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# Private Law Liability of Public Authorities for Negligent Inspection and Regulation

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The growth of the public sector in this century has greatly expanded the number of situations in which persons have come to rely upon or are affected by government action and inaction. One result of this expansion is that courts, especially in the last two decades, have been forced to determine the extent to which principles of private law liability apply to public authorities. In the United States, the policy-operational distinction combined with principles of specific detrimental reliance have been used by courts to determine the private law liability of public authorities in cases of negligent inspection and regulation. In the United Kingdom, Australia, and New Zealand the policy-operational distinction, however, has been rejected in favour of an approach which relies exclusively on specific detrimental reliance. In contrast, the Supreme Court of Canada has recently applied the policy-operational distinction in conjunction with an *Anns* foreseeability approach to duty of care when evaluating liability in comparable cases of negligent inspection and regulation.

In this article, the author criticizes the approach currently used by the Supreme Court in assessing the private law liability of public authorities for negligent inspection and regulation. The author suggests that the Court's use of both the policy-operational distinction and the *Anns* approach to duty of care as touchstones of liability is misguided and should be replaced by a specific detrimental reliance analysis. In the first part, he criticizes the policy-operational distinction. He argues that it is fundamentally ambiguous and fails adequately to distinguish between distinctively governmental and distinctively non-governmental activity. In the second part, he criticizes the *Anns prima facie* foreseeability approach adopted by the courts in determining the duties owed by governments to individuals. He argues that the use of foreseeability obscures the unique nature of a government's relationship with its citizens and the special duties which arise out of this relationship. Following the move away from both the policy-operational distinction and the *prima facie* duty of care in the United States and Commonwealth courts, the author suggests a theory of liability for public authorities grounded in the specific relationship which arises when a government induces a citizen to rely on it for inspection and regulation, and the citizen reasonably relies.

Au cours de ce siècle, la croissance du secteur public a multiplié les situations où les individus sont touchés par l'action ou l'inaction des gouvernements. Aussi, les tribunaux ont dû déterminer dans quelle mesure les principes de responsabilité civile s'appliquent aux organismes publics et ce, particulièrement au cours des deux dernières décennies. Aux États-Unis, deux principes sont employés par les tribunaux pour définir la responsabilité civile délictuelle des pouvoirs publics dans les cas d'inspections ou de règlements négligents. Le premier principe distingue une décision de politique gouvernementale de sa mise en oeuvre : seule cette dernière peut engager la responsabilité du gouvernement. Selon le second principe, les tribunaux retiennent la responsabilité du gouvernement lorsque la victime du dommage pouvait raisonnablement compter sur l'action ou l'inaction du gouvernement ou d'un de ses organes (*specific detrimental reliance*). Au Royaume-Uni, en Australie et en Nouvelle-Zélande, la distinction entre politique et mise en oeuvre a été rejetée en faveur d'une approche centrée uniquement sur les principes du *specific detrimental reliance*. Récemment, la Cour suprême du Canada a appliqué la distinction entre politique et mise en oeuvre en combinaison avec les principes de prévisibilité élaborés dans l'arrêt *Anns* de la Chambre des Lords britannique.

Dans cet article, l'auteur critique l'approche de la Cour suprême. Il propose qu'on substitue à cette analyse l'approche du *specific detrimental reliance*. Selon lui, la dualité politique/mise en oeuvre est fondamentalement ambiguë et ne permet pas de distinguer adéquatement les activités gouvernementales des activités non-gouvernementales. Puis, il critique l'approche basée sur la prévisibilité de l'arrêt *Anns*, utilisée par les tribunaux pour déterminer l'étendue des obligations des gouvernements envers les individus. Il soutient que le critère de la prévisibilité ne rend pas justice à la relation unique d'un gouvernement avec ses citoyens et aux devoirs particuliers qui naissent de cette relation. Comme les tribunaux des États-Unis et du Commonwealth, l'auteur écarterait ces théories. Il propose une théorie centrée davantage sur la spécificité de la relation qui s'établit lorsqu'un gouvernement incite un citoyen à reposer sur lui pour l'inspection et la réglementation et qu'en retour l'individu lui accorde une confiance raisonnable.

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*Of course, it is not a tort for the Government to govern.*<sup>1</sup>

## Introduction

When should a government agency be held liable in damages to a private citizen for negligently failing to protect the citizen's person or property? In principle, governments should bear the same liability in tort and delict as similarly situated persons. The question is: when is government activity sufficiently like the activity of persons that the law regulating the civil relations between persons can apply to the government?<sup>2</sup> In three recent decisions, the Supreme Court of Canada turned to the so-called "policy-operational distinction" to answer this question.<sup>3</sup> Once it has been determined that a government agency should bear

<sup>1</sup>*Dalehite v. U.S.*, 346 U.S. 15 at 57 (1953) [hereinafter *Dalehite*].

<sup>2</sup>There is some debate about whether the liability of governments to persons ought to be governed by a separate body of law altogether. The fact remains, however, that Canadian law does not have, nor could it easily create, a separate body of *droit administratif* as in France. Analogizing government activity to private activity so as to bring it under private law rules therefore remains necessary. On the debate about whether a separate *droit administratif* should be recognized in the common law, see B. Schwartz, "Public Tort Liability in France" (1954) 29 N.Y.U. L. Rev. 1432; J.B.D. Mitchell, "The Causes and Effects of the Absence of a System of Public Law in United Kingdom" [1965] P.L. 95; C. Harlow, "'Public' and 'Private' Law: Definition without Distinction" (1980) 43 Mod. L. Rev. 241; G. Samuel, "Public Law and Private Law: A Private Lawyer's Response" (1983) 46 Mod. L. Rev. 558; C. Harlow, "Fault Liability in French and English Public Law" (1976) 39 Mod. L. Rev. 516; E. Taborsky, "A Case for Administrative Tribunals" (1943-4) 7 Mod. L. Rev. 209.

<sup>3</sup>*Laurentide Motels v. Beauport*, [1989] 1 S.C.R. 705, 94 N.R. 1, 23 Q.A.C. 1 [hereinafter *Laurentide Motels* cited to S.C.R.]; *Just v. B.C.*, [1989] 2 S.C.R. 1228, [1990] 1 W.W.R. 385 [here-

liability as if it were a person, the question becomes: would a person have a duty to prevent injury to another in that situation? In seeking to determine whether such a duty existed in the common law cases, the Supreme Court has turned to the foreseeability test proposed by Lord Wilberforce in *Anns v. Merton London Borough Council*.<sup>4</sup>

In the first part of this paper I look at the roots of the policy-operational distinction in American law, and then trace the reception and ultimate rejection of the distinction in the law of England, Australia and New Zealand. I conclude that the concept of discretion, which lies at the centre of the policy-operational distinction, is too ambiguous to provide a clear basis for distinguishing categories of governmental activity. Moreover, I argue that there is nothing in the concept of discretion that is unique to government. Determining that a decision is in the nature of policy or that a function is operational does not answer the question of whether the defendant agency was or was not acting like a person.

In Part II, I trace the history of the foreseeability test since *Anns*. I show that the *Anns* foreseeability test has been roundly rejected as a broad approach to duties of care in negligence. I suggest instead that the Canadian courts should follow the lead of the Australian and English courts, taking into account the particularities of the relationship between the parties, analysing categories of duties on the basis of categories of relationships, and developing new duties by analogy to existing duties. I argue that in the category of cases represented by the Supreme Court trilogy, where in each case it was alleged that a government agency failed to prevent injury caused by a third person or by an act of nature, it may be appropriate to recognize new duties based on an analogy to the duty to rescue. A person may claim compensation for faulty regulation or inspection where a government has intentionally acted in such a way: (1) that it would be reasonable for the plaintiff to rely on the government agency to ensure his or her safety or interests and (2) that the agency has actually induced the plaintiff to forego other remedies or precautions against the risk.

It may be that even this approach is too restrictive to embrace the duties which we expect a government to shoulder in an increasingly communitarian society. However, if it is indeed desirable to create duties for which there is no private law analogy, I believe that the justification for those duties must be fully and openly articulated.

## I. The Policy-Operational Distinction

The policy-operational distinction lies at the centre of the Supreme Court of Canada's attempt to distinguish those areas of governmental activity which are sufficiently similar to personal activity to warrant the imposition of tortious

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inafter *Just* cited to S.C.R.]; *Rothfield v. Manolagos*, [1989] 2 S.C.R. 1259, [1990] 1 W.W.R. 408 [hereinafter *Rothfield* cited to S.C.R.].

<sup>4</sup>[1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) [hereinafter *Anns* cited to A.C.].

liability from those areas of governmental activity which are outside the scope of the law of tort. If an impugned decision is said to be in the nature of "policy" it is generally beyond review by the courts. In contrast, "operational" decisions made during the implementation of a policy decision can give rise to private rights of action, especially in negligence.

In this part I look at the history and judicial origins of the policy-operational distinction. Through an examination of the treatment of the distinction by the courts in England, Australia, New Zealand and finally Canada, I will demonstrate that the distinction is at best unhelpful and at worst confusing.

### A. *Historical and Judicial Origins of the Policy-Operational Distinction*

#### 1. Roots in American Law

The discretionary (or policy)-operational distinction has its roots in the American *Federal Tort Claims Act*.<sup>5</sup> The *Federal Tort Claims Act* was enacted to make the government liable in tort as if it were a person, so far as that is possible. It simplified the procedures for bringing actions against the federal government and for the first time abrogated the federal government's sovereign immunity from actions in tort.<sup>6</sup>

The following year the British *Crown Proceedings Act*<sup>7</sup> was enacted with the same objectives. "Sovereign immunity" in the U.S. and "Crown immunity" in English law are rough equivalents. The enactment of the American and British acts gave "fresh impetus to the demand for similar ... legislation in Canada."<sup>8</sup>

While the *Federal Tort Claims Act* (and later the state acts<sup>9</sup>) had the effect of waiving immunity from tort actions generally, it did so in an indirect way. A "tort claims act may be described as inverting the customary rule [that applies

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<sup>5</sup>*Federal Tort Claims Act*, 28 U.S.C. §2671ff (1946).

<sup>6</sup>L.L. Jaffe, "Suits against Governments and Officers: Sovereign Immunity (Part I) and Damage Actions (Part II)" (1963-64) 77 Harv. L. Rev. 1, 209. Sovereign immunity is a quasi-constitutional doctrine of questionable origin that holds that a sovereign power is immune from suit in its own courts without its consent. See W. Holdsworth, *A History of English Law*, vol. 9, 3d ed. (London: Methuen, 1944) at 8. But see *Kawananakoa v. Polyblank*, 205 U.S. 349 at 353 (1907) (per Holmes J.); L.H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988) at 174 n. 5.

<sup>7</sup>1947 (U.K.), 10-11 Geo. VI, c. 44.

<sup>8</sup>D.P. Jamieson, "Proceedings by and against the Crown in Canada" (1948) 26 Can. Bar Rev. 373 at 373.

<sup>9</sup>At the time of the enactment of the *Federal Tort Claims Act* only some states had begun to limit their own sovereign immunity. See E. Borchard, "Government Liability in Tort" (1948) 26 Can. Bar Rev. 399 at 409ff. Most state constitutions bar actions against the state in state courts except by consent. See *Restatement of the Law (Second) of Torts*, 2d ed. (Washington: American Law Institute, 1965) [hereinafter *Restatement*] at Reporter's Note to §895B; see *ibid.* at 256ff. for a list of states, their constitutional provisions relative to tort immunity, and the present law.

to individuals] by creating immunity and establishing liability only by exception."<sup>10</sup> The *Federal Tort Claims Act* provides that:

The United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. ...

The provisions of this chapter ... do not apply to ... any act or omission ... based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty ... *whether or not the discretion involved be abused*.<sup>11</sup>

The "discretionary" half of the discretionary-operational dichotomy therefore comes from the act itself. As Reed J. observed in *Dalehite*, the first U.S. Supreme Court case to consider the *Federal Tort Claims Act*, "[t]he statute is unique in Anglo-American jurisprudence in its explicit exception for discretion."<sup>12</sup> The original purpose of the exception was political: Congress feared that opponents of activist New Deal projects would oppose them with vexatious actions in negligence, trespass and nuisance.<sup>13</sup> The phrase "operational level" was coined by courts to describe activities where the "discretionary function" exception would not apply.<sup>14</sup> Thus the original dichotomy was between "discretionary" decisions on one side, and "operational" decisions on the other. Discretionary decisions were, by virtue of the *Act*, absolutely unreviewable. Operational functions, on the other hand, did not benefit from the qualified sovereign immunity, and could give rise to the same private law duties as would be imposed on persons.

It must be emphasized that the discretionary-operational distinction has always been a rule of immunity from suit, not a source of private law duties. Finding that a function is operational in nature does not create a presumption in favour of finding private law liability; it simply means that the doors to that

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<sup>10</sup>57 Am. Jur. 2d 27. The *Federal Tort Claims Act* is a series of nested exceptions. It holds that the government is generally not liable, save as provided in the *Act*. The sections mentioned below hold that it *is* liable as if it were a person, except where a list of express exceptions apply. The discretionary function exception is among those exceptions.

<sup>11</sup>28 U.S.C. §2674 and §2680(a), cited in *Indian Towing v. U.S.*, 350 U.S. 61 at 63 (1955) [hereinafter *Indian Towing*].

<sup>12</sup>*Supra*, note 1 at 82 n. 27.

<sup>13</sup>Reed J. in *Dalehite*, *ibid.* at 30:

[The discretionary function exception is] a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the government arising out of an authorized activity, such as a flood control or irrigation project, *where no negligence on the part of any Government agent is shown*. ... *The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion (emphasis added)*.

<sup>14</sup>*Ibid.* at 42. A similar dichotomy was developed by state courts considering state tort claims acts. See *Johnson v. California*, 447 P.2d 352 (Cal. 1968) [hereinafter *Johnson*].

possibility are not closed. Whether the parties are in a relationship of proximity must still be determined by the ordinary private law rules.<sup>15</sup>

## 2. *Anns* and the Policy-Operational Distinction in the Commonwealth

The House of Lords decision in *Anns* is important because it introduced the American “discretionary-operational” distinction (renamed the “policy-operational” distinction) into the Commonwealth.<sup>16</sup> *Anns* also raised foreseeability to a position of unwarranted preeminence among the many criteria for determining the existence of a duty of care. Our present interest is in the policy-operational distinction. I will discuss the duty of care issue below.<sup>17</sup>

Prior to *Anns* the leading English case on the liability of public authorities in tort was *East Suffolk Rivers Catchment Board v. Kent*.<sup>18</sup> Lord Romer held that an authority could be liable when it created fresh risk and inflicted injury, but that it could never be liable for failing to exercise a “discretionary power.” For example, an authority that had the power to light city streets could not be liable for negligence in carrying out that power.<sup>19</sup> This line of analysis focused on whether the authority had a duty or a mere power to do what the plaintiff alleged it had failed to do. Moreover, the House affirmed the more general principle that the duties of public agencies are governed by statute law (public law) not the common law (private law).

In *Anns*, Lord Wilberforce recognized that the scope of the duties owed by public agencies to persons is primarily a matter of public law, but added that it is not exclusively so. In his view, the development of the concept of proximity in the modern law of torts required a reconsideration of the civil responsibility of public authorities to persons who are closely affected by their activities. “The problem ...” he wrote, “is to define the circumstances in which the law should impose, over and above, or perhaps alongside, these public law powers and

<sup>15</sup>I will discuss the significance of this point in more detail in part II.

<sup>16</sup>It has been suggested that the policy-operational distinction was the basis of the decision of Laskin J. (as he then was) in *Welbridge Holdings Ltd v. Winnipeg (City)*, [1971] S.C.R. 957, 22 D.L.R. (3d) 470, [1972] 3 W.W.R. 433 [hereinafter *Welbridge Holdings* cited to S.C.R.]. See P. P. Craig, “Negligence in the Exercise of a Statutory Power” (1978) 94 L.Q. Rev. 428 at 438 n. 55; P.W. Hogg, *Liability of the Crown*, 2d ed. (Toronto: Carswell, 1989) at 125. This view involves a misreading of the case and a misunderstanding of the policy-operational distinction. *Welbridge Holdings* held that a municipal council could not be held liable in negligence to building developers who lost money when the failure to observe legislative formalities invalidated a by-law. The case is concerned with the immunity of municipalities in their “legislative and quasi-judicial” capacities contrasted with their corporate capacity; it was not concerned with distinguishing among levels of discretion *within* the executive branch of government.

<sup>17</sup>See below, subsection II.A.1.

<sup>18</sup>[1941] A.C. 74, [1940] 4 All E.R. 527 (H.L.) [hereinafter *Kent* cited to A.C.].

<sup>19</sup>Discussing *Sheppard v. Corporation of Glossop*, [1921] 3 K.B. 132, [1921] All E.R. 61 [hereinafter *Sheppard*], cited in *Kent*, *ibid.* at 99ff. Lord Atkin dissented.

duties, a duty in private law towards individuals such that they may sue for damages in a civil court.”<sup>20</sup> In other words, public agencies should in principle be subject to common law duties of care as well as to statutory duties. Lord Wilberforce seemed to be saying that the *Kent* analysis, which turned on whether the authority was acting under a power or a specific duty, did not address the question of proximity, which relates to the actual interaction between the parties. In other words, it did not address whether the agency’s actions brought it into a relationship of proximity with the plaintiff.

In distinguishing *Kent*, Lord Wilberforce turned to the discretionary-operational distinction. *Kent* was correct so far as it went, he wrote, but it failed to recognize the discretionary-operational distinction. The rule in *Kent*’s case must now “be understood and applied with the recognition that, quite apart from such consequences as may flow from an examination of the duties laid down by a particular statute, there may be room, once one is *outside the area of legitimate discretion or policy*, for a duty of care at common law.”<sup>21</sup> Since operational functions are generally outside the scope of legitimate discretion or policy “there is room” for a duty of care at common law. The idea seems to be, although it is nowhere stated directly, that it is more likely that a relationship of proximity would arise from operational functions than from policy decisions. Whether the agency was acting under a “power” or a “duty” is irrelevant.

### ***B. Critique of the Policy-Operational Distinction***

It appears that Lord Wilberforce considered the policy-operational distinction to be part of the test for determining when a government, a political abstraction, is in a relationship of proximity with a person in a manner analogous to the relationships of proximity between persons. That, however, is not the purpose for which the discretionary function exception was created by the drafters of the *Tort Claims Act*.

