Public Authority Liability in Negligence

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I. NEGLIGENCE AND THE PRIVATE ANALOGY

In the past, government functions have been divided into governmental and proprietary categories for the purpose of denying recovery for injury caused by actions falling within the governmental category. While the use of the distinction for such purposes has been justly discredited,[1] the distinction may still provide a useful focus for the special problems likely to be encountered in applying private law principles to defendants engaged in governmental activity. There is no more fruitful a context in which to test this prospect than the law of negligence.

Many examples can be found of the application of the law of negligence to public authorities engaged in providing services such as public transport, gas and electricity, water and sewerage, all of which are classed as "proprietary" functions. Since a "private analogy" is readily available in such cases, there has been need for little more than a straightforward application of the rules applicable to a private individual engaged in similar activities.

The presence of the private analogy in such cases certainly does not exclude consideration of matters unlikely to be encountered in actions against private persons. It is possible to argue, for example, that a public authority on a limited budget may be excused from liability for an act which in ordinary circumstances would constitute a departure from the standard of reasonable care.[2] Quite different implications, however, have been drawn from the expansion of liability in hospital cases,[3] and, according to the

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[1] See P.W. Hogg, *Liability of the Crown* (1971), 77-80.

[2] *E.g., East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74, 86 *per* Viscount Simon L.C.; 96 *per* Lord Thankerton; 106 *per* Lord Porter.

[3] One explanation of the expansion of liability of hospitals for negligence of professional staff has been the transfer of hospitals from private to public ownership. See J.G. Fleming, *Law of Torts* 4th ed. (1971), 319, fn.3.

House of Lords in *British Railway Board* v. *Herrington*,[4] not only is a Railway Board subject to a standard of "common humanity"[5] applicable to all, but such a body is more likely to be found liable because of the "skill, knowledge and resources"[6] which it possesses.

What constitutes a proprietary or governmental function differs from country to country and from time to time. However, there is a general trend in most Common law countries to remove from private organizations certain areas of public service such as health care and education[7] in order to place them in the hands of government departments or municipal corporations. It is possible to transfer such activities into the governmental category accordingly,[8] but history itself has supplied the private analogy.[9]

There are finally those functions which are, and have been, universally governmental, such as prisons or zoning and building regulation. The private analogy is here most tenuous, yet many of the most significant developments in recent years in the law of negligence have originated in cases arising from the exercise of such functions by public authorities.

1. Negligent supply of information or advice

As government activities increase and with them the accumulation and storage of information, so too does the potential for negligent release of such information. Generally, the adverse consequences of such release (with the possible exception of defamatory material) are likely to be economic. So long as recovery of economic loss fell outside the ambit of negligence,[10] with very limited exceptions,[11] its potential in this area was minimal. An action in negligen-

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4 [1972] A.C. 877.

5 *Ibid.*, 898-9 *per* Lord Reid; 904-7 *per* Lord Morris of Borth-y-Gest.

6 *Ibid.*, 898 *per* Lord Reid.

7 Actions against governmental and local authorities for injuries sustained during hospitalization are numerous. *E.g.*, *Gold* v. *Essex County Council* [1942] 2 K.B. 293; *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343; *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852. For actions against public school authorities, see *Carmarthenshire County Council* v. *Lewis* [1955] A.C. 549; *Barnes* v. *Hampshire County Council* [1969] 3 All E.R. 746; *Victoria* v. *Bryar* (1970) 44 A.L.J.R. 174.

8 Schools are treated as exclusively a government activity in Hogg, *supra*, note 1, 77.

9 See generally, G. Ganz, *Compensation for Negligent Administrative Action* (1973) Public Law 84, 87-8.

10 *Cattle* v. *Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453; *Old Gate Estates Ltd* v. *Toplis* [1939] 3 All E.R. 209.

11 *Morrison Steamship Co. Ltd* v. *Greystoke Castle (Cargo Owners)* [1947] A.C. 265.

ce was confined to those rare cases (*e.g., Barnes* v. *Commonwealth of Australia*[12]) of physical injury resulting from the release of inaccurate information. In the *Barnes* case a memorandum was sent to the plaintiff, the wife of a pensioner, requesting the return of her husband's pension certificate on the grounds that he had been admitted to a mental hospital. Mr Barnes had not been, nor was there any likelihood that he would be, admitted to a mental hospital. The plaintiff, not knowing the memorandum to be false, suffered nervous shock. Her right to sue the Commonwealth was unanimously upheld by the Supreme Court of New South Wales. Davidson J. in the course of his judgment, commented that:

> ... if a person doing an official act, ... recognised ... that he was communicating some serious information which might possibly affect the recipient's feelings strongly, surely he owed some duty to that person to take care that the information which he was communicating was correct.[13]

More recently the decision in *Hedley Byrne & Co. Ltd* v. *Heller & Partners Ltd*[14] has broadened the scope of liability for the negligent supply of information causing economic loss. Had this liability been confined to those who were parties to a "special relationship", recovery would have been restricted to loss suffered by those to whom the information was supplied or for whom it was intended.[15] However, the English Court of Appeal in *Ministry of Housing and Local Government* v. *Sharp*[16] ignored the limitation and extended the right to recover for economic loss to those who might *foreseeably* be affected by the release of inaccurate or misleading information. In the *Sharp* case an encumbrance was not disclosed in an official certificate of search under the *Land Charges Act, 1925*,[17] which had been supplied to a prospective purchaser of the

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[12] (1937) 37 S.R. (N.S.W.) 511.

[13] *Ibid.*, 515.

[14] [1964] A.C. 465.

[15] *Ibid.*, 483-86 *per* Lord Reid; 503 *per* Lord Morris of Borth-y-Gest; 514 *per* Lord Hodson; 530 *per* Lord Devlin.

[16] [1970] 2 Q.B. 223.

[17] 15-16 I Geo.V, c.22, s.17:

"(1) Where any person requires search to be made at the registry for entries of any matters or documents, whereof entries are reqnired or allowed to be made in the registry by this Act, he may on payment of the prescribed fee lodge at the registry a requisition in that behalf. (2) The registrar shall thereupon make the search required, and shall issue a certificate setting forth the result thereof. (3) In favor of a purchaser or an intending purchaser, as against persons interested under or in respect of matters or documents whereof entries are required or allowed as aforesaid, the certificate, according to the tenor thereof, shall be conclusive affirmatively or negatively, as the case may be."

property affected. It was not, however, the prospective purchaser who complained. The Minister of Housing and Local Government had paid compensation to the original owner when permission for residential development was refused by the local planning authority. Permission was later granted and the compensation, notice of which had been lodged at the local land registry, became repayable. The Minister was faced with a dilemma; he could not recover from the original owner because the right to repayment was enforceable only against the owner for the time being and he could not recover from the owner for the time being because that owner had purchased in good faith, relying on the certificate of search which had failed to disclose the compensation notice. So the Minister turned to the clerk of the local land registry who had negligently issued the certificate and the local council who employed him. Counsel for the defendant clerk argued that *Hedley Byrne* did not extend to a plaintiff towards whom the defendant had assumed no responsibility. Lord Denning M.R. replied that:

> ... the duty to use due care in a statement arises, not from any voluntary assumption of responsibility but from the fact that the person making it knows, or ought to know, that others being his neighbours in this regard would act on the faith of the statement being accurate. That is enough to bring the duty into being. It is owed, of course, to the person to whom the certificate is issued and whom he knows is going to act on it ... But it is also owed to any person whom he knows or ought to know will be injuriously affected by a mistake, such as the incumbrancer here.[18]

Salmon L.J. conceded that the case did not "precisely fit into any category of negligence yet considered by the courts".[19] His Lordship nonetheless concluded that a duty to exercise care had been undertaken by the defendants and that "it would be absurd if a duty of care were owed to a purchaser but not to an incumbrancer".[20]

The relationship between this case and *Hedley Byrne* itself has undergone close scrutiny elsewhere,[21] and textwriters agree that the case is "unique"[22] and "exceptional".[23] The influence of *Ministry of Housing* v. *Sharp* may therefore be confined within the narrowest possible limits. Nonetheless, the decision demonstrates the posibility of accommodating the law of negligence to the particular

[18] *Supra*, note 16, 268-9.
[19] *Ibid.*, 278.
[20] *Ibid.*, 279.
[21] *Winfield and Jolowicz on Tort* 10th ed. (1975), 238-39.
[22] *Ibid.*
[23] Fleming, *supra*, note 3, 161.

liability of government bodies dispensing information and the somewhat oblique use which can be made of *Hedley Byrne*. In *Sharp*, older cases such as *Herbert* v. *Pagett*[24] and *Douglass* v. *Yallop*[25] were relied upon.[26] So used, these cases were treated as authority for a right to sue for economic loss resulting from reliance placed on inaccurate court records.

With the aid of *Hedley Byrne* and without the generous interpretation of that case necessary to support *Ministry of Housing* v. *Sharp* both Canadian and Australian Courts have been able to impose liability on local authorities in a number of recent cases.

A municipal corporation was held liable in *Windsor Motors Ltd* v. *District of Powell River*[27] for the negligence of its licence inspector who had issued a licence to operate a used car business in a zone in which such use was not permitted. When the error was discovered the plaintiff company was required to move the business elsewhere. The considerable financial loss incurred in the move was claimed against the corporation. Relying on *Hedley Byrne*, the British Columbia Court of Appeal upheld the decision of the trial judge in the plaintiff's favour. *Hedley Byrne* was similarly applied to the negligent issue of building permits in *Gadutsis* v. *Milne*[28] and *Porky Packers Ltd* v. *Town of The Pas*.[29]

In *Hall* v. *Canterbury Municipal Council*[30] a developer who had obtained and relied on a development consent, which was later discovered to be null and void, was able to recover damages from the defendant Council for failure to comply with a planning scheme ordinance requiring consultation with the New South Wales State Planning Authority. This decision was applied in *G.J. Knight Holdings Pty Ltd* v. *Warringah Shire Council*[31] in which the plaintiff had relied on a development consent which was invalid because it purported to allow an impermissible use of the land in question.

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[24] (1663) 1 Lev. 64.

[25] (1759) 2 Burr. 722.

[26] [1970] 2 Q.B. 223, 266 *per* Lord Denning M.R.

[27] (1969) 4 D.L.R. (3d) 155. In *Couture* v. *The Queen* (1972) 28 D.L.R. (3d) 301 the right to sue the Canadian Radio-Television Commission for the negligent issue of an invalid cablevision license was acknowledged. The plaintiff's claim was unsuccessful only because of his failure to establish a casual connection between the defendants' reassurances of the validity of the licence and his loss.

[28] [1973] O.R. 503.

[29] (1974) 46 D.L.R. (3d) 83; rev'd (1976) 7 N.R. 569.

[30] [1974] 1 N.S.W.L.R. 300.

[31] [1975] 2 N.S.W.L.R. 796.

While these two cases would seem to be adequately explained by the application of *Hedley Byrne*,[32] they raise fresh doubts about the decision of the Canadian Supreme Court in *Welbridge Holdings Ltd* v. *Metropolitan Corporation of Greater Winnipeg*[33] in which a development company sued the defendant corporation in negligence for its alleged carelessness in passing a zoning by-law later declared invalid for procedural irregularities. The building permit issued pursuant to the by-law was revoked and the plaintiff sought to recover the loss sustained in proceeding with the development in reliance on the permit. It was held that its conduct fell outside the reach of the law of negligence, because the carelessness of the corporation was committed in the course of its legislative or quasi-judicial functions. Although the error complained of was preparatory to the exercise of such functions (a re-zoning hearing), it may not have been necessary to treat the continuing effect of a procedural oversight as part of such exercise.[34]

2. **Other Government functions**

There have been significant developments in areas other than the supply of inaccurate information or misleading advice. In *Dutton* v. *Bognor Regis U.D.C.*[35] the defendant Council was held liable for the negligence of its building inspector in the inspection of the foundation of a house on a housing estate in the Council's district. The imposition of a duty of care on a local authority in such circumstances has understandably alarmed officers of such bodies. It heralds a change in the direction of the law to which other courts have already responded. In *Collins* v. *Haliburton, Kawartha Pine Ridge District Health Unit*[36] the defendant authority was held liable in negligence for ruining the plaintiff's business by

[32] Despite the reference by Yeldham J. to *Ministry of Housing* v. *Sharp, ibid.*, 805.

[33] (1972) 22 D.L.R. (3d) 470.

[34] For a critical evaluation of this case see H.L. Molot, "Tort Remedies Against Administrative Tribunals for Economic Loss" in *L.S.U.C. Special Lectures in New Developments in the Law of Torts* (1973), 413, 438-43.

[35] [1972] 1 Q.B. 373. For comment on the case, see W. Horton Rogers, *Defective Premises — The Council will Pay* (1972) 30 Camb.L.J. 211; R. Hamilton (1973) 8 U.B.C. L.Rev. 177; C. Harvey, *Economic Losses in Negligence* (1972) 50 Can.Bar Rev. 580, 609-11; B.V. Slutsky, *The Liability of Public Authorities for Negligence: Recent Canadian Developments* (1973) 36 M.L.R. 656.

