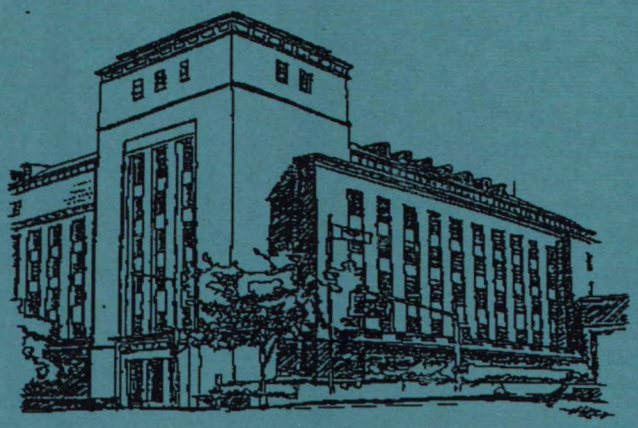
Department of Justice
Canada

Ministère de la Justice
Canada

Tort Liability of Public Authorities

Review of Jurisprudence

Fourth Edition



Constitutional and Administrative Law Section

June 1999

Tort Liability of Public Authorities

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(disponible en français)

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Preface to the Fourth Edition

From its first publication in November, 1992, the primary purpose of this document has remained unchanged: to acquaint Justice colleagues with the law governing the Crown's liability in negligence for harm flowing from decisions and acts taken by ministers, public servants or other Crown employees or agents in the exercise of statutory powers, duties and functions. To that end, this document summarizes relevant cases dealing with negligence claims against authorities at all levels of government, drawing on Canadian, Commonwealth, as well as American jurisprudence. In addition, it contains some analysis of major cases and discussion of certain issues and problem areas pertaining to this field of law.

This fourth edition adds summaries of recent judgments dealing with negligence claims against public authorities at all levels of government as well as a few summaries of older relevant judgments that had not been included in earlier editions. As with its earlier editions, this document neither purports to be exhaustive nor should be regarded as a substitute for the actual case law that it summarizes.

For the most part, the organization and format of the third edition have been retained. A few major changes, however, have been made. The appendix dealing with American jurisprudence found in earlier editions has been eliminated, with some of that case law moved into the introductory chapter as relevant to the formulation of the policy/operation distinction by the House of Lords in *Anns*. Chapters 3 and 4 of the previous edition have been combined into a single chapter summarizing jurisprudence pertaining to how the policy/operation distinction has been applied to the various types or classes of governmental functions and activities, with somewhat greater differentiation of those functions and activities reflected in new sections and the relocation there of some of the summaries formerly found in other sections of the text. The section dealing with contracting out and government liability has been greatly expanded to incorporate some historical case law on this subject along with recent appeal judgments in regard to cases reported in earlier editions. The section dealing with duty to warn has also been greatly expanded and moved from the body of the text into a new appendix. A new section containing discussion of "course of employment" by which vicarious liability of public bodies for torts committed by their servants and agents is to be discerned has also been added. Finally, most of the final chapter of previous editions which drew conclusions from the case law and presumed to offer advice on how departmental clients might avoid liability has been eliminated.

The inspiration for this edition remains the seminal "first edition" produced by Audrey Nowack in November, 1992, with much of her original text retained.

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1. INTRODUCTION

Departmental lawyers began to become concerned about the basis and extent of the federal government's potential liability in negligence following the Supreme Court's ruling in *Just v. British Columbia* in 1989 which, at first glance, seemed to lay the Crown open to damage claims arising from virtually all governmental decisions causing someone to suffer some kind of harm. The Court relied extensively on the House of Lord's ruling some eleven years earlier in *Anns v. Merton London Borough Council* which had enunciated the legal norms under which negligence was to be discerned and, more particularly, applied in relation to acts and decisions of public authorities. In fact, from about 1980 onward, Canadian courts had been following and applying the rules laid out in *Anns* quite rigorously in negligence claims against public authorities at all levels of government. Starting around 1985, however, English and Australian courts began to retreat from *Anns* and in 1991, in the case of *Murphy v. Brentwood District Council*, the House of Lords came right out and said that *Anns* had been decided on wrong principles thereby effectively putting an end to its authority in the field of negligence, at least in the United Kingdom. That decision generated a great deal of confusion among Justice lawyers as to the continuing applicability of *Anns* and the Canadian jurisprudence it had spawned and led to the Advisory and Administrative Law Section (now the Constitutional and Administrative Law Section) being asked to do a comprehensive review of this area of law.

Notwithstanding *Murphy* and numerous subsequent English cases, the Supreme Court of Canada recently reiterated that the test for discerning negligence articulated in *Anns* should continue to be applied in Canada.[1] Accordingly, *Anns* is summarized in some detail in this introductory chapter. Before dealing with that case, however, some discussion of the legal concept of negligence as a basis of liability in tort in the pre-*Anns* era, and of how that concept was then applied in relation to acts of public authorities, is offered so as to enable a clear understanding of the context in which *Anns* itself arose.

1.1 The law of negligence prior to *Anns*

Negligence is the failure to take appropriate care that results in harm to someone else. As a legal concept, it is tied to the existence of a duty, imposed solely by the operation of law, to take care not to harm another person or his property and is the result of a breach of such a duty.

The idea that such a duty did exist under the common law in particular circumstances was recognized as early as 1883 in ***Heaven v. Pender***, 11 Q.B.D. 503 (C.A.) where, after consideration of earlier authorities, Brett M.R. stated (at p. 509):

> The proposition that these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did

[1] *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165

> think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

In *Le Lievre v. Gould*, [1893] 1 Q.B. 491 (C.A.), this was restated in the following terms (at p. 491):

> *(Heaven v. Pender)* established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.

Lord Esher also stated the corollary to this principle (at p. 497):

> A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.

Although not stated in so many words, these cases identified the ingredients of proximity or neighbourhood as between plaintiff and defendant and foreseeability of harmful consequences necessary to give rise to a duty of care underpinning liability in negligence. These terms were expressly used by Lord Atkin in *Donoghue v. Stevenson*, [1932] A.C. 562, at 580 (H.L.) which, until reformulated some 55 years later in *Anns*, stood as the modern law of negligence:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.

