The modern position of the statutory authority defence in the UK

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Abstract:
This paper aims to evaluate the impact of the new s.158 Planning Act 2008 on the existing doctrine of statutory authority.

The Planning Act 2008 has introduced many changes pertaining to the planning and development of infrastructure projects in the UK. This paper will briefly overview those changes, before focusing on S.158 of The Act, which awards developers statutory immunity from an action in private nuisance. The paper will address the availability of certain actions, in both common law and statutory nuisance, before assessing the impact of any immunity or statutory authority defence on such actions. It will then be important to identify how a history of widening the statutory authority defence has affected its use in practice, and to consider whether s.158 could potentially extend the application of such a defence, before moving on to clarify the existing exceptions to the statutory authority rule. These exceptions have been created by the judiciary's antipathy towards overt infringement on property owners' rights. Therefore, in awarding the defence they will take into account a variety of considerations such as the specificity of the location, the inevitability of the nuisance, the effect on statutory provisions, and the bearing that negligence has on the defence.

Although s.158 of the Planning Act 2008 appears to broaden the opportunity for an exemption defence to be used, many restrictions remain on its application. There is no such thing as 'blanket immunity', and developers may still be held responsible for their un-neighbourly conduct. This is something that developers, and their advisers, will have to be aware of before seeking to rely on the statutory immunity defence.

Keywords: Statutory authority, Nuisance, Infrastructure planning, Tort.

1: Introduction

The Planning Act 2008 was introduced with the intention of streamlining and improving procedures in the United Kingdom for the planning and development of major projects such as power stations, airports and highways. The prescribed measures were a governmental response to the delays and costs incurred in the 7-year planning process for Terminal 5 at Heathrow Airport. The Act creates a range of measures, which have been introduced to ensure that the planning process for these projects, now referred to as Nationally Significant Infrastructure Projects (NSIPs), is conducted in a swifter, more transparent and clearly prescribed manner. In addition to these provisions, which create new policy statements, alter the consultation procedures, make changes to public participation opportunities, and create a new planning application process, the Government proffered statutory authority on such projects under s.158 of the Act. This section, which came into effect on March 1st 2010, awards developers of NSIPs a defence against actions in private or public nuisance. The application of such a defence could have serious implications for neighbours of infrastructure developments, who may suffer adversely as a result of the build, or the operation of the actual development. Although the use of the defence in such situations is not novel or original, this paper argues that by extending the scope of such protection, in the way set out in the Planning Act 2008, the legislature can be seen to significantly depart from the original ideologies of the statutory authority defence, which purported to defend public officials who may have committed a nuisance in the performance of their duties.

This paper will firstly direct its attention to a brief overview of the proposed procedural changes for the new NSIP planning process and then proceed to outline the legal principles of common law and statutory nuisance. The paper will then evaluate the governmental move from a 'blanket immunity' approach for towards nuisance actions to one of 'statutory authority' for developers of NSIPs. It will then be important to review the history of the statutory authority defence, in order to assess what such an authorisation will mean, in effect, for such developers. This paper will then demonstrate how the defence has been conferred in the Planning Act 2008, and consider whether the new provisions extend the scope of its application, before moving on to consider the inherent restrictions to the defence which have been carved out to protect private property owners. It is apparent from over two centuries of case law, that certain restrictions apply to the use of the statutory authority defence; this case law will be relevant in determining how any immunity will be approached in practice.

2: Making the system work

Nationally Significant Infrastructure Projects are, for the first time, set to have their own dedicated planning system, which aspires to achieve the Labour Government's desired outcome of *"a single, unified development consent regime"* (Communities & Local Government etc. 2007, 78). The impetus for this policy and procedural change was the lengthy planning application process and inquiry stage for Heathrow's Terminal 5. The inquiry, which sat for 525 days over a 4 year period, was the longest of its kind in the UK, at a cost of £17 million to the Government, and created an awareness for the need to create a more streamlined and efficient system (Department for Transport 2005). In order to achieve this aim, the Government introduced new procedures and institutions which would organise and administrate the process. The new framework strives to achieve a *tria politica*, or separation of powers, between the legislature (ministerial drafting of National Policy Statements), executive (consideration of each application by the relevant planning authority), and judiciary (appeal available through judicial review). This separation of duties and roles should ideally act as a filter system, ensuring that an accountable body is making policy decisions that are then applied by an impartial and independent body in considering applications, with both stages reviewable through the legal system.

