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CASE COMMENT

A RELOOK AT THE STATUTORY AUTHORITY DEFENCE: R V PEASE (1832)[2377]

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The Stockton and Darlington Railway is widely regarded as the world's first modern railway. Engineered by the famous George Stephenson, and financed and promoted by the efforts of Edward Pease, it marked a major advance on the many short horse-drawn wagonways which had sprung up in the North Eastern coalfields in the eighteenth century, linking collieries with waterways. In 1830 the directors and enginemen of the Stockton and Darlington Railway Company were indicted for public nuisance on the highway. The nuisance in question concerned the startling of horses by steam locomotives on a stretch of highway which ran alongside the railway. The case turned upon whether the statute, which authorised the construction and operation of the line, also authorised potential nuisances caused by the running of steam locomotives. In the landmark decision of R v Pease4 the Court of King's Bench held that the authority of the original Act did indeed extend to the authorisation of certain disturbances created by steam locomotives. Yet it is noteworthy that the Act, which had authorised the building of the railway, had explicitly authorised the use of steam locomotives.

Public or common nuisance (as it was originally termed) is a crime and serves as a receptacle for miscellaneous wrongs which affect a class of citizens. Actions for public nuisance have been brought in respect of everything from obstructed highways to unlicensed stage plays. It is not clear at what point the term 'nuisance' was first applied to such wrongs. However, the use of the term led to certain links being made with the entirely separate tort of private nuisance. Private nuisance evolved from certain forms of action designed to protect particular interests in land. In a case of 1535[2378], it was established that an individual who suffered particular damage over and above that inflicted upon the general population could maintain a separate action for damages. Thus, links were forged between the crime of public nuisance and the tort of private nuisance at an early stage in the development of the common law. This

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[2377] (1832) 4 B & Ad 30, 110 ER 366.
[2378] Anon (1535) YB 27 Hen 8, f 27, pl 10.

led to the cross-fertilisation of ideas between public and private nuisance. One concept, which arose in the context of public nuisance before leaping across into tort, was the defence of statutory authority.

Private bodies, causing damage in the course of carrying out a public duty, enjoyed a limited immunity which derived from Crown immunity. This could be justified on the basis that the duty was intended to serve the public interest and that this would outweigh certain individual harms. It was less easy to apply this logic to private enterprises which enjoyed statutory powers to undertake projects with a view to profit. The relationship between statutory powers and liability for damage caused by the use of such powers was rather more complex. The canals and the railways fell into the latter category since they were instigated by private enterprise with a view to profit; they were not built at the behest of government in order to implement some grand policy. In fact, the chaotic and unplanned manner in which the British railway system evolved is in marked contrast to the development of many of its continental European counterparts where strategic national plans were drawn up. One of the earliest European systems to develop in the wake of the pioneering work in the UK was in Belgium. After the opening of the first line in 1835 a national plan was devised, the main framework of which consisted of four principal routes converging on a central hub. Furthermore, the construction was funded by the state. This central planning on the part of certain continental governments was largely due to the fact it was quickly recognized that the railways could have an important strategic military role to play. Nevertheless, there was a clear public interest dimension to these projects which could not be ignored. Indeed, in the absence of such public benefits it is doubtful whether the promoters would have gained the necessary statutory backing for the schemes. Projects of this magnitude could only be undertaken with the authorisation of a private Act of Parliament. This provided the promoters with the wherewithal to build the infrastructure and much of the legislation was concerned with land acquisition and compensation. Such powers clearly expropriated the property interests vesting in the land which lay in the path of the development. However, once construction was complete, it was less clear whether the authority to restrict existing rights extended to the day-to-day operation of the enterprise. In R v Russell, a case which was to play a decisive role in Pease, the defendants were indicted in public nuisance for obstructing the navigable passage in the Tyne through the construction of new coal loading facilities. The Court of King's Bench upheld the trial judge's jury direction that it was appropriate to consider the

public benefits of the scheme. These included the national benefits associated with more efficient coal distribution and the resultant lower prices on the London market. By this stage it had long been established, as a matter of common law, that public benefit could be taken into account when considering the reasonableness of a particular land use. If a land use was reasonable it could not amount to an actionable nuisance.