According to Lord Atkin, the courts in England had, up to that point, been engaged in developing an elaborate classification of duties pertaining to real and personal property, which was further divided as to ownership, occupation or control, and further encumbered by distinctions based upon the particular relationships between the people involved, such as manufacturer vs. customer, landlord vs. tenant, etc. These distinctions allowed the courts to look at whether a particular species of duty had been classified and thus, recognized under the law. What this new formulation did was identify attributes common to the duty of care in all instances where liability had been found to exist and, in so doing, it created a new approach upon which the existence of a duty of care, and with it, the possibility of liability, might be discerned in any given set of factual circumstances. This was nicely restated by MacDonald J. *in Nova Mink v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241, at 254 (N.S.C.A.)

> The common law yields the conclusion that there is such a duty only where the circumstances of time, place, and person would create in the mind of the reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to take care to avert that probable result. This

> element of reasonable prevision of expectable harm became the touchstone of duty, in the same way that as his conduct in the face of such apprehended harm became the standard of conformity to that duty.... The existence of a legal duty of care by a defendant depends on whether the hypothetical Reasonable Man would foresee the risk of harm to the person in the situation of the plaintiff vis-à-vis himself and his activities.

One complicating aspect of the modern law of negligence, however, is the always-present possibility that even where the conditions of proximity and foreseeability exist to create a duty of care, that duty will not be imposed by a court, or will be limited or attenuated for valid "policy" reasons. This was, in fact, a prominent feature of Lord Wilberforce's reformulation of duty of care in *Anns* and, as will be seen, the central arena of conflict in English jurisprudence thereafter.

1.2 Pre-*Anns* application to public authorities - English jurisprudence

In the pre-*Anns* jurisprudence dealing with liability of public authorities, several cases seem to be cited more often than others as indicative of what the law was at that time. One of the earliest references is the dictum of Lord Blackburn in *Geddis v. Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430 at 455-456, setting out the basic principle underpinning liability of public authorities:

> For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently.

This was restated by Lord Parker in somewhat clearer terms in *Great Central Railway v. Hewlett*, [1916] A.C. 511(H.L.), at 519:

> It is undoubtedly a well-settled principle of law that when statutory powers are conferred, they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely occasioned by their exercise, damage for negligence may be recovered.

Essentially, a public authority was regarded by the courts to be in much the same position as a private person in terms of misfeasance in the doing of whatever it was empowered to do under statutory authority. This left open the question of whether negligence on the part of a public authority could be found on the basis of nonfeasance, that is, its failure or refusal to act under a statutory empowerment.

The application of the misfeasance/nonfeasance distinction in relation to public bodies was well-illustrated in two cases dealing with the lack of illumination of hazards that were the cause of personal injuries. In *Morrison v. Sheffield Corporation*, [1917] 2 K.B. 866 (C.A.), a protective wrought iron picket fence was installed around a tree by the defendant municipality. The individual pickets were each shaped in the form of a spike and inclined

to protrude outward at a height of five feet, two and a half inches. The municipality, acting under war-time powers, chose to extinguish all municipal street lamps at 9 PM. At 10 o'clock one evening, in total darkness, the plaintiff walked into the fence causing him to lose the sight of one eye. The court found that it was clearly foreseeable that the fence in question would present a significant hazard in the dark to passers-by because of its shape and height and, as a result, the municipality had a continuing common law duty to guard against reasonably foreseeable harmful consequences arising from its own act of having put up the fence and thus having caused the danger in the first place. The municipality could not rely on the defence of nonfeasance arising out of the fact that it had no statutory duty to light the fence.

By contrast, in ***Sheppard v. Glossop Corporation***, [1921] 3 K.B. 132 (C.A.), the plaintiff tripped over a short retaining wall set up in a particular street within and under the control of the defendant municipality. There was an obvious danger that, in the dark, anyone traveling on the street could easily trip over the wall and fall onto adjacent lower ground, which was precisely what happened to the plaintiff, causing him serious personal injuries. Although the municipality was empowered by statute to light the street, it had no statutory duty to do so. In fact, the municipality did light the street until 9 in the evening but thereafter, as an economy measure, extinguished the lamp. The plaintiff's accident occurred at 11:30 at night.

The only issue for the court to determine was whether the failure to keep a light on at the time of the accident constituted actionable negligence engaging liability. The court determined that because there was no actual statutory duty in play here, the municipality had a virtually unlimited discretion to determine whether they would light the street and, if so, the hours of illumination. Thus, the failure to keep the light on past 9 PM, even knowing that the area was dangerous in the dark, did not amount to negligence inasmuch as the danger caused by the retaining wall had not come about by any act on the part of the municipality. That alone distinguished this case from *Morrison*.

The basic principle of law here was that nonfeasance with respect to a statutory power, that is to say, a statutory authorization in respect of some particular activity conferred upon a public body simply as a discretion rather than as a duty, will not give rise to liability even if damages occur from the failure to exercise that power. On the other hand, misfeasance by a public authority in the exercise of a discretion would give rise to liability in damages in the same fashion as if committed by a private individual.

The leading, and undoubtedly, best-known pre-*Anns* case on the distinction between misfeasance and nonfeasance in relation to liability of public authorities is ***East Suffolk Rivers Catchment Board v. Kent***, [1941] A.C. 74 (H.L.). In that case, as the direct result of exceptionally high spring tides and a severe rainstorm, a tidal river rose so high as to overflow its banks and break through a flood-wall protecting the respondent's pasture-land. The appellant, a public authority constituted under a statute, was advised of the flooding and, pursuant to its statutory powers, undertook a series of unsuccessful attempts to repair the breaks in the flood-wall. The empowering statute did not explicitly place any duty on the catchment board to undertake any such repairs even when they became

necessary by reason of flooding. It did, however, provide a remedy in such an event by enabling the responsible minister, presumably upon petition, to direct the catchment authority to intervene. In this case, the authority did take it upon itself to attempt to repair the breaks but its intervention was so inept as to cause the flooding to continue for about four months whereas, with reasonable skill, the flooding could have been controlled in fourteen days from the commencement of the repair work. Even though the catchment board had not caused the flooding in the first place, the question was whether it could be held liable for the damages caused by the extended period of flooding beyond the fourteenth day as a result of its lack of skill in its unsuccessful repair attempts.

