

COMMENTS
COMMENTAIRES

**Governmental Liability, the Tort of Negligence and the
House of Lords decision in *Anns v. Merton London
Borough Council***

In *Dutton v. Bognor Regis Urban District Council*¹ the English Court of Appeal held that a local authority, exercising a power under its own byelaws to inspect the foundations of a house, owed a duty of care in negligence to the second purchaser of the house. Moreover, the authority, through its inspector, had acted negligently and the plaintiff was entitled to damages for her loss.

The byelaw in question concerned the standard of foundation work and had been made under a power conferred on specified local authorities by the *Public Health Act, 1936*^{1a} which also cast on them the general duty of implementing the Act. Under the byelaw, the builder was compelled to notify the local authority before covering up foundation work and the latter had the power to inspect those foundations to see that they complied with the standard prescribed by the byelaws. In *Dutton*², the defendant had in fact carried out an inspection but its inspector negligently failed to notice that the foundations were laid on an old and disused rubbish tip. He passed the construction as did the authority's surveyor at the damp-course level and the house progressed to completion. The first purchaser of the house sold it within a year to the plaintiff and over the next few years it started to slip badly with gaping cracks and distorted woodwork appearing.

The *Dutton* decision stands as a landmark in the area of governmental liability and the principles there laid down have come under judicial scrutiny again, this time by the House of Lords in *Anns v. Merton London Borough Council*.³ The plaintiffs leased flats and maisonettes under 999-year leases in a single block development in Wimbledon. They alleged that various structural movements in the

¹ [1972] 1 Q.B. 373.

^{1a} 26 Geo. V & 1 Edw. VIII, c.49, s.1 (U.K.).

² *Supra*, note 1.

³ [1977] 2 W.L.R. 1024 (H.L.).

building were attributable to the builder's negligence in providing inadequate foundations. The foundations were thirty inches deep whereas the builder's plans, deposited with the local authority, showed that the foundations were to have been taken down to thirty-six inches. In correspondence with the lessees, the local authority assured them that an inspection of the foundations must have been carried out but that it was unable to trace any record of this. The lessees brought an action against the local authority for its

negligence ... in allowing the first defendants [the builder] to construct the said dwelling house upon foundations which were only 2 feet 6 inches deep instead of 3 feet or deeper as required by the said plans, alternatively of failing to carry out the necessary inspections sufficiently carefully or at all...⁴

The authority decided to contest the existence of a duty of care and the matter reached the House of Lords on a preliminary point of law in the following terms:

1. Whether the defendant council was under: (a) a duty of care to the plaintiffs to carry out an inspection of the foundations (which did not arise in *Dutton's* case); (b) a duty, if any inspection was made, to take reasonable care to see that the byelaws were complied with (as held in *Dutton's* case); (c) any other duty including a duty to ensure that the building was constructed in accordance with the plans, or not to allow the builder to construct the dwelling house upon foundations which were only 2 feet 6 inches deep instead of 3 feet or deeper...⁵

In addition, a limitation of actions problem arose. A majority of the House (Lords Wilberforce, Diplock, Simon and Russell) held that, on the plaintiffs' allegations, the local authority owed them a duty of care if there had been an inspection, and would owe them a duty to inspect, so as to ensure compliance with the byelaws, provided any failure to inspect was not the product of a genuine discretionary decision as to the making of inspections. It did not matter whether an individual plaintiff was the first lessee of the flat or took it under an assignment; he was still within the contemplation of the authority's inspector. Lord Salmon, dissenting in part, concluded that the authority owed a duty of care to the plaintiffs only if there had actually been an inspection of the foundations.

The duty of care and omissions

When a local authority inspector passes bad foundation work, and thereby allows the builder to proceed to the next stage, has he carried out his task of inspection negligently, or has he negligently

⁴ *Ibid.*, 1030.

⁵ *Ibid.*, 1031.

failed to prevent the builder from continuing the development? Before *Dutton* this was important because of the House of Lords decision in *East Suffolk Rivers Catchment Board v. Kent*.⁶ In that case, a high tide broke through an embankment wall and flooded the plaintiffs' land. The Board had sent an inexperienced man with a gang of unskilled labourers whose efforts to repair the breach were wholly inadequate. Instead of the fourteen days which competent men would have taken, one hundred and seventy-eight days passed before the embankment was repaired. A majority^{6a} of the House of Lords held that there was no liability. They were particularly impressed by the fact that since the tide had already broken through, the appellant's efforts merely failed to abate a disaster which had already occurred. The case is perhaps best regarded as an authority on causation, for how could the appellants be liable for damage which already had occurred when the tide broke through the embankment. Perhaps surprisingly, it was not argued that the respondents had relied on the appellant's intervention so as not to turn elsewhere for help.

On its facts, *Dutton* was clearly distinguishable from *East Suffolk*. When the local authority inspected the foundations, the plaintiff had suffered no damage. At that stage, the foundations being merely potentially perilous to future purchasers, no one had suffered harm. Moreover, from the viewpoint of causation, the local authority's control over the situation far exceeded that of the Board in the *East Suffolk* case. The Board could be no more successful than Canute in commanding the sea to recede, but the building of the house above its foundations could be stayed by the local authority's injunction. In the graphic language of Stamp L.J. in *Dutton*, the local authority gave the builder the "green light" to proceed with the house when its inspector certified the foundations as sound.^{6b}

Even though *Dutton* could be distinguished from the *East Suffolk* case, it is questionable whether the local authority committed a positive act or rather was guilty of an omission. The dividing line between the two is difficult to draw and the vague middle-ground lends itself to tendentious reasoning. In *Dutton*, Sachs L.J. did not doubt that the passing of the foundations was a positive act.⁷

⁶ [1941] A.C. 74 (H.L.).

^{6a} The majority consisted of Viscount Simon L.C., Lord Thankerton, Lord Romer and Lord Porter. Lord Atkin dissented.

^{6b} *Supra*, note 1, 409.

⁷ *Ibid.*, 403.

Stamp L.J., by the tenor of his judgment, suggests that the local authority, by giving the "green light" to the builder, failed to prevent future damage being done. However the Court of Appeal may have characterised the defendant's behaviour, the important point is that the case signifies that, in this area of liability at least, judicial debate would no longer be distracted from the main theme of proximity by the argument that the common law recognises no duty of care in respect of omissions.