Our basic theme is that the policy-operational distinction was intended to define those situations where governments act sufficiently like persons so that the rules governing the relations between persons can apply to the government as well. There are, however, at least two ways in which governments are *not* like persons. First, government is political and legislative: it has the power and the duty to act in ways that persons may not and it redistributes costs, benefits and risks among the persons it governs. This is the aspect of government with which the American drafters of the discretionary function exception were dealing. Second, governments are abstract: we cannot have a relationship of proximity with a government, in either a physical or moral sense, in the same way we have relationships of proximity with persons. When we speak of a person being in a rela-

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<sup>20</sup>*Supra*, note 4 at 754.

<sup>21</sup>*Ibid.* at 758.

tionship of proximity with the government, we really mean that the person has come to be affected by a program or human agent of the government much more directly than other persons. This is the aspect of government Lord Wilberforce seems to have had foremost in his mind, although he was clearly concerned with the political and legislative aspect as well. Discretion, which lies at the heart of the policy-operational distinction, does not adequately address either of these issues.

### 1. Discretion and Policy

In American law, agencies exercising "discretion" are immune from suit in tort. Agencies performing operational functions, by definition non-discretionary, are subject to normal private law rules.<sup>22</sup> In *Anns*, the "discretionary-operational" distinction, transformed into the policy-operational distinction, continues to rely on discretion as the decisive criterion for determining whether the private law rules of tort will be applied. American commentators find the concept of discretion unhelpful due to its multiplicity of meanings. Lord Wilberforce, in *Anns*, imported this ambiguity into the Commonwealth. In addition, he introduced the concept of discretion into the operational level, further muddying the distinction.

The problem is that the concept of discretion is ambiguous. In different contexts it can mean very different things.<sup>23</sup> To say a decision-maker has non-reviewable discretion might be an allusion to the constitutional separation between the judicial and executive branches: the judiciary is cautious about commenting on executive decisions, and *vice versa*. The weakness with this interpretation is that the force of executive privilege declines as one descends through the bureaucracy. The implication of the policy-operational distinction is that the decision-maker's status might be relevant, with discretionary decisions being made at "high levels." However, the policy-operational distinction does not provide a test for distinguishing between high and low level decision-makers, nor does it address the principal question of when government action is so similar to private action that it should be subject to private law. Discretion might also mean that a decision-maker has a broad range of choice from which to choose a course of conduct. If one saw that a decision-maker had only two or three options one might conclude that his or her choice involved very little discretion. But to conclude that "bad" decisions from among a narrow range of choices should give rise to private law liability is a *non sequitur*. There is nothing in the idea of range of choice that is either uniquely governmental or uniquely akin to personal conduct.

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<sup>22</sup>See text accompanying note 11.

<sup>23</sup>See, for example, R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard U. Press, 1978) at 31, 69.

Finally, "discretion" might mean that the decision-maker must take into account a variety of complicated and perhaps technical considerations, and render a decision that is the product of judgment on matters about which reasonable persons would differ. An example is "the striking of a just balance between the rival claims of efficiency and thrift" mentioned by duParcq L.J. in the Court of Appeal judgment in *Kent*.<sup>24</sup> American authorities generally cite similar reasons for refusing to permit executive decisions to be second-guessed. In some cases courts focus on the specialized expertise of government agencies. It is said that the "vigorous decision-making" of the executive would be impaired if every functionary were required to "exercise his judgment and at the same time [be] held responsible according to the judgment of others who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may now be acting largely on the basis of hindsight."<sup>25</sup> Unfortunately, the discretionary-operational distinction is of no use in segregating "simple" decisions from those which require special expertise. Discretionary (or policy) decisions might involve weighing competing interests which are easily understood by lay-persons. On the other hand, day to day operations may require judgment which is beyond the reach of the average person.<sup>26</sup> Courts are properly reluctant to second-guess decisions of this type.

"Discretion," then, has a variety of meanings which courts seldom articulate when they rely upon it as the basis of an authority's liability. Even if a court is careful to identify the type of discretion it has in mind, the discretionary-operational distinction would not tell us whether a "bad" decision ought to incur private law liability. Lord Wilberforce sometimes equates "legitimate discretion" with policy,<sup>27</sup> implying, in line with the American cases, that that which is *not* policy, *i.e.* "operational" activity, is not discretionary. At other times he

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<sup>24</sup>[1940] 1 K.B. 319 at 338, [1939] 2 All E.R. 207 (C.A.), cited with approval by Viscount Simon L.C. in the House of Lords decision, *supra*, note 18 at 86.

<sup>25</sup>*Restatement, supra*, note 9 at §895D(b), commentary. See also O.M. Reynolds, "The Discretionary Function Exception of the Federal Tort Claims Act" (1968) 57 Georgetown L.J. 81 at 121.

<sup>26</sup>In *Weiss v. Fote and the City of Buffalo*, 167 N.E.2d 63 (N.Y. 1960) for example, the New York Court of Appeals held that the statute abolishing state immunity did not permit actions in negligence based on allegedly negligent placement of street lights. The Court held that recognizing such suits would require turning over to lay-persons (the jury) decisions about traffic control that could only be decided by experts. Is the placement of traffic lights in the nature of policy, or is it operational? One would expect this answer to be the same as the answer to the question of whether the decision about when to inspect for unstable rocks is by nature policy or operational: in principle, the decisions seem similar. But the court in *Weiss* evidently thought the traffic light decision was discretionary (unreviewable), while the Supreme Court of Canada thought the rock inspection decision in *Just* was operational (reviewable). The point is not that one court was wrong and the other right. The point is that the discretionary (or policy)-operational distinction does not tell us whether the decisions ought to be reviewable or not.

<sup>27</sup>*Anns, supra*, note 4 at 758: "[T]here may be room, once one is outside the area of *legitimate discretion or policy*, for a duty of care at common law."

says that "operational" decisions may have discretionary elements.<sup>28</sup> Operational decisions therefore seem to fall into two, or perhaps more, categories: first, those that are merely mechanical, where the functionary has no discretion, and which are therefore fully reviewable and second, those that involve the implementation of a higher level policy decision, but nevertheless permit wide (non-reviewable) discretion. Thus, while "policy" decisions (whatever they may be) are clearly discretionary, "operational" decisions may or may not be. In other words, describing a decision as being in the nature of "policy" seems to dispose of the issue, but finding that it is operational does not.

For these and other reasons the American literature has criticized the distinction.<sup>29</sup> As Louis Jaffe, a commentator on American public liability, has stated, "the dichotomy ... is at least unclear, and one may suspect that it is a way of stating rather than arriving at a result."<sup>30</sup> The Americans are stuck with the dichotomy because it is embodied in their statute. In Canada we should exorcise it.

## 2. Liability for Failing to Make a Policy Decision

As we have seen, operational functions may or may not be discretionary in nature, so they may or may not attract private law liability. It gets worse. Under American law, discretionary (policy) powers are simply incapable of attracting private law duties. In contrast, according to Lord Wilberforce, when authorities exercise discretionary powers, "[t]heir immunity from attack, though great, is not absolute."<sup>31</sup> The immunity is "not absolute" because the authority is "under a duty to give proper consideration to the question whether they should [exercise the discretionary power] or not."<sup>32</sup> The duty to give proper consideration is a common law duty, the breach of which gives rise to a claim in damages by persons. This "somewhat revolutionary and illogical proposition"<sup>33</sup> merits close consideration because it is the basis of the Supreme Court decisions

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<sup>28</sup>*Ibid.* at 755.

<sup>29</sup>See, for example, Note, "Discretionary Planning-Operational Dichotomy Revisited" (1966) 41 Wash. L. Rev. 340; L. Green, "Tort Law: Public Law in Disguise" (1959-60) 38 Texas L. Rev. 1, 257 (reprinted in L. Green, *The Litigation Process in Tort Law*, 2d ed. (Indianapolis: Bobbs-Merrill, 1977)) at 115; H.R. Hink & D.C. Shutter, "Some Thoughts on American Law of Government Tort Liability" (1965-66) 29 Rutgers L.J. 710; L.S. Jayson, "Application of the Discretionary Function Exception" (1964) 24 Fed. Bar J. 153; C.J. Peck, "*Laird v. Nelms*: A Call for Review and Revision of the Federal Tort Claims Act" (1972-73) 48 Wash. L. Rev. 391 [hereinafter *Review and Revision*]; C.J. Peck, "The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception" (1956) 31 Wash. L. Rev. 207; W.E. Steffen, "A Federal Tort Claims Act Tort" (1967) 34 Tenn. L. Rev. 367.

<sup>30</sup>Jaffe, *supra*, note 6 at 218.

<sup>31</sup>*Supra*, note 4 at 755.

<sup>32</sup>*Ibid.*

<sup>33</sup>Craig, *supra*, note 16 at 448.

in *City of Kamloops v. Neilson*,<sup>34</sup> *Laurentide Motels*,<sup>35</sup> and *Just*,<sup>36</sup> as I will show later.<sup>37</sup>

To begin with, it seems that Lord Wilberforce intended that the term "proper consideration" be given the narrowest of meanings. An authority would fail to give a question "proper consideration" only if it made a decision in bad faith, or refused to make a decision in circumstances that amounted to bad faith. If "improper" were to include "unwise" or "imprudent" or "negligent" the passage quoted immediately above would be incompatible with the rest of his speech. However, as will be seen, that is the interpretation of the Supreme Court of Canada.<sup>38</sup>

It is at best doubtful whether negligence is the appropriate doctrine for dealing with gross inaction or bad faith of public authorities. Negligence implies inattention or inadvertence where attention and care are required; bad faith implies deliberate action for unacceptable reasons. Such a policy decision would be *ultra vires*. One commentator suggests that a plaintiff who was injured by an *ultra vires* decision (or absence of decision) should be entitled to compensation. A cause of action claiming such compensation would, however, be *sui generis*: it would be an action with no private law counterpart.<sup>39</sup> Insisting that such a cause of action is not in negligence is more than a quibble about forms of action. By emphasizing the special nature of the cause of action the court naturally turns its mind to the proper tests and the different bases upon which liability can be imposed.<sup>40</sup>

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<sup>34</sup>[1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 [hereinafter *Kamloops*].

<sup>35</sup>*Supra*, note 3.

<sup>36</sup>*Ibid.*

<sup>37</sup>See discussion below, subsections II.C.2 and 3.

<sup>38</sup>See text accompanying note 58.

<sup>39</sup>P. P. Craig, "Compensation in Public Law" (1980) 96 L.Q. Rev. 413 at 438-40.

<sup>40</sup>Gibbs C.J. and Mason J. in *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1, 59 A.L.J.R. 564 (H.C.) [hereinafter *Sutherland Shire* cited to A.L.R.] at 15-17 explicitly reject the possibility of private law liability for failing to make a *policy* decision. Mason J. wrote:

Although *Anns* has since been applied in the House of Lords ... and by the Supreme Court of Canada in *Kamloops* ... it is evident from what I have written that I am unable to accept all that Lord Wilberforce stated in that speech. *Moreover, although a public authority may be under a public duty, enforceable by mandamus, to give proper consideration to the question whether it should exercise a power, this duty cannot be regarded as a foundation for imposing a duty of care on the public authority in relation to that power (ibid. at 31, emphasis added).*

Essentially the same position was taken by Sopinka J. in dissent in *Just*, *supra*, note 3 at 1251.

It is notable that only three common law decisions have found a public authority liable in negligence when the court found the decision in question to be one of policy: *Kamloops*, *supra*, note 34, *Laurentide Motels*, *supra*, note 3, and, in the New Zealand courts *Takaro Properties v. Rowling* [1986] 1 N.Z.L.R. 22 (H.C.), *aff'd* in part [1986] 1 N.Z.L.R. 51 (C.A.), *rev'd* [1987] 2 N.Z.L.R. 700 (P.C.) [hereinafter *Takaro Properties*]. In both *Kamloops* and *Takaro Properties* there were serious allegations that the decision-maker had acted in bad faith. Those cases might, therefore, be

### 3. "Immunity" for Policy Decisions

The foregoing illustrates why the policy-operational distinction does not answer the question of when government action is sufficiently like private action so as to incur private law liability. The idea that the distinction is a test for immunity further confuses the issue.<sup>41</sup> "Immunity" suggests a special rule that protects one from liability that would have been incurred but for the rule. If the idea of a "policy decision" has any meaning, it must be that the impugned decision is uniquely governmental in nature. If that is so, there can be no private law duty of care: the government agency making a policy decision is acting like a government and not like a person, so the rules that govern the civil relations between persons *do not* apply as a matter of law, and *cannot* apply as a matter of logic. It follows that a government rendering a policy decision is not "immune" from private suit; rather, private law is simply irrelevant.

This is not a mere doctrinal quibble. If one thinks of policy decisions as immune from private law suits, and operational decisions as not immune, it is easy to make the mistake that operational decisions (whatever they are) fall automatically into the realm of private law. This fallacious reasoning conceals the basic question the distinction purports to answer: when are government agencies sufficiently like persons that they should incur private law liability?

### C. *The Policy-Operational Distinction Since Anns*

#### 1. England

As we have seen, the policy-operational test in *Anns* only confuses the issue of when a public agency owes a duty of care arising out of public functions. While in some cases it may be possible to state confidently that a particular decision is in the nature of policy or, conversely, that it is operational in nature, in between there remains a vast grey area. The policy-operational distinction itself does not provide a criterion for dealing with cases in this grey area. Furthermore, the consequences of making such a determination are un-

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seen as cases granting compensation for *ultra vires* decisions rather than cases recognizing liability for imprudence or negligence. In *Review and Revision*, *supra*, note 29 at 417, the author cites *Johnson*, *supra*, note 14 for the proposition that an authority cannot raise the defence that it was engaging in a discretionary function if in fact no discretionary decision were made. On its face this seems to support Lord Wilberforce's position. The Court's position must, however, be limited to the context of that case. In *Johnson*, an adoption agency failed to notify the adoptive parents of the homicidal tendencies of the sixteen year old child they were adopting. The agency's fault, therefore, was not simply a failure to make a policy decision: its failure was in acting (placing the child with the adoptive parents) in a way that increased the risk to the parents. Once an agency acts in such a way normal negligence principles can be applied.

<sup>41</sup>The idea that policy decisions are "immune" from tort liability is found in the judgments of Lord Wilberforce in *Anns*, *supra*, note 4 and Mason J. in *Sutherland Shire*, *ibid.* at 34-35.

clear: some policy decisions may attract private law liability, and some operational functions may be discretionary and therefore immune from private law evaluation.

It will not come as a surprise, then, that this aspect of *Anns* has virtually disappeared from English jurisprudence. When English courts refer to the "Anns test" they mean the test for the existence of a private law duty of care based on foreseeability. The leading decisions of the House of Lords on the private law liability of public authorities since *Anns*, *Peabody Donation Fund v. Lindsay Parkinson & Co. Ltd.*,<sup>42</sup> *Yuen Kun-yeu v. A-G Hong Kong*<sup>43</sup> and *Hill v. Chief Constable of West Yorkshire*,<sup>44</sup> do not even mention the policy-operational distinction.<sup>45</sup>

## 2. Australia

Of the four judges who wrote decisions in *Sutherland Shire*,<sup>46</sup> the leading Australian case in governmental liability in tort, only two mentioned the distinction. Gibbs C.J. found the distinction as employed by Lord Wilberforce in *Anns* to be useful, but nothing in his decision turned on it. Mason J., whose decision was cited with approval by Cory J. in *Just*,<sup>47</sup> discussed the discretionary-operational distinction quite fully. Like Lord Wilberforce, he proposed the policy-operational distinction as an immunity rule alternative to the rule in *Kent*: a decision not to act is immune if it is in the nature of policy, but not immune if it is operational in nature. Whether liability will actually be imposed depends on private law tort rules. According to Mason J., however, the policy-operational distinction is not a general test for government liability in tort. It is relevant only to the very narrow range of cases where it is alleged that the government agency made a conscious decision not to take certain actions.<sup>48</sup> Moreover, the policy-operational distinction does not provide a reason for imposing liability in those limited cases. It is invoked only to rebut the suggestion that an agency could never be liable for an affirmative decision not to act. As we will see, government liability, like private law liability generally, arises from relationships of proximity, an issue wholly unconnected to the policy-operational distinction.<sup>49</sup>

<sup>42</sup>[1985] A.C. 210, [1984] 3 All E.R. 529. (H.L.) [hereinafter *Peabody* cited to A.C.].

<sup>43</sup>[1988] A.C. 175, [1987] 2 All E.R. 705, [1987] 3 W.L.R. 776 (P.C. (H.K.)) [hereinafter *Yuen Kun-yeu* cited to All E.R.].

<sup>44</sup>[1989] A.C. 53, [1988] 2 All E.R. 238 (H.L.).

<sup>45</sup>The Privy Council in *Takaro Properties, supra*, note 40 discussed the distinction only to reject it. See below, text accompanying note 53.

<sup>46</sup>*Supra*, note 40.

<sup>47</sup>*Ibid.* at 34-35 cited in *Just, supra*, note 3 at 1241-42.

<sup>48</sup>Mason J. explicitly rejected the notion that an agency could be liable in private law for failing to make a *policy* decision. *Supra*, note 40.

<sup>49</sup>See below, part II.

The several decisions in *Sutherland Shire* have been very influential in both England and Australia for the development of negligence law in general, and governmental liability in tort in particular, but the policy-operational distinction has played almost no part in the jurisprudence of either country.

### 3. New Zealand

In England the policy-operational distinction simply faded away after *Anns*. In Australia it never really took hold. In New Zealand, however, the lower courts applied the distinction with the same baffling results as the Canadian courts.<sup>50</sup> The appeals courts were therefore obliged to consider the merits of the distinction carefully. They concluded that the distinction was a difficult one and that the lower courts were misapplying it.

According to the Court of Appeal in *Brown v. Heathcote County Council*, "the presence of a policy element is certainly relevant both to whether a duty of care exists and to the question of breach, but only as one factor to be considered."<sup>51</sup> In *Takaro Properties* Woodhouse P. stated:

All kinds of decisions which are made in the execution of policy will still involve a considerable element of discretion. In the same way it may not be possible on purely logical grounds to distinguish aspects of the practical development of policy from its broad formulation. So in my opinion it would be wrong to conclude that these distinctions can have final significance in a case such as this. Nor do I think there will be automatic exclusion of a duty of care simply because accent is on policy rather than operational aspects of statutory decisions.<sup>52</sup>

Because the matter had been raised in the lower courts, the Privy Council in *Takaro Properties* thought it necessary to state its views regarding the role of the policy-operational distinction. Lord Keith agreed with the Court of Appeal, stating:

[The conclusion of Quilliam J. of the New Zealand High Court] was expressed as follows:

The distinction between the policy and the operational areas can be both fine and confusing. Various labels have been used instead of operational... .