In determining whether certain projects are necessary, and where they should be situated, Government ministers are to produce new National Policy Statements (NPSs). These aim to simplify the system by avoiding repeat enquiries; for example *"... if ministers have said once that they consider nuclear power to be safe and necessary, then it should not be necessary for this to be tested every time an application is made"* (Bassford 2007, 150). Developers must be aware of the NPS for that type of development before making any application, and must also have conducted any consultation procedures prescribed by the Act. It was proposed that applications would then be considered by a newly appointed Infrastructure Planning Commission (IPC), who would determine whether the applications they received were in accordance with the NPS on such matters and/or locations. However, the new coalition Government has committed to abolishing the IPC (as was evidenced in both parties' election manifestos) and will instead legislate for the consideration of applications by a 'Major Infrastructure Planning Unit' in the Planning Inspectorate,[1] thereby countering the anti-democratic argument of opponents to the IPC.

[1] To be implemented by Decentralisation and Localisation Bill, proposed in Queen's Speech, May 25th 2010.

The need to streamline the planning system for major developments, and increase efficiency, transparency and productivity for such projects, is unquestionable, but at times the recent reforms have led to vehement opposition. Commentators such as Ellis (2008), Thompson (2009), and Bassford (2007), have negatively critiqued the new measures in relation to; their impact on public consultation, the removal of certain hearing processes, and the aforementioned lack of democratic accountability of the unelected IPC. One aspect of the recent measures which has received little treatment however, is the abrogation of neighbours' rights to an action in private or public nuisance, with the Government using the pre-existing defence of statutory authority. This paper will first address the meaning of common law and statutory nuisance before exploring the notions of immunity or a statutory authority defence.

3: What Constitutes a Nuisance?

Nuisance has been described by Blackstone (1768) as:

> … anything that works hurt, inconvenience or damage. And nuisances are of two kinds: public or common nuisances, which affect the public, and are an annoyance to the King's subjects; … and private nuisances, which … may be defined, anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. (Blackstone, 1768, p.216)

Such a definition has been acknowledged as excessively broad however, in relation to both public and private nuisances.

Private nuisance actions have been restricted to apply in situations where there has been unlawful interference with land, which the claimant has an interest in, and where it can be proven that the defendant is legally responsible for the unlawful interference (Elvin & Karas 2002). The common law doctrine of private nuisance protects landowners from interferences with either their land, or their enjoyment of it, and has been referred to as the realm of the *"stinking privy, the urban hog-sty, the fouled or diverted stream, the polluting chimney"* (Brenner, 1973, p. 403). The three main forms of private nuisance, identified in *Hunter v. Canary Wharf*[2], are:

- encroachment on a neighbour's land
- physical injury to a neighbour's land

[2] [1997] 2 All E.R. 426.

- substantial interference with a neighbour's quiet enjoyment of his land

Nuisance actions seek to address potential conflicts in land usage, and balance these competing interests, in view of what is 'reasonable'[3] in the circumstances. It can be argued that this judiciary measure has been historically successful in balancing such competing interests in regards to the nature of the locality, the duration and frequency of the defendant's conduct, the utility of the defendant's conduct, any abnormal sensitivity of the claimant, and malice on the part of the defendant (Giliker & Beckwith, 2008). The direction given is for the judiciary to consider these matters with a pragmatic approach, rather than pandering to *"the elegant or dainty modes and habits of living, but according to the plain and sober and simple notions among the English people"*[4]. This paper will later direct its attention to the way in which the legislature has circumvented the capacity for such judicial intervention in certain land usage disputes.

In consideration of public nuisance it is appropriate to begin with another broad definition, as used by academics such as McLaren (1972), Spencer (1989), and Coyle & Morrow (2004), to illustrate the ambitious ideals of the principle. Archbold's Criminal Pleading (2010) states:

> A person is guilty of a public nuisance…, who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects (Archbold, 2010).

In reality however, public nuisance was most effective in providing actions for the protection of health and safety for the public at large in the centuries before legislative measures such as the Public Health Act 1936, the Highways Act 1980 and, most recently, environmental legislation such as the Environmental Protection Act 1990. As Spencer (1989) noted in his seminal work on public nuisance: *"Over the last hundred years … virtually the entire area traditionally the province of public nuisance prosecutions has been comprehensively covered by statute"* (Spencer, 1989, p.76). Although the doctrine of public nuisance appears increasingly redundant in the modern criminal and tort landscape the judiciary have recently upheld its existence, in the *Goldstein*[5] case, with the proviso that statutorily defined offences be preferred in most instances.

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[3] Described in *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880 at 903.
[4] *Walter v. Selfe* (1851) 64 E.R. 849 quoted in Kidner, 1998 at 276.
[5] R. v Goldstein [2005] UKHL 63.