If the local authority in *Anns* had inspected the foundations, which at this stage the plaintiffs had not proved, its liability would have been four-square with that of the authority in *Dutton*. Indeed, the London Borough of Merton was challenging the correctness of *Dutton* in the House of Lords. Their Lordships, however, were unanimous in holding that *Dutton* was rightly decided.⁸ *Anns*, therefore, establishes beyond all doubt that a local authority, subject to the matter of discretion,⁹ owes a duty of care to prospective purchasers when inspecting the foundations of a building. The class of persons to whom the duty is owed is not as infinite as might appear, since the nature of the builder's negligence is such as to assert itself quite soon after the commission of the negligent act. The limitation period will afford some protection and people who buy a tumble-down house, which they know or should have realized was so, will receive scant judicial sympathy.

Where the *Anns* decision does depart from the law established by *Dutton* is in the liability of a local authority which fails to carry out any inspection at all. The common law has been notoriously slow to impose a duty to take positive action, even when abstention is detrimental to another party. It has also been loath to infer the existence of a causal connection between an omission and another party's loss. The majority of their Lordships held that, assuming no inspection had been carried out, the local authority could owe a duty of care to the plaintiffs to carry out an inspection. Whether it did owe a duty would depend on whether the failure to inspect was protected by the existence of a discretionary decision not to inspect.¹⁰ In imposing a duty to take positive action, even one limited in this way, the decision is innovative. It is exceedingly

⁸ *Supra*, note 3. See Lord Wilberforce, with whom Lords Simon, Diplock and Russell concurred, *ibid.*, 1040, and Lord Salmon, *ibid.*, 1042.

⁹ *Infra*, p.286.

¹⁰ *Supra*, note 3, 1035 *per* Lord Wilberforce: "Thus, to say that councils are under no duty to inspect, is not a sufficient statement of the position. They are under a duty to give proper consideration to the question whether they should inspect or not."

difficult to translate this omission into positive misconduct. We cannot say that the local authority carried out an inspection of the plaintiffs' maisonettes badly, unless perhaps the failure to inspect the foundations was part of a more general inspection of the maisonettes, part of which had been carried out. Nor can we say that the local authority's general supervision of building standards in its area was performed defectively, because the plaintiffs must rely on a duty of care owed to them as individuals and cannot build on a duty owed to others. Moreover, there is no significant antecedent relationship between the local authority and the plaintiffs establishing the latter as dependents of the former, and into which one can imply a duty to take positive action.¹¹ By being obliged to inspect, the local authority is thus compelled to "rescue" the plaintiffs from the position into which the builder has put them, although the authority will not benefit from the latitude that the courts would probably extend to different types of rescuers as they carried out their works of mercy.¹² Admittedly, while the plaintiffs' position at the time of the failure to inspect is one of potential rather than actual peril, the builder has already behaved culpably.

In a partial dissent, Lord Salmon was not prepared to impose on the local authority a positive duty to inspect the foundations, even where negligence was suspected, because the statute itself had imposed none;¹³ the implication being that the imposition of such a duty would usurp Parliament's function. He considered it unlikely that an authority would act so irresponsibly as to decide not to carry out any inspections but thought that such a decision could be quashed by a prerogative order of *certiorari* or *mandamus*.¹⁴ Putting aside the difficulty that this hypothetical failure to inspect might not have stemmed from a general decision, such order would afford no real remedy at all to the plaintiffs in the present case. It is hard to see the sense in denying a remedy where the failure to inspect has been isolated and unconsidered, when the victim of a negligent inspection can recover substantial damages.

The problem of a causal link between the failure to inspect and the plaintiffs' injury did not trouble their Lordships. In *Dutton*, the Court of Appeal had rejected the argument of the local authority that the plaintiff ought not to recover since it could not be said that she had relied on the local authority's inspection of the

¹¹ Cf. *R. v. Instan* [1893] 1 Q.B. 450.

¹² Cf. the majority in *Horsley v. MacLaren* [1972] S.C.R. 441.

¹³ *Supra*, note 3, 1041.

¹⁴ *Ibid.*, 1041-42.

foundations. The authority was made liable, not because it induced the plaintiff to buy the house, but because it failed to prevent the house from coming on to the market. This argument and other causation arguments are absent from *Anns*. Strictly, the existence of a causal link might be regarded as a question of fact anyway and therefore outside the functions of a court ruling on a preliminary point of law. Nevertheless, in the area of causation it is particularly difficult to separate neatly questions of fact and law. The House of Lords in *East Suffolk* and the Court of Appeal in *Dutton* devoted considerable attention to causation.

Governmental liability and the classification of governmental functions

It is the way adopted by the majority of their Lordships, for mapping out the area of potential liability of governmental bodies, especially with regard to omissions, in which the *Anns* decision is most significant. Before this could be done, it was necessary to consider the classification of governmental functions.

The traditional division is into duties and powers, the significance of which was explained by Lord Denning in *Dutton* in the following terms (although he himself favoured modifying the scheme):

Much discussion took place before us as to whether the council were under a *duty* to examine the foundations or had only a *power* to do so. . . . The argument was that if the local authority had a mere *power* to examine the foundations, they were not liable for not exercising that power. But if they were under a *duty* to do so, they would be liable for not doing it.¹⁵

As we shall see, this rather simple argument no longer has any force. Furthermore, it is fundamentally unsound in that it appears to confuse an ordinary action in negligence with the civil action for breach of a statutory duty. As far as the latter action goes, the distinction between acts and omissions has never posed problems. An employer who neglects to fence a machine will not succeed with the argument that his injured employee is seeking to hold him liable for a mere omission. Nor are too many problems of causation posed, since, just like the inspector who can prevent a building from being taken up beyond the foundations, the employer has extensive control over the machine. On the other hand, a failure to comply with a statutory duty is tantamount to a breach of the common law duty of care, with the important reservation that

¹⁵ *Supra*, note 1, 391.

not all statutory duties are capable of giving rise to the special action for breach of statutory duty.¹⁶ It therefore follows that no such special action can lie where a mere power is conferred because Parliament has laid down no statutory standard.