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<sup>50</sup>See, for example, the High Court decision of Quilliam J. in *Takaro Properties*, *supra*, note 40 at [1986] 1 N.Z.L.R. 34-35. Quilliam J. stated that when a Minister of Finance makes a decision, on the recommendations of a Cabinet Committee, based on irrelevant criteria, the "discretionary" decision becomes "operational," and therefore subject to private law duties. The gap in this logic is obvious.

<sup>51</sup>*Brown v. Heathcote County Council*, [1982] N.Z.L.R. 584 at 618 (H.C.), *aff'd* for different reasons [1986] 1 N.Z.L.R. 76 (C.A.), *aff'd* for different reasons [1987] 1 N.Z.L.R. 720 (P.C.). The citation quoted here is from Cooke P.'s judgment at the Court of Appeal at 81 ln. 34. At trial Hardie Boys J. of the High Court declined to find that a drainage authority had a general duty to warn home builders of potential flood damage because to do so would intrude on the authority's policy-making powers.

<sup>52</sup>*Supra*, note 40 at [1986] 1 N.Z.L.R. 59.

Their Lordships feel considerable sympathy with Quilliam J.'s difficulty in solving the problem by simple reference to this distinction. They are well aware of the references in the literature to this distinction (which appears to have originated in the United States of America), and of the critical analysis to which it has been subjected. They incline to the opinion, expressed in the literature, that this distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is ... unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution of risks.<sup>53</sup>

In other words, whether a decision is by nature policy may assist in determining whether the courts should decline to comment altogether, but it is of no assistance in determining whether private law liability should be imposed.

#### D. *The Supreme Court of Canada Trilogy and The Policy-Operational Distinction*

The reader will perhaps be surprised to find the Supreme Court of Canada firmly wedded to the policy-operational distinction given the theoretical problems with and the movement in the Commonwealth away from the distinction. This section will consider the Supreme Court's recent application of the distinction and demonstrate the heights of confusion which the distinction has produced.

##### 1. *Laurentide Motels v. Beauport (City)*

In *Laurentide Motels*<sup>54</sup> a fire department responded to a fire caused by a guest of the plaintiff motel. The fire department arrived at the scene promptly, but was unable to find the fire hydrants, which had become buried in the snow. After the fire fighters found the hydrants they were unable to obtain water. The motel sued on two grounds: (1) that the city was liable for the negligence of its fire fighters at the scene; and (2) that the city was liable for failing to maintain the fire hydrant system. The Supreme Court agreed on both counts. On the first ground, the Court held that firefighter functions were operational in nature, and therefore subject to private law duties. In so doing, the Court overruled the bulk of authority.<sup>55</sup> On the second ground, the Court inferred from the municipality's

<sup>53</sup>*Takaro Properties, ibid.* at [1987] 2 N.Z.L.R. 709.

<sup>54</sup>*Supra*, note 3.

<sup>55</sup>The bulk of the authorities have held that municipalities owe no private law duties for negligence in the operation of a fire service.

Quebec: *Fournier v. Victoriaville* (1918), 28 B.R. 216; *Peletier v. Gatineau Pointe* (1937), 76 C.S. 180; but see *Point-Viau v. Gauthier Mfg.*, [1979] C.A. 77 (where a fire service is actually created the chief is obliged to act according to basic fire-fighting principles).

Common Law Canada: *Alexander v. London* (1919), 15 O.W.N. 320; *Sequin v. Hawkesbury*, [1955] O.R. 956, 5 D.L.R. 809 (C.A.); *Soderberg v. Medstead*, [1921] 1 W.W.R. 1130, 14 Sask. L.R. 201, 59 D.L.R. 702 (C.A.); *Stevens-Wilson v. Chatham*, [1933] O.R. 305 at 326, [1933] 2 D.L.R. 407 (C.A.); *Wing v. Moncton*, [1940] 2 D.L.R. 740, 14 M.P.R. 515 (N.B.C.A.); but see

power to operate a waterworks a duty to maintain the system. It found further that the city's *ad hoc* inspections were inadequate and in breach of the inferred statutory duty. This amounted to fault for the purposes of art. 1053 of the *C.C.L.C.*<sup>56</sup>

The Court was faced with three questions. First, are the boundaries of municipal delictual liability in Quebec defined by public law or private law? In other words, does one look to public law for the demarcation between the private and public character of municipal corporations, or is the demarcation found in private law?<sup>57</sup> The second question, following from the first, was: what *specific* public law rule defines the limits of municipal delictual responsibility? The third question was: once we know which municipal functions are subject to private law, what are the precise civil law rules that govern municipal delictual liability for those functions?

#### a. *The Policy-Operational Distinction*

Beetz J. decided the first question by holding that the determination of the dividing line between the public and private aspects of municipal liability is a matter of public law. Accordingly, he then turned his attention to finding which particular public law rules apply. He wrote:

Where the legislator confers a power upon a public authority, the conferral of power is usually couched in terms of a discretion. The discretionary power is necessary to allow the public authority latitude in which to make decisions that can be categorized as policy decisions: decisions of a political nature for which the authority should be accountable not before the courts but before the electorate or the legislature. *Anns, supra*, and *Kamloops, supra*, indicate that the form such policy decisions may take varies, ranging from by-laws and resolutions to internal directives, administrative decisions and even a discretion in the execution of activ-

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*Hesketh v. Toronto* (1898), 25 O.A.R. 449 (no duty to fight fires, but once one takes on the duty it must be followed through).

United States: *Dalehite, supra*, note 1 (referring to the assertion that liability could lie for negligence in fighting fires: "The Federal *Torts Claims Act* did not create a cause of action where none existed before. ... That cities, by maintaining fire fighting organizations, assume no liability for their lapses, is much more securely entrenched." (*ibid.* at 43-44)); *Moytka v. City of Amsterdam*, 204 N.E.2d 635 (N.Y. 1965); but see *Rayonier Inc. v. United States*, 352 U.S. 315 (1957) (where state law imposes liability on persons for failing to prevent the spread of fire, that liability will also be imposed on federal fire fighters for failing to contain fires on federal lands).

Australia: *Bennett & Wood Ltd v. Orange City Council* (1967), 67 S.R. (N.S.W.) 426 (duties of a fire authority "described" in a statute are "descriptive only"; cannot be the basis of a duty of care).

<sup>56</sup>Art. 1053 states, "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

<sup>57</sup>For discussion of the dual nature of municipal corporations, see *Bowles v. Winnipeg* (1919), 29 Man. R. 480, 24 C.C.C. 327, 45 D.L.R. 94 at 99 (K.B.); *Pon Yin v. Edmonton* (1918), 24 C.C.C. 327 at 333, 8 W.W.R. 809 (Alta K.B.); *Welbridge Holdings, supra*, note 16 at 968ff.

ities within the operational sphere. *The only duty incumbent upon the authority in the policy sphere is to make its decisions responsibly and in accordance with the object of the Act which conferred the power.* However, the discretion conferred by the legislator is not so broad as to exclude all liability for the authority's actions. Once the authority moves into the operational sphere of its power, *i.e.*, the practical execution of its policy decision, the authority will be liable for damage caused to an individual by its negligence. ...

The question now arises as to whether this common law rule is a rule of public law or of private law. If it is a rule of private law, it cannot apply in Quebec... . *In fact, I do not believe that the rule can be categorized as other than a rule of public law.*<sup>58</sup>

This passage is interesting because it emphasizes that the policy-operational distinction is a matter of public law, not private law. That being so, it cannot by itself be a test for the existence of private law liability. Second, this enunciation of the policy-operational test is consistent with the American sources: if a decision is in the nature of policy, it can be reviewed only according to public law. On the other hand, merely operational decisions may be subject to the private law, and in particular to arts 1053 *et seq.* Unfortunately, the test he then applied did not conform to the test he enunciated. Beetz J. wrote:

The testimony of Armand Grenier, a superintendent of the city of Beauport whose duties included ensuring that the fire hydrants were inspected, maintained and cleared, shows that no real policy decision was ever taken with respect to the inspection and repair of the fire hydrants. As a matter of practice, all hydrants would be inspected during the summer to ensure that they were functional, but no records were kept of those inspections. In winter, again as a matter of practice, all fire hydrants would be cleared after each snowfall, but again, no records were kept of these activities. There is no doubt that the municipality could have, as a matter of policy, established some scheme of inspection and repair. However, failure to make such a policy decision does not allow the municipality to escape the application of the private law. Wilson J. wrote for the majority in *Kamloops, supra*, that:

In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion.

*Therefore, in absence of a policy decision to which the omission alleged to have caused damage can be attributed, the inspection and repair of the fire hydrants must be taken to be in the operational sphere, since they are the practical execution of the municipality's policy decision to establish the water system and to allocate personnel and money to the maintenance of the system. Private law standards therefore apply to the municipality's conduct.*<sup>59</sup>

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<sup>58</sup>*Laurentide Motels, supra*, note 3 at 722-23 (emphasis added). This conclusion follows from art. 356 C.C.L.C.

<sup>59</sup>*Ibid.*, note 3 at 726.

Observe that the municipality did have a practice of inspecting the fire hydrants. The municipality's alleged fault lay only in not enunciating an *explicit* policy. One would have thought that according to Beetz J., if an authority does not *explicitly* say it has decided *not* to perform its functions as a matter of policy, whatever procedures it adopts will be deemed operational. By Beetz J.'s transmutation, an unwise policy decision turns into an operational function, which is then judged according to private law standards. According to the first passage cited above, "[t]he only duty incumbent upon the authority in the policy sphere is to make its decisions responsibly and in accordance with the object of the Act which conferred the power."<sup>60</sup> On these terms, the authority could be faulted only if it was irresponsible. What, then, does "irresponsible" mean? If the distinction between the policy and the operational spheres has any meaning, an "irresponsible" decision cannot simply be one that appears "unwise." Yet Beetz J.'s second formulation has done exactly that.

There is certainly no support for this proposition in the American, Australian or English decisions, nor does it follow from the nature of policy or discretionary decisions. In fact, as it was originally understood, discretionary (or policy) and operational decisions were mutually exclusive categories. Perhaps Beetz J. was thinking of Lord Wilberforce's tentative suggestion that in appropriate circumstances a public authority might be held liable if it fails to consider whether to exercise a statutory power.<sup>61</sup> Lord Wilberforce, however, did not say that the failure to make an explicit policy decision rendered all that follows operational in nature.

*b. Firefighters' Lack of Diligence*

In addition to the question of whether the municipality had been negligent by failing to inspect fire hydrants, there was an allegation that the firefighters had lacked diligence in the techniques used once they arrived at the scene of the fire. On that question Beetz J. wrote:

The characterization of the acts and omissions of the city of Beauport's firefighters poses no difficulties: they are clearly operational in nature. Doubtless there exists a discretion in the execution of the firefighters' operational activities. *But this discretion exists in the operational rather than the policy sphere, and the exercise of this discretion is itself an operational decision. Here too, private law standards apply.*<sup>61A</sup>

Beetz J. asserted that the fighters' activities were more operational than policy in nature (despite the element of discretion), and that liability could be imposed

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<sup>60</sup>*Ibid.* at 722.

<sup>61</sup>See above, text accompanying notes 31, 32. Lord Wilberforce suggested that when an authority is negligent in considering whether to exercise a power it might be held liable to private individuals. The basis for this proposition has never been explained.

<sup>61A</sup>*Supra*, note 3 at 727.

as a result. If "policy" means planning while "operational" means doing, it does not seem extravagant to assert that fighting fires is more operational in nature than policy in nature. But the policy-operational distinction adds nothing to this intuition. The fact that the assertion seems plausible does not make it more than an assertion.

Neither Beetz J. nor L'Heureux-Dubé J. ever considered whether the municipality or the firefighters conducted themselves in the manner of a prudent person similarly situated as required by art. 1053 *C.C.L.C.*<sup>62</sup> Beetz J. adopted L'Heureux-Dubé J.'s reasoning on this question, and the latter inferred a duty to fight fires prudently from the fact that the municipality had allocated funds for the creation and maintenance of a waterworks system. As a result, the policy-operational distinction became the source of the duty to compensate rather than a preliminary determination of the appropriateness of applying private law standards to public conduct. This decision is impossible to justify on its own logic or to reconcile with the jurisprudence.

## 2. *Just v. British Columbia*

In *Just*,<sup>63</sup> the plaintiff's car was struck by a boulder that had been dislodged by natural forces from the slopes above the highway on which he was travelling.<sup>64</sup> The plaintiff was severely injured and his daughter was killed.

McLachlin J. (as she then was) found for the province on the ground that the decisions on how to inspect the road-side slopes, and on what to do about potential hazards, fell "within the area of policy, and [could not] be reviewed by this court."<sup>65</sup> She did not go on to consider what standards would be reasonable, or whether the province had met those standards because she considered the province's decisions on road maintenance to be in the nature of policy, and hence incapable of giving rise to a private law duty of care. A unanimous British Columbia Court of Appeal agreed.<sup>66</sup>

The Supreme Court of Canada reversed.<sup>67</sup> Cory J. found first that the province was under a duty of care to maintain the highways reasonably.<sup>68</sup> Second, he found that these duties were operational (not policy) in nature and therefore that the court was not barred from reviewing the adequacy of the maintenance

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<sup>62</sup>See above, subsection II.C.2.

<sup>63</sup>*Supra*, note 3.

<sup>64</sup>"In all probability the fall was caused by the action of tree roots working into the natural discontinuities of the rock. The resultant cracks were expanded by successive freeze-thaw cycles. Heavy wet snow settling on the tree, perhaps aided by high winds, caused it to act as a lever on the rock" ((1985), 64 B.C.L.R. 349 at 350, [1985] 5 W.W.R. 570 (S.C.) [cited to B.C.L.R.]).

<sup>65</sup>*Ibid.* at 355.

<sup>66</sup>10 B.C.L.R. (2d) 223, [1987] 2 W.W.R. 231 [cited to B.C.L.R.].

<sup>67</sup>Per Cory J., Sopinka J. dissenting.

<sup>68</sup>*Supra*, note 3 at 1236.

program. The case was returned for a new trial on that issue as the lower courts had not made any findings as to the adequacy of the province's maintenance program.

*a. Immunity for Policy Decisions*

Cory J. began his analysis by setting out his views on how the tort liability of government agencies relates to tort liability generally. He wrote:

It may be convenient at this stage to summarize what I consider to be the principles applicable and the manner of proceeding in cases of this kind. As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists, the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.<sup>69</sup>

It is evident that Cory J. regarded the policy-operational distinction as a test for immunity from liability that would otherwise be imposed, in the way discussed and criticized above. The first three sentences are uncontroversial. If a government agency is in a proximate relationship with a specific person a duty of care towards that person may arise. However, he goes on to say that if the plaintiff and the agency were in a relationship of proximity, the agency may be exempted from liability if the decision in question is a "pure policy decision."

With respect, this view misconceives the very question the policy-operational distinction is supposed to answer. We say that governments ought to bear the same civil responsibility as persons, but the fact is that governments are different from persons in important respects.<sup>70</sup> The American discretionary function exception was intended to identify those government decisions which are political and legislative and therefore uniquely governmental. The civil duties which arise from relationships between persons are simply inapplicable to a relationship between the government and the governed. Similarly, Lord Wilberforce saw the policy-operational distinction as a way to identify when the government ceases to act at large towards the general public, and begins to act in a specific way towards a specific person so that it could be said that a relationship of proximity had arisen. If a decision is "policy" and not "operational,"

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<sup>69</sup>*Ibid.* at 1244-45, per Cory J. This schema is borne out in the structure of his judgment. After laying out the facts he decided that the province was under a private law duty of care in respect of the highway inspections; then he turned to the policy-operational distinction to see whether the province should be granted immunity.

<sup>70</sup>See above, text accompanying section I.B.

then by extension the government *cannot* be in a relationship of proximity with the plaintiff. According to both the American legislation and Lord Wilberforce in *Anns*, a policy decision is generally outside the scope of private law.

Cory J., in contrast, assumed that government activities are *prima facie* subject to private law rules. He decided that all government functions are capable of attracting private law liability, although the government will be immune from the liability that would otherwise be enforced if the operative decision was in the nature of policy. This is the converse of the view of Lord Wilberforce, who held in *Anns* that government functions were presumptively governed by public law, although there might be room for private law liability "over and above, or perhaps alongside" the public law duties. In the long run, it would probably not be very important where the presumption lay, so long as there was a test which would unambiguously decide when the presumption should hold and when it should be set aside. The policy-operational distinction is not such a test. As applied by the Supreme Court of Canada it simply confirms the presumption that government functions are subject to private law liability.

*b. Applying the Policy-Operational Distinction as a Test*

After approving the use of the policy-operational test generally,<sup>71</sup> Cory J. applied it to the facts in *Just*. The difficulties he encountered illustrate the ambiguity of the test.

After reviewing the jurisprudence, Cory J. summarized the policy-operational distinction as follows:

In determining what constitutes such a policy decision it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge if it is not made in the *bona fide* exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found, a traditional tort analysis ensues and the issue of standard of care required of the government must next be considered.<sup>72</sup>

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<sup>71</sup>But *supra*, note 3 at 1239 he cited *Blessing v. U.S.*, 447 F.Supp. 1160 (E.D. Penn 1978) [hereinafter *Blessing*] which cautions against the temptation to subject broad administrative programs to the crucible of tort law; at 1243 he cited *Indian Towing*, *supra*, note 11, where it was made clear that the discretionary function exception does not say anything about the private law duties of care; and at 1243 he cited *U.S. v. Varig Airlines*, 467 U.S. 797 (1984) [hereinafter *Varig Airlines*] which made it clear that inspection systems are matters of discretion, and cannot be subject to a "reasonable person" test.

<sup>72</sup>*Supra*, note 3 at 1245.

Thus, policy decisions may be made at high or low levels. The test turns on the "nature of the decision" but there is no discussion about the "nature" of a policy decision.<sup>73</sup> Generally, budgetary decisions are policy in nature, but then again, even those may be challenged if they are not made in the *bona fide* exercise of discretion. What are the boundaries of a *bona fide* decision? None are set out, but two examples are given: where a municipality inspects its roads only every five years<sup>74</sup> and where a lighthouse service inspects its lighthouses only every two years.<sup>75</sup> Yet the implication of *Just* is that it is open to a court to find that an elaborate inspection and maintenance program could be attacked as being beyond the *bona fide* exercise of discretion.<sup>76</sup> In short, policy is what the court says it is. Once again, the policy-operational distinction is "a way of stating, rather than arriving at, a result."<sup>77</sup>

After considering various examples of policy and operational decisions Cory J. wrote:

Thus, a true policy decision may be made at a lower level provided that the government agency establishes that it was a reasonable decision in light of the surrounding circumstances.<sup>78</sup>

First, Cory J. had earlier stated that no liability could attach to actions following from "pure policy decisions." Now he seems to be saying that the agency will be exempt only so long as the "true" policy decision is reasonable. Second, there is no suggestion in any of the previous jurisprudence that the onus is on the government to show that even its operational decisions were reasonable. The onus, as in private law generally, is on the plaintiff to show that the decision taken was unreasonable.