Statutory nuisance has evolved as a legislative way of prohibiting certain activities which could be deemed harmful to the health, well-being, or property interests of the public and has been formed and shaped by the harms identified in the common law doctrines of public and private nuisance. Statutory nuisance thus *"reworks common law nuisance, taking some of its more practical features for remedying interference with property and separating them from the more onerous procedural and standing requirements"* (Coyle & Morrow, 2010, p.126). Powers are given to local authorities[6] and to certain individuals[7], under statutory provisions, to enable them to request the abatement of the nuisance; however it has been noted that courts tend to favour claimants who have experienced interference which affects personal comfort (Coyle & Morrow 2010). Thus the application of statutory nuisance may be more restrictive than that of the common law approaches and claimants could still benefit from the availability of a common law action, which may not be possible where defendants have been awarded statutory authority. The statutory authority defence can be seen to infringe on certain rights in action for property owners; this paper will explore the impact of the defence on such rights in a subsequent chapter.

The Government have however, been impelled to arrive at the current provision, which grants the defence of statutory authority to developers of NSIPs. The original proposal, which strongly mirrored the focus on streamlining and efficiency, was a complete or 'blanket' immunity from all forms of action in private, public or statutory nuisance for such developers. This paper will now examine the reasons for the change in position; from a clause which proposed total immunity, to a section which awards the defence of statutory authority.

4: The opposition to 'blanket immunity'

On the 25th of June 2008, M.P. Clive Betts tabled a clause for insertion in the Planning Bill, removing the right to an action in nuisance, stating that;

> No proceedings, whether criminal or civil, in nuisance and no civil proceedings in respect of the escape of things from land, other than proceedings for breach of statutory duty, may be brought in relation to development, works or operations authorised by an order granting development consent. (Betts, 2008 Hansard HC Col.371)

[6] S.80 Environmental Protection Act 1990.
[7] 'Persons aggrieved' under s.82 Environmental Protection Act 1990.

The proposed aim of the measure was to mimic the existing exemptions for nuisance actions afforded under other legislative measures, such as the provisions set out in s.122 of the Railways Act 1993. However the ambiguity of phrasing in the Planning Act led to confusion for practitioners, and even the legislature, with Hazel Blears envisaging a scenario which would result in the removal of any responsibility for the developers in the creation of statutory nuisances (Blears, 2008). Emotive headlines such as, *"Hundreds of thousands will not be able to complain about noisy building sites"* (Hope, 2008) and *"The Planning Bill: a bulldozer through democracy"*, (Cavendish, 2008) heightened concerns and generated the requisite publicity for an anti-governmental backlash.

In October 2008, what has been referred to as an *'unprecedented alliance'* (Miner, 2008), consisting of professionals, council leaders, lawyers, and environmental organisations, joined forces to sanction for the removal of clause 151 from the Planning Bill. The alliance consisted of Environmental Protection UK (EPUK) and the Local Authorities Co-ordinators of Regulatory Services (LACoRS), as well as CPRE (Campaign to Protect Rural England), Friends of the Earth (FoE), and the Local Government Association (LGA). CPRE and FoE, as well as being part of the alliance against clause 151, were leading members of the 'better planning coalition' which also included organisations such as the NSPB, Plantlife International, The National Trust and Civic Trust. These parties strengthened the position against the proposed planning reforms with the support of over 5 million members.

Concerns highlighted by the leaders of the opposition, EPUK and LACoRS, included the following;

1. The clause did not appear to recognise the authority of case law in dealing with nuisances successfully in the past.
2. There was no incentive for developers to mitigate effects on local communities.
3. The clause created a lack of clarity as to the scope and application of new environmental protection legislation which should protect from nuisances.
4. Communities would have no voice once consent was given, and no authority to turn to if there was any interference with their enjoyment of their land.
5. Would the nuisance immunity be retrospective in order to cover pre-existing infrastructures?
6. Did the clause abrogate rights enshrined in the ECHR and HRA, which entitle citizens to respect for their home and peaceful enjoyment of their possessions? (EPUK, 2008)

These concerns and requests for clarity were echoed by a number of environmental campaign groups and organisations, with the disquiet spreading and increasing in volume. The Chartered Institute for

Environmental Health (CIEH) added its support to the protest against clause 151, asking for justification from the Government for the application of statutory immunity in such a broad and sweeping fashion;

> ... it appears to offer protection to activities which currently do not attract (and hitherto have not thought to need) statutory immunity or even the benefit of the older common law doctrine and unlike previous applications, its scope is not limited by a statutory purpose; rather it applies to a long list of projects by virtue of the vehicle chosen to permit their development (Price, 2008).

The CIEH viewed such broad application as 'tantamount to a licence to pollute' (Price 2008), echoing the opinion that credit ought to be given to the success of the existing system in balancing competing interests when considering nuisance actions;

> Both statutory nuisance controls and the common law doctrine of statutory authority offer some protections to the sort of operations in your list, the first in the form of the "best practicable means" defence, the second through a similar concept of "reasonable care", and we should be grateful to know why you think it now imperative to over-ride that balance... (Price, 2008).