It is one thing to assert this, but quite another to say that the classification of a function as a power prevents the inference of an ordinary duty of care in negligence. A major contribution of the *Anns* and *Dutton* cases is that they have exposed the fallacy that the dividing line between public duties and powers is identical to that between cases where a common law duty of care in negligence does and does not exist. This may be compared to the overthrow, by the House of Lords in *Donoghue v. Stevenson*,¹⁷ of the rather different privity of contract fallacy whereby liability to one's contracting partner in contract was considered to rule out liability in tort in respect of the same act to a third party.¹⁸

The question then arises, where exactly do we draw the line as regards the existence of a duty of care and does the power/duty distinction provide any assistance at all in the matter? Lord Denning in the *Dutton* case was all for introducing a third term, "control", alongside the public duty and the public power.¹⁹ He did not make it clear how "control" fitted in with the other two, but we can assume it must have overlapped them considerably. Whilst the idea of control may be useful in establishing whether a local authority or other governmental body's act or omission has causal significance, it does not really help us to decide the difficult question whether the plaintiff should be owed a duty of care in the first place. The majority in *Anns* rejected it for the purpose of the duty of care because it suggested a theory of liability wider than that acceptable to the Court, taking no account of the protective wall of the body's discretion.²⁰

In what circumstances, therefore, will a governmental body be liable in respect of the exercise of, or failure to exercise, an administrative power or duty? To begin with, it is necessary to consider

¹⁶ The test of Parliament's intention to afford a civil remedy, as applied in the past, has been fictitious and self-contradicting in its application. There is a growing tendency, however, for statutes actually to say whether a civil remedy is or is not available. See, e.g., *The Health and Safety At Work Act*, 1974, c.37, s.47 (U.K.) (no civil action); and *The Consumer Credit Act*, 1974, c.39, s.72(11) (U.K.) (actionable as a breach of statutory duty).

¹⁷ [1932] A.C. 562 (H.L.).

¹⁸ See, e.g., *Winterbottom v. Wright* (1842) 10 M. & W. 109, 152 E.R. 402.

¹⁹ *Supra*, note 1, 391-92.

²⁰ *Supra*, note 3, 1034.

whether there is a "sufficient relationship of proximity or neighbourhood"²¹ between it and the injured party, to make it reasonably foreseeable that damage to the latter will result from its carelessness. Should this be so, a "prima facie duty of care arises".²² Two interesting points are raised here. First, Lord Wilberforce speaks of "damage"²³ and the context makes it clear that he is referring not just to physical but also to economic loss.²⁴ As we shall see, the dividing line is not always easy to draw. Nevertheless, if foreseeability of economic loss does create a *prima facie* duty of care, (and his Lordship cites *Hedley Byrne v. Heller*²⁵ in favour of this broad proposition), then the law on economic loss has moved a considerable way in favour of the plaintiff in the last dozen or so years. The other point concerns the meaning of a "prima facie duty of care". This suggests that once the plaintiff establishes a relationship of proximity with the defendant, the onus then passes to the defendant to point to considerations justifying the limiting or negating of this duty of care. At the very best, it would make no-duty cases a clear exception to the norm. As illustrations of such cases, Lord Wilberforce cites *Hedley Byrne* (negligent misstatement causing economic loss) and *Weller v. Foot and Mouth Disease Research Institute*^{25a} (economic loss). It is apparent too that such

²¹ *Ibid.*, 1032.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.* The passage is a crucial one:

"Through the trilogy of cases in this House — *Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of 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: see *Dorset Yacht* case [1970] A.C. 1004, *per* Lord Reid at p.1027... and *Weller and Co. v. Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569; and ... cases about 'economic loss' ...".

²⁵ *Supra*, note 24.

^{25a} [1965] 3 W.L.R. 1082, 3 All. E.R. 560 (Q.B.).

considerations exist in the case of a body exercising governmental functions.^{25b} Both points reveal the enormous impact of the decision on the general tort of negligence. It is now established beyond peradventure that there is a single, homogeneous tort known as "Negligence" rather than a collection of closely related instances of liability linked by a common theme. This may indeed turn out to be the enduring legacy of the decision — that it puts the seal on a process substantially launched forty-five years earlier by the same court in the great case of *Donoghue v. Stevenson*.²⁶

To return to the liability of governmental bodies and the crux of the *Anns* decision itself, there will be no liability if the body is operating behind the wall of an administrative discretion or policy. The Court draws a distinction between the taking of policy decisions and their practical execution (the "operational area" of the discretion).²⁷ In the former case, the body will be protected from liability, in the latter it will not be. Exactly where the line is to be drawn is not easy to see. Indeed, Lord Wilberforce speaks of the difference as "probably a distinction of degree."²⁸ It does seem, however, correct to say that the further one gets from the central government, the more likely it is that the governmental body will be caught by the duty of care. Perhaps this is only another way of saying that such bodies are more likely to be operating under public duties than are organs of the central government. Whilst *Anns* does not say so explicitly, it seems unlikely that a body which fails to comply with a public duty will be protected behind the discretionary wall.

Another point to consider is this: a governmental body may well have a general statutory power to enact byelaws conferring on itself more specific powers. To take a hypothetical example, it may have a statutory power to scrutinise the standard of private swimming-pools. To that end it might pass byelaws conferring on itself the power to examine the drainage system or the water-filtering process, or the power to demand child-safety precautions. The specific powers are clearly more "operational" than the general power and therefore are more likely to support a duty of care in negligence. Perhaps one can make the generalization that the more specific a power is, the less likely its exercise or non-exercise will lie behind the discretionary wall.

^{25b} But see *infra*, p.287.

²⁶ *Supra*, note 24.

²⁷ *Supra*, note 3, 1034.

²⁸ *Ibid.*

It might be helpful too, when considering a governmental body's liability in respect of a power, to consider the following seven situations.

- (i) *The body makes no decision whether to exercise the power and in fact does not exercise it.*

The body is protected provided that the action taken (or not taken) was "within the limits of a discretion bona fide exercised."²⁹ Otherwise, reasonable foreseeability raises a duty of care and an ordinary negligence action ensues.

*Home Office v. Dorset Yacht*³⁰ is of some assistance in understanding the meaning of a *bona fide* exercise of an administrative discretion. Lord Diplock thought that the proper test to apply here was that of *ultra vires*, at least where debate concerned the *means* to be adopted to achieve a public purpose.³¹ That case concerned Borstal boys who escaped from supervision at night because their guards, in breach of regulations, failed to keep an eye on them. His Lordship thought that the breach of regulations necessarily entailed the commission by the officers of an *ultra vires* act.³² If, however, the boys had escaped because of a loose system of supervision carried out by officers in compliance with instructions, the position would have been quite different. There could be liability in negligence only if no reasonable person could have entertained the *bona fide* belief that the boys would be benefitted by this system of supervision.³³ The same point is made by Lord Reid in a more general way when he says that immunity within the discretionary wall exists only if "the person entrusted with discretion either unreasonably failed to carry out his duty to consider the matter or reached a conclusion so unreasonable as again to show failure to do his duty..."³⁴ Lord Reid, nevertheless, might be a little more generous to an aggrieved plaintiff than Lord Diplock. The latter saw the commission of an *ultra vires* act as a condition precedent to civil liability and he seems to have thought that, provided the benefit of the boys was attained to some extent, the risk to outsiders posed by the loose system of supervision could be disregarded. Lord Reid's more general formulation would allow some kind of balance to be struck between the interests of the boys and people put at risk.