He then turned to the question of whether the decisions concerning the inspection system in the case at hand were in the nature of policy or were operational. He wrote:<sup>79</sup>

The manner and quality of an inspection system is clearly part of the operational aspect of a government activity and falls to be assessed in consideration of the standard of care issue.<sup>80</sup>

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<sup>73</sup>To be fair, Cory J. does identify criteria, *ibid.* at 1245. However, as my discussion of standard of care demonstrates above, subsection II.C.3.a., these criteria break down at the level of application.

<sup>74</sup>*Ibid.* at 1238.

<sup>75</sup>*Ibid.* at 1243. Cory J. here states that in *Indian Towing* the Coast Guard was obliged to conduct the inspections carefully because it had decided to inspect. That is far from the ratio of that case. See text accompanying note 139ff., *infra*.

<sup>76</sup>The role of budgetary allotments in the liability of government agencies is explored more fully below, subsection II.C.3.a.

<sup>77</sup>Jaffe, *supra*, note 6.

<sup>78</sup>*Just*, *supra*, note 3 at 1243 (emphasis added).

<sup>79</sup>*Ibid.* at 1245.

<sup>80</sup>It might be argued that he meant only to say that the inspections themselves were operational and subject to assessment. However, from the aspects of the operation listed in the subsequent pas-

Why this is "clearly" so is not explained. In fact, one source he had cited earlier, *Varig Airlines*,<sup>81</sup> held unequivocally that the design of an inspection system is unreviewable policy. *Barratt v. North Vancouver*,<sup>82</sup> a decision of Martland J. of the Supreme Court of Canada, stated the same thing. In *Barratt*, a cyclist sued the city for failing to detect and repair potholes. A unanimous bench found that:

[A municipality's] method of exercising its power [of maintaining municipal roads] was a matter of policy to be determined by the Municipality itself. If, in the implementation of policy its servants acted negligently, causing damage, liability could arise, but the Municipality cannot be held negligent because it formulated one policy of operation rather than another.<sup>82A</sup>

Cory J. did not distinguish the case. He simply stated that Martland J.'s view was *obiter*, and that it went "too far." (Sopinka J. disagreed, saying it was on "all fours").<sup>83</sup> Cory J. then sought to show that all road inspection decisions are in principle assessable by private law standards by offering the example of a municipality which decided to inspect its roads only once every five years.<sup>84</sup>

This is a *non sequitur*: the possibility that policy-makers will make unreasonable discretionary decisions does not show that those decisions are really operational in nature. Moreover, the example, which amounts to a total abdication of responsibility, is irrelevant to the *Just* case. There was no suggestion that the province had failed entirely to conduct inspections; rather, an elaborate program was in place.

### c. *The Dissent of Justice Sopinka*

Sopinka J.'s dissent was based on three propositions: first, that the "explosion" of tort liability generally ought to be defused; second, that where an agency is acting under a power, rather than a duty it cannot be held liable to persons; and third, that the decision in *Barratt* was correct insofar as it held that decisions concerning the maintenance of public roads are in the nature of policy. The second and third propositions bear no logical relation to each other or to Sopinka J.'s major thesis, that the expansion of tort liability ought to be reversed.

The second proposition is contained in the following passages:

The starting point for the application of the *Anns* principle is that there is no statutory duty in favour of the plaintiff to do the thing the lack of which is alleged to have caused the injury to the plaintiff.<sup>85</sup>

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sages it seems that Cory J. intends to permit a challenge to the system as a whole. I must admit that that is not absolutely clear. That in itself is a problem with the decision.

<sup>81</sup>*Supra*, note 71.

<sup>82</sup>[1980] 2 S.C.R. 418, 114 D.L.R. (3d) 577, 27 B.C.L.R. 182 [hereinafter *Barratt*].

<sup>82A</sup>*Ibid.* at 428.

<sup>83</sup>*Just. supra*, note 3 at 1238, Cory J. and at 1257-58, Sopinka J.

<sup>84</sup>*Ibid.* at 1238.

<sup>85</sup>*Ibid.* at 1250.

And later:

If, as here, the statute creates no duty to inspect at all, but simply confers a power to do so, it follows logically that a decision to inspect and the extent and manner thereof are all discretionary powers of the authority.<sup>86</sup>

This reasoning appears to resurrect the rule in *Kent*<sup>87</sup> that omissions can never give rise to civil liability unless there is a statutory duty to act. With respect, the power-duty dichotomy is no more helpful than the policy-operational distinction. It has no bearing whatsoever on the question of when a government is sufficiently like a person that private law rules can apply.

The core of Sopinka J.'s third proposition is found in the following passage:

My colleague's [Cory J.'s] reasons are based essentially on an attack on the policy of the respondent with respect to the extent and the manner of the inspection program. In my opinion, absent evidence that a policy was adopted for some ulterior motive and not for a municipal purpose, it is *not* open to a litigant to attack it, nor is it appropriate for a court to pass upon it.<sup>88</sup>

Citing *Barratt*,<sup>89</sup> he concluded that decisions concerning the form and extent of road inspection programs are policy in nature and therefore exempt from review. This conclusion seems correct. However, his reasoning in this case will not be of much assistance in future cases because it relies on the policy-operational distinction. As I have suggested, finding that a decision is by nature policy or operational is invariably a simple assertion.

This leaves only the first proposition that courts ought to be wary of admitting new forms of liability because tort liability has gotten out of hand. Citing a number of studies and academic articles, Sopinka J. observed that insurance-conscious judges have amended the classical function of tort law, shifting the loss suffered by the plaintiff to the defendant who caused the loss, by adding a loss-spreading function, which compensates those who suffer harm irrespective of the fault of the plaintiff or the defendant. Sopinka J. hinted that this development is detrimental, and that recognizing liability in a case like *Just* would exacerbate this undesirable trend.

I cannot say that loss-spreading has no place. Indeed, there are powerful arguments that a progressive society should alleviate distress where it is capable of doing so, and loss-spreading in tort law is a reflection of that value. My objection is that by employing the empty rhetorical device of the policy-operational distinction, the Court prevents principled discussion of the merits of

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<sup>86</sup>*Ibid.* at 1253.

<sup>87</sup>*Supra*, note 18.

<sup>88</sup>*Supra*, note 3 at 1251.

<sup>89</sup>*Supra*, note 82.

the loss-spreading approach in theory and the limits to loss-spreading in particular cases.<sup>90</sup>

*d. Conclusion*

In older cases like *Kent*, the possibility of government liability in tort was dismissed virtually out of hand because it was thought that the fundamental differences between public agencies and persons was so great that private law liability was simply inapplicable. Sopinka J. adopted this view, although in a more moderate way.

In Cory J.'s judgment the presumption was reversed. Cory J. presumed that government activity is like private activity unless the converse is proven. The converse might be proven if the government, not the plaintiff, can show that the operative decision was in the nature of policy. However, the ambiguities of the policy-operational distinction make it virtually impossible to prove that a decision was a "pure" policy decision. Even if the government convinces the court that the decision was in the nature of "pure policy" there remains the possibility that it will have to show that the decision was reasonable. In short, the presumption that public activity can generate private law liability is virtually irrebuttable.

Neither extreme view is helpful. A more balanced position is that of Lord Wilberforce in *Anns*, who began with the assumption that government activity is essentially public in nature, but then recognized that in certain circumstances a government agent or agency could be in a relationship of proximity with a person such that a duty of care could arise. This view focuses attention on the particularities of the relationship between the government agent or agency and the plaintiff, always keeping in mind the essential public nature of the agency.

3. *Rothfield v. Manolakos*

In *Rothfield* the plaintiffs wished to build up and level their sloping backyard. They hired a contractor to build a retaining wall, and on their own initiative discovered that they required a building permit. Owner-builders were normally obliged to submit engineer's diagrams with their application for a building permit, but the by-laws also provided the chief inspector with a discretion to dispense with this requirement for less ambitious projects. The city did so in this case, on the understanding that the owner or contractor would notify the city at each stage of construction so that the work could be inspected visually. This understanding merely duplicated the requirements of the by-law.

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<sup>90</sup>See in regard to possible loss spreading approaches: D. Cohen & J.C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64 Can. Bar Rev. 1; R.A. Macdonald, "Jurisdiction, Illegality and Fault: An Unholy Trinity" (1985) 16 R.G.D. 69.

Despite these twin obligations the owners failed to summon the city during the important first stages of construction. When the inspector was finally summoned he was unable to examine the foundations properly because they had already been covered over. He permitted work to continue, but again on the understanding that he would be summoned at each stage. Work progressed almost to completion until a crack appeared in the wall. The inspector returned, but he was unable to evaluate the seriousness of the problem. He ordered work halted for a period during which the wall would be watched to see if further evidence of structural weakness manifested itself. The wall did not deteriorate, so he granted permission to complete the backfilling. The wall collapsed a short time later.

Professional engineers hired by the owner-builders in contemplation of litigation determined that the wall had been designed and constructed inadequately. The owner-builders sued the contractors, the city, and its inspectors, alleging that they had been negligent in not ensuring that the construction conformed to the by-laws. The trial court found the contractors 60% liable (for faulty construction and design) and the city 40% liable (for negligently issuing the building permit and failing to conduct adequate inspections).

The Supreme Court of Canada found that the city, by making a policy decision to inspect houses, came under a duty of care to owner-builders to ensure that their construction projects conformed to the by-laws. The Court also found that the owner-builders had been contributorily negligent in failing to notify the city, so their damages were reduced accordingly. The portion of liability the trial judge had allocated to the city was re-apportioned, 70% to the city and 30% to the owner-builders.

The decisions in *Rothfield* did not rely on the policy-operational distinction to the same extent as the other cases did. However, the plurality judgment of La Forest J. did mention it.<sup>91</sup> His decision reflects the danger of relying on the policy-operational distinction, and the analytical poverty of the foreseeability test for establishing duties of care.

La Forest J.'s basic position is set out in the following passage:

By application of the test formulated by Lord Wilberforce in *Anns*, and adopted by this court in *Kamloops*, the city, once it made the policy decision to inspect building plans and construction, owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those powers. This duty is, of course, subject to such limitations as may arise from statutes bearing on the powers of the building inspector.<sup>92</sup>

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<sup>91</sup>Only two of the remaining six judges agreed with him, but his judgment, with three signatories, became the basis of the order because the other two had only two judges each.

<sup>92</sup>*Supra*, note 3 at 1266-67.

La Forest J. implied that once one made a policy decision, all subsequent decisions following from the first decision are necessarily non-policy (operational) in nature. But there is nothing in the nature of either policy or discretion that would support this conclusion.<sup>93</sup> For example, it is conceivable that a policy decision (passing a by-law) could establish a review process that itself grants broad, non-reviewable discretion to a functionary. In fact, the by-law in this case gave the city's chief inspector considerable discretion in the making of a number of decisions. Thus, the fact that a "policy" decision was taken to inspect buildings tells us nothing whatsoever about the discretionary nature of subsequent implementation decisions, or whether courts ought to refrain from second-guessing those decisions.<sup>94</sup>

To reiterate, the policy-operational distinction is supposed to distinguish the government acting as a government from the government acting as a person. Of the three areas of government activity that gave rise to the trilogy of cases, the house inspections in *Rothfield* appear at first blush to bear the greatest resemblance to an activity that could be performed by a person. Once one looks at the matter more closely, as we will below, it becomes clear that there are fundamental differences between the relationship between a municipal inspector and a home-builder on the one hand, and the relationship between a private industry design professional and his or her client on the other. The policy-operational distinction, especially as misapplied by La Forest J., is incapable of bringing these differences into relief.

#### *E. Policy-Operational Distinction: Conclusion*

The objective of the law regulating the private law responsibility of public agencies is to hold the government civilly responsible as if it were a person, insofar as that is possible. Under American law, which initially focused on political or legislative aspects of government, "discretion" was nominated as the touchstone of truly governmental activity. The discretionary function exception, however, does not address the principal question. First, "discretion" is a hopelessly vague concept. Second, there is nothing in the concept of discretion that is uniquely governmental. Third, and most important, civil responsibility is about relationships among persons in society. The concept of discretion takes account only of the agency's actions and ignores the plaintiff's relationship with the government. Discretion cannot tell us when the government is acting like a person because, as it is aimed at the government only, it does not take into account how persons interact.

The discretionary-operational distinction was mentioned by Lord Wilberforce in *Anns*. That was a mistake. It was not necessary for Lord Wilberforce's

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<sup>93</sup>See the discussion of discretion, above subsection I.B.1.

<sup>94</sup>This seems to be Sopinka J.'s criticism of the majority in *Just, supra*, note 3 at 1251.

argument that the statutory character of public agencies does not automatically preclude private law responsibility. Moreover, while discussing the distinction, Lord Wilberforce confused it further. Fortunately, English, Australian and New Zealand courts have ignored the policy-operational distinction or deliberately set it aside.

The three Supreme Court decisions rely on the policy-operational distinction to varying degrees. In all three cases the analysis is circular and unhelpful. The judges simply assert that the government should compensate the victims, and their analysis confirms that assertion.

As we will see, this hazy reasoning is perpetuated by the foreseeability theory of the existence of duties of care. The *Anns*-based foreseeability theory does not and cannot relate the hypothetical foresight of a government agency to the hypothetical foresight of an individual. But when one uses an alternative theory for the existence of private law duties, focusing on the nature of the relationship between the parties, as suggested by recent decisions of the House of Lords and the Australian High Court, one's mind turns naturally to the question of whether the government acted towards the plaintiff in a manner analogous to relations between persons. The fundamental question that the policy-operational question seeks, but fails, to answer will therefore be addressed.

## II. Private Law Duties of Care

The policy-operational distinction is, at best, a test for deciding whether government activities are sufficiently like the activities of a person to render the government liable "in the same manner and to the same extent as a private individual under like circumstances."<sup>95</sup> This does not answer the further question of whether a person would owe a duty of care in the circumstances alleged by the plaintiff. In this section I leave the policy-operational distinction aside, and turn to consider the private law rules which apply to cases like the three Supreme Court cases reviewed in this article.

### A. Duties of Care

#### 1. The *Anns* Foreseeability Test

What then is the test for the existence of a common law (private law) duty of care? One of the most controversial passages in the modern law of torts is found in Lord Wilberforce's speech in *Anns*:

Through the trilogy of cases in this House — *Donoghue v. Stevenson*, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, and *Dorset Yacht Co. Ltd. v. Home Office*, the position has now been reached that in order to establish that a duty of

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<sup>95</sup>From the U.S. *Tort Claims Act*, *supra*, text accompanying note 11.

care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.<sup>96</sup>

This passage has been much followed and much doubted. The fault is not in the passage itself but in the way it has been interpreted. Lord Wilberforce set out a complex, perhaps inevitably complex formula, but other judges have collapsed it into a single rule: the so-called foreseeability test.

Lord Wilberforce's formula has two stages. The first stage focuses on the specific parties and the circumstances that brought them to court. The second stage introduces broader considerations not limited to the circumstances of the specific parties, sometimes called "policy" considerations.<sup>97</sup>

The first stage has been the most seriously misunderstood. The test for a *prima facie* duty of care in *Anns* involves three considerations: whether there is a "relationship of proximity or neighbourhood" between the parties; whether injury was "within the reasonable contemplation" of the defendant; and whether "carelessness on [the part of the defendant] may be likely to cause damage" to the plaintiff. Lord Wilberforce did not set out in any detail how these elements, proximity, foreseeability, and causation, relate to one another conceptually, or, on a more practical level, how a judge would apply them to real cases.<sup>98</sup> In the hands of other judges, however, "reasonable contemplation," re-named "foreseeability," emerged as the pre-eminent consideration. The concept of proximity was swallowed up by foreseeability, so that foreseeability of injury automatically created proximity, which in turn created a duty of care. This was perhaps inevitable, given Lord Atkin's now-sacred speech in *Donoghue v. Stevenson*.<sup>99</sup> But, as Lord Wilberforce wrote soon after *Anns* in *McLoughlin v. O'Brian*:

<sup>96</sup>*Supra*, note 4 at 751-52.

<sup>97</sup>This "policy" is judicial policy. It is not to be confused with executive discretion or policy in the context of the policy-operational distinction.

<sup>98</sup>Recall that *Anns* was an appeal on a preliminary point of law rather than on a final determination of the *lis* between the parties.

<sup>99</sup>*Donoghue v. Stevenson*, [1932] A.C. 562, [1932] All E.R. 1 at 19 (H.L.). Lord Atkin's judgment is criticized in *Sutherland Shire, supra*, note 40 at 41. Brennan J. commented on Lord Atkin's biblical allusion and the neighbourhood principle:

If foreseeability of injury were the exhaustive criterion of a duty to act to prevent injury occurring, the "neighbour" of the law would include not only the biblical samaritan but

Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting the persons to whom a duty may be owed... . It is not merely an issue of fact to be left to be found as such. When it is said to result in a duty of care being owed to a person or a class, the statement that there is a "duty of care" denotes a conclusion into the forming of which considerations of policy have entered. *That foreseeability alone does not of itself, and automatically, lead to a duty of care is, I think, clear... . [As Lord Reid stated,] A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee.*<sup>100</sup>

The Supreme Court of Canada is the last adherent to the foreseeability thesis. In recent years Commonwealth courts have considered anew the concept of duty of care. In *Peabody* Lord Keith of Kinkel observed that "[t]here has been a tendency in recent years to treat [the passages from *Anns* reproduced above] as being themselves of a definitive character. This is a temptation that should be resisted."<sup>101</sup> He suggested that, rather than becoming preoccupied with foreseeability, judges should take into account "all the circumstances of the case." Turning too quickly to the question of foreseeability upsets the logical order in which the various considerations ought to be taken into account. There must be a relationship of proximity, in Lord Atkin's sense, before any duty of care can arise.<sup>102</sup>

The problem with Lord Keith's formulation is that saying we must take all the circumstances into account does not help a great deal. Moreover, proximity "in Lord Atkin's sense" may, it seems, be created by foreseeability alone. He therefore added that "in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration

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also the priest and the levite who passed by the injured man. Windeyer J. commented on their relationship... :

He obviously was a person whom they had in contemplation and who was closely and directly affected by their action. Yet the common law does not require a man to act as the Samaritan did... . The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him.

If foreseeability of injury were the exhaustive criterion of a duty to act to prevent the occurrence of that injury, legal duty would be coterminous with moral obligation... .