It was agreed that the catchment board would be liable if, through its inept intervention, it had inflicted fresh injury on the respondent, such as causing the flooding to spread to previously unaffected land or causing the flooding to persist for a longer period than would have been the case had it never intervened at all. In the final analysis, the court determined that the catchment board should not be held liable because it had not caused the damage and it had no statutory duty to alleviate the damage caused by the flooding. In effect, what the court said here was that where a public authority does exercise a discretion conferred by statute, it would continue to be immunized from tort liability to the same extent as for nonfeasance with respect to that power as long as its misfeasance was not the cause of damages suffered. In other words, the undertaking of a task by a public authority pursuant to a statutory discretion did not put them in the same position as if they were acting pursuant to a statutory duty.

The misfeasance/non-feasance distinction remained in effect as applied to negligence claims against public bodies until it was simply done away with in *Anns*.

The case of ***Dorset Yacht Co. Ltd. v. Home Office***, [1970] A.C. 1004 (H.L.) is widely regarded as the most significant English case dealing with liability of public authorities in the pre-*Anns* era. Three corrections officers had charge of a group of juvenile offenders ("Borstal boys") on a training exercise on an island, with instructions to keep the boys in their custody and under their control at all times. During one night, seven of the boys escaped by stealing a boat which collided with the plaintiff's yacht, then boarded the plaintiff's yacht and did extensive damage to it. The officers had simply gone to sleep without posting a sentry or taking other precautions to ensure that such an escape did not occur.

The question that came before the court was whether the Home Office Department, the employer of the corrections officers, owed any duty of care to the plaintiff for which it would be vicariously liable in respect of the foreseeable consequences of an escape of boys in the custody of their employees. In the circumstances, the risk that the boys would attempt an escape while out on the training exercise was foreseeable: five of the boys in question had a record of previous escapes; all of them had criminal records, and all of this was known, or should have been known, to the defendant.

The Home Office claimed that it could not be held liable for a number of reasons, two of which are significant as it pertains to public authorities. In the first place, it was claimed

that there was no statutory provision imposing on Borstal officers a duty toward any member of the public in general to take care to prevent boys under their supervision and control from injuring any individual's property. More generally, it was further claimed that the policy underpinning the statutory authority and mandate of corrections officers required that they should be immune from civil liability.

Both of these grounds were rejected out of hand. Citing authority going back to *Geddis*, the Court held that in conferring statutory authority, Parliament never intended to immunize any public body from liability in the event of careless exercise of that authority causing injury to others. Although, in this case, the carelessness attached to the nonfeasance of the officers in failing to take adequate precautions, the nonfeasance/misfeasance distinction did not arise here inasmuch as the failure of the officers occurred in the performance of their statutory duties rather than in the exercise of simply a discretion, as was the case in both *Glossop* and *East Suffolk*. As to the second ground, the Court simply concluded that it could find no reason why, as a matter of public policy, liability should not attach in respect of the negligence of corrections officers. A third important ground argued by the defendant was that no person could be liable for injury caused by another who is of full age and capacity and is not the servant or acting on behalf of that person. This, however, misstated the issue inasmuch as the cause of action was not the damaging acts of the boys but rather the alleged negligence of the officers themselves in allowing the boys to escape. Accordingly, the true legal issue connected to this allegation was the matter of causation. In the end, the Court found that the actual conduct of the boys directly causing the damages was not in the nature of *novus actus interveniens* to prevent attributing liability on the basis of the negligence of the officers.

1.3 Canadian pre-*Anns* jurisprudence

None of the above-cited English cases distinguished between the various categories or types of discretion exercisable by public authorities. In the pre-*Anns* era, however, there were a few Canadian cases where the Court did examine the nature of a public authority's discretionary power to determine whether liability might arise from its exercise. For example, in ***Roman Corp. v. Hudson's Bay Oil & Gas***, [1973] S.C.R. 820, the Supreme Court had to consider a tort claim against two federal ministers arising out of their statements to the effect that a proposed corporate share transfer would offend government policy on Canadian ownership and would be stopped legislatively if necessary. The transfer was not made and the company involved sued the government for its financial loss. In dismissing the appeal, Martland J. found that the ministers were acting in good faith in accordance with their duties. Thus, a *bona fide* statement of policy by a Minister regarding a governmental intention to legislate would not give rise to a claim in tort for inducing breach of contract.

In ***Canadian Federation of Independent Business v. Canada***, [1974] 2 F.C. 443 (T.D.), the court allowed a motion to strike out the plaintiff's claim in damages arising from the alleged negligence of the Crown pertaining to the performance of statutory duties in

ensuring the delivery of mail, specifically in its alleged mishandling of an illegal strike by postal employees which interrupted mail service. The court found that the governing statute imposed no duties on the Crown in respect of which its negligence was alleged but rather, merely conferred powers pertaining to the operation of the Post Office Department. The court held that, within the framework of those statutory powers, the decisions complained of were clearly "decisions of policy" for which the Postmaster General and other officers of the Crown were answerable only to Parliament and not to the plaintiff.

One case that may have been a precursor of things to come was *McCrea v. White Rock (City)*, [1975] 2 W.W.R. 593 (B.C.C.A.). A building collapsed some years after it had been renovated. The plaintiffs claimed that the municipality had been negligent in failing to inspect the renovation pursuant to its building by-laws. The Court dismissed the claim on the ground that the municipality's duty to inspect only arose at the time of construction and then, only upon being called by the builder at various stages of construction as set out in the by-law. In the circumstance, there had been no breach of statutory or regulatory duty. More generally, there was no common law duty to inspect and even if there was, there would be no negligence arising from simple nonfeasance here.

Perhaps the most well-known pre-*Anns* Canadian case is *Welbridge Holdings v. Winnipeg (City)*, [1971] S.C.R. 957, where the court dismissed a claim for damages allegedly flowing from application of a by-law that was later ruled invalid. A developer had been given a building permit and had begun construction when the by-law authorizing the permit was declared invalid. The permit was revoked and construction stopped, with resulting losses. The court held that tort law could not be used as a basis for compensation for losses arising from the exercise of legislative or adjudicative authority.