Although their Lordships speak of unreasonable governmental

²⁹ *Ibid.*, 1035.

³⁰ *Supra*, note 24.

³¹ *Ibid.*, 1067-68.

³² *Ibid.*, 1070.

³³ *Ibid.*, 1068.

³⁴ *Ibid.*, 1031.

behaviour as a prerequisite to civil liability, it is almost as if the behaviour of the governmental body is being measured by a special standard of care, one that is much less demanding than the standard which would be exacted on the other side of the discretionary wall.

The same approach is apparent in *Anns* where Lord Wilberforce states that local authorities "are under a duty to give proper consideration to the question whether they would inspect or not."³⁵ This suggests that the obligation to consider precedes the duty of care in negligence, although the effect of this seems to be the subjection of the local authority to a less exacting standard than the ordinary one of reasonable care.

Given the use of words like "proper" and "unreasonable" in the definition of a governmental body's protective discretion, it is proper to speculate on the durability of the discretionary wall, and to wonder how long it will be before negligence will entirely supplant *ultra vires*, to use Lord Diplock's language,³⁶ as the test of the civil liability of governmental bodies.

(ii) *The body makes a general decision to exercise the power but unaccountably fails to exercise it on the instant occasion.*

This appears to be the position in *Anns* itself, if one assumes that no inspection was in fact carried out. The failure to inspect is clearly not based on a discretionary decision not to do so and, reasonable foreseeability having been established, there exists a duty of care in negligence.

(iii) *The body makes a general decision to exercise the power but decides not to exercise it on the instant occasion.*

Liability here would depend on why the authority chose not to inspect. If this were an isolated occurrence, it would be difficult to regard this as the proper exercise of a discretion. Indeed, it is hard to see an isolated act or occurrence ever being the product of a genuine policy decision.

(iv) *The body makes a general decision to exercise the power selectively and in accordance with this decision the power is not exercised on the instant occasion.*

This bears much more resemblance to a policy decision; thus the governmental body is more likely to be protected in this case than in the previous three.

³⁵ *Supra*, note 3, 1035.

³⁶ In *Dorset Yacht*, *supra*, note 24, 1067-68.

The most likely reason for taking such a decision is an economic one. Lord Wilberforce, echoing du Parcq L.J.'s dissent in the Court of Appeal in *East Suffolk*,^{36a} stated that "public authorities have to strike a balance between the claims of efficiency and thrift"³⁷ and this suggests that the courts will look sympathetically at an argument based on the need to trim public spending.

If, for example, local authorities decided that builders' work could be examined only on a random basis for this reason, there would surely be no duty of care owed to purchasers of buildings that had not been inspected. This would mean, of course, that some purchasers would be better protected in the event of buying a tumbledown house than others. If, too, an authority decided to spread its resources by examining in alternate weeks the work of builders whose names, for example, began in the ranges A-M and N-Z, then it would probably be immune from a suit in negligence. An interesting question would arise if the authority discovered, or should have discovered, that builders were taking advantage of the predictable workings of its system to pass off shoddy work. If liability were to be imposed, it would not be for the decision to inspect selectively but because the policy could have been carried out by a more efficacious procedure. Providing the system could be amended so as not to prejudice its policy objectives, it is submitted that adherence to its system by the authority in these circumstances should be treated as a decision which no reasonable man could possibly have taken, at least when the authority has actual knowledge of the abuses of the system. Likewise, there should be no protection for those authorities which arbitrarily decide to inspect the work of some builders but not others.

Similar conclusions would be presented in the case of an authority which, desiring to save energy and money, lit its streets selectively. It would surely be reasonable to phase out individual lights alternately (although perhaps not in notorious accident areas) and surely unreasonable to black out, indefinitely, entire areas if other areas were left lit. Of course, the economic crisis might be so severe as to make drastic measures a reasonable exercise of the discretion, for example, putting out all street lights in order to keep the power going in hospitals.

Enough has been said, it is hoped, to show that since the *Dorset Yacht* and *Anns* decisions the courts will have to bear an extremely sensitive burden in this area of governmental liability.

^{36a} [1940] 1 K.B. 319, 338.

³⁷ *Supra*, note 3, 1034.

- (v) *The body makes a general decision to exercise the power and subsequently a conscious decision to cease doing so or do so selectively.*

This suggests the facts of *Sheppard v. Borough of Glossop*³⁸ where the defendant authority, for reasons of economy, decided that gas lights in the borough should be extinguished as soon as possible after nine p.m. each night. At eleven-thirty p.m. on Christmas night the plaintiff, having left the house of a friend, missed his way in the dark and fell from an embankment into the road below. The decision finding the local authority not liable was upheld in *Anns*. Nevertheless, the scope of the decision should be examined. The light in question was positioned on a retaining wall. If it had been in the highway, in such a position as to cause an obstruction, or if there had been some other obstruction in the highway, Scrutton L.J. considered the authority would have had to warn passers-by in some way.³⁹ As Atkin L.J. put it in the same case, the authority did not cause the danger for the danger was already in existence.⁴⁰ It must therefore be said that, in cases of this kind at least, even a decision which clearly seems to be policy-based may not suffice to protect the authority from liability. Perhaps this conclusion can be harmonized with *Anns* and *Dorset Yacht* by saying that, the authority having created the danger, it would be an entirely unreasonable exercise of its discretion for the authority to take steps which would conceal the danger.

- (vi) *The body makes a general decision never to exercise the power.*

It is again likely that the very generality of the decision would protect the authority from liability. Nevertheless, an authority which took or adhered to such a decision, despite abundant evidence that its intervention was urgently required, might well be guilty of a totally unreasonable exercise of its discretion.

- (vii) *Whilst exercising its power, the body acts negligently.*

To some extent, this is the most difficult of the hypotheses. It represents what happened in *Dutton* and may well have happened too in *Anns*. The difficulty is posed by the *East Suffolk* case. In that case, the significance of the Board's guilt for a mere omission in

³⁸ [1921] 3 K.B. 132.

³⁹ *Ibid.*, 144.