It was only a matter of time a degree of opposition had emerged to the use of steam locomotives. Unlike canals, it had become apparent that the disruption caused by building a steam railway extended beyond the construction phase. Thomas Creevey, a Member of Parliament who led objections to the Liverpool and Manchester Railway Bill, referred to 'this infernal nuisance—the loco-motive Monster carrying Eighty Tons of goods, and navigated by a tail of smoke and sulphur'[2379]. As regards the Stockton and Darlington, certain landowners who had lost land to the railway anticipated the disruption. John Russell Rowntree successfully appealed against the level of compensation offered and had it increased to £500 so as to reflect likely nuisance[2380].In 1830 Edward Pease, several of his fellow directors and the enginemen were indicted in public nuisance. The trial was held at the York Assizes on 30 March 1831 before Mr Justice Littledale. In his opening address for the prosecution, Mr Williams elected to set the case up as a battle between new technology and the traditional English way of life[2381].Williams then went on to paint a picture of a backward looking merry old England. The 'obsolete and perhaps impracticable people' using horses on the highway should 'not be sacrificed to these scientific projects and locomotive engines'. He went on,

The old people of England are not easily moved—they do not easily adopt alternatives even if they are improvements; the dull, lagged and quiet people of this realm must beg for a little protection of the law, as long as it may be necessary[2382].

Charles Harrison, a toll keeper on the turnpike, recounted several incidents in which all manner of wagons and carriages drawn by up to six horses had been overturned. Those on horseback fared little better as 'The same cause frequently made saddle horses, plunge, rear, start aside, or turn around and gallop a considerable distance'. On many occasions he had

[2379] Sir H Maxwell (ed), The Creevey Papers (London, John Murray, 1903) vol 2, 88.
[2380] Durham County Advertiser, 9 April 1825.
[2381] From notes of evidence taken during the trial, Durham County Records Office (DCRO) Records of the Fleming family of Tudhoe, D/FLE/122, D/FLE/123.
[2382] Ibid.

offered 'alarmed and agitated' horses refuge in his barns until the locomotive had passed. They invariably emerged 'sweating as they do after hearing a distant cannonade'[2383].The defence counsel, Frederick Pollock then made the crucial assertion that 'It must be supposed that the legislature balanced the evils and inconveniences before the power was given'. Accordingly, the public benefits arising from the scheme must have been deemed to have outweighed the inconveniences suffered by the public[2384].Pollock pursued the public benefit theme in the case for the defence. Richard Otley, the Secretary of the Stockton and Darlington Railway, gave evidence regarding the vast quantities of coal now carried by the railway. In the year ending 30 January 1830, 171,000 tons of coal had been transported and carriage costs had been considerably reduced. Furthermore, in order to keep pace with demand, there was a pressing need to expand the fleet of locomotives beyond the seven already in use[2385]. Pollock emphasised the economic benefits of the line and claimed that these extended beyond local business concerns and encompassed the national interest. Conveying coals cheaply to the Tees would benefit 'not only London but the other great interests connected with the commerce and wealth of the country'[2386]. He then questioned the motives of those who had sought to bring about the present prosecution. Whilst he did not wish to characterise the action as 'an outcry against Reform', he regarded it as 'an attempt to put down persons from doing that which they had a right to do under the Act of Parliament'[2387]. Furthermore, in operating the railway, the defendants had done everything demanded by discretion, prudence and care to minimise the disruption caused by the locomotives. In this respect, Otley gave evidence to the effect that 'the engines of the Company were constructed on the best principle, and had been from time to time improved'[2388].This latter point appears not to have been contested, and Littledale J shut the door to any argument based upon want of care by concluding that 'upon the evidence of Otley it appeared that due care and caution had been used to make the thing as little nuisance as possible'[2389].

[2383] Ibid.
[2384] Ibid.
[2385] Ibid.
[2386] Ibid.
[2387] Ibid.
[2388] Ibid.
[2389] Ibid.

In the Court of King's Bench[2390] the case was tried before Lord Tenterden CJ, Littledale, Parke and Taunton JJ. On this occasion the prosecution was led by Cresswell Easterby who appeared to accept the notion of statutory authority. His main arguments were based upon the idea that such powers should be interpreted very narrowly. A statutory power of this nature should not be construed as conferring blanket immunity and it should not afford the defendant any protection in respect of avoidable harms. For example, as Williams had argued at trial, the corridor of land in which the defendants were entitled to build would have enabled the line to be set further back from the turnpike. Furthermore, where Parliament had intended to expropriate existing rights one would have expected it to make provision for compensation.