The Environmental Law Foundation (ELF), after consulting counsel, joined forces with the alliance in declaring the clause unlawful in its removal of the right to redress. A briefing, prepared in October by ELF, found that the proposed clause could;

> restrict access to justice for disadvantaged communities affected by nuisance from major power stations, airports, or roads, as their local council could no longer bring such claims; severely restrict rights to claim compensation against nuisance; and allow for operators of major infrastructure projects to claim immunity on grounds of 'statutory authority' against prosecution, even when it can be proved they have been negligent (ELF, 2008).

The Bill entered the Committee stage, for debate in the House of Lords, on October 6th. Baroness Andrews began the discussion on clause 151, on October 16th, summing up the intention of the original insertion, which was to replicate the existing statutory authority exemptions for transport schemes. She then went on to acknowledge that the actual clause, as written, had far broader scope and application than that which was originally intended, agreeing with Lord Reay that the proposed clause *"tips the balance too far towards the promoter"*(Andrews, 2008, Hansard HC, Col.881). Reference was made to the fact that the measure would result in a situation where all nuisance proceedings would be barred, even those brought only 'in relation to' authorised developments. This was seen as too great an advance and the Baroness suggested amendments to the clause, which, although still awarding immunity, would provide more appropriate redress for claimants in the form of compensation. On October 20th 2008, the contentious clause 151 was officially removed, and was replaced by this provision;

> Nuisance: statutory authority
> (1) This subsection confers statutory authority for—
> (a) carrying out development for which consent is granted by an order granting development consent;
> (b) doing anything else authorised by an order granting development consent.
> (2) Statutory authority under subsection (1) is conferred only for the purpose of providing a defence in civil or criminal proceedings for nuisance.
> (3) Subsections (1) and (2) are subject to any contrary provision made in any particular case by an order granting development consent. (Andrews, 2008, Hansard HC, Col.989).

This amended clause went on to become s.158 of the Planning Act 2008. It seems that, although the original broad-stroke application of immunity has been somewhat restricted in scope by the reassurances given in the House of Lords, the actual phrasing has changed little. In fact, the insertion of the pre-existing term 'statutory authority' lends further credence to a move which could result in the abrogation of rights for neighbours and communities, who may have to suffer long-lasting and unforeseen consequences of major developments. This paper will now explore the potential impact of the statutory authority defence on such actions, by reviewing the historical origins of the doctrine and the restrictions carved into its application by the judiciary in over two centuries of case law.

5: The widening of the statutory authority defence

This paper will now address the potential widening of the statutory authority defence in three key ways; through the historical reshaping of the doctrine, the move to implying authority for activities not specifically sanctioned by the legislature, and the augmentation of the list of projects, and their size limits, that has occurred in the Planning Act 2008.

5.1 Inception of the doctrine

The defence of statutory authority has evolved as a governmental response to the harmful consequences of activities condoned or mandated by the State. The legal principle behind it has been acknowledged as; *'cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse* *non potuit'*[8] (he who grants something is deemed to also grant that without which the grant would be worthless). In authorizing the activity, or allowing that something be built in a particular location, the legislature are seen to sanction any infringements which might have previously been considered to be unacceptable or unlawful (Brubaker 1995). Initially however, such an authorization was deemed to apply only to public officials, in the performance of a public duty (Linden 1996). This form of statutory authorization is evident in one of the first cases to consider the existence of the defence, *Entick v Carrington*[9], which related to the unsolicited entry of government messengers onto private land. Although the judgment in *Entick*[10] failed to find such authority, it did acknowledge that Parliament could authorise such interferences with property rights by clear prescription; *"if the Legislature be of that opinion they will make it lawful"*[11]. This eighteenth-century judgment may seem trivial, especially in the modern context of larger scale industrial nuisances and pollution cases, but it indicates the origins of greater state-infringement on private property rights; something which was to continue over the following century.

The turnpike roads and harbours of the early 18th Century have been identified by Bassford (2007) as the first major infrastructure projects which required immunity from suits in nuisance, in order to install the requisite obstructions or methods of payment. However, infrastructure soon progressed from what was essentially *"a mean and muddy thoroughfare or a simple sea wall"* (Bassford 2007, 135). The dawning industrial era led to the development of major infrastructure provisions such as canals and railways, which would facilitate the burgeoning mills and factories. The most intrusive of these projects were the railway lines, with over 400 being authorized for construction between 1844 and 1846, with the accompanying legislation to ensure their completion (Brubaker 1995): "*At the very height of the reign of the "Railway King" George Hudson there were a vast number of railway bills before Parliament annually.*" (Bassford 2007, 136) These Bills and their resultant provisions included a host of measures which could interfere with personal property rights;

> Land could be acquired, surveys carried out, trains run, canals built, navigation interfered with, charges levied, other conflicting legislation could be overridden, roads closed or diverted, criminal offences could be created and action taken if offences were committed. Until the 1940s, planning permission was not, of course, required. An Act was-- and in many cases remains --a panacea for every promoter's ill. (Bassford 2007, 136)

[8] *Hammersmith & City Railway Co v Brand* (1865-66) L.R. 1 Q.B. 130, Lord Chelmsford at 202.
[9] [1765] 95 E.R. 807.
[10] Ibid.
[11] Ibid. at 819.