⁴⁰ *Ibid.*, 150.

failing to repair damage already done must be taken to have disappeared with *Dutton* and *Anns*. As for causation, the argument that the Board did not cause the loss would be unlikely to succeed today. *Dutton* and *Anns* suggest that the proper question to ask is not, "Did the Board cause the loss?" but rather, "Did the Board permit, or not prevent, the loss?"⁴¹ In answering this question, the argument that the damage occurred when the sea flooded the land would be just as unsatisfactory as holding that the damage could be divided up equally between all the days when the land was flooded. Lord Atkin's dissenting speech in *East Suffolk* shows that the plaintiffs would have had to be much more particular in their proof than that.⁴²

The real difficulty posed by *East Suffolk* stems from Lord Wilberforce's opinion in *Anns* that the *East Suffolk* decision could be justified on the ground that the Board's behaviour was "still well within a discretionary area."⁴³ Admittedly, he spoke of the distinction between taking and executing policy decisions as one of degree,⁴⁴ but even so the decision is surely hard to support after *Anns*.

The catchment board had been given, by statute, extensive control over river banks in its area. It declined to contract the work out to an experienced man who had done such work before the creation of the statutory scheme.

Instead, the work was entrusted to an employee with very limited experience working with a few totally inexperienced casual labourers. Their work was, in the words of MacKinnon L.J. in the Court of Appeal, "entirely incompetent".⁴⁵ If a board with limited resources has to spread these thinly in the event of a disaster, it ought not to be held liable in negligence if damage occurs solely because insufficient resources were devoted to the work at hand. The allocation of limited resources is based on a decision taken behind the discretionary wall. A board, nevertheless, ought not to be excused from compliance with a duty of care when the damage flows from the incompetence of its employees on the job, especially when a reasonable alternative method was available. Otherwise, an authority which paid low wages and so attracted the naturally incompetent might be protected from liability on the argument that

⁴¹ See Hart and Honoré, *Causation in the Law* (1959), 132.

⁴² *Supra*, note 6, 93-94.

⁴³ *Supra*, note 3, 1036.

⁴⁴ *Ibid.*, 1034.

⁴⁵ *Supra*, note 36a, 331.

nothing more could be expected when such limited resources were deployed. The position here is clearly distinguishable from a situation where damage occurs or is worse because insufficient men or the best machinery were not available.

From these seven situations, it should be clear that mapping out the boundaries of a governmental body's discretion will be difficult and perhaps only future case law will serve to clarify matters.

A further matter to be considered is the relationship of the governmental body's protected discretion to the *prima facie* duty of care. At first sight, the existence of a *prima facie* duty of care in favour of a plaintiff related to a governmental body by reasonable foreseeability should cast a burden on the body to point to circumstances, such as its discretion, which tend to negative or reduce the scope of the duty. This impression is dispelled when Lord Wilberforce states that a plaintiff, complaining of a negligent inspection, "must prove, the burden being on him, that action taken was not within the limits of a discretion *bona fide* exercised, before he can begin to rely upon a common law duty of care";^{45a} to which we might add, even a *prima facie* duty of care.

This formulation seems to add yet another wheel to Buckland's negligence wagon.^{45b} Whilst it protects the governmental body from the burden of establishing its protective discretion, it does so at the expense of Lord Wilberforce's earlier generalization of negligence liability and compels the plaintiff to establish a kind of pre-duty of care in governmental liability cases. It may be that this can be avoided by taking account of the protective discretion at the breach of duty level in the application of the tort of negligence.

Duty of care and its breach

A familiar feature of the tort of negligence is that once the citadel is stormed and the existence of a duty of care conceded in a particular type of case, the debate in future moves to other areas of negligence such as the standard of care. No one doubts now that manufacturers owe a duty of care to the ultimate consumers of their products. The real question then becomes whether in the circumstances they are negligent. It is no coincidence that *Grant v. Australian Knitting Mills*,⁴⁶ which is concerned with actual negligence, followed so close on the heels of *Donoghue v. Stevenson*.

^{45a} *Supra*, note 3, 1035.

^{45b} Buckland, *The Duty to Take Care* (1935) 51 L.Q.R. 637.

⁴⁶ [1936] A.C. 85 (P.C.).

Likewise, now that a builder's potential liability in negligence has been conceded,⁴⁷ we can expect future decisions to concentrate on breaches of the duty of care. Much the same will surely happen once the duty of care in respect of negligent misstatements and economic loss caused by other means has been finally settled. Whilst it was once undoubtedly true to say that the duty of care was owed by one individual to another and that a plaintiff could not avail himself of a duty owed to someone else, it is probably now more correct to say that duties are owed to classes of individuals — consumers, passengers and road-users⁴⁸ for example — and that reasonable foreseeability takes on a more specific meaning when the question of breach is considered. Certainly, it would be no defence for a manufacturer to say that the plaintiff did not even exist at the time the injurious product left his factory,⁴⁹ just as it did not matter that the plaintiffs in the *Dutton* and *Anns* cases were persons with no interest in the property at the time of the inspector's negligence. Breach of the duty of care undoubtedly took place before the plaintiffs were ascertained as persons to whom the duty of care was owed. To avoid putting the breach cart before the duty horse, it has to be said that the local authority owed a duty of care to purchasers of the property as a class.

When one turns to *Anns* and sees that a local authority can owe a duty of care, regardless of omissions, to purchasers of houses in respect of its control over building work, it seems conceptually tidier to consider the question of liability within the framework of breach of the duty of care. The alternative put forward by Lord Wilberforce, which involves the plaintiff's initial establishment of an absence of genuine discretion coupled with a *prima facie* duty of care, seems more ponderous.

In *Dorset Yacht*, Lord Pearson, considering the open regime applied to Borstal boys to encourage their initiative, self-reliance and responsibility, came to the conclusion that the liability of the Home Office for their escape should be dealt with in the context of what the duty of care demanded of them. "They should exercise such care for the protection of the neighbours and their property as is consistent with the due carrying out of the Borstal system of training."⁵⁰ It may be that future liability attaching to governmental bodies will take the direction suggested by Lord Pearson though there is nothing in Lord Wilberforce's speech in *Anns* to suggest it.

⁴⁷ See *Dutton*, *supra*, note 1 and *Anns* itself, *supra*, note 3.

⁴⁸ See *Haley v. London Electricity Board* [1965] A.C. 778 (H.L.).

⁴⁹ Cf. *Watt v. Rama* [1972] V.R. 353 *per* Gillard J.

⁵⁰ *Supra*, note 24, 1056.

In England, the issue is not a burning one since a jury is most unlikely to sit in a case of this nature. Nevertheless, it is submitted that the word "reasonable" is flexible enough to accommodate this question of policy within the breach of duty category and that such an approach is more in keeping with the general dynamic of the tort of negligence.