This case is discussed at greater length in chapter 3, below, in connection with liability arising in relation to legislative decisions.

1.4 The policy/operation distinction - American origins

The policy/operation distinction comes out of what was known as the "discretionary function exception" which was a limitation to the general tort liability of the federal government of the U.S. that was set out in section 2674 of the *Federal Tort Claims Act*. That exception was itself stipulated in section 2680(a) of that statute in the following terms:

> The provisions of this chapter and section 1346(b) of this title shall not apply to
>
> (a) Any claim based.....upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.

On its face, this provision seemed to categorically immunize the government from vicarious tort liability where the act or omission of its servants or agents giving rise to the

cause of action involved discretion, that is to say, where a decision of some sort involving judgment had to be made by the servant or agent in the execution of his duties or functions. It did not, however, stipulate what such discretion had to entail, or what kind of decision had to be involved, in order to come within this exclusion. That was determined by the case law.

Beginning in 1953, the courts distinguished between "planning" or "policy" decisions on one hand, and "operational" decisions on the other, and limited the application of the "discretionary function exception" only to the former. The distinction was first stipulated in ***Dalehite v. United States***, 345 U.S. 15, which dealt with a tort claim against the federal government arising out of an explosion during the loading onto a ship of ammonium nitrate fertilizer that had been manufactured for the U.S. government under the supervision and direction of government employees.

At trial, negligence on the part of government employees resulting in the explosion was, in fact, found in relation to various acts or decisions involved in the manufacture, delivery and/or loading of the fertilizer, including such things as the failure to have tested the compound for combustibility, the temperature of the material at the time it was bagged, and some defects as to how the material was labeled. The question for the U.S. Supreme Court to determine was whether such acts fell within the "discretionary function exception" such as to exclude vicarious governmental liability in relation to the ensuing damages.

In the court's view, what was intended to be covered by §2680(a) was the discretion given by statute or regulation to an official "to act according to one's best judgment of the best course," a concept in which the court found "substantial historical ancestry in American law" to exist. Although the court was reluctant to set out where such discretion started and ended, it did say that this discretion covered by this provision was not to be limited to simply a decision to initiate a program or an activity. Rather, it also included

> determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision, there is discretion (at p. 36).

The court went on to say that acts of subordinates in carrying out the operations of government in accordance with official directions would not attract personal liability under the discretionary function exception.

Applying this analysis to the facts of the case, the court, by 4 to 3 majority, found the decisions taken by officials giving rise to the damages were within the "planning" realm inasmuch as they all involved matters of serious judgment dealing with "considerations more or less important to the practicality of the Government's fertilizer program." Thus, they were "discretionary" in the sense of the discretionary function exception thereby relieving the U.S. government of tort liability.

On the other hand, the three dissenting judges concluded that the acts in respect of which the negligence was found were operational in nature (at p. 57-58):

> We do not predicate liability on any decision taken at "Cabinet level" or on any other high-altitude thinking.....The common sense of this 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 an immunity for every balancing of care against cost, of safety against production, of warning against silence.

In these respects, the dissenting judges saw governmental officials as carrying on activities indistinguishable from those performed by private individuals which, in their view were not within the exception of the statute. It might be noted in passing that the famous quote to the effect that "it is not a tort for Government to govern" comes of the dissent in *Dalehite*, written by Jackson J. The dissent also had something to say about the deleterious social effect of construing government tort immunity widely:

> The Government, as a defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest. Hence, one of the unanticipated consequences of the Tort Claims Act has been to throw the weight of government influence on the side of lax standards of care in the negligence cases which it defends.

The issue of how the discretionary function was to be construed was again considered by the Supreme Court a couple of years later in ***Indian Towing Co. Inc. v. United States***, 350 U.S. 61 (1955). In that case, the plaintiff's tug boat ran aground while towing a barge resulting in damage to the barge's cargo for which the plaintiff was partially responsible. The plaintiff sued the federal government contending that the tug had run aground because of the negligence of the Coast Guard in not properly maintaining the light in a lighthouse which had gone out and thus had failed to illuminate the waterway in question. The principal argument presented by the government was that the discretionary function exception shielded the government from liability for negligence in relation to particular operational acts that were uniquely governmental in nature, such as the keeping of a lighthouse, but did not create an immunity in relation to operational acts performed by government servants which might also be performed by individuals in a private capacity (such as driving a car, operating machinery, etc..).

The Court rejected this argument, stating that all Government activity is inescapably, uniquely governmental. In regard to the policy/operation dichotomy as applied to the exercise of discretion, the Court stated that while the Coast Guard was not legally obliged to undertake the lighthouse service for the benefit of private, commercial shipping and navigation (at p. 69):

> ...once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obliged to use due care to make certain that the light was kept in good working order; and once the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.

The purpose and purport of the policy/operation distinction was nicely summarized by a judge of the U.S. District Court in 1978 in the case of ***Blessing v. United States***, 447 F. Supp. 1160, at 1170 :

> Statutes, regulations, and discretionary functions, the subject matter of para. 2680(a), are, as a rule, manifestations of policy judgments made by the political branches. In our tripartite governmental structure, the courts generally have no substantive part to play in such decisions. Rather, the judiciary confines itself - or, under laws such as the FTCA's discretionary function exception, is confined - to adjudication of facts based on discernible objective standards of law. In the context of tort actions, with which we are here concerned, these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political or economic decisions.

It might be noted that in *United States v. Gaubert*, 499 U.S. 315 (1991), the Supreme Court appeared to put an end to the policy/operation distinction as the basis for construing the ambit of the discretionary function exception. The court claimed that when the term "operational" was first used in *Dalehite* in connection with the discretionary function, that distinction was stated to be merely descriptive of the level at which the challenged conduct occurred. There was no suggestion that decisions made at an operational level could not also be supported by policy.