[36] [1972] 2 O.R. 508.

acting with undue haste in issuing a notice to cease his processing and packaging of chicken offal on the ground that it was an offensive trade. Donohue J. in the Ontario Supreme Court referred to *Dutton*'s case as pointing the way to a remedy for the plaintiff.[37]

The *Collins* judgment, however, has met with some criticism[38] and in the recent decision of *McCrea* v. *Corporation of City of White Rock*[39] a note of caution is sounded with regard to the *Dutton* case. Alterations had been carried out to a building subsequently occupied by the plaintiffs. The roof collapsed because of defective work which, had it been discovered by the corporation's building inspector at the appropriate time, would have been condemned. The corporation argued that it was not customary to inspect except at the request of the contractor and no such request had been made. *Dutton* was distinguished on the grounds that, whereas a negligent inspection had taken place in that case, no inspection had taken place in *McCrea*.[40] Furthermore, serious doubts were cast on whether *Dutton* should be followed in Canada at all.[41]

While the English Court of Appeal has led the expansion of liability in negligence into local government, the House of Lords has made a significant contribution in one of the main fields of central governmental responsibility: the administration of corrective institutions. Prior to 1970, decisions on the responsibilities of prison authorities were sparse and uncertain. As to the safety of the prisoners themselves, injuries sustained while doing prison work were held to fall outside industrial legislation[42] and outside the common law duty between master and servant.[43] Later cases did concede a duty not to subject prisoners unreasonably to undue risk of injury,[44] even at the hands of fellow prisoners.[45] Quite

[37] *Ibid.*, 513.

[38] *E.g.*, Slutsky, *supra*, note 35, 660.

[39] [1975] 2 W.W.R. 593.

[40] *Ibid.*, 597 *per* Maclean J.A.; 609 *per* Robertson J.A.; 621 *per* Seaton J.A.

[41] *Ibid.*, 599-604 *per* Robertson J.A. But the majority of the Supreme Court of Canada referred to *Dutton* without disapproval in *O'Rourke* v. *Schact*, *infra*, note 147.

[42] *Bullin* v. *Prison Commissioners* [1957] 1 W.L.R. 1186; *Hall* v. *Whatmore* [1961] V.R. 225.

[43] *Gibson* v. *Young* (1899) 21 L.R. 7 (N.S.W.); *Morgan* v. *A.G. of New Zealand* [1965] N.Z.L.R. 134.

[44] *Quinn* v. *Hill* [1957] V.R. 439; *Hall* v. *Whatmore*, *supra*, note 42; *Morgan* v. *A.G. of New Zealand*, *ibid.*; *Howard* v. *Jarvis* (1958) 98 C.L.R. 177. *Cf. U.S.* v. *Muniz*, 374 U.S. 150 (1962).

[45] *Ellis* v. *Home Office* [1953] 2 All E.R. 149; *D'Arcy* v. *Prison Commissioners*, *The Times*, Nov. 17, 1955; and since the *Dorset Yatch Co.* case itself: *Dixon*

separate was the duty to individual members of the public to prevent the escape (or release) of prisoners likely to do harm once out of custody. While courts were ready to admit the existence of such a duty,[46] they were equally ready to hold that in the particular case the prisoner's record did not support a conclusion that it was reasonably foreseeable that he would do any harm of the sort that was inflicted.[47] In only one case (an English County Court decision) were the prison authorities actually held liable to the owner of a lorry damaged while being used by a boy who had escaped from the defendants' Borstal.[48]

Then came *Home Office* v. *Dorset Yatch Co. Ltd.*[49] Seven Borstal boys escaped from an island where they had been working under the control and supervision of three prison officers. The boys caused a yacht to collide with the *Silver Mist*, a motor yacht owned by the plaintiff. They then boarded her, cast her adrift and caused considerable damage to her and her contents. Both the Court of Appeal[50] and, by a majority of four to one, the House of Lords[51] held that a duty was owed to the plaintiffs to take reasonable care to prevent Borstal trainees from escaping from custody although their Lordships emphasized the physical proximity of the property damaged and the place of escape. Damage to the plaintiffs' property was "a manifest and obvious risk"[52] and the property was "situate in the vicinity of the place of detention".[53]

These recent cases are sufficient in number and importance to prompt an investigation of particular problems that are likely to be encountered in the application of the law of negligence to government functions. The devices adopted to meet these problems may be producing a distinctive branch of the law of negligence.

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v. *Western Australia* [1974] W.A.R. 65. *Contra, Keatings* v. *Secretary of State for Scotland* [1961] S.L.T. 63, discussed in Hogg, *supra,* note 1, 70-71.

[46] *Williams* v. *State of New York,* 127 N.E. 2d 545 (1955); *Thorn & Rowe* v. *Western Australia* [1964] W.A.R. 147.

[47] A similar reason was given for defeating the plaintiff's claim in *Ellis* v. *Home Office, supra,* note 45.

[48] *Greenwell* v. *Prison Commissioners* (1951) 101 L.J. 486; also noted in (1952) 68 L.Q.R. 18.

[49] [1970] A.C. 1004.

[50] [1969] 2 Q.B. 412.

[51] *Supra,* note 49.

[52] *Ibid.,* 1035 *per* Lord Morris of Borth-y-Gest.

[53] *Ibid.,* 1070-71 *per* Lord Diplock.

II. ADMINISTRATIVE DISCRETION AND LIABILITY IN NEGLIGENCE

1. Planning and operational levels of government

It has been said that all power is discretionary,[54] that is, no duty is owed. In this sense the exercise of governmental powers is not subject to the law of negligence. There are, however, many cases in which public authorities exercising governmental responsibility have been held liable in negligence, and defendants relying on statutory authority are protected from liability only in the absence of negligence.[55] However, the word "discretionary" is used in a narrower sense which includes a "privilege to be negligent". For example, the United States *Federal Tort Claims Act* of 1946 exempts the Government from claims based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government...".[56]

In an attempt to explain this exception, the United States Supreme Court distinguished between the "planning" and "operational" level of government.[57] Elaborating on this, Professor Davis comments:

> When the President or a cabinet officer, pursuant to a proper delegation decides that justice or wisdom calls for a particular course of action, a court may well be bound by the determination in the same way that it is bound by legislation. The court thus may properly refrain from inquiring whether the action was negligent, for even if the court deems itself competent to inquire, the power may be committed to the officer to act unwisely or mistakenly or even negligently.[58]

Shortly after he adds:

> Perhaps the line is not between those who plan and those who operate (for all do some planning), nor between those who exercise discretion and those who do not (for all do), nor between high-salaried and low-salaried employees (for the government should be liable for negligence of a cabinet officer driving a government car on government business), nor between manual and mental workers, nor between those who affect economic interests and those who affect physical results. The line must

[54] B. Schwarz and H.W.R. Wade, *Legal Control of Government* (1972), 188.

[55] *Vaughan* v. *Taff Vale Ry* (1860) 5 H. & N. 679; *Hammersmith Ry* v. *Brand* (1869) L.R. 4 H.L. 171; *Manchester Corporation* v. *Farnworth* [1930] A.C. 171; *Benning* v. *Wong* (1969) 43 A.L.J.R. 467.

[56] U.S.C.A. para.2680(a).

[57] *Dalehite* v. *United States*, 346 U.S. 15, 42 (1953).