Another aspect of breach is presented by cases like *Dutton* and *Anns*. In a normal case of negligence, a party will be under a duty to exercise reasonable care so as to avoid causing injury to the plaintiff. The House of Lords in *Anns*, however, was careful not to oblige local authorities to attain the same kind of goal. The duty was not to take reasonable care to avoid injury to the plaintiffs, but to take reasonable care to see that the authority's own byelaws were complied with.⁵¹ First, the implication of all this is that the content of the duty can be increased or diminished according to the authority's own standards as prescribed in its byelaws, although the unchanging formula of "reasonable care"⁵² is being retained in this as in other areas of negligence liability. Secondly, the limitation on an authority's liability by reference to the standards it sets for itself, is surely only another way of saying that prescribing the content of the byelaws falls within the authority's discretion, thereby illustrating the flexibility of the breach of duty category and demonstrating its ability to take account of matters of policy.

Physical damage or economic loss

Although restrictions on the recovery of damages for economic loss have been somewhat relaxed in recent years, it cannot yet be said that we are witnessing their total dismantlement. Distinguishing physical from economic loss may be important for many years to come.

We have seen that a relationship of proximity between plaintiff and defendant creates a *prima facie* duty of care.⁵³ The existence of economic loss, however, is one of those factors which may serve "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".⁵⁴ It is important, therefore, to consider whether

⁵¹ *Supra*, note 3, 1038. See also p. 1035, where Lord Wilberforce justifies this on the ground that the authority, unlike the builder, is merely performing a supervisory role.

⁵² *Ibid.*

⁵³ See *supra*, p.284.

⁵⁴ *Supra*, note 3, 1032.

the local authority's liability for passing substandard foundation work is liability for economic loss.

In *Dutton*, Mrs Dutton's house was built on a rubbish tip. The tip had always been there and there was never a time when the house did not suffer from the effects of being built on it. The deficiency was implicit in the building of the house. To say that a thing has been damaged suggests that one can draw a disparaging comparison between its present and its pristine condition. This cannot be done with the house because no ideal ever existed against which its present condition could be compared. To say that Mrs Dutton could recover for physical injury done to her house would be tantamount to saying that Mrs Donoghue would have a claim for the damage done by the snail to the contents of her ginger beer bottle. Nor would it be satisfactory to say that physical injury occurred to Mrs Dutton's house because unfavourable comparisons could be drawn with equivalent houses in the locality. This approach would allow for the recovery of tortious damages in relation to claims based on unsatisfied contractual expectations.

Nevertheless, in *Dutton*, Lord Denning boldly asserts that the damage done to the house was physical.⁵⁵ He does not say why it is physical but he says enough to show that in some cases the dividing line between physical and economic loss can cause anomalies. His illustration of the prudent property owner who forestalls the collapse of his house on a bystander⁵⁶ calls to mind Lord Devlin's famous hypothetical examples of the two doctors, one of whom prematurely advises his patient to return to work so that his physical condition is further impaired while the other dilatorily advises a return to work so that his patient loses more wages than was necessary.⁵⁷ Both illustrations argue the case for extending recovery for economic loss. They do not serve to redefine physical loss.

Sachs L.J. considered that drawing a distinction between physical and economic loss in a case of this kind was inappropriate, although he contented himself with the observation that physical damage "seems to me to have occurred in the present case".⁵⁸ Stamp L.J. was troubled more by this difficulty than his brethren and clearly appreciated that liability in negligence for Mrs Dutton's type of loss could not easily be justified if liability in tort was denied in general for substandard products. He seems to have regarded

⁵⁵ *Supra*, note 1, 396.

⁵⁶ *Ibid.*

⁵⁷ *Hedley Byrne v. Heller*, *supra*, note 24, 517.

⁵⁸ *Supra*, note 1, 404.

Mrs Dutton's loss as economic but nevertheless recoverable because of the nature of the duty imposed on the local authority.⁵⁹

In *Anns*, Lord Wilberforce considered that the plaintiffs had suffered physical damage, although again no reasons were given,⁶⁰ and Lord Salmon seems to have regarded the plaintiffs' loss as physical.⁶¹ The tenor of their speeches, however, suggests that the House of Lords considered the distinction between physical and economic loss unimportant in a case of this kind. Certainly, it was highly foreseeable that someone would suffer loss if the building inspector failed to exercise reasonable care to ensure compliance with the byelaws. Furthermore, the risk presented by the inspector's negligence was a very precise one. In *Dutton*, Sachs L.J. had asked himself this question: "What range of damage is the proper exercise of the power designed to prevent?"⁶² The answer is, specifically, the acquisition by a purchaser of a substandard house, just as the risk posed by a house-painter in leaving open a door is the specific one of theft of the householder's property.⁶³

The same tendency to play down the distinction between physical and economic loss in what might be called landslip cases is discernible in the recent decision of the English Court of Appeal in *Batty v. Metropolitan Realisations Ltd.*^{63a} The house in question had already experienced a landslip in the garden and was doomed to eventual collapse within several years. Megaw L.J. was of the opinion^{63b} that the defendant's argument that he could not be sued until there was real physical damage to the property was easily met by the fact that the garden had already suffered in the landslip. Further, he appears to have taken his cue from *Anns* in finding that the distinction between physical and economic loss has no application to a case when the purchasers of a tumbledown house are imperilled by its prospective collapse.

Reasonable foreseeability, therefore, creates a *prima facie* duty of care. The defendant is unlikely to be released from such duty by the fact of economic loss when economic loss is precisely the risk posed by his negligence, especially when there is a high degree of probability of harm. Thus seen, the distinction between physical harm and economic loss is of diminishing importance and the scant

⁵⁹ *Ibid.*, 414-15.

⁶⁰ *Supra*, note 3, 1039.

⁶¹ *Ibid.*, 1050.

⁶² *Supra*, note 1, 404.

⁶³ *Stansbie v. Troman* [1948] 2 K.B. 48.

^{63a} [1978] 2 W.L.R. 500 (C.A.).

^{63b} *Ibid.*, 512.

attention given to it by the House of Lords in *Anns* testifies to that. There does emerge, however, the difficulty foreseen by Stamp L.J. in *Dutton*,⁶⁴ namely that of the relationship between the implied terms of quality in a contract of sale and the tort of negligence in relation to a manufacturer's liability for substandard goods.⁶⁵

Statute of limitations

The problem here is whether the limitation period runs from the date that the inspector negligently passes the foundations or from the date that the purchaser discovers or should have discovered that something was wrong with the house. Thus stated, there is a clear connection between this problem and the problem of economic loss or physical damage. If it is maintained that time runs from the date when the foundations are certified as sound, it is difficult to support the proposition that the purchaser suffered physical damage, for reasons already stated.