Once again, the defence was led by Pollock, who took the opportunity to refine his nascent concept of statutory authority. He reiterated the public utility arguments and the fact that Parliament must be taken to have balanced the benefits against individual detriments[2391]. Pollock conceded the argument that the immunity conferred by a statute should be confined to inevitable harms. However, he was of the view that the statutory provision should not be so narrowly construed that it rendered the defence meaningless. Some disruption was unavoidable; otherwise there would have been no need to gain statutory powers in the first place. The test should be whether all reasonable steps had been taken to reduce the harm to tolerable levels. In this respect, he cited the evidence of Otley to the effect that the locomotives were of the best construction. Furthermore, the flexibility which the Act allowed, regarding the precise positioning of the line, was not for the purpose of reducing nuisances on the highway. Pollock also ventured that the disruption to traffic on the highway would lessen as horses became accustomed to their new rivals. Finally, he rejected the notion that the absence of provisions for compensation was determinative of whether Parliament had intended to abrogate existing common law rights.

The leading judgment was delivered by Parke J, who agreed that the case raised an issue of statutory interpretation. The wording of section 8 of the 1823 Act, which empowered the company to use steam locomotives, would be given its literal and ordinary meaning unless this would lead to unreasonable results. On this basis, he held that that section conferred an

[2390] R v Pease (1832) 4 B & Ad 30, 110 ER 366.
[2391] Ibid, 4 B & Ad 38.

'unqualified authority to use the engines'. It was inevitable that nuisances would arise from the construction of the line as the proximity to the Yarm turnpike was clearly shown in the plans:

"The Legislature, therefore, must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and consequently that travellers upon the highway would be in all probability incommoded by the passage of locomotive engines along the railroad.[2392]"

Parke J accepted that, had these consequences been deemed an 'unreasonable result' of the use of statutory powers, it would have been necessary to imply some qualification or condition requiring mitigation of the nuisances. Examples of such measures, given by the prosecution, included the erection of screens or building the railway further back from the highway. However, Parke J was not prepared to find that the nuisances suffered by the highway users could be regarded as unreasonable given the wider public benefits arising from the construction of the new railway. The majority of the public would benefit from 'more speedy travelling and conveyance of merchandise along the new railroad'[2393]. These benefits were deemed to outweigh the inconvenience suffered by highway users.

The most significant aspect of the judgment, though, was that statutory authority was formulated as a specific defence to an otherwise actionable nuisance. The notion that a statutory authorisation could operate as a specific defence to a prima facie public nuisance was entirely novel and, in this respect, R v Pease can properly be regarded as the starting point for the defence of statutory authority. The decision is especially significant for the reason that Parke J was prepared to regard such an authority as implicit within the statute in the absence of express words. This had a significant effect on the drafting of future statutes; where the legislature intended to preserve common law rights, they felt compelled to insert 'nuisance clauses' for the avoidance of doubt.96 Furthermore, the decision can be regarded as an early example of judicial deference to the legislature. Parke J was prepared to assume that the sophisticated parliamentary machine would have weighed the competing interests and reached an unimpeachable conclusion that the railway was for the public benefit. This begs the question of whether the court was right to place such faith in the thoroughness of the

[2392] Ibid, 4 B & Ad 41.
[2393] Ibid, 4 B & Ad 42.

parliamentary procedures. In fact, the various standing and select committees which scrutinised private Bills in both Houses of Parliament were exceedingly thorough. Some commentators went so far as to say that the procedure was quasi-judicial in nature. As Erskine May noted:[2394]

"In passing private bills, Parliament still exercises its legislative functions: but its proceedings partake also of a judicial character. The persons whose private interests are to be promoted, appear as suitors for the bill; while those who apprehend injury are admitted as adverse parties in the suit. Many of the formalities of a court of justice are maintained; various conditions are required to be observed, and their observance to be strictly proved; and if the parties do not sustain the bill in its progress, by following every regulation and form prescribed, it is not forwarded in the house in which it is pending."

Thus, in R v Pease the court could be reasonably confident that the Bill would have been subject to thorough scrutiny. However, the main problem was that, due to the novelty of the technology, many of the problems would not have been foreseen. One cannot be sure that the full extent of the potential nuisances was fully investigated. Nevertheless, the court was prepared to make a bold assumption that these difficulties must have been anticipated and deemed an acceptable price to pay for the public benefits of the scheme. However, set against this, it must be noted that the decision resulted in a duty to minimise the harm. In fact, to this date, statutory authority is an effectual defence in the cases for private nuisance.

[2394] T Erskine May, A Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 6th edition (London, Butterworths, 1868).