[58] K.C. Davis, *Tort Liability of Governmental Units* (1956) 40 Minn.L.Rev. 751, 799-800.

be located on the basis of a judgment about the propriety of making adjustments through the medium of damage suits.[59]

The view that it is the court's responsibility to see that the application of the law of negligence does not impede the exercise of legislative and administrative freedom has also been advocated by Professor Hogg. Referring to an administrative decision to establish a hospital, he observes that such a decision

> ... depends upon a whole host of considerations. Some of these are highly technical, others are political. Of the latter, the crucial question may be whether and to what extent scarce governmental resources can be made available in priority to other projects. No court is in as good a position to reach such a complex judgment as the appropriate government officials.[60]

While other common law jurisdictions do not share its legislative basis, the planning/operational distinction has been promoted as "a good and, indeed, an inevitable limitation which must be accepted in every legal system".[61]

Laskin J., in *Welbridge Holdings Ltd* v. *Metropolitan Corporation of Greater Winnipeg*[62] applied the distinction:

> 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. On 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 the 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.[63]

While the transition of the distinction across the United States/Canada border ought to be welcomed, it is doubtful whether the most appropriate set of facts were chosen for its introduction.[64] The omission on the part of the defendant corporation to consult interested parties in the re-zoning process may well have taken place at the planning *stage* but could hardly be said to be part of the planning *function*, that is, of any real exercise of discretion in the sense discussed below.

A better example of its use is the later case of *Berryland Canning Co. Ltd* v. *The Queen*[65] in which the reasoning in *Welbridge Holdings*

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[59] *Ibid.*
[60] *Hogg, supra*, note 1, 86.
[61] W. Friedmann, *Law in a Changing Society* (1959), 389.
[62] *Supra*, note 33.
[63] (1972) 22 D.L.R. (3d) 470, 478.
[64] *Cf. supra*, note 34.
[65] (1974) 44 D.L.R. (3d) 568.

was applied to a more appropriate set of facts. In that case, Heald J. refused to apply the law of negligence to a decision by the Department of National Health to phase out an artificial sweetener used in canned foods produced by the plaintiffs. But the difficulty of distinguishing between what is "planning" and what is "operational" must not be underestimated. This difficulty is well illustrated by the *Dalehite* case from which the distinction is drawn.[66] Sulphur and ammonium nitrate fertilizer about to be shipped as part of the American foreign aid programme exploded on board ships docked in the port of Texas City. Five hundred and sixty people were killed; another three thousand were injured. Majority and minority agreed that administrative discretion was beyond the reach of an action in damages, but their opinions differed widely on where the resulting protection began. The majority were of the opinion that:

> ... [the] decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program.[67]

Mr Justice Jackson, delivering the dissenting judgment, denied that liability in this case would make the discretion of executives and administrators "timid and restrained".[68]

> The common sense of the matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence.[69]

Seventeen years later the problem remained unresolved. In Professor Davis's words:

> What the law of the discretionary function exception most needs at this point is a formulation to help the courts in their difficult task of locating the line between liability and immunity ... . The case law under that distinction is moving too far away from the purposes of the immunity. Decisions near the borderline should be based on those purposes. Courts should impose liability on the government except when doing so will allocate power to the courts that is better left with the administrators.[70]

He goes on to commend the decision in *Johnson* v. *State of California*,[71] in which negligence was alleged on the part of the State

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[66] *Supra*, note 57.

[67] *Ibid.*, 42.

[68] *Ibid.*, 58.

[69] *Ibid.*

[70] K.C. Davis, *Administrative Law Treatise* (1970 Supplement), 846.

[71] 69 Cal.2d 782, 447 P.2d 352 (1968).

Youth Authority for allowing Mr and Mrs Johnson to adopt a 16 year-old boy without warning them of his "homicidal tendencies" which later led to an assault on Mrs Johnson. The problems raised in that case paralleled those in the *Dorset Yacht Co.* case;[72] a decision had to be made on whether or not the alleged negligence occurred at the "level of governmental decisions calling for judicial restraint".[73] The basic policy involved in formulating penal and parole practices (even in a decision to release a particular prisoner or other detainee) was acknowledged as falling outside the proper sphere of judicial control.[74] But neither carelessness in allowing the escape of the Borstal boys, nor failure to warn of homicidal tendencies, could be so regarded. The State Youth Authority in *Johnson* was therefore held liable.

> Once an official reaches the decision to parole to a given family ... the determination as to whether to warn the foster parents of latent dangers facing them presents no such reasons for immunity; to the extent that a parole officer consciously considers pros and cons in deciding what information, if any, should be given he makes such a determination at the lowest ministerial rung of official action. Judicial abstinence from ruling upon whether negligence contributed to this decision would therefore be unjustified.[75]

The decision recognizes that in cases not clearly on one side of the line nor the other it may be relevant to show that the employee "actually reached a considered decision knowingly and deliberately encountering the risks that give rise to plaintiff's complaint".[76] It may well be helpful, especially in those cases in which the planning/operational distinction is unclear, to insist that there must have been a "real" exercise of discretion by way of a considered choice between possible courses of action before such discretion can be relied upon as a basis of immunity from civil action.

This device did not meet with Lord Reid's approval in the *Dorset Yacht Co.* case. Responding to the argument that there would have been no liability had the Borstal boys been deliberately released, his Lordship stated:

> Presumably when trainees are released either temporarily or permanently some care is taken to see that there is no need for them to resort to crime to get food or transport. I could not imagine any more

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[72] These two cases are compared in Ganz, *supra*, note 9, 89-91.

[73] *Supra*, note 71, 797.

[74] *Ibid.*, 795-7; [1970] A.C. 1004, 1037 *per* Lord Morris; 1068-69 *per* Lord Diplock.

[75] *Supra*, note 71, 795-96.

[76] *Ibid.*, 794, fn.8.

> unreasonable exercise of discretion than to release trainees on an island in the middle of the night without making provision for their welfare.[77]

Since the decision to release would not be taken at "the lowest ministerial rung of official action",[78] Lord Reid either places a limit on the protection of discretionary action in the borderline area between planning and operational levels, or goes further and contemplates an ultimate limit on discretion even at the planning level. An earlier statement in his judgment suggests that it may be the latter:

> There could ... be liability 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.[79]

Such uncertainty is inevitable given that the "planning/operational" distinction as such has been almost entirely ignored by Commonwealth courts.[80]

2. Nonfeasance

The need to insulate administrative discretion from the law of negligence has certainly not eluded Commonwealth courts. However, their solution has been far less satisfactory than that adopted by the courts of the United States. Rather than attempt to formulate a basic rule peculiarly appropriate to public responsibility they have resorted to the much abused and often unintelligible distinction between misfeasance and nonfeasance. *East Suffolk Rivers Catchment Board* v. *Kent*[81] has been responsible for elevating the concept of nonfeasance, as it applies to public authorities, to its present level of importance. The defendant Board, in charge of the maintenance of banks and drainage works on rivers in its area, took one hundred and sixty-four days to repair a breach caused by flooding. Reasonably efficient work would have achieved the same result in fourteen days. The plaintiff sought to recover damages for the harm done by salt water to his pastures during the additional one hundred and fifty days, harm which could have been avoided with the exercise of reasonable care and skill. The House of Lords, by a majority of four to one,[82] held the Board not liable. It had only a