See also J.C. Smith & P. Burns, "*Donoghue v. Stevenson* — The Not So Golden Anniversary" (1983) 46 Mod. L. Rev. 147; P.P. Craig, "Negligent Misstatements, Negligent Acts and Economic Loss" (1976) 92 L.Q. Rev. 213; I.N. Duncan Wallace, "From Babylon to Babel, or a New Path for Negligence?" (1977) 93 L.Q. Rev. 16 at 17, 20; S. Todd, "The Negligence Liability of Public Authorities: Divergence in the Common Law" (1986) 102 L.Q. Rev. 370 at 376; R.F.V. Heuston, "*Donoghue v. Stevenson* in Retrospect" (1957) 20 Mod. L. Rev. 1.

<sup>100</sup>[1983] A.C. 410, [1982] 2 All E.R. 298 at 303 (H.L.) [hereinafter *McLoughlin*] (emphasis added).

<sup>101</sup>*Supra*, note 42 at 240.

<sup>102</sup>*Ibid.*

whether it is *just and reasonable that it should be so*.<sup>103</sup> This apparently boundless discretion was clearly unsatisfactory, and Lord Keith did not repeat the test in such broad terms when he had the opportunity soon afterward.<sup>104</sup> Like the “*Anns* test,” however, the “just and reasonable test” soon took on a life of its own, far beyond what its author had intended.<sup>105</sup>

In Australia, the strong foreseeability thesis has been authoritatively repudiated at least since the decision in *Jaensch v. Coffey*.<sup>106</sup> In *Sutherland Shire*,<sup>107</sup> the High Court unanimously rejected the proposition that foreseeability is the paramount consideration in determining the existence of duties of care. The several judgments advocated various alternative tests. Brennan J., whose judgment found favour with the House of Lords in *Caparo Industries*,<sup>108</sup> suggested a frankly contextual approach. He stated:

It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable “considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.”<sup>109</sup>

As with Lord Keith in *Peabody*, Brennan J. would oblige judges to look closely at the particular facts of each case. However, rather than permitting judges the discretion to decide cases based on what is “just and reasonable in the circumstances,” he would have them justify new duties of care by explaining how the new situation is similar to ones where duties of care have already been accepted. This may appear to be a return to the piecemeal approach that Lord Atkin sought to avoid in *Donoghue v. Stevenson*, but that is in fact how trial courts now work. At the appellate level (and with trial judges who have the inclination and the time to consider cases more thoroughly) judges will be obliged to consider explicitly the nature of the relationship between the parties, whether that type of relationship makes one party civilly responsible for the welfare of the other, and the extent and limits of that responsibility. An approach that forces

<sup>103</sup>*Ibid.* at 241 (emphasis added).

<sup>104</sup>In *Yuen Kun-yeu*, *supra*, note 43 at 712ff.

<sup>105</sup>See, for example, *Norwich City Council v. Harvey*, [1989] A.C. 828 (C.A.); *Pacific Associates v. Baxter*, [1989] 2 All E.R. 159 (C.A.) where the English Court of Appeal applied *Peabody* as if it introduced a length-of-the-Chancellor’s foot test for the existence of a duty of care.

<sup>106</sup>(1984), 54 A.L.R. 417 at 443 (H.C.): “It is not and never has been the common law that the reasonable foreseeability of risk of injury to another automatically means that there is a duty to take care with regard to that risk of injury... ” Although *Jaensch v. Coffey* and *Sutherland Shire* both reject the foreseeability thesis of civil responsibility, they differ greatly on how proximity is actually established. See Note, “The Concepts of ‘Proximity’ and ‘Reasonable Foreseeability’” (1986) 60 A.L.J. 4.

<sup>107</sup>*Supra*, note 40 at 41.

<sup>108</sup>[1990] 1 All E.R. 568 (H.L.), [1990] 2 A.C. 605 [hereinafter *Caparo Industries* cited to All E.R.].

<sup>109</sup>*Supra*, note 40 at 43.

explicit analysis of the particularities of human relationships cannot help but come closer to the objectives of civil responsibility than one based on the retroactive prophesies of a "hypothetical person looking with hindsight."

As stated, Brennan J.'s judgment was adopted by several Law Lords in *Caparo Industries*. Lord Bridge's speech may be regarded as the lead judgment. After canvassing the line of jurisprudence surrounding *Peabody* he concluded, as Lord Keith did in the latter case, that proximity (or neighbourhood) and what is "just and reasonable in the circumstances" are factors which ought to be given at least equal weight with foreseeability as foundations for duties of care.<sup>110</sup> However, he went somewhat further than Lord Keith. He found that concepts like foreseeability, proximity, and what is "just and reasonable" are little more than labels which do not elucidate the real issues, and may in fact provide concealment for the lazy or the intellectually dishonest. Like Brennan J., he stated that the law should turn back "in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope, and the limits of the varied duties that the law imposes."<sup>110A</sup> A great deal of excitement was created by the recent decision of the House of Lords in *Murphy v. Brentwood District Council*,<sup>111</sup> but in my view *Caparo Industries* is a far more significant case. *Murphy* overruled *Anns*<sup>112</sup> insofar as *Anns* implied that pure economic loss is recoverable in tort even absent a special relationship like that in *Hedley Byrne*<sup>113</sup> or *Ross v. Caunters*.<sup>114</sup> *Caparo Industries* reformulated the basis of tortious civil responsibility generally.

Brennan J. and Lord Bridge did not offer a specific test so much as a course of judicial inquiry. What is clear, however, is the following: first, one must concede that there is not, nor could there be, a single overarching principle for establishing duties of care in negligence; rather, it will be necessary to recognize various categories of duties. It might be objected that this returns us to the "bad old days" before *Donoghue v. Stevenson* when the plaintiff had to prove that his or her injury fit within one of a limited number of recognized classes of victim. This should not arouse concern. What may have been objectionable before *Donoghue v. Stevenson* was not that negligence duties were categorized, but that the court was reluctant to admit new tort duties that did not fit into one of the recognized categories. *Caparo Industries* follows the spirit of Lord MacMillan's dictum in *Donoghue v. Stevenson* that, "[t]he categories of negligence are never

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<sup>110</sup>*Supra*, note 108 at 574.

<sup>110A</sup>*Ibid.*

<sup>111</sup>[1990] 2 All E.R. 908 (H.L.), [1990] 3 W.L.R. 414.

<sup>112</sup>It is arguable that just as Lord Wilberforce's statements on foreseeability were applied more broadly than he had intended, so too have his views on economic loss been exaggerated. See the comments by Taylor J. on economic loss in *Kamahap Enterprises Ltd v. Chu's Central Market Ltd*, [1990] 1 W.W.R. 632, 40 B.C.L.R. (2d) 288 at 290-94.

<sup>113</sup>*Hedley Byrne & Co. v. Heller & Partners Ltd*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

<sup>114</sup>[1980] Ch. 297, [1979] 3 All E.R. 580.

closed.”<sup>115</sup> The stress is on development of new categories of duties as opposed to the rigid adherence to old categories.<sup>116</sup> In short, recognizing that we must develop categories of duties is not so much a choice, but an imperative rising out of the variability of human relations. Second, in establishing categories of duties we should work *by analogy* from recognized duties. Third, these analogies should focus on, among other things, the particularities of the relationship between the parties and the *type of injury actually suffered*. This “neo-traditional” approach has already been employed by appellate courts in Canada.<sup>117</sup> One hopes that it will be adopted by the Supreme Court of Canada as well.

## 2. Foreseeability, Duty of Care and Omissions

The move in the Commonwealth away from the all-inclusive foreseeability approach in *Anns* suggests a need to consider whether foreseeability alone is a suitable approach to the category of liability of public authorities. In the vast majority of negligence cases involving persons, foreseeability is still a useful and often decisive criterion for the determination of proximity and duty. At the risk of oversimplification, when defendants have deliberately set in motion a chain of events that resulted in physical injury to the person or property of the plaintiff, it is proper that they should be held accountable unless it is shown that they could not have foreseen the result. This, of course, was the case in *Donoghue v. Stevenson*. According to the facts as alleged,<sup>118</sup> Stevenson initiated the system of manufacturing and distributing that caused the bottle of ginger beer to be served to Mrs. Donoghue. Causation was not controversial. The issue was whether the factory owner was in a relationship of proximity with the consumer. Lord Atkin concluded that there was a relationship of proximity because Stevenson could foresee that Mrs. Donoghue, or persons similarly situated, would come to harm because of a chain of events he put in motion. When factual causation is not controversial, foreseeability may be a shortcut to determine

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<sup>115</sup>*Supra*, note 99 at 30.

<sup>116</sup>As Smith & Burns observe, *supra*, note 99 at 149:

One might wonder why it would be necessary to continue the separate categories, once the general principle has been recognised and formulated... . The reason is that there are many important policy considerations involving different interests in the context of different kinds of conduct that could not all be accommodated and taken into account in the context of a general principle. For example, a mere affront to dignity can be actionable in assault and battery, while the most damaging and intentional attack on reputation and character are not actionable in defamation, providing that the allegation is true.

<sup>117</sup>See the judgment of Lambert J.A. in *Edgeworth Construction Ltd v. N.D. Lea & Assoc.* (1991), 53 B.C.L.R. (2d) 180 (C.A.).

<sup>118</sup>Recall that *Donoghue v. Stevenson* was heard on a preliminary motion so there were no explicit findings of fact.

whether the defendant should compensate the plaintiff. Even so, the source of the duty to compensate<sup>119</sup> is not the fact that the defendant should have foreseen the injury. As Smith and Burns stated in an article cited with approval by the House of Lords and the Australian High Court, “[c]ausation is the principal foundation of liability in the law of torts.”<sup>120</sup> Defendants are liable to compensate plaintiffs because they *caused* the plaintiffs’ injuries.<sup>121</sup> This statement must be regarded cautiously, but it provides a first working hypothesis. In this context the source of the duty to compensate is the *act* of the defendant which caused the injury to the plaintiff. Foreseeability is not a source of a duty to compensate, but rather a limiting principle: defendants are obliged to compensate only those who they could have foreseen would be injured by their deliberate actions.<sup>122</sup> However, in the category of cases we are considering it is not obvious that the defendants *caused* the accidents at all. In *Just*, the rock that fell on the car was not set on the hill by the province, nor was it dislodged by the province. In *Laurentide Motels*, the fire was started by a careless hotel guest, not by the fire service. Finally, in *Rothfield*, the wall was constructed inadequately by the contractor, not by the city.

There is considerable debate about whether an omission can ever be the *cause* of an accident. For example, Gibbs C.J. stated in *Sutherland Shire*:

I am disposed to agree that there is a basic difference between causing something and failing to prevent it from happening... . Thus it has been held that damage resulting from tick infestation was not caused by a negligent failure to eradicate ticks.<sup>123</sup> In *Kamloops* it was held that a council’s negligence caused the plaintiff’s damage, but with the greatest respect I am not sure that the distinction between causing damage and failing to avert it was fully examined. If a building inspector negligently fails to carry out an inspection which, if properly made, would have revealed defects, and the building is completed, it does not seem right to say that the inspector’s negligence caused the defects, although had the inspector not been negligent he might have prevented the building from being completed in a defective state.<sup>124</sup>

<sup>119</sup>I prefer to speak of a duty to compensate rather than of a duty of care.

<sup>120</sup>Smith & Burns, *supra*, note 99 at 148.

<sup>121</sup>Causation is essential to the Aristotelian conception of commutative (or “corrective,” or “rectificatory”) justice which has influenced thinking in tort law. See *Ethica Nicomachea* in W.D. Ross ed., *The Works of Aristotle*, vol. IX (Oxford: Oxford U. Press, 1925) at 1132a 4: “[T]he law looks only to the distinctive character of the injury and treats the parties as equal, if one is in the wrong and the other is being wronged, and if *one has inflicted injury and the other received it.*” Below, I look very briefly at a justification for compensation in which causation and fault are irrelevant.

<sup>122</sup>See the statement of Lord Wilberforce in *McLouglin*, *supra*, text accompanying note 100.

<sup>123</sup>*Administration of Papua and New Guinea v. Leahy* (1961), 105 C.L.R. 6 at 10, 12, 21 (H.C. Aus.).

<sup>124</sup>*Supra*, note 40 at 15, 17. See also Deane J. in *Sutherland Shire*, *ibid.* at 63. He had earlier described *Kamloops* as a “decision of the Supreme Court of Canada which provides a striking example of liability for inaction.”

This position, or something like it, is shared by Weinrib,<sup>125</sup> Smith and Burns,<sup>126</sup> and others. Some of those who hold this view of causation might nevertheless impose moral and legal responsibility for failing to take positive steps to avert danger in appropriate circumstances. Here, however, the first step is to articulate whether there is such a duty in the circumstances. Such a duty could not be derived from foreseeability of harm alone, but it might be based on other moral values. I suggested earlier that the statement that “[c]ausation is the principal foundation of liability in torts” must be regarded cautiously. As Professor Stephen Perry argues, causation can never provide a complete theory of responsibility even where the defendant’s actions were among the principal causes of the plaintiff’s injuries.<sup>127</sup> One might go further and say that the fact that causation is the foundation of responsibility in one class of cases does not mean that it is the only foundation, or even a necessary element. A ground of responsibility may be the relationship between the parties. That is, whether they are in a personal relationship such as to give rise to a positive duty on one party in favour of the other even where the one did not create risk that endangered the other.<sup>128</sup> If there is such a duty the responsibility of the defendant is engaged.<sup>129</sup> In short, the duty of care arises not from foreseeability alone, but from a pre-existing relationship of proximity of which foreseeability may form a part.

An alternative position, identified with Hart and Honoré,<sup>130</sup> is that omissions (of which a failure to avert danger may be one) may in fact *cause* an injury. If a result occurs because one fails to do what is normally done, then the failure can be seen as a true cause of the result. The link between what would otherwise be a non-culpable omission and causation is the notion of “what is normally done.”<sup>131</sup> I suggest that when we are speaking about a duty of positive

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<sup>125</sup>E.J. Weinrib, “The Case for a Duty to Rescue” (1980) 90 Yale L.J. 247 at 256: “Participation by the defendant in the creation of the risk, even if such participation is innocent, is thus the crucial factor in distinguishing misfeasance and nonfeasance.”

<sup>126</sup>*Supra*, note 99 at 154: “In [*Annis*] the inspectors did not *cause* the damage to the structures. The damage was caused by the builders who negligently built the foundations. While it is true that the inspectors may have carelessly *approved* the inadequate foundations, they did not cause the damage to happen through their actions. Rather, they allowed it to happen, or failed to prevent it from happening.”

<sup>127</sup>S.R. Perry, “The Impossibility of General Strict Liability” (1988) 1 Can. J. L. & Juris. 147 at 169.

<sup>128</sup>In Weinrib’s case, *supra*, note 125, the relationship between the parties is not an *actual* relationship between the particular parties, but a hypothetical, idealized, universalized relationship derived from Kantian deontological arguments.

<sup>129</sup>There is some controversy about whether responsibility which is divorced from causality should carry with it a further obligation to compensate, or whether penal sanctions would be more appropriate. This question is beyond the scope of this article.

<sup>130</sup>H.L.A. Hart & A.M. Honoré, *Causation in the Law* (Oxford: Clarendon Press, 1959), discussed in T.M. Benditt, “Liability for Failing to Rescue” (1982) 1 Law & Phil. 391.

<sup>131</sup>Benditt, *ibid.*, is of the opinion that this is not really a theory of causation, but rather a theory of responsibility.

action by one person in favour of another, "what is normally done," *i.e.* whether there is such a duty to act, will depend on the relationship of proximity between the parties.

Thus, even if one accepts the view that an omission can be the true cause of an accident, foreseeability is not an appropriate shortcut for finding a duty of care. The omission is a "cause" of the accident because we believe the parties *were already* in a relationship such that it would be "normal" for one to look out for the interests of the other. Foreseeability is relevant only after that relationship is established.

The *Caparo Industries* approach to duties of care, which concentrates on categories of relationships, has the merit of obliging us to shift our focus among the elements of a duty of care, proximity, foreseeability, and causation, in different categories of cases. In the category of cases where the defendant's actions are a true cause of the injuries suffered by the plaintiff, proximity, or the relationship between the parties, is relatively unimportant, and we can focus on whether the defendant should have foreseen the consequences of her or his actions.<sup>132</sup> But in the category of cases where someone or something other than the defendant is the factual cause of the plaintiff's injuries, we must focus more directly on the relationship between the parties to see whether the defendant had a duty to prevent the harm. Foreseeability is always an issue, but it becomes an issue in this category of cases only after it has been established that the relationship between the parties raised a duty in the defendant to prevent others, or nature, from injuring the plaintiff. The three cases we are examining fall into the second category. As we will see, the Supreme Court does not distinguish the two categories of cases, and focuses immediately on foreseeability in both.

In summary, where the injury in question was not the direct result of a deliberate act of the defendant we cannot go straight to the question of foreseeability. We must first see whether the parties were in a relationship which gives rise to a recognized common law duty. If the cause of the plaintiff's injury was an act of a third party or an act of nature, we must first see whether there was a common law duty to take positive steps to protect the plaintiff from that danger. Such positive steps might include issuing warnings, or actually removing the danger itself.

#### ***B. Specific Detrimental Reliance — A Relationship of Proximity, Good Samaritan Rules, and Duties to Warn***

If the foreseeability thesis is so unhelpful in certain categories of negligence involving liability of public authorities, what should replace it? *Caparo*

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<sup>132</sup>Alternatively, one might say that a relationship of proximity flows *automatically* from the fact that a reasonable defendant would have foreseen the consequences of his or her actions.

*Industries* suggests that we should not try to find a single basis for negligence liability. Rather, we ought to develop categories of duties based on, among other things, the nature of the relationship between the parties and the type of injury suffered. The first obstacle, when considering a case of negligent inspections, as in *Rothfield* and *Just*, or negligent maintenance of fire hydrants, as in *Laurentide Motels*, is to see whether there is a private law duty to do that which it is alleged the government has failed to do. Persons do not normally owe one another the duty to seek out and eliminate potential sources of danger, nor do they even owe a duty to warn about clear and imminent peril or effect an easy rescue.<sup>133</sup> But this does not close the matter. In *Caparo Industries* and *Sutherland Shire* it was suggested that courts may develop *new* categories of negligence duties *by analogy* from recognized duties. Courts have found an analogy to the duty to warn and the duty to rescue fruitful.