Such large scale interference with landowners' property rights resulted in an increase in actions for nuisances caused; including claims for beer ruined by vibrations from the passing trains[12], fright caused to horses by *"the great roaring, snorting, appalling monster vomiting smoke and fire in all directions"* (first steam locomotives)[13], and increased premiums for a cotton mill adjacent to a sparking railway line.[14] It is in this abundance of resultant case law that the general principles surrounding statutory authority have been formulated and shaped.

5.2 Widening of the application

The existence of statutory authority provided ample opportunity for developers of these new railway schemes to escape liability for causing any nuisance to citizens with interests in proximate land. This arose as a result of a widening in the statutory exemption considered in *Entick*[15], which had specifically referred to explicit parliamentary authority for the actions of public officials, who were performing a public duty. The courts appeared more willing over the subsequent years to consider the defence applicable in any situations where individuals were seen to be acting under sanction of the legislature, including private commercial enterprises that incorporated an amount of public benefit into their activities (Linden 1966). It seems that the proliferation of railway-related case law in the mid-1800s may have been responsible for interweaving the realms of common law and statutory interpretation, thus incorporating the statutory authority immunity into such actions (Wilde & Smith, 2010).

This widening continued however, with a move to judicially implied authority, as demonstrated in *Hammersmith Railway v Brand*[16]. In such instances the application of the defence was widened beyond express statutory phrasing or insertion, and deemed to also occur by 'necessary implication'. This case appears to establish a low threshold for the interpretation of the statutory authority exemption. Such 'back door' authorisation has been highly contentious, with judges having to interpret statutory authority in situations where the effective use or purpose of certain permitted projects would have been impossible otherwise (Pontin 2002).

[12] *The London and North-Western Railway Company v Bradley* (1851) 42 E.R. 290.
[13] *Rex v. Pease*, quoted in Wilde & Smith pg. 16.
[14] *Stockport, Timperley and Altringham Railway Company* (1864) 33 L.J. 251.
[15] (1765) 19 St. Tr. 1030.
[16] (1869) LR 4 AC HL.

Cases such as *Manchester Corporation v Farnworth*[17] and *Allen v Gulf Oil Refining*[18] demonstrate the implication of such an authority. In these cases the relevant Acts were silent or ambiguous as to certain operational procedures pertaining to a power station and an oil refinery respectively. The judges in both instances overruled the private rights of neighbours, who had brought reasonable actions in nuisance, by the necessary implication of statutory authority. This form of equivocal judicial interpretation has led to some criticism;

> A substantial minority of judges have argued that casting courts into the role of 'soothsayer' of some potentially mythical Parliamentary intent in this way is an invitation to arrive at radically divergent and unpredictable outcomes. Denning colourfully likened this task to 'a guesswork puzzle'. (Pontin 2002, pg.351)

It also led to conflicting and, in certain instances, anomalous results as the courts were not inclined to favour the defendants in every case, as evident in *Rapier v London Tramways*[19], a case which pertained to the authorised operation of horse-drawn trams. The statutory authorisation for the tramlines was silent on the matter of where, or how, the requisite horses might be housed but the defendant had built stables that could accommodate approximately 400 horses, which were a severe disturbance to the local residents. The court in *Rapier*[20] however, did not find sufficient authorisation in the actual statute for such a nuisance and did not feel compelled to imply it in that instance. They determined that the stables, although necessary for the effective operation of the tram, should have been conducted and managed in a way that did not cause a nuisance to the neighbouring community.

Parliament has, until now at least, been quite reluctant to show a clear and explicit intention to remove citizen's private rights, and express statutory authority has appeared in very few legislative provisions. Parliament has, it seems, tried instead to abrogate such rights in a more oblique manner due to the political sensitivity of the issue (Pontin 2002). Where immunity has been awarded it has generally only been successfully received when juxtaposed with some form of statutory remedy, as in s.44 of the Land Compensation Act 1973 and, in the current instance, s.152(3) Planning Act 2008, which states that; *"A person by whom or on whose behalf any authorised works are carried out must pay compensation to any person whose land is injuriously affected by the carrying out of the works"*. This mirrors the common law position on the removal of private rights as, where there was a

[17] [1930] AC 171.
[18] [1981] AC 1001.
[19] [1893] 2 Ch. 588.
[20] Ibid.

statutory compensation scheme available, it acted as an indication to the courts that any nuisance caused was an inevitable result of the action.[21]