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[77] *Supra,* note 49, 1031 *per* Lord Reid.
[78] *Supra,* note 71, 795-96.
[79] *Supra,* note 49.
[80] See Ganz, *supra,* note 9, 91. The exception is *Welbridge Holdings Ltd* v. *Metropolitan Corporation of Greater Winnipeg, supra,* notes 33-4 and 62-4.
[81] *Supra,* note 2.
[82] *Ibid.,* Lord Atkin (dissenting).

satutory *power* and not a *duty* to act; its intervention had not aggravated damage which had been caused by the flood-waters; and in the case of a local board, special account had to be taken of the limitations imposed by inadequate staff, equipment and financial resources.[83]

This resort to considerations of public policy was really unjustified given the facts of the case. No evidence was brought by the Board to show that its initial choice of method was prompted by a penury of resources. Lord Thankerton's reference to the allocation of the Board's resources was purely speculative:

> ... [i]t may be that in its judgment it is necessary to use its skilled staff in mending other breaches; it may be that the outlay involved in making a good job of one particular repair is more than its limited finances would permit.[84]

Lord Romer referred to a selection of methods by the Board "in the exercise of discretion",[85] but there is no suggestion in the statement of facts of any considered choice between possible courses of action.[86] In fact, Lord Romer was moved to describe the attempt to fill up the breach, by throwing bags of clay into it, as "quite ridiculous".[87] In itself, such conduct could be the result of a serious error in the planning stage leading to "a conclusion so unreasonable as to show failure to do [one's] duty".[88] But this analysis has difficulties of its own; the planning/operational distinction provides a more satisfactory method of exposing the weaknesses in the *East Suffolk* judgments.

It is doubtful whether the choice of method to stop the breach in the river bank was more than an operational decision; the planning stage was complete when the Board decided to intervene. If the decision to resort to ineffective means involved no "real" exercise of discretion, the courts are fully justified in intervening to determine liability for a mishandled emergency.[89] Although a decision to take no action will escape such adjudication, the argument, that liability for "taking a chance" but failing is an

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[83] *Ibid.*, 86 *per* Viscount Simon L.C.; 96 *per* Lord Thankerton; 106 *per* Lord Peter. *Cf. supra*, note 2.

[84] *Supra*, note 2, 86.

[85] *Ibid.*, 102.

[86] *Cf. supra*, note 49, 1031.

[87] *Supra*, note 2, 99.

[88] *Cf. supra*, note 49, *per* Lord Reid.

[89] *Cf.* Davis, *supra*, note 58.

invitation to take no action at all,[90] is not unanswerable. Persistent refusal to take action will not go unchallenged; maladministration will ultimately be judged by a higher administrative authority or the electorate itself. In addition, a deliberate refusal to act, in the interest of self-protection, may well be construed as an exercise of discretion in bad faith, thus exposing the authority to liability of another kind.[91]

a) *Causation*

Considerable reliance was placed in the *East Suffolk* case[92] on the decision in *Sheppard* v. *Glossop Corporation*.[93] In the latter, the defendant corporation, as an economy measure, had ordered its gas street lamps to be extinguished at 9 p.m. The plaintiff was injured when he fell over a wall having lost his way in the dark after the lamps had been put out. The two cases can be distinguished: a decision not to light is clearly an exercise of discretion; ineffectual attempts at mending the breach in *East Suffolk* is negligent performance of a task upon which the Board, in its discretion, had *already* decided to embark. If an analogy could be found in *Sheppard* v. *Glossop Corporation*, it would be negligence in lighting[94] rather than not lighting.[95]

The refusal by the majority in *East Suffolk* to accept this distinction is partly explained by what Lord Thankerton described as the "only real question"[96] in the case, namely that of causation. In *Sheppard* v. *Glossop Corporation*[97] Scrutton L.J. had not only distinguished between negligence in lighting and failure to light, but also between negligence in lighting and failure to light "dangers which they [*i.e.* the defendant corporation] have not themselves

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[90] An argument used by both Lord Romer and Lord Porter in the *East Suffolk* case. See *supra*, note 2, 98-9 and 106 respectively. See also Hogg, *supra*, note 1, 90.

[91] *E.g.*, the action based on "misfeasance in a public office". *Roncarelli* v. *Duplessis* (1959) 16 D.L.R. (2d) 689; *Farrington* v. *Thomson and Bridgland* (1959) V.R. 286. These, and other relevant cases, are discussed in Hogg, *supra*, note 1, 81-85 and by B.C. Gould, *Damages as a Remedy in Administrative Law* (1972) 5 N.Z.U.L.R. 105, 112-22.

[92] *Supra*, note 2, 87 *per* Viscount Simon L.C.; 99-100 *per* Lord Romer, 105 *per* Lord Porter.

[93] [1921] 3 K.B. 132.

[94] Which was not what occurred in that case. See *ibid.*, 149 *per* Scrutton L.J.

[95] *Cf.* Lord Atkin (dissenting) in the *East Sufflok* case *supra*, note 2, 90.

[96] *Ibid.*, 96.

[97] *Supra*, note 93.

created".[98] In *East Suffolk* the flooding was caused by the sudden rise in the tide and gale force winds. The plaintiff would have sustained the damage whether the defendant Board had intervened (as it did) or not. Since the Board was under no duty to intervene, the negligence of its servants was not the "cause" of the plaintiff's injury.

Determining the effective legal cause of an injury, which has more than one cause in fact, is not an easy task, especially when the causes in fact are independent in origin and time. Professor Fleming has nonetheless put forward as a "modest proposal" the suggestion that:

> ... where the additional or alternative cause is of innocent origin, it should be taken into account, if not for the purpose of eliminating the causal relevance of the other (guilty) factor, at all events of reducing the recoverable loss.[99]

The causation argument of the majority in *East Suffolk* is consistent with this suggestion. It was this same argument that was relied upon by the High Court of Australia in *The Administration of the Territory of Papua and New Guinea* v. *Leahy*.[100] Referring to the failure of the administration's officers to do more than they did towards eradicating the ticks from the plaintiff's cattle-grazing properly, Kitto J. endorsed the conclusion in the court below that the cause of the continued tick infestation was the ticks, not negligence on the part of the administration.[101]

However, the very fact that the majority of their Lordships in *East Suffolk* were prepared to surrender so easily to general principles of causation exposes an inconsistency in their approach to the case as a whole. In the discussion of the nature of the duty owed by the defendant Board, importance was attached to factors such a manpower and financial resources[102] which are peculiarly relevant to the determination of the liability of public authorities. Yet no corresponding adjustment was forthcoming in disposing of the question of causation. There may be justification for discounting the culpable act of a private individual as causally irrelevant to consequences which were, in any case, bound to occur through natural forces. There is no corresponding justification in the case

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[98] *Ibid.*, 150.