1.5 Adoption of the policy/operation distinction in *Anns*

Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.), concerned a claim for negligence brought by lessees of residential buildings in respect of cracks in the foundation and other structural damage that began to occur years after completion of construction. The damage resulted from movement of the foundation because of insufficient depth. It had, in fact, been dug out only to a depth of two feet contrary to local building bylaws which required foundation depths of three feet. The action was brought against the municipal council for negligence in having allowed construction contrary to the bylaws or, alternatively, for failure to have inspected the premises during construction sufficiently carefully, if at all, so as to enforce the bylaws.

On appeal to the House of Lords, Lord Wilberforce was of the view that a two-step test for liability in negligence should be adopted:

> 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 persons to whom it is owed or the damages to which a breach of it may give rise. (p. 751-75)

The first step was essentially a restatement of Lord Atkin's *dictum* in *Donahue v. Stevenson* as to discerning a duty of care on the basis of proximity and foreseeability. The breakthrough occurred in respect of the second step of the test in so far as it opened up a fresh analytical approach to imposing the duty of care on public authorities without regard to whether their decisions giving rise to the impugned conduct emanated from a statutory power or a duty. The essential element was the nature of such decisions, and it was precisely in this context that the policy/operation distinction was drawn:

> Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this a discretion meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say in addition to the area of policy or discretion, there is an operational area. (p. 754)

The judgment did not set out hard and fast criteria for differentiating between policy and operational decisions. On the contrary, it acknowledged that it is only at the extremes where the distinction between the two can be easily drawn while, in most other cases, there will be overlap as between a policy and an operational decision, particularly in so far as operational decisions can involve the exercise of some discretion. Keeping this in mind, the reason for distinguishing between the two was explicitly for the purpose of excluding policy decisions from attracting liability for damages based on negligence where they are made in good faith. More specifically, in terms of the two-step test enunciated here, the fact that a decision was in the nature of policy rather than operations would constitute a consideration under the second step for negativing the duty of care that arises and would otherwise impose liability. Furthermore, that duty of care could arise not only in regard to positive acts but also in relation to omissions or non-feasance relating to the exercise of a power, that is to say, a discretion to act unaccompanied by a public law duty to do so. It is in this latter respect that *Anns* overturned the earlier rulings in *East Suffolk* and *Glossop* and established new law in regard to liability of public authorities.

1.6 A brief note on Crown liability

The expression "Crown liability" essentially refers to the body of law governing the tort liability of the federal and provincial governments and other public institutions which are constituted as agents of those governments. Crown liability is distinguishable from tort liability of other public authorities in that it is governed essentially by statute and involves consideration of statutory and prerogative immunities, all of which are beyond the scope of this document. The rules governing liability of public authorities for negligence do, however, apply to federal and provincial government departments and agencies, including for example, the policy/operation distinction as the framework for attributing liability in respect of decision-making at those higher levels of authority. Accordingly, a brief word on some of the peculiarities of Crown liability is included here.

There are three major idiosyncrasies of Crown liability that differentiate it from the general rules governing tort liability of lesser authorities which are not emanations or

agents of Her Majesty. First, the Crown is liable in tort only to the extent that it has legislated to explicitly make itself liable. Without such legislation, federal and provincial governments would continue to enjoy the benefit of immunity from liability on the basis of the common law's traditional recognition of the prerogative *rex non potest peccare* - the King can do no wrong.

At the federal level, negligence claims against the Crown arising from death or injury to persons or property were statutorily permitted as early as 1887,[2] at least where the cause of action arose on a "public work," whatever that meant. That requirement pertaining to a public work was dropped in 1938 in a further amending statute thereby effectively removing the Crown's prerogative immunity in respect of any negligence committed by an officer or servant of the Crown while acting within the scope of his duties or employment. Eventually, this was carried over into the *Crown Liability Act*, first enacted in 1953, which expanded the Crown's liability beyond negligence claims to all causes of action in tort. Apart from Quebec which had incorporated Crown liability within the framework of the *Civil Code*, the common law provinces enacted their own equivalent statutes between 1951 and 1974. With one or two exceptions, the rules now governing Crown liability at the federal and provincial levels are essentially the same.

A second peculiarity is that Crown liability in tort is, for the federal government and eight of the ten provinces, exclusively vicarious, that is to say, based solely upon its status as employer or principal in relation to torts committed by its employees or agents while acting within the scope of their duties. The governments of British Columbia and Quebec may also be held directly liable in tort under their provincial laws. The regime of vicarious liability applies generally to public authorities at all levels having a corporate status inasmuch as these entities can only act through their servants or agents.

The most important consideration in vicarious liability is the issue of whether the servant or agent committing the tort had been acting within the scope of his duties. For the most part, that issue either did not arise or was satisfied in the cases summarized in this document. There are, however, a few instances where that was the central issue and, in very recent judgments, some new criteria appear to have been developed by the courts for discerning course of employment as related to employees of public authorities. Further discussion of that particular issue is included in chapter 3.

Two further peculiarities attaching to the federal government's vicarious liability should be noted. Section 10 of the *Crown Liability and Proceedings Act* expressly excludes vicarious liability in relation to acts or omissions by Crown employees or agents unless such act or omission gives rise to a cause of action in tort against the servant or agent in question. One effect of this limitation is to exclude Crown liability in relation to a tort where the servant or agent himself is given a statutory immunity in relation to conduct performed in the course of his duties that would otherwise be tortious. As a result, where, as a matter of policy, Parliament wants to statutorily immunize the individual employee

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[2] 50 -51 Vict. (1887), c. 16, s. 16(2)

from liability but preserve a tort remedy against the Crown, it is necessary to do so expressly so as not to unintentionally extend the immunity to the Crown.

The other thing to note is that it is not always clear who, in the employ of the federal government, is a servant or an agent. Beyond public servants or other employees who are covered by the *Public Service Employment Act* or employed in some governmental unit under the umbrella of the *Public Service Staff Relations Act*, there are persons who work for some governmental entity and are paid by the Crown but, for tort liability purposes, could not be said to be servants or agents. This would include Governor in Council appointees to regulatory tribunals, such as the C.R.T.C. or the National Parole Board, who hold an office rather than occupy a position pursuant to a real or imputed contract of employment. It would also exclude those hired under contract to perform functions for, or offer services to, the Crown as independent contractors. That status is determinable by reference to various common law tests, such as the control test or organization (enterprise) test, and has been the subject of extensive litigation.