In recent years some of the more "sickening examples of callous refusal to help, followed by immunity from tort liability"<sup>134</sup> have been mitigated,<sup>135</sup> but few jurisdictions have imposed an affirmative duty to rescue one who is in peril.<sup>136</sup> Nevertheless, many American jurisdictions have begun to accept what is known as a "Good Samaritan" rule based on the *Restatement*.<sup>137</sup> According to

<sup>133</sup>*Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928) (drowning person); *Gautret v. Egerton* (1867), 2 C.P. 371 at 375, cited by Gibbs C.J. in *Sutherland Shire*, *supra*, note 40 (no general duty to warn one who is headed into danger); *Buch v. Amory Manufacturing*, 44 A. 809 (1897); *Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004 at 1027, [1970] 2 All E.R. 294 (H.L.) (no *general* duty to assist a person in distress).

But a duty to rescue might arise if the parties are otherwise in a special relationship of proximity: *Horsley v. MacLaren*, [1972] 2 S.C.R. 441, 22 D.L.R. (3d) 545 (*special* duty from proximity relationship of passenger — boat owner, derived from statute); *Anderson v. Atcheson*, 333 U.S. 821 (1948) (employer-employee); *Millette v. Côté*, [1971] 2 O.R. 155, 17 D.L.R. (3d) 247, *rev'd* in part [1972] 3 O.R. 224, 27 D.L.R. (3d) 676 (C.A.), *aff'd* in part [1976] 1 S.C.R. 595, 51 D.L.R. (3d) 244 (police officer and driving public); *Schacht v. R.*, [1973] 1 O.R. 221, 30 D.L.R. (3d) 641, *aff'd* [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96, 3 N.R. 453 [hereinafter *Schacht*] (police and driving public); *Suarez v. Dosky*, 407 A.2d 1237 (N.J. Super. Ct. App. Div. 1979) (police officers assisting children on cross-walk).

<sup>134</sup>A.M. Linden, "Rescuers and Good Samaritans" (1971) 34 Mod. L. Rev. 241 at 241.

<sup>135</sup>Largely by providing rescuers who injure themselves damages against the person who made the rescue necessary. See *ibid.* at 252ff.

<sup>136</sup>But see the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1975, c. C-12, art. 2:

Every human being whose life is in peril has a right to assistance.

Every person must come to the aid of anyone whose life is in peril, either personally or by calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

A Vermont Good Samaritan statute states that a duty is owed not only to those whose lives are at risk, but also those "exposed to grave physical harm." However, the penalty for wilfully violating the duty is a fine of only \$100. See Benditt, *supra*, note 130 at 392.

<sup>137</sup>*Restatement*, *supra*, note 9.

#### § 323 *Negligent Performance of Undertaking to Render Services*

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or

the *Restatement* there is no general duty to avert danger to others, but a duty to warn about or avert danger is created where: (1) the defendant acts in such a way (2) in relation to a particular plaintiff's safety (3) that it would be reasonable for the plaintiff to rely on the defendant, and (4) the defendant has actually "induced [the plaintiff] to forego other remedies or precautions against the risk."<sup>138</sup> The Good Samaritan rule has been pleaded in cases of allegedly negligent inspections by government agencies. This reliance-based duty is a useful analogy, and it has gained cautious approval in Australia. Its roots in the ungenerous common law rule are, however, noticeable, and the elements which the plaintiff must prove are quite strict. I will now consider the application of a detrimental reliance analysis in the United States and Australia.

### 1. United States

In the United States, a cause of action based on the duty to warn was recognized in the 1955 case *Indian Towing*.<sup>139</sup> In *Indian Towing*, a tug and barge went aground on an island in the Mississippi. The island had been marked by a lighthouse, and the location of the lighthouse was indicated on navigational charts, but the light in the lighthouse went out following a careless inspection by a coast guard employee. The Supreme Court decided that lighthouse inspections were among the "operational" duties of the coast guard. The Court recognized, however, that finding that the function was operational only opened the door to private law liability; the plaintiff still had to prove the relationship between the government and himself was similar to a relationship that could

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things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

#### § 324A Liability to Third Person for Negligent Performance of an Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the third or the third person upon the undertaking. (emphasis added)

<sup>138</sup>*Restatement, ibid.* at 144, § 324A, comment (e). For a sample of cases employing the rule, see *Blessing, supra*, note 71 at 1187.

<sup>139</sup>*Supra*, note 11. Reliance as a basis for liability for a negligent rescue was recognized for individuals in *Zelenko v. Gimbel Bros.*, 287 N.Y.Supp. 134 (N.Y. Sup. Ct. 1935). Causation was a major factor: the Court was impressed by the fact that the "rescuer," by undertaking to provide medical assistance, precluded other efforts to provide medical assistance.

exist between individuals, and that a private law duty of care would arise in such a relationship. The fact that the coast guard had undertaken to facilitate navigation by marking hazards did not by itself place it under a general liability for injuries due to the continued existence of navigational hazards. Such a requirement would be so open-ended as to resist precise definition. It has, moreover, no analogue in private law: there is no general private law duty to warn others that they are heading into danger. Rather, the government's liability was founded on the much more specific fact that the coast guard had for some time operated a light in a particular place, that it had caused charts to be printed that indicated the location of the light, and that mariners had come to rely on the light.

Liability was based on the principle of specific detrimental reliance based on the duty to warn. A private law duty to warn can be raised once persons have assumed the duty to warn about a particular danger so that others rely on such persons' continued warnings. They must continue to warn until such time as they inform others that they intend to abandon the duty. When a duty to warn is based on specific detrimental reliance, proximity is established between the person who warns and the victim by: (1) the conduct of the defendant (the past warnings); (2) the fact that the plaintiff has altered her or his conduct in anticipation of future (or continued) warnings; and (3) the fact that the victim relies on the specific warnings.<sup>140</sup> Elements 1 and 2 supply the relationship of proximity, including the requirement that the perspective of both parties be taken into account, and the third element provides the causal link between the defendant's conduct and the plaintiff's injuries. The focus of the cause of action based on detrimental reliance is the *relationship* of proximity between the *particular* parties. The question of foreseeable harm arises only after the relationship has been established. In this respect, the case anticipated the re-interpretation of the principle in *Donoghue v. Stevenson*, as expressed in recent decisions of the House of Lords and the High Court of Australia.<sup>141</sup>

Since *Indian Towing*, the *Restatement* has been adopted by the American Law Institute,<sup>142</sup> and the cause of action based upon the duty to warn has been

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<sup>140</sup>Compare to *Sheppard*, *supra*, note 19. Local authority sued when plaintiff injured himself because he could not see in a street where the lights had been deliberately extinguished at 9:00 pm. The authority had a power, but not a duty, to light the street. It placed a lamp at a dangerous point in the street (the danger not of its own making). Although it could be foreseen that extinguishing the lights would be dangerous, the authority was held not liable on the ground that it did not create the danger, that it had a power but not a duty to set up the lights in the first place, and since it had no duty to set up the lights, it had no duty to continue illuminating the lights.

<sup>141</sup>Some might argue that this type of approach risks returning the law of torts to the "bad old days" before *Donoghue v. Stevenson*, when plaintiffs were obliged to show that the cause of action they alleged fit within a previously recognized category. It is true that this type of approach would involve a retreat from grand principles, recognizing more differentiated categories of negligence. This, however, is probably unavoidable. See the authors cited *supra*, note 99.

<sup>142</sup>On 25 May 1963 and 22 May 1965.

pleaded in safety inspection cases. If all the conditions listed above are met, the inspecting agency comes under a duty to "warn" the plaintiff about dangers that it has or ought to have discovered through its inspections.<sup>143</sup>

The cause of action has not, however, been easy to establish. In *Patentas v. United States*,<sup>144</sup> the owners and employees of a Greek tanker, in United States waters, sued the Coast Guard because an allegedly negligent inspection failed to detect the cause of an explosion that occurred shortly after the inspection. The Third Circuit expressly adopted the language of the *Restatement*. The Court held that while it was possible to base a claim on detrimental reliance induced by the conduct of the agency, in this case the necessary elements had not been established. The most important missing element was proof that the plaintiffs had, as a result of the conduct of the Coast Guard, been induced to forego their own inspections.

In *Blessing*,<sup>145</sup> plaintiff employees sued the Occupational Health and Safety Administration for alleged negligence in inspecting manufacturing facilities. The Court held that the inspections were intended to supplement, not supplant, the employers' inspections. The employees would be able to establish that they had relied on the inspections to their detriment if they could show that the employers had been induced to reduce their own safety programs *as a result of the inspectors' conduct*. As the inspectors had done nothing to suggest either to the employers or the employees that they were assuming responsibility for ensuring a safe workplace, they had no private law duty to the employees.

In *Clemente v. United States*,<sup>146</sup> the relatives of airline crash victims alleged that the victims had relied on the duty of air traffic controllers to protect their safety by ensuring that overweight planes would not be permitted to take off. The Court held that the plaintiffs had not established that the victims had altered their conduct on the basis of the agency's conduct. In addition, the First Circuit would also have struck out the cause of action because the agency was not in fact under a duty to prevent overweight planes from taking off, and it did not act as if it did.<sup>147</sup>

A claim based on the duty to warn is regarded with particular suspicion when the defendant is a regulatory agency. As Burger C.J. stated in *Varig Airlines*,

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<sup>143</sup>Both *Just* and *Rothfield* may be seen as inspection cases. The aspect of *Laurentide Motels* dealing with fire hydrant inspections could also be considered an inspection situation.

<sup>144</sup>687 F.2d 707 (3d Cir. 1982) [hereinafter *Patentas*].

<sup>145</sup>*Supra*, note 71.

<sup>146</sup>567 F.2d 1140 (1st Cir. 1977).

<sup>147</sup>A statutory duty to act does not create a private law right: *Lacey v. U.S.*, 98 F.Supp. 219 (D. Mass. 1951) (the Coast Guard has no private law duty to rescue even though it has a statutory responsibility to do so); *In Re Silver Bridge Disaster Litigation*, 381 F.Supp. 931 (S.D.W.Virg. 1974) (statutory obligations to inspect bridges are public in nature, and thus do not give rise to private rights of action).

[w]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals...<sup>148</sup>

This suspicion has two main bases. First, the creation of a procedure for policing compliance does not alter the fact that the responsibility for compliance rests with the regulatory targets named in the enabling statute: the "police" try to make sure the law is obeyed, but they are not themselves guilty when the law is broken.<sup>149</sup> This reasoning is particularly forceful when the plaintiff is himself or herself charged with compliance, as in *Rothfield*. Even if the inspections were regarded as operational, thus outside the ambit of sovereign immunity, the plaintiffs would fail because instituting the inspections did not create new private law duties on the inspectors, or displace existing ones on the regulatory targets.<sup>150</sup>

The second reason reflects judicial reluctance to interfere with decisions establishing "philosophical priorities."<sup>151</sup>

Congress wished to prevent judicial "second guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of action in tort.<sup>152</sup>

Decisions on "compliance review" involve a trade-off between economy on one side, and full compliance on the other. Thus, a compliance inspection regime that would foreseeably permit a certain number of violations is not for that reason unreasonable: it may be that reasonable concern with thrift makes it necessary to accept a less than perfect system of inspections. It follows therefore that the mere fact of a particular violation (which injures the plaintiff) says nothing whatsoever about the private law liability of the inspecting authority.

These principles are illustrated in *Blessing*.<sup>153</sup> In addition to the reasons outlined above, the *Blessing* court refused to recognize a cause of action because the inspection system of the health and safety authority was in the nature of policing compliance. It was not reasonable to hold the "police" responsible for the conduct of the offenders. This is consistent with the view expressed by the English Court of Appeal in *Acrecrest Ltd v. W.S. Hatrell & Partners*,<sup>154</sup> a post-*Anns* building inspection case.

<sup>148</sup>*Supra*, note 71 at 813.

<sup>149</sup>*Ibid.* See also *Smith v. Leurs* (1945), 70 C.L.R. 256 at 262 (H.C. Aus.): "The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third."

<sup>150</sup>*Varig Airlines, supra*, note 71.

<sup>151</sup>See text accompanying notes 24ff.

<sup>152</sup>*Restatement, supra*, note 9 at 412, §895D(b).

<sup>153</sup>*Supra*, note 71.

<sup>154</sup>[1983] Q.B. 260, [1983] 1 All E.R. 17, [1982] 3 W.L.R. 1076 (C.A.). The local building authority's function is not to restrain the wrongdoer from persisting in his wrongdoing.

## 2. Australia

The leading Australian case, *Sutherland Shire*,<sup>155</sup> arose from facts which are nearly identical to those in *Rothfield*.<sup>156</sup> The High Court had before it the same body of precedent cited by the Canadian Supreme Court in its trilogy of government liability decisions, but it reached very different conclusions.

In *Sutherland Shire*, land owners submitted an application to a local authority for a permit to erect a house on their land. The plans did not include a detail of the foundations, but the permit was issued under the condition that the owners submit a survey of the foundations to the Council, and that the Council be given notice at various stages of construction. The Council's records did not indicate whether the inspections had in fact been made. There was no evidence that the owners had given notice to the Council, or that the building had in the end been passed for occupation. Each of the judges who wrote opinions agreed that when an authority acts in such a way that the plaintiff is induced, to her or his detriment, to rely on the skill of the authority, an action may lie for damages.<sup>157</sup> Mason J. (as he then was) made the reliance thesis the centre of his judgment:

Generally speaking a public authority which is under no statutory obligation to exercise a power comes under no common law duty of care to do so... . But an authority may by its conduct place itself in such a position that it attracts a duty of care which calls for the exercise of the power.<sup>158</sup>

He agreed with his colleagues in preferring *Peabody* to *Anns*, holding that the ability of an authority to foresee that a failure to exercise a power would harm the plaintiff would not create a duty to exercise the power. However, a duty can arise where

a person, by practice or past conduct *upon which others come to rely*, creates a self-imposed duty to take positive action to protect the safety or interests of another, or at least to warn him that he or his interests are at risk.<sup>159</sup>

He cited and adopted a number of the American cases. As in the American cases, the Australian judges were of the opinion that the authority's conduct and reliance on the part of the plaintiff had to be taken seriously. Here, however, where the builder did not give the required notice to the Council it could not be said that he had relied on the judgment of the Council's employees. The plaintiff was therefore denied recovery.

<sup>155</sup>*Supra*, note 40.

<sup>156</sup>*Supra*, note 3.

<sup>157</sup>See *Sutherland Shire*, *supra*, note 40, Gibbs C.J. at 17, Brennan J. at 47, Deane J. at 65, and Mason J. at 29.

<sup>158</sup>*Ibid.* at 28.

<sup>159</sup>*Ibid.* at 29.

Since *Sutherland Shire*, courts have been cautiously receptive to the idea of a cause of action basing detrimental reliance upon continued inspections. In *McCauley v. Hamilton Island Enterprises Pty. Ltd.*<sup>160</sup> the plaintiff was injured in a helicopter accident at a floating helipad off the Great Barrier Reef. He sued the government agency with authority over the Great Barrier Reef on the ground that the helicopter accident which injured the plaintiff would have been avoided if the authority had properly regulated aviation in the area. The plaintiff argued that the Commonwealth knew or should have known about the helicopter flights, that the government knew or should have known that they were unsafe, and that he relied on the government to prohibit activities which it knew were unsafe. On a preliminary motion the Commonwealth sought to have the action dismissed as disclosing no cause of action. The trial judge refused to do so, saying that on the basis of Mason J.'s judgment in *Sutherland Shire*, the plaintiff was entitled to try and prove his case. He was of the opinion, however, that "the plaintiff is confronted with a difficult task in demonstrating a case of general reliance, especially in terms of causation."<sup>161</sup> In *McDonogh v. Commonwealth of Australia*,<sup>162</sup> the plaintiff was injured when the truck he was driving overturned on a road on federal land. The way the road was maintained created the appearance that it was level and firm, but in fact the outer portion was inadequate to support the plaintiff's truck. At trial, the plaintiff sued on the grounds that (1) the authority had been negligent in maintaining the road and (2) the authority failed in its duty as occupier. The Federal Court of Appeal dismissed the second ground. On the issue of negligence, the Court found that while a public authority cannot, in general, be held liable for the state of repair of the road, it can be held liable if, by its conduct, it induces drivers to believe that it is actively ensuring that the road is adequate as a road. The plaintiff succeeded on the ground that the authority had so conducted itself, and that he had relied on that conduct.

On the other hand, the courts insist that the plaintiff's reliance be reasonable, especially in light of the general duty to the public owed by public agencies. In *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act*,<sup>163</sup> developers sued the state government and the City of Sydney. The developers alleged that the governments had induced them to purchase and consolidate land holdings through the publication of a zoning plan that allowed high density housing. The High Court held that statements and conduct of government authorities could, in general, be the basis for an action in detrimental reliance. Significantly, however, it held that such reliance must take into account the nature of the public authority, and in particular the fact that

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<sup>160</sup>(1987), 75 A.L.R. 257 (Fed. Ct. Gen. Div.).

<sup>161</sup>The law reports do not indicate that a trial has been held.

<sup>162</sup>(1985), 73 A.L.R. 148 (Fed. Ct. Gen. Div.).

<sup>163</sup>(1986), 68 A.L.R. 161 (H.C.).

the general purpose of public authorities is to act in the public interest. It would be unreasonable to rely on an authority to act in a private interest if doing so would fetter its discretion to act in the public interest (in whatever manner public interest be defined).<sup>164</sup> In *Skuse v. Commonwealth*,<sup>165</sup> the Federal (Appeal) Court held that a duty to warn based on detrimental reliance could not be recognized where it would interfere with other important administrative concerns. In *Skuse*, a lawyer attending court was shot by a man who confused the lawyer with another lawyer. Prior to the incident, the local police had been warned by state police that the assailant had threatened to kill his lawyer, but they did not act. On the day of the incident the assailant's daughter informed the police that he was headed to the courthouse with a gun, but they were unable to intercept him. The lawyer sued on the ground that he had relied generally on the authorities to keep the courts safe. The Federal Court of Appeal held for the Commonwealth on the ground that recognizing a private law duty of care would interfere with a matter of general public concern; namely, whether the police or the courts held ultimate authority over security within the court buildings. The claim might also have been rejected on the ground that security staff had not conducted itself in relation to the particular plaintiff so as to lead him to alter his conduct.

### 3. Specific Detrimental Reliance: Summary

Specific detrimental reliance, based on an analogy to the Good Samaritan duty to continue past warnings which have induced reliance by the plaintiff, is a promising basis for developing a rational private law duty on the part of public authorities to regulate or inspect. When an agency induces a particular plaintiff to rely on its inspections, and when the plaintiff does rely on the inspections and reasonably alters his or her conduct because of that reliance, a private law duty to inspect carefully may arise.