[99] *Fleming, supra,* note 3, 172.

[100] (1961) 105 C.L.R. No.6.

[101] *Ibid.*, 21.

[102] See *supra,* note 83.

of a public authority, an essential function of which is the manipulation and control of such natural forces.[103]

It was this concept of "control" which appealed to Lord Denning M.R. and Sachs L.J. as a means of establishing a duty on the local council in *Dutton* v. *Bognor Regis U.D.C.*,[104] in which the defendant council was held responsible for the results of subsidence not of its own creation. However, the control concept is an unconvincing basis on which to distinguish the two cases,[105] for if this element of control explained the duty of the council in the conduct of its buildings inspection functions, it may equally be used to suggest that the defendant should have been liable in *East Suffolk*. This does not mean that the cases cannot be distinguished. *Dutton's* case and others in which liability has been based on negligent inspection[106] do not share with *East Suffolk* the difficulty created by the causation rule. They were all cases in which the existing danger to which the defendant authority had failed to avert was man-made. The courts have encountered little difficulty in finding the necessary causal connection between the injury and act of negligence in such cases.[107] Furthermore, *Dutton* has raised fresh doubts about the workability of the nonfeasance criterion. Both *Dutton* and *East Suffolk* fall on the same side of the planning/operational distinction. Decisions not to inspect[108] and decisions not to repair are made at the planning stage; once inspection or repair is embarked upon, the activities become operational, subject to the operation of the causation rules[109] and no longer inmune from judicial evaluation.

b) *Reliance*

There is another line of argument which adds support to the view that rules of causation should be adjusted in cases concerning intervention of public authorities. This argument is based on the element of "reliance"[110] so fundamental to the special duty relation-

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103 *Cf.* Gould, *supra*, note 91, 109.

104 [1972] 1 Q.B. 373, 391-2 and 403, respectively. For a more detailed discussion of the case, see *supra*, note 35.

105 Horton Rogers, *supra*, note 35, 212.

106 *Ostash* v. *Sonnenberg* (1968) 67 D.L.R. (2d) 311; *Armstrong* v. *City of Regina* [1972] 1 W.W.R. 685. See Slutsky, *supra*, note 35, 659.

107 Fleming, *supra*, note 3.

108 *McCrea* v. *City of White Rock, supra*, note 31.

109 *Supra*, notes 99-103.

110 See generally: G.D. Goldberg, *The Tortious Duties of Care: Reflections on Dutton* v. *Bognor Regis U.D.C.* (1972) 1 Anglo American Law Review 509, 517-8; Slutsky, *supra*, note 35, 661-2, fn.44.

ship envisaged in *Hedley Byrne* v. *Heller*.[111] But it is only in a more general sense that reliance has any relevance to the present context; in *Dutton*'s case Stamp L.J. described the council's approval of the building foundations as "showing the green light".[112] His Lordship continued: "he who shows the green light in such circumstances as these causes the consequential injury."[113]

Presumably such causal link is at least partly created by the tacit reliance placed on the council's competence. It is this reliance on a public authority's competence which may induce others to believe that no action on their part is necessary. But if *East Suffolk* is any guide, such reliance would have to be expressly pleaded by the plaintiff in order to make it a relevant factor in the causal chain.[114]

c) *Immunity of highway authorities*

Regarded as a special example of nonfeasance is the immunity of highway authorities for failure to repair even known dangers on the highway as long as these were not the result of their own negligence in construction or repair.[115] This immunity arose from the protection offered to local residents who were held personally liable. When this personal liability was later transferred to local corporations, the immunity rule was transferred with it, its survival thus becoming an historical anomaly.

The effect of the immunity rule is that the highway authority is free from liability as long as intervention has neither added to an already existing danger nor created a new one.[116] To this extent the causation issues are very similar to those in *East Suffolk*. However, the danger which calls for removal in the highway cases is of a somewhat different composition than that which arose in *East Suffolk*. In the highway authority cases the danger is usually one

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[111] *Supra*, note 14, especially 486 *per* Lord Reid; 496 *per* Lord Morris.

[112] *Ibid.*, 410.

[113] *Ibid.*

[114] *Supra*, note 2, 107 *per* Lord Porter.

[115] See W. Harrison Moore, *Misfeasance and Non Feasance in the Liability of Public Authorities* (1914) 30 L.Q.R. 415; W. Friedmann, *Liability of Highway Authorities* (1951) 5 Res.Jud. 21; G. Sawer, *Non-Feasance Revisited* (1955) 18 M.L.R. 541; *Non-Feasance under Fire, Ainge* v. *Town and Country Planning Appeal Board* (1966) 2 N.Z.U.L.R. 115; F.T.P. Burt, *The Tort Liability of Local Government Bodies* (1971) 10 U.W.A.L.Rev. 99, 106-111. For an excellent summary of the case law, see Fleming, *supra*, note 2, 361-5. *Cf.* the remarks of Salmon J. in *A.G.* v. *St. Ives R.D.C.* [1960] 1 Q.B. 312, 323.

[116] *Gorringe* v. *Transport Commission* (1950) 80 C.L.R. 357.

brought about by gradual deterioration or sudden but recurring defects.[117]

More important, at least in Australia (one of the few jurisdictions in which the highway rule survives at all[118]) is the control by virtue of title which the authority has in the highway surface. Title means occupation and the relationship between highway authority and road user should be regarded as one between occupier and entrant as of right. Uncertain as the relevant standard of care may be, especially in Australia,[119] there is no doubt that as an occupier such authority would be liable for failure to remove a known danger,[120] and probably a danger whose existence was not but should have been known.[121] There is no material difference between a decayed tree which falls on a parked car and one which falls on a passing car. Yet in *Bretherton* v. *Hornsby Shire*[122] the former was said to give rise to no liability while in *Vale* v. *Whiddon*[123] the defendant authority was held liable, the reason being that the relevant section of roadway in *Vale* v. *Whiddon* ran through a public park and, although it joined two sections of public highway, it was not itself a "public road".[124] Thus the defendant was not entitled to the protection afforded to a highway authority.

Judicial uneasiness with the immunity rule is evidenced by various attempts to confine it within the narrowest possible bounds, by stretching the concept of misfeasance,[125] by distinguishing artificial structures from the roadway proper,[126] or by endowing split

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[117] *Ibid.*

[118] It has been abolished in most Canadian provinces and in England. See Fleming, *supra,* note 3, 362.

[119] In England the entrant as of right has been equated with the licensee (*Pearson* v. *Lambeth Borough Council* [1950] 2 K.B. 353). In Australia, judicial opinions have fluctuated, granting the entrant as of right protection which has varied between something better than that owed to the licensee (*Burrum Corporation* v. *Richardson* (1939) 62 C.L.R. 214, 229-30 *per* Latham C.J.) and something better than that owed to the invitee (*Aiken* v. *Kingborough Corporation* (1939) 62 C.L.R. 179; *Pettiet* v. *Sydney Municipal Council* (1936) 10 A.L.J. 198). For a fuller discussion, see W.L. Morison, R.L. Sharwood and C.S. Phegan *Cases on Torts* 4th ed. (1973), 577-9.