5.3 Application under s.158 Planning Act 2008

Opponents to the original clause 151 continue to raise concerns that there will still be a high possibility that developers will escape liability for nuisances under the new provisions, referring to it as *'de facto immunity from nuisance"* (EPUK, 2008). This is particularly relevant in consideration of the list of projects with such exemption. This list, which appears in s.14 of the Planning Act 2008, contains a considerable amount of structures and developments which could be treated as 'Nationally Significant Infrastructure Projects':

(a) the construction or extension of a generating station;
(b) the installation of an electric line above ground;
(c) development relating to underground gas storage facilities;
(d) the construction or alteration of an LNG facility;
(e) the construction or alteration of a gas reception facility;
(f) the construction of a pipe-line by a gas transporter;
(g) the construction of a pipe-line other than by a gas transporter;
(h) highway-related development;
(i) airport-related development;
(j) the construction or alteration of harbour facilities;
(k) the construction or alteration of a railway;
(l) the construction or alteration of a rail freight interchange;
(m) the construction or alteration of a dam or reservoir;
(n) development relating to the transfer of water resources;
(o) the construction or alteration of a waste water treatment plant;
(p) the construction or alteration of a hazardous waste facility.

Although statutory authority is an established defence against private action, it has previously been used in a more measured and restricted way in relation to very specific projects such as railways and utilities. This large new list of projects appears to extend the application of the defence to a wider variety of developments and their ancillary projects.

Concern has also been raised as the projects in the list have no stringent size limits, which could lead developers to 'think big', submitting applications for projects larger than strictly necessary in order

[21] See *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 K.B. 284.

to benefit from the statutory authority defence (Bassford 2007). This point was noted in the House of Lords committee stage of the Planning Bill:

> … the threshold for onshore wind projects is set at 50 megawatts, which means 15 megawatts of annual production of electricity generated and suggests that they are only one-hundredth the size of a normal nuclear power station. They cannot be considered to be big projects. (Lord Reay 2008, Col. 886)

It would seem that the proposed application of the statutory authority defence for infrastructure projects is a far remove from the immunity propounded in *Entick*[22], of protection for public officials performing activities of benefit to the public concerned. What appears to be emerging as more common is the protection of private commercial companies, which are engaged in works sanctioned by the State, and an acceptance of any resulting infringements caused by their activities. This, it could be argued, is a substantial stretch of the public benefit argument as, while it can be acknowledged that *"salus populi suprema lex"*[23] (the welfare of the people is the supreme law), it is not always clear who the real beneficiaries are in such circumstances. Mc Laren (1983) states that the law strongly reflects changes of perception within society and what importance they have, emphasising that this is particularly relevant *'in times of dramatic social change and economic growth'* (and, it could be argued, recession). In the current economic climate it may be that the prospect of employment growth, investment in national infrastructure and improved transport links, which encourage trade and tourism, are the incentives being offered to the new generation of disenfranchised neighbours. We are not facing a new industrial revolution, in fact quite the reverse, with industry and manufacturing on the decline in the UK year-on-year but the same justifications are being given for infringements on private property interests (Marvin & Guy 2001). It will therefore fall to the judiciary to continue to apply the restrictions carved out in common law to the statutory authority defence in order to protect private property owners' rights.

6: The scope and application of statutory authority

The range of activities excused under the statutory authority defence has been exceedingly broad and, at times obscure, covering nuisances such as; cattle noise from a railway yard,[24] the emission of unpleasant smells from sewage works,[25] and the operation of a smallpox hospital in a residential

[22] (1765) 19 St. Tr. 1030.
[23] *British Cast Plate v Meredith* (1792) 100 E.R. 1306 at 1309.
[24] *Brighton and South Coast Railway v Truman* (1886) L.R. 11 App. Cas. 45.
[25] *Hounslow LBC v Thames Water Utilities Ltd* [2003] EWHC 1197 (Admin).

area.[26] However, the actual application of the defence, and its relationship to statutory nuisance, has been restricted to allow for more fair and reasonable results for claimants. These restrictions have been applied through the years in a number of proceedings, shaping the scope of statutory authority in relation to; the proposed location of the nuisance, the inevitability of the nuisance, the effect on statutory provisions and the bearing that negligence has on the defence.

6.1: The importance of location specificity

Obviously in s.158 of the Planning Act 2008, Parliament have made their intention to restrict private rights apparent, meaning that in future developments there should be an amount of legal certainty. However the NPS process in itself could affect the application of the exemption, as courts have been reluctant to proffer the authority where there is a wide discretion available in the choice of sites for the proposed development (Buckley 1981). Unless National Policy Statements were location-specific in every instance, this aspect of implied authority could become problematic. This proved to be the case in *Metropolitan Asylum District Managers v Hill (No.2)*[27]; although the legislature had empowered the Poor Law Board to designate an asylum in the London area, the statutory framework did not explicitly specify the building or operation of the hospital. The courts could not determine whether the operation of the hospital would cause any nuisance irrespective of its location in London and, therefore, did not find sufficient explicit authority to abrogate common law rights. Lord Watson clarified the scope of the immunity:

> I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result.[28]

The clarity of expression in the 2008 Act should make it easier for judges to identify that such statutory authority exists, however the actual application in each situation could depend on the wording of the National Policy Statements and the amount of consideration given to the location of the proposed development.