Specific detrimental reliance takes seriously the conduct of the agency towards the plaintiff, and the reliance of the plaintiff on the agency, so it incorporates the sort of mutual regard implied by the terms "neighbourhood" and "proximity." The requirement that the plaintiff have altered his or her conduct supplies the necessary element of causality. Put crudely, the "neighbourhood" provides the moral basis for a duty, and, together with causation, provides a reason for insisting that the agency compensate the plaintiff. The duty is, of course, bounded by foreseeability in that the agency is not culpable if it could not have

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<sup>164</sup>See also *L. Shaddock & Associates Prop. Ltd v. Parramatta (City)* (1981), 150 C.L.R. 225 (H.C. Aus.). A council that gave information upon which it was reasonable to expect a home purchaser to rely could in principle be liable if the purchaser in fact relied on that information to his or her detriment. However, it was not reasonable for a purchaser to rely on anonymous telephone information, and it would not be reasonable for a council telephone information officer to reasonably expect that such telephone information would be acted on without further verification.

<sup>165</sup>(1985), 62 A.L.R. 108 (Fed. Ct. Gen. Div.).

foreseen the plaintiff's reliance or if the plaintiff's reliance was so unreasonable as to be beyond anticipation. In these ways the cause of action is consistent with the re-interpretation of tort duties in *Caparo Industries* and *Sutherland Shire*.

The cause of action has been recognized in the United States and Australia, although plaintiffs have had limited success. Recognizing the possibility of the cause of action does not make the government liable in private law generally for injuries suffered in relation to activities over which the government has a measure of regulatory control. On the other hand, if the government induces reliance by undertaking a specific safety measure, it will be held liable to compensate persons who are injured if it fails to do so carefully.

Finally, it must be recognized that the detrimental reliance analogy, which imposes liability on the government in circumstances where the government acts like a person, may not go far enough in some instances. We may wish to impose additional duties on government agencies that we are not willing to accept as individuals. In some cases, concerns for the liberty of the individual prevent the recognition of duties which a generous morality and more communitarian spirit would willingly embrace. For example, the common law's hesitation in accepting affirmative duties to rescue is often justified on the ground that such a duty would unduly impose upon the individual's freedom of action.<sup>166</sup> Since individual liberty is not an issue where agencies of the state are concerned, the moral duty to rescue could become a legal duty for certain government agencies. We might, therefore, wish to recognize duties on government agencies which are broader than those imposed between persons. This analysis might prove helpful in dealing with police and fire protection cases.<sup>167</sup> But even in these cases, where it is not helpful to analogize government activity to personal activity, the focus remains the relationship between the parties. A specific detrimental reliance-based analysis was at one time considered persuasive by

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<sup>166</sup>See *supra*, note 134.

<sup>167</sup>*Jane Doe v. Metropolitan Toronto Police Commission* (1989), 58 D.L.R. (4th) 396, 48 C.C.L.T. 105 (Ont. H.C.J.) (potential cause of action based on duty of police to warn persons known to be potential target of serial rapist); *Air India Flight 182 Disaster Claimants v. Air India* (1987), 44 D.L.R. (4th) 317, 62 O.R. (2d) 130 (H.C.) (suit against government and officers for negligent investigation of terrorist threat); *Lafleur v. H.M.T.Q.* (1990), 48 B.C.L.R. (2d) 180, 4 C.C.L.T. (2d) 78 (S.C.) (duty of police to arrest drunk motorcyclist to protect him from riding and crashing his motorcycle); *Schacht, supra*, note 133 (duty to mark accident site); *Suarez v. Dosky*, 407 A.2d 1237 (N.J. Super. Ct. App. Div. 1939) (police assisting children across a cross-walk); *Schuster v. City of New York*, 154 N.E.2d 534 (N.Y. 1954) (duty to protect persons who identify dangerous criminals); *Crouch v. Hall*, 406 N.E.2d 303 (Ind. Ct. App. 1980) (police investigation failed to apprehend known rapist who raped and killed daughter of plaintiff; no liability on "public duty doctrine" and discretionary function exception); *Ketchum v. Alameda County*, 811 F.2d 1243 (9th Cir. 1987); *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988); *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984), cert. denied, 105 S.Ct. 1754 (1985) (duty of police to protect where victim's vulnerability known to police).

the Supreme Court of Canada.<sup>168</sup> However, in the most recent cases where it would have been particularly illuminating, it was not considered. While the action in detrimental reliance based on the analogy to a duty to warn or rescue is a promising analytical tool, it need not be the sole basis for imposing government liability. The chain of reasoning does, however, provide a strong model. In contrast, the *Anns* foreseeability test remains an obstacle to reaching a principled basis for imposing liability.

### C. *The Supreme Court Trilogy*

In the recent cases involving inspection and regulation by public authorities, the Supreme Court, after employing the policy-operational distinction, relied on an *Anns*-inspired foreseeability approach in analyzing the issue of duty of care. This section will focus on the Supreme Court's treatment of the duty issue in the two recent common law cases, *Rothfield* and *Just*, critiquing the foreseeability approach and demonstrating the superiority of a specific detrimental reliance analysis. In adopting a specific detrimental reliance approach, we would get a different and far more satisfactory result. As the three cases demonstrate, the policy-operational distinction and the *Anns* foreseeability approach lead the court to find *prima facie* duties of care. In contrast, a specific detrimental reliance approach would force consideration of the actual relationship between the parties, thus staying truer to a traditional tort law analysis.

#### 1. *Rothfield v. Manolakos*

It will be recalled that in *Rothfield*, homeowners who wished to enjoy a level backyard employed contractors to build a retaining wall to support the built-up slope behind their house.<sup>169</sup>

##### a. *Justice La Forest*

La Forest J., writing for the majority, concluded that once the City made a policy decision to enact a house inspection by-law, it "owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise

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<sup>168</sup>See *R. v. Nord-Deutsch Verischerungs Gesellschaft*, [1971] S.C.R. 849 at 863, 20 D.L.R. (3d) 444, Ritchie J. (ship collision due in part to breach of Department of Transport's duty to maintain range lights "upon which mariners were entitled to place reliance"). See also *Grossman v. R.*, [1952] 1 S.C.R. 571, 2 D.L.R. 241, Kellock J. (when the Crown undertakes to mark obstructions on airport runways, pilots are entitled to rely on the assumption that that duty will be discharged carefully). The specific detrimental reliance thesis has also been explicitly accepted in England. One of the earliest instances of a plaintiff succeeding on the basis similar to the Good Samaritan test of the *Restatement*, *supra*, note 9 was the judgment of Slessor L.J. in *Kent v. East Suffolk*, [1939] 4 All E.R. 174 at 175 (C.A.). The decision was reversed by the House of Lords, *supra*, note 18. Surprisingly, Lord Atkin was particularly hard on the reliance thesis.

<sup>169</sup>See *above*, subsection I.D.3.

of those powers."<sup>170</sup> Surely La Forest J. was not saying that making a policy decision is itself grounds for imposing a private law duty of care. Such a position would have no basis in principle or precedent. Perhaps the source of the duty of care is to be supplied by the foreseeability theory of the existence of duties of care: the City owes a duty to those it reasonably foresees will be injured. As we have already seen, that thesis as relating to public authorities has been roundly rejected in England and Australia, and for good reason. But even if foreseeability were generally an acceptable basis for private law duties of care for public authorities, it would not explain the City's duty in this case. Compare two hypothetical situations. In the first, the City codifies rules of prudence by enacting a regulation to govern a certain activity. It foresees that persons who do not observe the code of conduct might suffer. In the second hypothetical, the City does not establish the code, but it is still able to foresee that persons who do not observe the rules of prudence will suffer. No one would impose a duty of care on the City in the second case, yet the element of foreseeability is the same as in the first hypothesis.<sup>171</sup> Foreseeability, therefore, is not the critical criterion upon which the existence of a duty of care exists. The duty rests almost entirely on the imputed consequences of its making a "policy" decision to codify the rules of prudence. As we have seen, it is all too easy to draw the false conclusion that the government activity which follows from a "policy" decision is automatically operational. Hence a version of the policy-operational distinction was used as a *prima facie* basis for imposing a duty.

In short, La Forest J. assumed, rather than proved, the existence of a private law duty of care. However, he did discuss the reliance-based cause of action in the course of rejecting Cory J.'s reasons for judgment. While Cory J. stated that third parties might be entitled to rely on the City, owner-builders' reliance on the City could not be reasonable because of the regulatory context of the by-laws. La Forest J. decided that reliance was reasonable.

As a preliminary matter, it is not clear to me how owner-builders, unless possessed of a high degree of technical knowledge, are supposed to see to it that their contractors comply with the technical aspects of building by-laws. Doubtless, owner-builders can choose their contractors, and it is incumbent on them to hire reputable tradesmen. But I fail to see how, having done that, they are in a position to ensure that construction actually proceeds according to standard. Owner-builders can hardly be expected to serve as their own inspectors. It can, I think, safely be assumed that the great majority of those who engage building contractors

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<sup>170</sup>*Supra*, note 3 at 1266-67. See text accompanying note 92.

<sup>171</sup>It might be argued that in *Rothfield* the City did not voluntarily undertake to establish the code: it was obliged to do so by statute. This obligation, it might be said, creates the obligation. But this does not follow. There is nothing in the policy-operational distinction, in the concept of foreseeability, or indeed in the canons of statutory interpretation that transforms a public duty to regulate the conduct of persons into a duty to those persons when they injure themselves by ignoring the regulations.

to undertake a project must rely on the disinterested expertise of a building inspector to ensure that it is properly done. In that respect, owner-builders are in a position similar to third parties who may be affected by the construction. Like them, they are, in my respectful opinion, entitled to rely on the municipality to properly inspect construction to see that it conforms to the standards set out in the municipality's building by-laws.<sup>172</sup>

The reliance that La Forest J. considered adequate to form the basis of a duty of care was not at all like the specific detrimental reliance of the American and Australian cases. All this passage shows is that the owner-builders would benefit if the City were to supplement the inspections of owner-builders or their consultants.

First, La Forest J. did not refer to any specific conduct of the City in relation to the particular plaintiff that would permit the latter to conclude that the City intended its inspections to "supplant, rather than supplement" the inspections that prudent owner-builders would conduct on their own behalf.<sup>173</sup> The fact that an owner-builder may not personally possess the technical knowledge is irrelevant. He or she can, and should, retain architects or engineers to oversee the construction project, both in their own interests and in the interests of their neighbours.<sup>174</sup> In other words, the owner-builder had alternative courses open to ensure that the construction was sufficient. Second, there is no evidence in this case to suggest that the owner-builders actually relied on the City's inspections for their own purposes. In fact, the evidence suggests that the plaintiffs here, like the plaintiff in *Sutherland Shire*, regarded the by-laws as regulatory duties owed by builders to the City rather than as duties owed by the City to builders. Third, there is no suggestion that the plaintiffs *altered their conduct* to their own detriment: there is no suggestion that they would have acted differently in the absence of the building inspection scheme. Fourth, as La Forest J. himself observed, "[t]he by-law squarely imposes the duty on the owner at particular stages of construction."<sup>175</sup> By making the City liable to the owner-builders when the latter fails to ensure that his or her project satisfies the by-laws, the court shifts the statutory duty without justification. In so doing it makes the "police" responsible for the conduct of the "offenders."<sup>176</sup> Finally, and most importantly, the obligations on the owner-builders may well be predicated on the justifiable assumption that a person who undertakes the initiative to effect new construc-

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<sup>172</sup>*Supra*, note 3 at 1267-68.

<sup>173</sup>See the discussion of *Blessing*, text accompanying note 71; and *Patentas*, text accompanying note 144.

<sup>174</sup>That they cannot afford to do so, or that the project is so trivial that it seems to them excessive to do so, is no reason to shift the consequences of their frugality to the City. Cory J. indicates that the Manolakoses eventually did hire an engineer, so they were evidently aware that engineers were available for consulting.

<sup>175</sup>*Supra*, note 3 at 1270.

<sup>176</sup>See text accompanying note 149.

tions should bear the risks inherent with those constructions, at least as between themselves and the public at large.<sup>177</sup>

For La Forest J., the fact that the owner-builders failed to notify the City amounted to contributory negligence. Accordingly, he reduced the liability of the City. If he had adopted a reliance-based test for the existence of a duty of care he would have seen the owner-builder's failure to summon the City as evidence that they did not rely on the City. The City owed them no duty of care because they did not rely on the City. That was the view of the judges in *Sutherland Shire* and, with respect, it seems correct.

*b. The Dissent of Justice Cory*

The better view is that of Cory J. (Lamer J., concurring), in dissent. Cory J. saw the question of liability between the City and the owner-builder as a matter of negligent misstatement.<sup>178</sup> His decision, then, turned on whether the City had engendered reasonable reliance, and whether the owner-builder was justified in relying on the City. He concluded that the owner-builders' reliance, if they did in fact rely on the City, was not reasonable. According to Cory J., whether the City had a duty of care to the owner-builder had to be determined according to a two-stage test.<sup>179</sup> The first stage is to see whether the parties were in a position of proximity in the sense of being within a "special relationship" which 'would arise in circumstances where the defendant, [was] so placed that others would reasonably rely on his ... statements.'<sup>180</sup> He concluded that, although the City's chief inspector was not acting in a private capacity, "there [was] still such a close relationship that in the reasonable contemplation of Mr. Phillips, carelessness on his part might cause damage to the Manolakoses."<sup>181</sup> The second stage was to see whether there were considerations of policy that ought to negate or diminish the duty of care or the damages that would be recoverable upon its breach. Cory J. wrote:

It must be remembered that Mr. Phillips, although a professional engineer, was a senior employee fulfilling certain specific duties on behalf of the City. *He was nei-*

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<sup>177</sup>Richard Buxton says:

The attraction of making the local authority liable appears to spring from its assured solvency and general responsibility to the public at large, and not because reliance is placed on the council's inspection in any particular case by any particular plaintiff. It is a pity that this rationale, apparently accepted by Lord Wilberforce in *Anns*, was not more stringently reviewed in that case, since it is (at least) not self-evident that the rate-payers should act as insurers to house-purchasers who make bad bargains ...

R. Buxton, "Built Upon Sand" (1978) 41 Mod. L. Rev. 85 at 87. See similar comments, *infra*, note 181.

<sup>178</sup>*Supra*, note 3 at 1287.

<sup>179</sup>The source of this methodology in *Anns* is obvious.

<sup>180</sup>*Supra*, note 3 at 1287.

<sup>181</sup>*Ibid.*

*ther dispensing advice to the respondents nor was he guaranteeing that the respondents' home improvement (the retaining wall) would be a success.* The respondents had hired a contractor to take care of their interests in that regard. Further, the granting of a building permit did not and could not relieve the respondent owners of their responsibility to have the work on the retaining wall carried out in accordance with the City's by-laws. Nor did Mr. Phillips' willingness to allow this relatively small and inexpensive project to proceed without requiring the respondents to incur the cost of obtaining drawings completed by a professional engineer relieve the respondents of that responsibility.<sup>182</sup>

Cory J.'s approach has the merit of focusing on the particularities of the relationship between the City and persons in the place of the plaintiff. The City and the plaintiff stand in the position of regulator and regulatory target. Like the courts in the American and Australian specific detrimental reliance cases, Cory J. concluded that it did not matter whether the City could foresee that the plaintiff would be better off if the inspections were made. The point was that the City inspector was acting in his capacity as a public official enforcing by-laws. The inspection office was not a publicly funded architecture or engineering service intended to provide free consultations to displace those that prudent owner-builders would have conducted on their own behalf.

Despite the merits of Cory J.'s approach, specific detrimental reliance based on an analogy to the duty to warn provides a more appropriate analytical scheme than Cory J.'s approach based on the law of negligent misstatement. An analysis based on negligent misstatement asks whether a person should be held accountable for what he or she *did* say. Here the question is whether the City is liable for something it *did not* do: make a proper inspection. The first inquires into the responsibility flowing from a positive act. The second asks whether the defendant is under a duty *to act*. The issues are very different. Had Cory J. employed the reliance test derived from the duty to warn, instead of the reliance test derived from the law of negligent misstatement, he would not have held that the City owed a *prima facie* duty of care, and the regulatory context of the relationship of the parties would not have been a "policy" element that negates the *prima facie* duty. Rather, it would go to show that no private law duty to inspect arose in the first place.

c. *Summary of Rothfield v. Manolakos*

The Supreme Court's decision in *Rothfield* is questionable in principle and in policy. The Court appears to believe that it is watching out for the interests of the small home owner by making the City a virtual guarantor of a warranty of fitness of new constructions.<sup>183</sup> The concern is misplaced. The decision will

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<sup>182</sup>*Ibid.*

<sup>183</sup>Todd, *supra*, note 99 at 392 (commenting on the liability imposed in *Anns*, which was less strict than the liability imposed in *Rothfield*). Todd says that the liability in *Anns*, which resembles a contractual warranty of fitness, is particularly problematic because unlike true contracting parties

have the effect of increasing the costs of small projects generally because cities will be loathe to approve *any* plans without engineering certificates, or otherwise to allow any shortcuts in the compliance review process. More fundamentally, there is no good reason why the risk of home improvements should be shifted from those who undertake them to the residents of a municipality as a group. The owner-builders are the ones who benefit and they are the ones who should bear the risk. This is particularly so when homeowners can protect their own interests by obtaining insurance against third party claims and by selecting contractors who have demonstrated competence.

The reason the elaborate arguments of the Supreme Court are necessary in the first place is quite simple: neither the by-laws nor the statute obliging the municipality to enact the by-laws mentions civil liability anywhere. The Court therefore had to infer a "common law" duty of care. The Court did not even analyze the statutory scheme to articulate the reasons for reading in private liability. As Duff J. stated as early as 1925:

[T]he object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty.<sup>184</sup>

This passage suggests an approach very much like the one suggested in *Patentas and Blessing*.<sup>185</sup> The court should focus on the relationships between the regulatory targets, the problems the statute seeks to redress, and the means chosen by the statute for that purpose. By focusing on the relationship between the parties within the context of the regulatory scheme, it is also consistent with *Caparo Industries*. The policy-operational distinction and the foreseeability test ignore these questions.

To argue that owner-builders should not have a right of action against the City does not imply that there should not be private law liability arising out of negligent inspections. Rather it is only to argue that owner-builders have no right of action. The approach suggested by *Caparo Industries* says that we should not look at duties "at large," but look at them in the context of the specifics of the relationship between the parties. Owner-builders, who are able to

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the municipality is not in a position to expressly limit its exposure by the contract, or control the work of the contractors. See also, Wallace, *supra*, note 99 (conclusion similar to Todd's). See also Buxton, *supra*, note 177.