In *Dutton*, however, Lord Denning said that the period of limitation (six years) began to run when the foundations were badly constructed.⁶⁶ Sachs L.J. preferred to express no view although he was very much aware how closely this problem related to the problem of the classification of the plaintiff's loss.⁶⁷ There the matter rested until the decision of the Court of Appeal in *Sparham-Souter v. Town and Country Development*⁶⁸ which held that the cause of action accrued only when the plaintiff discovered or should

⁶⁴ *Supra*, note 1, 414-15.

⁶⁵ In *Rivtow Marine v. Washington Ironworks* [1974] S.C.R. 1189, (1973) 40 D.L.R. (3d) 530, the plaintiffs recovered damages from the manufacturers and from distributors of a crane for loss of profits incurred when the defendants failed to issue a timely warning that defects in the cranes rendered them dangerous, with the result that the cranes had to be withdrawn at the height of the logging season instead of before it. A further claim against the manufacturer for the cost of repairs to the cranes was rejected by the majority in the Supreme Court of Canada, which contented itself with Tysoe J.A.'s conclusion (in the B.C.C.A.) that the claim was for irrecoverable economic loss. Laskin J. (as he then was), in a vigorous dissent on this point, supported liability for the cost of repairs. This type of claim is strikingly similar to the plaintiffs' claims in *Dutton* and *Anns*. In characterising it as economic loss, it is submitted that the Supreme Court was correct. The peremptory refusal of damages is unfortunate, but that Laskin J.'s views might ultimately win the day is shown by their acceptance by Collier J. in *Canadian National Railway v. The Ship "Harry Lundeborg"* (1977) 78 D.L.R. (3d) 175 (F.C.C.A.).

⁶⁶ *Supra*, note 1, 396.

⁶⁷ *Ibid.*, 405-406.

⁶⁸ [1976] Q.B. 858.

have discovered the damage, Lord Denning recanting on the position he had taken in *Dutton*.⁶⁹

The Court of Appeal in *Anns* took the same line without further argument.^{69a} Lord Wilberforce in the House of Lords, however, said that the cause of action could only arise "when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it".⁷⁰ This prompts two observations. First, he is not saying quite the same thing as the court in *Sparham-Souter*, adopting a slightly different stance without argument or criticism of the earlier decision. Nevertheless, there may not be much difference in practice between the two positions because a house which presents a danger to health or safety will soon advertise that fact. Secondly, the way in which his Lordship presents the matter in terms of potential danger to the health or safety of occupants is quite revealing. It is almost as if liability arises, not because of damage done to the house in its own right, but because there might have been damage of a different kind, namely to the person of the occupant. We have seen that, in *Dutton*, Lord Denning was struck by the unattractiveness of the distinction between the owner of property who prevented its collapse by taking remedial measures and the owner who suffered injury when the building collapsed.⁷¹ The strain of maintaining crucial distinctions going to the existence of liability appears to be telling on the judiciary if it is so susceptible to arguments of this sort.

Relevance for Canada

As regards the impact of the *Anns* decision on the general tort of negligence, it is likely to be influential in Canada. It can be predicted that it will be invoked frequently in support of reasonable foreseeability and the *prima facie* duty of care, almost as a kind of shorthand description of that principle. Moreover, it has been cited very recently with approval by the Alberta Supreme Court in *Bowen v. City of Edmonton*,^{71a} a governmental liability case. Before that decision is considered however, it is proposed to assess the development of governmental liability principles in the years preceding *Anns*.

⁶⁹ *Ibid.*, 868.

^{69a} *Sub.nom. Anns v. Walcroft Property* [1976] W.L.R. 512 (C.A.).

⁷⁰ *Supra*, note 3, 1039. This approach was followed in *Batty v. Metropolitan Realisations Ltd, supra*, note 63a, 512.

⁷¹ *Supra*, note 1, 396.

^{71a} (1977) 80 D.L.R. (3d) 501 (Alta. S.C.).

The question of governmental liability has been canvassed in the United States, particularly in the context of claims against the Government under the *Federal Tort Claims Act*^{71b} of 1946. In *Dalehite v. United States*,⁷² the Supreme Court drew a distinction between the planning and operational levels of government, reserving liability for the latter. The same distinction seems to have been drawn by the Canadian Supreme Court in *Welbridge Holdings v. Greater Winnipeg*.⁷³

That case concerned a development company which had suffered loss by taking steps to put up an apartment building in reliance on a byelaw amending a general zoning byelaw. The amending byelaw was subsequently declared invalid because the municipality had failed to observe the *audi alteram partem* rule of natural justice in its conduct of the hearing of the application for the amendment. Alleging a negligent and continuing representation that the byelaw was valid, the development company sought damages. Laskin J., however, delivering the judgment of the Court, considered the municipality to be immune from a negligence action. He drew a distinction between actions of the municipality in a legislative or quasi-judicial capacity, where it would be immune from suit, and its behaviour in an "administrative", "ministerial" or "business"⁷⁴ capacity:

A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or *quasi-judicial* level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach.⁷⁵

Although the distinction would profit from a more extended articulation, it appears to be broadly the same as that taken by the House of Lords in *Anns* when it considered that common law liability could apply where the governmental body was in the "operational area" of its discretion. In view of differences in the nature of government between England and Canada, and the delicacy and difficulty of the task of defining governmental immunity, differences in the outcome of individual cases in the two countries are

^{71b} 28 U.S.C. §921 (1946).

⁷² 346 U.S. 15 (1953). See also *Indian Towing v. United States* 350 U.S. 61 (1955), which was referred to by Lord Wilberforce in *Anns*, *supra*, note 3, 1036.

⁷³ (1972) 22 D.L.R. (3d) 470 (S.C.C.).

⁷⁴ *Ibid.*, 477.

⁷⁵ *Ibid.*, 478.

inevitable. Certainly, English decisions should be treated with some circumspection.

Welbridge Holdings was by no means the first Canadian decision to broach the matter of governmental liability. In 1967, the Ontario High Court in *Neabel v. Town of Ingersoll*⁷⁶ declined to hold liable a municipality for its building inspectors' failure to enforce one of its building byelaws where a private residence was undergoing a structural conversion. The inspector certainly examined the builder's work from time to time so the Court's characterization of his behaviour as nonfeasance is more than a little questionable. Perhaps we might regard such a characterization as rationalising a judicial disinclination to fetter executive action, a process more likely now to be harnessed to the application of the distinction created by the Supreme Court in *Welbridge Holdings*. The Court's further holding that the inspector's behaviour had no causal significance for the plaintiff's loss is probably best explained as flowing from its finding that the plaintiff himself had combined with the builder to frustrate the efforts of the inspector. Anyway, the subsequent reception of *Dutton* in Canada and the decision in *Welbridge Holdings* have probably ensured the supersession of the reasoning employed in the *Neabel* decision.