A third idiosyncrasy pertaining to tort claims brought against the federal government is that the substantive law, that is to say, the legal rules pertaining to negligence as well as the rules determining scope of employment for purposes of attributing vicarious liability, is governed by the law of the province where the cause of action arises, as determined by where the damages are suffered rather than by where the tort occurs.[3] According to Prof. Hogg,[4] this lies in the interpretation of the *Crown Liability and Proceedings Act*, and of its predecessor legislation, as incorporating by reference the relevant provincial law. There is, in fact, extensive case law specifically confirming that point.[5]

As far as Quebec is concerned, the substantive law defining the scope of the provincial government's liability is not significantly different from Crown liability regimes in other provinces or at the federal level. As noted, one difference that does exist is that the provincial government's liability may be direct as well as vicarious. Other substantive differences arise out of the differences between the *Civil Code* and common or statute law pertaining to negligence and other torts in respect of which claims against governmental authorities in the other provinces or at the federal level are brought. The most important thing to note, however, is that "public law" aspects of the common law, including the policy/operation distinction, apply to negligence claims brought against public authorities under the *Civil Code*. More specifically, that distinction operates not only in relation to claims brought under Quebec law against the federal government or its agents, but also to claims brought against provincial authorities. This is amplified further on in discussion of the *Laurentide Motels* case in section 2.1 below.

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[3] *The Queen v. Couture Estate*, [1974] 2 F.C. 107 (C.A.); *J.P.L. Canda Imports Inc. v. Canada* (1990), 43 F.T.R. 109. For an opposite result, see *Kibale v. Canada* (1992), 58 F.T.R. 199.

[4] *Liability of the Crown*, 2nd ed., p. 228.

[5] For example, *Lamoureux v. Canada (Attorney General)*, [1964] Ex. C.R. 448; *Domestic Converters v. Arctic Steamship Line*, [1984] 1 F.C. 211.

2. THE POLICY/OPERATION DISTINCTION: FROM *ANNS* TO *JUST* AND BEYOND

This chapter summarizes some of the leading cases that introduced the policy/operation distinction into Canadian law in the years immediately following *Anns* up to 1989 when *Just v. British Columbia* was decided by the Supreme Court. Once issued, *Just* immediately became the most important authority in this field of law in Canada, effectively replacing *Anns*. In 1994, in the companion cases of *Brown v. British Columbia* and *Swinamer v. Nova Scotia*, the Supreme Court added certain clarifications and refinements to what it had earlier said in *Just* about the policy/operation distinction without reducing or otherwise altering its significance. That distinction continues to be the touchstone of liability for negligence of public authorities under Canadian law.

2.1 From *Anns* to *Just*

Barratt v. District of North Vancouver (1980), 114 D.L.R. (3d) 577 (S.C.C.) was the Supreme Court's earliest encounter with the policy/operation distinction. At trial, a municipality was found liable when a cyclist was injured upon riding into a pothole. This was overturned by the Court of Appeal which relied upon *Anns* to find that the decision as to how frequently inspections would be made was a policy one, validly arrived at and thus, not actionable, and that the most recent inspection - the operational aspect - had been properly carried out. The pothole had developed between inspections. The Supreme Court upheld the Court of Appeal and dismissed the appeal, briefly noting the Court of Appeal's reference to *Anns* but without itself actually relying on it to determine the issue.

On the other hand, in *Malat v. Bjornson* (1980), 114 D.L.R. (3d) 612 (B.C.C.A.), the province was held liable for failing to replace a highway median that was known to be defective and dangerous to highway traffic. Although the Court acknowledged that the decision whether or not to replace a median was a policy one, it held that once having decided to replace it, the province's failure to implement that decision within a reasonable time-frame was an operational act and, in the circumstances, was negligent.

Anns was explicitly relied on to reject a negligence claim in ***Diversified Holdings Ltd. v. British Columbia*** (1982), 133 D.L.R. (3d) 712 (B.C.S.C.). Provincial Crown servants, concerned that wild elk could not feed themselves adequately during winter months, commenced a feeding program of enriched alfalfa fodder for the purpose of maintaining, if not increasing, the size of the herd. That program was discontinued after a few years. The elk, however, had become accustomed to the new diet which they found in plentiful quantity growing on the plaintiff's land. As a result, they gathered in large numbers and fed off the plaintiff's crop, breaking down fences and causing other damage in order to get to that food supply. Among other issues, the Court had to decide whether the acts of the Crown servants in feeding the elk were wrongful in the sense that they had either created a nuisance or had been negligent, thereby causing damage to the plaintiff. Citing *Barratt*

as well as *Dorset Yacht*, but using the terminology of Lord Wilberforce in *Anns*, the Court determined that the actions of the Crown servants in regard to the feeding program were within the delegated discretion or policy embodied in the governing statute and as such, would not engender liability for ensuing damages. In addition, the Court found that the government employees in question did not act unreasonably or carelessly in implementing the feeding program.

Anns was also cited in ***Baird v. Canada*** (1983), 148 D.L.R. (3d) 1 (F.C.A.), which concerned a claim for damages brought against the Crown in respect of the alleged negligence of the Minister of Finance and the Superintendent of Insurance in the exercise of statutory powers and duties pertaining to the licensing and supervision of trust companies. A trust company had been given a licence. In conducting its business, it violated various provisions of the *Trust Companies Act* by, among other things, misrepresenting certain assets as secured and making loans to directors. The plaintiff placed money on deposit with that company which was ultimately lost as a result of allegedly deceptive, unethical and fraudulent practices and brought suit against the Crown. At trial, the statement of claim was struck out as disclosing no reasonable cause of action. The appeal was brought not on the merits but rather on the trial court's ruling on the motion to strike.