[120] This would be so even where the plaintiff is treated as a licensee.

[121] Since it is Australian law which is now largely relevant.

[122] (1963) 63 S.R. 334 (N.S.W.).

[123] (1950) 50 S.R. 90 (N.S.W.).

[124] Mr Justice Burt has suggested that the only "rational" explanation for the retention of the immunity is the inability of a highway authority to close a public road. See Burt, *supra,* note 115, 109-11.

[125] *Taylor* v. *Commissioner for Main Roads* (1945) 46 S.R. 117 (N.S.W.).

[126] *Bathurst* v. *Macpherson* (1879) 4 App.Cas. 256; *Municipality of Picton* v. *Geldert* [1893] A.C. 524.

personalities upon local authorities so that the immunity only applies when the authority is acting in its capacity as a highway authority and not in some other capacity such as sewerage and drainage authority.[127]

Special as it may be, the nonfeasance rule, as applied to highway authorities, conspicuously demonstrates its difficulty of application and the unfortunate complications which result from attempts to circumvent it.

d) *Nonfeasance and the planning/operational distinction*

That nonfeasance is susceptible to verbal gymnastics, whatever the context, is amply demonstrated by remarks in the case of *Schacht* v. *Province of Ontario*.[128] The Ontario Court of Appeal upheld a claim based on the alleged negligence of two policemen who failed to take appropriate measures to warn traffic before leaving the scene of an accident in which detour signs directing traffic around an excavation had been knocked over. Delivering the judgment of the Court, Schroeder J.A. stated that:

> ... the passivity of these two officers ... may appear to be nothing more than nonfeasance, but in the case of public servants subject not to a mere social obligation but to what I feel bound to regard as a legal obligation, *it was nonfeasance amounting to misfeasance*.[129]

It has already been suggested that a more appropriate solution to the problems associated with the judicial control of administrative action can be found in the planning/operational distinction. To subject these problems to that distinction would not mean that all cases in which nonfeasance has protected the public authority in the past would be decided in the plaintiff's favour. If the experience in the United States can be relied upon as a guide there will continue to be many examples of nonfeasance of the planning variety.[130] However, there are indications that some of the best known illustrations of nonfeasance providing immunity from liability will be subjected to re-examination. It has been decided, for example, that a city authority can be liable for failure to supply water to fight a fire.[131]

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[127] *Buckle* v. *Bayswater Road Bd* (1936) 57 C.L.R. 259; *A.G.* v. *St. Ives R.D.C., supra*, note 115.

[128] (1973) 30 D.L.R. (3d) 641.

[129] *Ibid.*, 651 (italics added).

[130] See generally, K.C. Davis, *Administrative Law Treatise* (1958) vol.3, para.25.14.

[131] *Veach* v. *City of Phoenix* 427 P. 2d 335 (1967). *Contra* earlier decisions to the contrary: *Moch* v. *Rensselaer Water Co.* 159 N.E. 896 (1928); *Steitz* v. *City of Beacon* 64 N.E. 2d 704 (1945). *Cf.* Slutsky, *supra*, note 35, 661.

It is not suggested that adoption of the planning/operational distinction will free this area of the law from difficulty. Already American courts have produced borderline decisions which are difficult to reconcile.[132] The virtue of the approach lies, not so much in its simplicity of application,[133] but in the fact that it comes closer to a realistic definition of the proper limits on judicial control of administrative action in the context of damage suits than does the more artificial misfeasance/nonfeasance distinction.

III. THE ROLE OF STATUTES

Conspicuous attention has been given to relevant statutory provisions in the most recent English cases on public authority liability in negligence. In *Ministry of Housing* v. *Sharp*[134] statutory provisions were relevant to the nature of the certificate issued by the land registry, the respective functions of the defendant personnel, and the class of persons for whose protection the certificates were intended. It is true that these matters received most attention in the Court of Appeal in the context of the claim for breach of statutory duty. However, it is likely that they were borne in mind when their Lordships came to discuss the liability in negligence of the clerk who had failed to discover the compensation notice before issuing a certificate of search.[135]

In the course of his judgment in the *Dorset Yacht Co.* case, Lord Diplock examined relevant provisions of the *Criminal Justice Act, 1961*[136] and the Borstal Rules which distinguished the different functions of the Home Secretary and supported the need for restricting the scope of the duty to prevent escape.[137] Similarly, in his explana-

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[132] Davis, *supra,* note 130 and especially the 1970 Supplement, *supra,* note 70, 845-60.

[133] In this respect it probably presents as many difficulties as the misfeasance/nonfeasance dichotomy. *Cf. supra,* notes 66-69.

[134] *Supra,* notes 16-20.

[135] To describe the case as not strictly a negligence case, "but one involving breach of statutory duty" (C.R. Symmons, *The Duty of Care in Negligence: Recently Expressed Policy Elements* (1971) 34 M.L.R. 528, 540) is an oversimplification. The plaintiff's action included both breach of statutory duty and negligence. Since the majority in the Court of Appeal did not consider that the statutory duty, if it existed, imposed strict liability, the case was ultimately resolved as one based on common law negligence.

[136] 9-10 Eliz. II, c.39. *E.g.,* s.43(1)(c) defining Borstal institutions and s.47 giving the Home Secretary wide power to make rules concerning persons detained in Borstal Institutions including their temporary release.

[137] *Supra,* note 49, 1064-6.

tion of the basis of the council's duty in *Dutton*'s case, Lord Denning M.R. quoted the council's own by-laws.[138]

As *Ministry of Housing* v. *Sharp* illustrates[139] some confusion between liability in negligence and for breach of statutory duty is inevitable where so much attention is given to statutory provisions. This confusion is the result of general uncertainty surrounding the concept of breach of statutory duty[140] and the reluctance of Canadian courts in particular to commit themselves to any one view of the use to be made of conduct-proscribing statutes.[141] On the one hand is the view that such statutory provisions supply a standard of care to replace that of the reasonable man in an otherwise ordinary negligence claim;[142] on the other hand is the view that an action for breach of statutory duty is separate and distinct from negligence,[143] thus allowing for the possibility of liability without fault if the statute so dictates.[144]

To a large extent, the use made of statutes in these cases transcends this endless debate. Most of the cases concerned with the nature of breach of statutory duty involve a defendant's failure to comply with a course of conduct dictated by the statute.[145] In the

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138 [1972] Q.B. 373, at 391-2 and it was a difference in the relevant statutory provisions which made it possible to distinguish *Dutton* in *McRae* v. *City of White Rock, supra,* note 39.

139 *Supra,* note 135.

