the 1990s, limiting liability for public bodies unless there is clear negligence. The circumstances of the sewer flooding in this case were similar to those in *Tock*.

The court explained that the flooding of the Plaintiff's basement was not due to negligence. Further, the court relied on the *Ryan* precedent to show that the municipal Defendant could invoke the defence of statutory authority. The flooding "could not practically have been avoided", because "[n]o fail proof system exists. The flooding of the plaintiffs' basement was the inevitable consequences of the defendant carrying out its statutory duty to provide for sewage collection and treatment". The legislation protected them from any claim of nuisance, short of clear negligence.

Similar exculpatory legislation was considered in *Neuman v. Parkland County*, [2004] A.J. No. 441. The Alberta Provincial Court considered s. 528 of the *Municipal Government Act, R.S.A. 2000, c. M-26*, which protects municipalities from claims of nuisance. According to the statute,

A municipality is not liable in an action based on nuisance, or on any other tort that does not require a finding of intention or negligence, if the damage arises, directly or indirectly, from roads or from the operation or non-operation of

- (a) a public utility, or
- (b) a dike, ditch or dam

In this instance, the statute protected the municipality from a claim of nuisance, granting it full immunity. The court ultimately found the municipality liable under negligence, as it had ignored the design recommendations and instead decided to fully cap the culverts.

While Ontario's Municipal Act has stemmed a majority of claims, other provincial legislation offers even broader protection, as seen in *Bavelas v. Copley*, [2001] B.C.J. No. 387. In this instance there was Provincial legislation that stated:

No action arising out of, by reason of or in respect of the construction, maintenance, operation or use of a drain or ditch authorized by this section, whenever the drain or ditch is or was constructed, may be brought or maintained in a court against a district municipality.

The B.C. Court of Appeal stated that this "section effectively creates an immunity from liability in the circumstances of this case, and the cases cited by the intervenors relating to the defence of statutory authority are not of assistance".

This judgment explicitly stated that the *Ryan* and *Tock* cases were not relevant, as this is not a case based on the narrow defence of statutory authority. The legislation provided the municipality with broad immunity against all liability.

There is some value to understanding cases where the court considers the issue of negligence, rather than focusing on nuisance. No claim of nuisance was advanced under *John Campbell Law Corp. v. Strata Plan 1350*, [2001] B.C.J. No. 2037, and so the B.C. Supreme Court only considered whether the flooding caused by the maintenance of a sewer system was caused by negligence.

The British Columbia Supreme Court found that "it could not reasonably have been anticipated that roots from a neighbour's tree would have found and entered the sewer line near the point where that line entered the City's sewer main".

Overall, no municipality is held to a standard of care where they must inspect for problems regularly. In this case, the municipality acted reasonably by calling for a plumber once the problem was discovered.