The Court of Appeal overturned that ruling and restored the statement of claim, thereby sending the case back for trial. In so doing, the Court not only referred explicitly to the policy/operation distinction enunciated in *Anns* but actually applied it in relation to various decision-making powers and other duties conferred on both officials. For example, to the extent that there may have been any negligence in relation to the exercise of the Minister's licensing authority, Le Dain J. stated that such power "would appear to involve a residual discretion of a policy nature" thus giving rise to serious doubt as to whether "negligence in the exercise of such authority should in principle be capable of giving rise to liability." In addition, he saw problems of causation as between the issuance of a licence and the loss of investments in the licensee as well as an absence of foreseeability in the relationship between the two such as to undermine the existence of a duty of care in the first place. At the same time, however, he regarded the supervisory powers of the Superintendent, even though they had discretionary aspects, to be operational in nature and thus capable of attracting liability if negligently exercised and thus, a matter that should have been left to the trial court to determine on the merits.

It is widely agreed that the Supreme Court "officially" imported *Anns* into Canadian law in ***Kamloops (City) v. Nielson***, [1984] 2 S.C.R. 2. The city was held partly liable for the cost of repairs to a house where it had been made aware, through its inspector, of defective foundations and building by-law violations, but had failed to prevent its construction. A stop work order had been issued but ignored, and the building had been completed. The owner assumed occupancy without an occupancy permit. The plaintiff was a subsequent purchaser from whom the defects had been concealed.

Explicitly basing itself on *Anns*, the Court stated that the city's decision to regulate construction of buildings by enacting appropriate by-laws, authorized by a provincial

statute, was a "policy" one. Although, in its discretion, the city could have chosen not to enter into regulation of this area by making by-laws, the Court determined that once it made the decision to do so, the city owed a duty of care to purchasers of such buildings in enforcing those by-laws. The Court looked to the ostensible public safety purpose underpinning the governing by-law and its enabling legislation in finding a duty of care here.

The Court dealt extensively with the misfeasance/nonfeasance distinction that had been an essential element in the pre-*Anns* era in deciding whether a public authority exercising a statutory discretion could be found liable in negligence. That distinction was determined to be no longer relevant and, in fact, was supplanted where, pursuant to the foreseeability and proximity components of the first of the two-step test enunciated in *Anns*, a private law duty of care was found to exist in relation to how the discretion was to be exercised. As applied to the city's "operational" duty to enforce its building by-law, the Court suggested that the city did indeed have discretion in relation to the actual enforcement means it would use, but such discretion did not extend to whether it would enforce the by-law at all. In other words, the city could not clothe itself with immunity simply through nonfeasance because it had no statutory duty, as might have been possible prior to *Anns*. More generally, the Court concluded that even if the failure to act could be seen as a "policy" decision, it still would not be immunized from liability because, in the face of a clear violation of the by-law, that decision could not be seen as having been made in good faith, an essential ingredient for immunity that was explicitly stated by the House of Lords in *Anns*.

The Court also addressed the fact that damages were in the nature of economic loss. That element of the decision is dealt with in chapter 4, infra.

Gutek v. Sunshine Village (1990), 103 A.R. 195 (Q.B.) also illustrates how the purposes of legislation, in this case dealing with government inspection of ski lifts, relate to the finding of a duty of care. A resort operator was sued for damages in respect of injuries sustained by faulty operation of a chair-lift. The operator launched a third-party claim against the Alberta government alleging negligent inspection and failure to ensure that the operator complied with certain regulatory requirements. The court held that any duty of care on the part of the government and its inspectors was toward users of the lift, not its operators, since the purpose of the legislation did not extend to protecting the designer, manufacturer, installer or owner of the lift from liability.

In *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, it was a municipality's responsibility to provide and maintain fire fighting services and equipment that was the basis for the claim. A hotel guest who had been smoking caused a fire, and when the firefighters arrived, it took them forty minutes to get water out of nearby fire hydrants because the hydrants in question were difficult to reach, covered with snow, frozen or broken.

The court concluded that while there had clearly been decisions made to create a water system and a fire-fighting service, there had been no real policy decision taken concerning

inspection and repair of hydrants. Occasional inspections had been made but no inspection records had been kept. Beetz J. referred to the statement of Wilson J. in *Kamloops* to the effect that a failure to act where some action should have been taken, specifically the failure to put in place a formal inspection system, whether for no reason or for an improper reason, would not be a bona fide policy decision.

By contrast, L'Heureux-Dubé J. found that a policy decision to inspect and maintain the hydrants could be implied to have been taken by the City in having decided to adopt by-laws which specifically spoke of the necessity of a water system for health and fire protection. On the other hand, according to Beetz J., the carrying out of inspections and repair of fire hydrants had to be operational since this was the "practical execution of the municipality's policy decision to establish the water system and to allocate personnel and money to the maintenance of the system." The causal link between lack of water and the spread of fire was clear; the fire had been almost extinguished with the water from the fire truck alone and had only spread when no water was available from the hydrants to finish the job. The city therefore shared liability with the person who had set the fire.

As stated earlier, *Laurentide Motels* is particularly relevant to claims brought before courts in Quebec. In fact, the significance of this case extends to all negligence claims brought against the Crown where the cause of action arises in the province of Quebec, including such claims brought against the federal Crown in the Federal Court of Canada. The Supreme Court had to determine whether the city's liability was governed by public law or by private law. If public law governed, in the absence of statutory provisions explicitly defining such liability, the common law, as enunciated in *Anns* and subsequent Canadian jurisprudence, would apply. If, on the other hand, private law governed, the civil law of Quebec, specifically, the *Civil Code*, would apply.

The Court held that matters of government liability are matters of public law within *Civil Code* and are, therefore, governed by the guiding principles of *Anns* and *Kamloops*, specifically the rule of public law that policy decisions will not attract liability. Thus, the policy/operation distinction, a common law precept, was held to apply even in relation to negligence claims taken in provincial courts under provincial law against the province or other public authorities in Quebec. However, that same public law also states that liability for operational decisions is determined according to private law rules, which in Quebec would mean the *Civil Code*. In other words, once it is found that an impugned decision is operational, it will be the *Civil Code* that determines whether, in the circumstances of the case, the public authority had committed the necessary fault to engage what is now known as its extra-contractual liability.