140 For general discussion of the subject see A. Linden, *Canadian Negligence Law* (1972), Ch.4, 108-115, 156-9; C. Phegan, *Breach of Statutory Duty as a Remedy Against Public Authorities* (1974) 8 U.of Queensland L.J. 158.

141 Linden, *ibid.*

142 This view is generally understood to represent the "negligence *per se*" doctrine applied in the United States. See F.V. Harper and F. James, *The Law of Torts* (1956), vol.2, 997; W.L. Prosser, *Law of Torts* 4th ed. (1971), 197-203. But the uncertainty does not stop here, since the statutory standard may be either conclusive or constitute a rebuttable presumption. Linden, *supra,* note 140, 110-114.

143 The view to which English and Australian courts subscribe, (Fleming, *supra,* note 2, 122; Phegan, *supra,* note 140) but not without exception, *e.g.,* Lord Reid in the *Dorset Yatch Co.* case, discussing *Greenwell* v. *Prison Commissoners* [1970] A.C. 1004 at 1031 referred to the prison authorities' "breach of statutory duty".

144 A possibility not excluded in some Canadian decisions, *e.g., Ostash* v. *Sonnenberg* (1968) 67 D.L.R. (2d) 311; *Cunningham* v. *Moore* [1972] 3 O.R. 369, 380.

145 Such as the duty to provide and maintain indicator markings near fire plugs (*Dawson & Co.* v. *Bingley U.D.C.* [1911] 2 K.B. 149), to keep fire hydrants in effective working order (*MacEachern* v. *Pukekohe Borough* [1965] N.Z.L.R. 330) or to remove snow from the sidewalk (*Commerford* v. *Board of School Commissioners of Halifax* [1950] 2 D.L.R. 207).

present context the role of statutes is more varied and, if it is possible, even more complex. Statutes are examined not only for the purpose of identifying specific responsibilities[146] but also as a means of clarifying the functions of a particular body or officer of such body,[147] and as a tangible expression of public policy.[148]

What must be encouraged is an awareness that public authority liability in negligence not only calls for the introduction of entirely new determinants[149] of duty but a broader and more subtle use of already familiar influences such as relevant statute law.

IV. THE ROLE OF PUBLIC POLICY

In one sense public policy has a fundamental role to play in all questions of tort liability. Professor Leon Green in his pioneering article chose to describe tort law as "public policy in disguise".[150] Text writers and other commentators, particularly in the United States, have injected into their writing a considerable amount of public policy analysis. The courts of the Commonwealth, unlike their American counterparts, have been slow to adopt this outlook. Express judicial recourse to public policy as a basis for a decision has been conspicuously rare.[151] It is therefore of particular significance to the present discussion that, with few exceptions[152] it is in the field of public tort liability that English and other Commonwealth courts have been prepared to address themselves explicitly to "public policy".[153]

Public policy has been advocated in tort law to promote the equitable distribution of the loss resulting from injury. The liability

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[146] As in *Ministry of Housing* v. *Sharp, supra,* notes 134-5.

[147] And sometimes thereby providing the basis of a positive duty which would not exist independently of the statute *e.g.,* to control another's conduct, *Home Office* v. *Dorset Yatch Co. Ltd, supra,* note 49 or replace a warning sign *O'Rourke* v. *Schacht* (1974) 55 D.L.R. (3d) 96.

[148] *Supra,* notes 136-7.

[149] *Supra,* part II, at pp.613-625.

[150] *Tort Law Public Law in Disguise* (1959) 38 Texas L.R.1, 257.

[151] The most celebrated exception has been Lord Denning M.R. in the English Court of Appeal.

[152] The resort to policy in the case of *Rondel* v. *Worsley* [1969] 1 A.C. 191 to defend the immunity from liability of a barrister in the preparation and presentation of a court case.

[153] C.R. Symmons, *The Duty of Care in Negligence* (1971) 34 M.L.R. 394, 528 may be suggesting otherwise. However, apart from *Rondel* v. *Worsley, ibid.,* and *S.C.M. (U.K.) Ltd* v. *W.J. Whittal & Sons Ltd* [1971] 1 Q.B. 339 (a decision in which Lord Denning was prominent) the third decision to which he gives the most attention is the *Dorset Yacht Co.* case.

of public authorities in this context raises unique and familiar problems. To take the extreme case of an action against a fully representative and revenue-collecting government, there is no other situation which offers the prospect of so complete a distribution of loss amongst the community as a whole.[154] However, loss borne by a public corporation or local authority working on a limited budget cannot be spread so widely.[155] Although the role of insurance is much more limited than it is in the private sector, its presence in the private sector has implications for the public sector. Professor Green gives the example of an action against a water supplying authority for failing to maintain adequate pressure to extinguish a fire.[156] The ultimate cost to ratepayers of maintaining higher water pressure (or paying for the consequences if this is not done) must be balanced against the cost of indemnity insurance to property owners.[157]

Another familiar control device reflects the concern that the ultimate cost of allowing unrestricted recourse to damages may reach a point where it is not justified by the risk involved. So in *Dorset Yacht*, Lord Diplock confined the duty owed by the Borstal officer to persons:

> ... whom he could reasonably foresee had property situate in the vicinity of the place of detention ... .[158]

Where a public authority is defendant questions of public policy may be evident in the form of legislative policy expressed or implied in statutes which govern the authority's conduct.[159] The planning/operational distinction advocated above[160] is an attempt to give effect to the broad policy that discretionary activity should not be subjected to criteria of liability in negligence.

Finally, there may be cases in which public policy dictates that, for reasons quite independant of the planning/operational distinction, a public body should be placed entirely outside the reach of the law because of the nature of the governmental function in which it is engaged. The public interest is identified with government

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[154] Davis, *supra*, note 130, 503-4. *Cf. Herrington* v. *British Railways Board*, *supra*, note 4.

[155] *East Suffolk Rivers Catchment Board* v. *Kent*, *supra*, notes 2 and 83. Ganz, *supra*, note 9, 88-9.

[156] See cases referred to *supra*, note 131.

[157] *Supra*, note 150, 8.

[158] *Supra*, note 49, 1070-71.

[159] *Supra*, note 148.

[160] *Supra*, part II, pp. 613-625.

action unencumbered by the threat of a suit for damages.[161] An uncomplicated example can be found in the decision of the High Court of Australia in *Shaw Savill and Albion* v. *The Commonwealth*[162] in which it was stated that no duty of care is owed to a private individual by a naval vessel engaged in actual operations against the enemy. But the overriding public interest assumed in that case, and reflected in the government activity of conducting a war, cannot be regarded as typical. It is the one situation where private interests are most easily discounted.

It is trite to observe that public policy is relevant to tort liability in this or any other context. But as in the use to be made of statutory provisions, its role in public authority liability is an extended and especially important one.

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161 An argument attributed to the Home Office in the *Dorset Yatch Co.* case by C.J. Hamson [1969] 27 Camb.L.J. 273, 276.
162 (1940) 66 C.L.R. 344.