[26] *A.G. v. Corporation of Nottingham* [1904] 1 Ch. 673.
[27] (1881) L.R. 6 App. Cas. 193.
[28] *Metropolitan Asylum District Managers v Hill (No.2)* (1881) L.R. 6 App. Cas. 193 at 212.

6.2: Is the nuisance caused an 'inevitable result' of the development?

One of these fundamental rules, established in *Manchester v Farnworth*[29], is that the nuisance caused will only be excused if it is an inevitable result of the defendant acting within the scope of their Parliamentary authority (Penner 2000). In that case it was also viewed that inevitability would apply where the defendant had tried the best system of nuisance prevention available at the time, allowing for up-to-date knowledge of such systems and taking into account the cost implications.[30] The defence in *Manchester*[31] failed because the damage caused was not an inevitable result of the building of the power station in question; it should instead have been built with taller chimneys, which would have dispersed the emissions more efficiently (Wilde 2008). This position was upheld more recently in the *Allen*[32] case, with Lord Wilberforce describing the procedure for courts when considering the defence in some detail:

> The respondent alleges a nuisance, by smell, noise, vibration, etc. The facts regarding these matters are for her to prove. It is then for the appellants to show, if they can, that it was impossible to construct and operate a refinery upon the site, conforming with Parliament's intention, without creating the nuisance alleged, or at least a nuisance.[33]

This obviously has some bearing on the treatment of future cases relating to Nationally Significant Infrastructure Projects and developers will need to ensure that they do not cause or exacerbate any avoidable nuisances. As Viscount Sumner stated in the *Manchester*[34] case: *"The legislature, in authorising a very big concern, must not be taken to be chary of requiring that much care is to be taken"*[35]. The concerns voiced by opponents to the Act that, under the new provisions, developers would have no need to mitigate their effects on local communities may thus be addressed. The defence will only be available as long as any nuisance they cause is an inevitable result of their actions and they have used the most modern means available in order to try to abate that nuisance. In effect, this replicates the existing defence of 'best practicable means', which is available under s.80(7) of the Environmental Protection Act 1990, for defendants who face prosecution under statutory nuisance provisions (Samuels 2004).

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[29] [1930] AC 171.
[30] *Manchester Corporation v Farnworth* [1930] AC 171 at 183.
[31] Ibid.
[32] *Allen v Gulf Oil Refining Ltd* [1981] AC 1001.
[33] Ibid. at 1013.
[34] *Manchester Corporation v Farnworth* [1930] AC 171
[35]Ibid. at 201.

6.3: Effect on statutory nuisance

Opponents to the initial Planning Bill raised concerns that a total immunity approach could mean that developers would not be held responsible for any breaches of statutory nuisance legislation and would elude potential enforcement proceedings. However the actual wording of the Planning Act appears to remove such concerns, mirroring as it does the previous provisions in the Railways Act 1993. The defence as set out in s.122(3) of the Railways Act 1993 provides exemption; *"(i) in any proceedings, whether civil or criminal, in nuisance; or (ii) in any civil proceedings"*, whereas statutory authority in s.158(2) of the Planning Act 2008; *"is conferred only for the purpose of providing a defence in civil or criminal proceedings for nuisance"*.

Immunity from statutory nuisance proceedings under s.122(3) was considered in *Camden LBC v London Underground Ltd*[36], with the court determining that statutory authority could only act as a defence to common law nuisances, and would not create a defence in actions prescribed by environmental protection legislation. This means therefore, that immunity will be afforded to any interference with land, as protected by common law nuisance, but will not remove liability for actions which may be prejudicial to health.

Although the reference to statutory nuisance in *Camden*[37] was *obiter*, the guidance remains that statutory authority will not be considered where activities have resulted in effects that are injurious to the health of others;

> ...our provisional view is that the immunity conferred by s.122 applies to common law nuisance but not to all statutory nuisances under the 1990 Act. All the categories of statutory nuisance listed in s.79(1) are defined by reference to the matter complained of being "prejudicial to health" or "nuisance". In the absence of any contrary expressed intention, nuisance must mean common law nuisance, which is a tort committed against land. There is nothing in section 122 to suggest that the statutory defence was being conferred in relation to all statutory nuisances, which include injury to health which might not be related to land.[38]

Such a position would appear to uphold the sanctity of environmental protection legislation, which should protect neighbours from certain nuisances, and reinforces the reassurances voiced by Baroness Andrews in the House of Lords Committee stage debate:

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[36] [2000] Env. L.R. 369
[37] Ibid.
[38] Ibid. LJ Rose at 379.