<sup>184</sup>*Orpen v. Roberts*, [1925] S.C.R. 364, 1 D.L.R. 1101 at 1106. See also *Ostash v. Sonnenberg* (1968), 67 D.L.R. (2d) 311, 63 W.W.R. 257 (Ont. C.A.); G. Williams, "The Effect of Penal Legislation in the Law of Tort" (1960) 23 Mod. L. Rev. 233.

<sup>185</sup>*Supra*, notes 144, 77, respectively.

protect their own interests, should not have a right of action, but it might be otherwise with remote purchasers. Perhaps remote purchasers, who did not participate in the construction of the building, can be said to rely on the integrity of the regulatory scheme. Whether that reliance is reasonable remains an open question. After all, remote purchasers are also able to protect their interests by hiring inspection engineers before they purchase.

These issues are complicated, and reasonable persons will differ on how they should be resolved. The Supreme Court's decision, however, does not even acknowledge that these questions exist.

## 2. *Laurentide Motels v. Beauport*

It will be recalled that in *Laurentide Motels*,<sup>186</sup> Beetz J. held that the dividing line between the public law duties and the private law duties of municipalities is itself a matter for public law. The public law of Quebec is derived from the common law, so the policy-operational distinction applies. Applying (or, misapplying) the policy-operational distinction in this case, Beetz J. concluded that the fire department was subject to the private law duties set out in art. 1053 C.C.L.C. It is beyond the scope of this paper to analyze in detail the scope of the civil law delictual liability of municipalities. I will simply assert my opinion that the judgment of L'Heureux-Dubé J. is inconsistent with authority.<sup>187</sup>

Let us consider, however, whether the facts in *Laurentide Motels* would justify compensation in a jurisdiction which employed the detrimental reliance analysis based on the duty to rescue suggested in this paper.

If the plaintiff is suing for personal injuries suffered because of negligent fire-fighting, there may be strong justifications for recognizing such a cause of action. The case is much less compelling when the plaintiff is suing for property damage for which insurance is available. When the plaintiff claims that she or he has relied on the government agency for protection it must be shown that that reliance was reasonable, taking into account all the circumstances, and that the conduct of the agency must have been such that the plaintiff was induced to forego other *remedies or precautions* against the risk. There is little doubt that it is reasonable for one person to rely on another to prevent personal injury even if the rescuer did not create the risk. That message is conveyed by the common law rescuer cases, by the Quebec *Charter of Human Rights and Freedoms*, and by the Vermont Good Samaritan statute reproduced above.<sup>188</sup> The duty to inspect and regulate, developed by analogy from the duty to rescue, thus focuses naturally on injury to the person. It is another matter altogether where property

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<sup>186</sup>*Supra*, note 3.

<sup>187</sup>See *supra*, note 55.

<sup>188</sup>Reproduced *supra*, note 136.

owners seek restoration of their property from a government agency which did not cause the damage to the property; and where the specific property damage was insurable. First, it is not at all clear that the communitarian values that oblige each of us to assist others in personal peril also oblige us to restore, from the public purse, the asset position of those who have acquired property. Second, and more fundamentally, the fact that governments set up fire-fighting services should not be regarded as excusing individuals and corporations from purchasing their own insurance, a "remedy or precaution" against the risk of property loss.

The *Caparo Industries* approach to the existence of duties of care invites us to distinguish between categories of plaintiffs and defendants, and the type of injury suffered. A reliance-based duty to inspect or regulate, derived from the duty to rescue, may therefore distinguish between types of injury (personal injury or property loss) and types of plaintiff (individual or corporation). I submit that in firefighter cases like *Laurentide Motels* the law may deem it to be unreasonable to rely on the government for compensation for insurable property losses.

### 3. *Just v. British Columbia*

In *Just*, the activities of a roadside inspection crew were found to be operational in nature, and thus subject to private law duties of care. When analyzing the private law duty of care, Cory J. immediately adopted the *Anns* foreseeability test.<sup>189</sup> He mentioned in passing the doubts expressed by the House of Lords in *Yuen Kun-yeu*,<sup>190</sup> but he stated,

[n]evertheless, it is a sound approach to first determine if there is a duty of care owed by a defendant to the plaintiff in any case where negligent misconduct has been alleged against a government agency.<sup>191</sup>

He may, however, have been uncomfortable relying on foreseeability alone, because he went on to suggest another basis for a duty of care:

In the case at bar the accident occurred on a well used major highway in the province of British Columbia. All the provinces across Canada extol their attributes and attractions in the fierce competition for tourist business. The skiing facilities at Whistler are undoubtedly just such a magnificent attraction. It would be hard to imagine a more open and welcoming invitation to use those facilities than that extended by the provincial highway leading to them. In light of that invitation to use both the facilities and the highway leading to them, it would appear that, apart from some specific exemption arising from a statutory provision or established common law principle, a duty of care was owed by the province to those that use its highways. That duty of care would extend ordinarily to reasonable maintenance

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<sup>189</sup>*Supra*, note 3 at 1235.

<sup>190</sup>*Supra*, note 43.

<sup>191</sup>*Supra*, note 3 at 1235.

of those roads. The appellant as a user of the highway was certainly in sufficient proximity to the respondent to come within the purview of that duty of care. In this case it can be said that it would be eminently reasonable for the appellant as a user of the highway to expect that it would be reasonably maintained. For the Department of Highways it would be a readily foreseeable risk that harm might befall users of a highway if it were not reasonably maintained. That maintenance could, on the basis of the evidence put forward by the appellant, be found to extend to the prevention of injury from falling rock.<sup>192</sup>

The foreseeability theory of the duty of care employed by Cory J. in *Just* would have the effect of making the government liable for losses suffered in any of a myriad of activities in which the government facilitates the private objectives of residents and visitors.

One hopes that Cory J. was not suggesting that the province, by inviting persons to use tourist attractions (not even owned or operated by it), became responsible for the tourists' safety while they were en route to those attractions.<sup>193</sup> That explanation is not at all satisfactory. First, as a practical matter, this explanation leaves unanswered the question about what duty, if any, is owed people using the road for purposes wholly unconnected with these so-called provincial inducements. Second, and more fundamentally, the analogy between persons inviting others onto their private property and a person using public roads in response to government promotions of tourism is patently false.<sup>194</sup>

#### a. *Standard of Care*

"Duty of care" and "standard of care" are often spoken of as logically separate concepts. In practice, however, they are inseparable. One cannot say that a defendant had a duty of care to do a particular thing, that is, inspect roadside slopes at certain intervals, without having already defined the scope of the standard of care. Cory J.'s difficulty in articulating the standard of care casts doubt on whether the province could have the duty of care he imposed.

Finding, as the Supreme Court did, that the province has a duty to take "reasonable" steps to ensure that the roads are "safe" throws no light on what precise steps would be sufficient. "Safety" may mean different things to different reasonable persons, especially at the margin. Moreover, the relative impor-

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<sup>192</sup>It is interesting that the British Columbia judges, all of whom were familiar with the Whistler highway, and who would not have imposed a private law duty of care, stressed the natural causes of the rock fall. See McLachlin J., *supra*, note 64 at 350, and Hinkson J.A., *supra*, note 66 at 224. For Cory J. the possibility of rock falls was simply a matter of "reasonable maintenance of the roads."

<sup>193</sup>A similar analogy is used later. He suggests that the duty of a person to maintain his or her driveway is similar to the duty of the province to maintain its highways, although he notes that differences in the scope of the duty must be recognized even as we recognize their essential similarity. *Supra*, note 3 at 1246.

<sup>194</sup>See W. Friedmann, "Liability of Visitors to Premises" (1943) 21 Can. Bar Rev. 79.

tance of various perils is a subject on which reasonable people will differ. Should money be spent on guard-rails? Should sand barrels be placed in front of bridge abutments? Should the province check for potential rock falls? Should more attention be paid to preventing rock falls or removing snow? Should checks be made on a dangerous portion of road on which only a few people travel, or a heavily travelled portion which is by its nature safer? Cory J. offered an example of an obviously bad safety program or, more accurately, an example where there was no program at all. However, he did not suggest a test for assessing a program that is not blatantly inadequate.

Cory J. stated in several places that a possible test would be to determine whether the authorities have wisely spent the money allotted to them. With respect, this could not provide a workable test. For example, what could constitute the relevant budget? If the province defends by saying that its inspections were adequate considering that it only had a limited amount allocated to the rock-scaling budget, could the plaintiff assert that the relevant budget is in fact the entire maintenance budget, and that within that budget the province unwisely allocated too little to rock-scaling? Similarly, could the province defend by claiming that the cut-back in its rock-scaling efforts was necessitated by a premature exhaustion of its quarterly budget because of the unforeseeable cost of repairing flood damage? Further, could the plaintiff counter by saying it was imprudent to so rigidly compartmentalize quarterly budgets, and that a reasonable plan would have allowed flexibility throughout the fiscal year? Obviously, there are no objective answers to these questions. In practice, courts will be tempted to call otherwise reasonable programs which they deem inferior "unreasonable" in order to invoke the power to review this unreasonable decision. The court would simply be substituting its opinion of what is reasonable for that of the province.<sup>195</sup>

#### *b. Specific Reliance*

Perhaps Cory J. did not intend the invitee analogy to be taken literally. Maybe all he meant was that the government builds and maintains roads, so the people who use them are entitled to assume that the government will ensure that rocks will not fall from the mountain slopes onto the road. Could the Justs claim compensation on this ground under the specific detrimental reliance thesis discussed above? Probably not. The specific detrimental reliance thesis requires that: (1) the authority have conducted itself so as to suggest to persons in the place of the plaintiff that it would take specific steps (for example, continue

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<sup>195</sup>There is precedent for this. Consider the history of judicial review of administrative adjudicative bodies, where decisions of administrative tribunals which might be open to debate among reasonable persons were consistently held to be "manifestly unreasonable" so as to open the door to judicial review. See Y-M. Morissette, "Le contrôle de la compétence d'attribution: thèse, anti-thèse, et synthèse" (1986) 16 R.D.U.S. 591.

warnings); (2) that it is reasonable for the plaintiff to rely on the authority to take those steps; and (3) that the plaintiff has altered his or her conduct in reliance on the anticipated conduct of the authority. First, the highway has signs at the beginning of the mountainous passage, and at frequent intervals along the way, indicating the danger of falling rocks. It cannot be asserted that the province invited drivers to rely that they would be safe from falling rocks. Second, in a case like *Just*, it would be difficult to argue that the province had by its conduct induced persons to rely on it taking *specific* steps: its commitment to safety generally along an entire highway is not analogous to the Coast Guard's commitment to light a specific lighthouse at a specific place in the Mississippi river.<sup>196</sup>

Many people would feel that denying recovery to plaintiffs in the position of the *Justs* is hard-hearted. If the specific reliance thesis cannot accommodate such compensation, it ought to be set aside in favour of an alternative that better reflects the communitarian values of a progressive society. I cannot dispute this intuition. It may be that we are not satisfied with the corrective justice of negligence law and expect something more. As John Finnis has written:

Consider the common law of torts. ... [T]his set of rules and principles was regarded as an instrument of justice, indeed of corrective justice in Aristotle's sense. ... In [a more recent view] the question is not "What are the standards of conduct which one person must live up to in relation to his 'neighbours'?" or "What should be the extent of liability of one who fails to live up to those standards of conduct?," or even "How should someone injured by the wrong of another be restored to his former condition?" Those are questions central to the theory of commutative justice. But in the newer view, the question is held to be "How should the risks of *common life* be apportioned, especially the risks of essentially collaborative enterprises as travel and traffic by road?" Injury to one of the participants is then treated as an incidental loss to be set against the gains which accrue to all who participate in this sphere of common life. ... *The question whether the injury was caused by any fault becomes substantially irrelevant.*<sup>197</sup>

If road travel is indeed an area where "common enterprise" justice ought to prevail it would be better if that were stated outright. The present approach of the Supreme Court, while intending to "do justice" in an individual case like *Just*, does a disservice to the development of negligence law generally and the liability of government agencies in particular.<sup>198</sup> If we are willing to adopt the common enterprise thesis we must then decide which activities qualify as common enterprises, and what sorts of classes of plaintiffs can claim compensation for which injuries. For example, it does not seem unreasonable to require private drivers and commercial carriers to insure their vehicles and cargoes, nor does

<sup>196</sup>See *Indian Towing*, *supra*, note 11.

<sup>197</sup>J.M. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 180 (emphasis added to final sentence).

<sup>198</sup>Sopinka J.'s decision reflected similar concerns, see above, subsection I.D.2.c.

it seem unreasonable to prevent their insurance companies from passing on claims to the general public via suits against the government. Insurable perils of this sort might, then, be ineligible for assistance based on "common enterprise" justice or other communitarian values. But as long as the true basis of compensation is concealed behind the policy-operational and foreseeability tests, these questions will not receive the attention they deserve.

It may be that Canadian society expects governments to cushion the blow of tragedies like that which befell the Just family. It is not inconceivable that the members of a progressive society would expect the state to compensate the victims of natural calamities arising from the common enterprises of life. If that is so, rules will have to be developed to segregate justified claims from the unjustified. Those rules would not be based on the fault of the government, but on the victim's loss. Whether such compensation is well founded is an open question. But it is clear that it should not be implemented through the back door by bending the rules of negligence law.

c. *Summary of Just*

The decision of Cory J. in *Just* illustrates how the policy-operational distinction combines with the foreseeability thesis of the duty of care to impose novel private law duties on government without explicit justification or explanation. Using the policy-operational distinction as a test for immunity implies that government activity is *prima facie* subject to private law duties. The concept of discretion, upon which the policy-operational distinction is based, is so vague that it invites circular reasoning. As a result, the presumption that the specific government activity, here, roadside safety inspections, can be judged by private law standards becomes virtually irrebuttable.

If Cory J. had employed the approach suggested by Brennan J. in *Sutherland Shire* and Lord Bridge in *Caparo Industries*, he would have had to take a second look at the relationship between the government agency and the specific plaintiffs. He would have recognized that the province's role as facilitator of transportation generally has no persuasive analogy to the activities of persons.<sup>199</sup> He would also have recognized that the duty he would impose on the province, a duty to prevent injury caused by nature, is not one normally imposed on persons in favour of the public at large. In short, the false presumption created by the policy-operational distinction would have been rebutted: he would have concluded that government in this case cannot be judged by ordinary private law

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<sup>199</sup>One might be tempted to compare the government as road builder and maintainer to private corporations which act as common carriers. The analogy is false. The relationship between a common carrier and a passenger (or freight shipper) is contractual. The common carrier is bound by the terms of the contract, and charges a fee sufficient to carry out the terms of the contract.

duties. Of course, Cory J. may have gone on to conclude that the government should compensate persons in the position of the plaintiffs in this case, but he would have been obliged to say why they should be compensated, and he would have had to outline the limits of that compensation.

Instead, Cory J. relied on the *Anns* foreseeability test. Like the discretion-based policy-operational distinction, the foreseeability test invites circular reasoning. When one looks with hindsight at an accident that has actually happened, it is easy to jump to the conclusion that it should have been foreseen. Having concluded, perhaps erroneously, that the accident was foreseeable, it seems to follow that someone should have done something to prevent it. From there, fingers naturally point to the government. The result is an *ad hoc* assertion that the government ought to compensate persons who are injured by natural forces while using public highways.<sup>200</sup>

### Conclusion

Lord Atkin saw tort law as the legal expression of the moral injunction, "Love thy neighbour."<sup>201</sup> The ideas of love (or more prosaically, mutual respect) and neighbourhood are distinctly human. The concepts of foresight and proximity, through which the moral maxim is translated into legal rules, are no less human. People "foresee" the consequences of their acts, and have "relationships" with other people. We try to make corporations human by calling them "persons." We do not go so far with government, but we say that it should be held civilly responsible *as if* it were a person. We say, by analogy, that government agencies can "foresee," but we really mean that it is possible to create administrative procedures which assign to a member of the bureaucracy the task of effecting or avoiding certain results. We say that the government is in a relationship of proximity with a person. But a government agency is merely a political concept. What we really mean is that the government has come to affect the person in a way that sets that person apart from the rest of society.

The policy-operational distinction and the use of the foreseeability test for public agencies appear to affirm the precept that governments can, in principle, be treated as if they were human. "Policy" seems abstract and legislative, while "operational" evokes the image of actual people *doing* things. And as I have observed, attributing foresight to a government agency is anthropomorphic.

In practice, however, these two tools have allowed the Supreme Court of Canada to impose liability on government agencies that has no analogue in the duties owed by individuals to their neighbours. Discretion, which is said to

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<sup>200</sup>See *supra*, note 64.

<sup>201</sup>*Supra*, note 99.

divide policy decisions from operational functions, is hopelessly vague. The distinction yields only *ad hoc* assertions. The Supreme Court has increasingly chosen to find that the government's activities are operational. With the benefit of hindsight courts can find "foresight" whenever they feel the result is desirable.

The result is incoherence. Whether one agrees with the results or not, the decisions must be criticized because it is impossible to say how the results came about or, more importantly, what will happen in future cases. In addition, government liability cases affect tort liability generally. Consider the effect of *Anns* in the jurisprudence. The broad-based foreseeability approach is as problematic in many cases involving actual people as it is in cases where the defendant is a government agency. The repetition of the *Anns* test in the Supreme Court trilogy obstructs the development of more principled bases of civil liability.

It is likely that some members of the Supreme Court believe the analogy to human activity to be too limiting. We expect more of our government than we expect of our human neighbours. Imposing liability on the government when it fails in its role as public guardian is consistent, they might say, with communitarian social values. In the abstract, there is considerable merit to that argument. But it is by no means clear that the *ad hoc* creation of duties practiced by the Supreme Court has achieved or will achieve the values of an increasingly communitarian society. Payments from the public purse can go to the undeserving as easily as to those in genuine need. If the Supreme Court believes that tort law should recognize new duties to compensate, it should articulate why the plaintiffs deserve compensation. The policy-operational distinction and the foreseeability test ignore the plaintiffs. It does not distinguish those who have the resources to protect their own interests from those who are vulnerable and thus have a greater need for the protection of government.

The reconsideration of the concept of proximity proposed by the Australian High Court in *Sutherland Shire* and the House of Lords in *Caparo Industries* would permit consideration of these questions. Proximity and the duties that arise from it are a matter of context and individual circumstances. New duties can be created if they can be justified by analogy to existing duties. It is therefore not necessary to limit new duties to ones which persons already owe to one another. But if new duties are to be created, the basis for the duty must be articulated expressly.

A duty to inspect and regulate, based on specific detrimental reliance, is a type of duty that has been created based on close examination of all the circumstances in which the parties came together. It is consistent with the goal of

imposing liability on government agencies “as if” they were persons, but it is not unduly restricted by that goal. If the policy-operational distinction and the foreseeability test are laid to rest, other similar duties may be recognized.

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