Dutton was indeed relied on by the Ontario High Court itself in rather extreme circumstances in *Collins v. Haliburton, Kawartha Pine Ridge District Health Unit*⁷⁷ where a body, acting under *The Public Health Act*,⁷⁸ was held liable in negligence for ruining the plaintiff's milk food business. Acting on complaints that the business amounted to an offensive trade under section 94 of the Act,⁷⁹ it had issued a stop notice without a proper investigation of the plaintiff's premises and without giving him a proper hearing. Donoghue J. relied on *Dutton* but his decision does seem a questionable invasion of the defendant's immunity from suit as laid down by Laskin J. in the *Welbridge Holdings* case.

Dutton, however, was not followed by the British Columbia Court of Appeal in *McCrea v. City of White Rock*.⁸⁰ There was a reluctance to import the whole of the English decision, with its reliance on broad "policy", into British Columbia and the Court was happy to distinguish it on the ground that the building inspector

⁷⁶ [1967] 2 O.R. 343 (H.C.).

⁷⁷ [1972] 2 O.R. 508 (H.C.).

⁷⁸ Then, R.S.O. 1960, c.321, s.94.

⁷⁹ Now, s.97 of R.S.O. 1970, c.377.

⁸⁰ [1975] 2 W.W.R. 593 (B.C.C.A.).

in *McCrea* was guilty at the most of a nonfeasance. The House of Lords decision in *Anns*, following perhaps a more conservative line of legal reasoning than Denning M.R. in *Dutton*, puts the question again in an acute form.

Welbridge Holdings and *Anns* have now come together in the Alberta Supreme Court in *Bowen v. City of Edmonton*.^{80a} What that case reveals is that Canadian courts, whilst receptive to the logic employed in *Anns*, may not necessarily apply it in the same way as would an English court. Indeed, it is rather doubtful that a Canadian court will impose liability in negligence in the foreseeable future on a governmental body which is guilty at the most of a genuine nonfeasance. Further, the *Bowen* case reveals that courts may still find it useful to employ the language of nonfeasance to reach what might be the desired result of no liability in a given case.

In *Bowen*, the plaintiff purchased a lot in an undeveloped sub-division of Edmonton in 1973. This sub-division had originally been zoned for substantial country developments but in 1967 the City, after protracted negotiations with the then owners of the sub-division, authorized the replotting of the land for smaller residential housing. The land purchased by the plaintiff turned out to be useless for housing development and unsaleable because of soil instability. The plaintiff contended, *inter alia*, that the City was negligent in authorising the replot in these circumstances.^{80b} Although Clements J.A. considered that the City had been guilty of a "negligent omission" in authorizing the replot without inquiry into soil stability, he held that it was immune from suit in negligence. He considered that the distinction between the planning and operational levels of government taken by the House of Lords in *Anns*, for the purposes of the instant case at least, had the same effect as the division sponsored in *Welbridge Holdings* between legislative, judicial and quasi-judicial activity on the one hand, and administrative, ministerial and business powers on the other. In his Lordship's opinion, zoning and sub-division both call for a balancing of the developer's interest against the public interest and hence are quasi-judicial in nature. The faculty of judgment is inherent in the

^{80a} *Supra*, note 71a.

^{80b} *Ibid.* 514 *per* Clements J.A.: "If there was actionable negligence on the part of the city, it lay in authorizing, approving and registering the replot plan ... without the engineering studies and recommendations of a consulting engineer referred to in decision No. 414/62 [of the Alberta planning Appeals Board, dealing in 1962 with the appeal of the owners of the sub-division against the Edmonton District Planning Commission's refusal to allow them to replot], negligence which in any view lay also on the owners."

process of orderly development and hence there should be no liability on the City's part for authorizing the replot.

Although such reasoning may be perfectly proper to meet the case of a municipality which refuses to allow development, or permits the construction of an abattoir uncomfortably close to private residences, it is difficult to see what legitimate governmental interest is served by according immunity to a municipality which is guilty of negligence in failing to give consideration to the question of soil instability when authorizing a replot. Putting aside the questions of the possible contribution the municipality might claim from the owners of the sub-division at the time of the replot, or of possible contributory negligence on the plaintiff's part, it is submitted that there should have been liability on the City's part for making a decision which no reasonable body would have made. The instability of the soil was such a dominant factor that the faculty of administrative judgment could not really have been said to be in play at all. There was, in other words, no genuine balancing required on these facts and it is the particular facts of the case, rather than the general nature of the governmental activity, which should lead to or away from liability in negligence.

Conclusion

(1) As we have seen, the *Anns* case demonstrates the organic growth of the tort of negligence. Reasonable foreseeability has been placed on the pedestal reserved for it forty-five years earlier by Lord Atkin in *Donoghue v. Stevenson*.⁸¹ The "generalization" of the tort by the House of Lords seems the inevitable outcome of the efforts of Lord Atkin and of Brett M.R. in *Heaven v. Pender*.⁸²

(2) Governmental liability has been rationally assimilated into private law so as to produce a reasonably clear border-line between administrative law and private law. Causation and no-duty arguments are henceforth unlikely to confuse the central issue of when a governmental body or agency ought properly to be protected from private law liability in the exercise of its functions.

(3) The decision, like *Dutton*, is important in the way it operates to distribute loss among the ratepaying population. Loss distribution, admittedly, is easy enough to decree and seems to be in keeping with the spirit of the age, but the people who ultimate-

⁸¹ *Supra*, note 17, 580-81.

⁸² (1883) 11 Q.B.D. 503.

ly pay are those who benefit from the building standards that governmental inspection safeguards. Moreover, the building profession is an unstable one and corporate rearrangements are common. In some cases, the local authority may be the only defendant, which should serve as an incentive to the proper scrutiny of the work of private builders.

(4) The way in which the *Anns* and *Dorset Yacht* cases define a genuine exercise of administrative discretion, and the possible impact of the former case on future economic loss claims⁸³ might serve to stultify the emergence of a separate tort providing redress for the abuse of governmental powers,⁸⁴ thereby demonstrating once again the versatility of the tort of negligence.

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⁸³ See *supra*, p.284.

⁸⁴ See *Asoka Kumar David v. Abdul Cader* [1963] 1 W.L.R. 834 (P.C.).

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