> The default position set out in our amendment does not confer a defence against any of the statutory nuisances set out in Section 79(1) of the Environmental Protection Act 1990, in so far as they involve matters outside what would constitute nuisance in common law. (Baroness Andrews 2008, Col. 882)

6.4: A negligent act

There is a long case history clearly demonstrating that there will be no defence available where a nuisance has been caused due to the tortfeasor's negligence. The court in *Manchester v Farnworth*[39] reaffirmed this position, citing cases such as; *Rex v. Pease*[40]; *Vaughan v. Taff Vale Railway Co.*[41]; *Hammersmith Railway v Brand*[42] and *Geddis v. Bann Reservoir*[43]: *"If the Legislature has authorized the doing of a particular thing in a particular place it authorizes the doing of it, even though it causes a nuisance, provided that it is not done negligently."*[44]

The definition of the term 'negligence', as it applies to statutory authority exemption, was propounded in the *Allen*[45] case, with Lord Wilberforce stating that the word be used; *"... in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons."*[46] More recently, negligence has been considered in relation to statutory authority immunity in the *Marcic*[47] case, with the House of Lords again upholding the need for operators to perform their functions within the scope of the authority proffered upon them, in a way that is not negligent or too remote. This approach is in accordance with both previous case law and European jurisprudence, as evidenced in *Kane v New Forest*[48]:

> Nor on the facts of this case are the defendants immune from a claim in negligence because they were exercising a statutory function under planning legislation… I reject Mr Snells's submission that a planning authority has blanket immunity from claims for negligence whatever the facts. That is simply not consonant with recent

[39] [1930] AC 171.
[40] (1832) 4 B. & Ad. 30.
[41] (1860) 5 H. & N. 679.
[42] (1869) LR 4 AC HL.
[43] (1878) 3 App. Cas. 430.
[44] Viscount Dunedin, *Manchester Corporation v Farnworth* [1930] AC 171 at 174.
[45] *Allen v Gulf Oil Refining Ltd* [1981] AC 1001.
[46] Ibid. at 1011.
[47] *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66.
[48] [2001] 3 All E.R. 914.

> developments of the law both in this jurisdiction and in Strasbourg see for example *Barrett v Enfield London Borough Council [2001] 2 AC 550* and *Osman v United Kingdom (1998) 29 EHRR 245*.[49]

All of the restrictions outlined above could have a big impact on developers or operators of major infrastructure projects, who will not have a *"carte blanche"*[50] to create or exacerbate nuisances. Instead they will have to show that any nuisance caused is an inevitable result of the permitted development, as well as having to perform their duties in consideration of the relevant statutory provisions, whilst ensuring that all activities are conducted in a manner that cannot be classified as 'negligent'. Additionally any NPS pertaining to such developments may have to be very location-specific, in order for the legislative authorisation to be explicit. These exceptions have been carved out in a demonstration of judicial hostility towards the notion of any infringement on private rights, sanctioned or otherwise (Linden 1966). It would seem that many of the opponents to the Planning Act 2008 could find solace in the safeguards these qualifications provide for neighbours of new infrastructure developments.

7: Conclusion

This paper demonstrates that the planning system for major infrastructure projects has been radically reshaped. Among a host of more contentious measures such as the curtailing of consultation, the establishment of an unelected planning commission, and the removal of certain hearing rights, the insertion of the existent 'statutory authority' defence appears unremarkable. This paper argues however, that the provisions set out in s. 158 of the Planning Act 2008, while embracing the terminology of the existing legal doctrine of statutory authority, may extend the scope and significance of such a principle and could tilt the balance of conflicting property rights in the developer's favour.

The previous explicit authorization, in clause 151 of the Planning Bill, to infringe private rights and award complete immunity from actions in private or public nuisance for developers of NSIPs, indicated a governmental disregard for private property owners. This paper has demonstrated the progression from this 'blanket immunity' to the statutory authority defence proffered in s.158 of the Planning Act 2008. It has also been shown that such a defence will be awarded restrictively in the

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[49] Ibid. at 921.
[50] *Midwood v. Manchester Corporation* [1905] 2 K.B. 597 at 606.

court rooms; the judiciary will retain a key role in determining both the scope of statutory authority in such instances and whether the defence should be applied at all. In producing National Planning Statements, government ministers will need to ensure that they are presenting statements that pertain to specific locations wherever possible, or the defence may not be upheld. Additionally, developers will have to heed precedents spanning two centuries pertaining to the application of the statutory authority defence and ensure that they behave in a non-negligent fashion, that any nuisance caused is an inevitable consequence of their sanctioned actions, and abide by the relevant statutory nuisance provisions which pertain to their activities.