An earlier case that makes an interesting contrast to *Laurentide Motels* is ***Gordonna v. St. John's (City)*** (1986), 30 D.L.R. (4th) 720 (Nfld. S.C.). A building that was within city limits but beyond the end of the water main and hydrant system was destroyed by fire, mainly because the closest hydrants were far enough away that the water pressure was too low. The court dismissed the claim of damages for negligence brought against the city finding, among other things, that although the city had a statutory duty to "establish hydrants throughout the city as the council shall think necessary," its actual placement of

particular hydrants was "discretionary." By finding that there was no duty to distribute water to all streets of the city, the court implied that the distribution system that had been put in place was reasonable.

A case that might have been decided differently had it been decided after *Just* v. *British Columbia* is ***Thornhill v. Martineau*** (1987), 39 C.C.L.T. 293 (B.C.S.C.). The plaintiff claimed that an accident at an intersection was partly caused by the municipality's failure to trim trees that obscured the stop sign. The court considered *Barratt* and *Kamloops* and found no liability. Although a municipal engineer was authorized to place, erect and maintain traffic control devices, the method he chose to follow in doing this was found to be a policy matter and thus carried no duty of care, assuming that it was reasonable and made in good faith. While there was no program of regular inspection and improvements or repairs were made only in response to complaints, that too was regarded as a policy decision. Since there had been no complaint concerning the obscured sign, there was nothing "operational" to consider.

It might be noted that the same issue of liability in relation to the failure of a public authority to trim trees or remove other kinds of road traffic hazards is considered in a number of cases summarized in section 3.3.2 infra under the heading "enforcement and inspection functions."

Another "road" case that might have been decided differently post-*Just* is ***Rowe v. British Columbia*** (1989), 56 D.L.R. (4th) 541 (B.C.S.C.). A passenger in a car was injured when the car left the highway and struck a boulder beyond the ditch line. During highway widening in 1971, the boulder had been dug up and raised, allegedly becoming more of a hazard than it had been previously. In 1979, the Roads and Transportation Association of Canada had issued a guideline suggesting an optimum seven metre "clear zone" for such highways. The plaintiff alleged that failure to move the boulder in either 1971 or 1979 was negligent. The Ministry policy was to clear the road down to the ditch but not beyond.

The court, in a very brief judgment, found, first, that pre-1979, it was not foreseeable that the boulder presented a hazard to motorists using ordinary care. Second, as for post-1979, since the RTAC guideline was not government policy there was no duty to conform to it. The existing policy of clearing to the ditch line was followed. The court did not ask whether the existing government policy or the guideline was reasonable or "bona fide," except for one sentence to the effect that the boulder was beyond the minimum clearance suggested by the guideline. There was also a hint, but no more, that it would not have been feasible for the government to have adopted the more stringent guideline.

2.2 *Just v. British Columbia* - a turning point

Whether deliberately or otherwise, the Supreme Court seemed to use the opportunity provided by ***Just v. British Columbia***, [1989] 2 S.C.R. 1228, to further define and refine the governing principles for determining tort liability of public authorities.

The province of British Columbia was sued after a boulder came loose from a slope above a highway and fell on the plaintiff's car, injuring him and killing his daughter. The trial and appeal courts both found that the system of inspection of rockfaces and overhangs put in place by the Department of Highways, and the way it was to be carried out, were policy matters for which there was no liability. There was no evidence at trial that the inspection itself was either not done or not done with reasonable care.

On appeal before the Supreme Court, writing for the majority and ostensibly influenced by Lord Wilberforce's judgment in *Anns*, Cory J. started by first asking whether there was a duty of care pertaining to rock scaling and other aspects of inspection and maintenance pertaining to assuring safe highways and, second, whether liability was limited by either statute or common law in that particular regard. As to the first matter, it was his view that the relationship between the province and users of its highways was sufficiently proximate and that the risk of injury resulting from lack of maintenance was reasonably foreseeable so to establish a duty of care on the part of the province. As to the second question, no legislation absolved the province from liability. Accordingly, it fell to the common law, and, in particular, the policy/operation distinction, to determine whether, in respect of the decisions involved in the inspection and maintenance of the rockface in question, the province had committed actionable negligence.

What this came down to was determining whether those decisions were "policy" or "operational" in the sense of *Anns*. That case, however, did not define or, for that matter, even specify, the bases upon which the policy/operation character of a decision might be discerned. To come up with a definition of a policy decision, Cory J. used the *dictum* of Mason J. of the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1, at pp. 34, 35, as to where the distinction between policy and operational decisions is to be drawn:

> The distinction between policy and operational factors is not easy to formulate, but the dividing line between the two will be observed if we recognize that a public body is under no duty of care in relations to decisions that involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

These latter references to administrative directions, professional opinion, etc. set out the bases for determining that a decision is operational rather than policy. As for policy decisions, Cory J., seemed to take the non-applicability of a duty of care to policy decisions somewhat further than did Mason J. in *Sutherland Shire Council* in stating, at p. 1242:

> The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion.

Further on, summarizing what he had already said about the policy/operation distinction, he stated, at p. 1245:

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

Cory J. used the example of having to make a choice between spending funds on airport construction or lighthouse inspection, and suggested that a decision to either not inspect or reduce inspections for budgetary reasons would be immune from liability. A positive decision to inspect, however, would mean that the system of inspection employed was subject to judicial scrutiny for its reasonableness.

He also distinguished *Barratt* on the basis that the inspection policy at issue there was clearly reasonable and therefore a bona fide policy decision. If it had been a question of a policy to inspect roads, for example, every five years, that would not have been *bona fide* and would therefore have been open to attack. The circular reasoning here seems to have been that, while a policy decision is protected, one has to first assess the reasonableness of a policy to see if it is subject to attack; if reasonable, then it is a "true policy decision." If not, it can be minutely examined.

This led Cory J. to conclude that the following discretionary decisions in *Just* were not policy but were "manifestations of the implementation of the policy decision to inspect and were operational in nature": the manner in which inspections were to be carried out; the frequency or infrequency of inspections; how and when trees above the rock cut should have been inspected; and finally, the manner in which the cutting and scaling operations should have been carried out. It appears from a reading of Cory J.'s reasons that the only decision in an inspection context that would always be protected as "policy" would be a decision either to inspect or not to inspect made on the basis of budgetary or some other overarching public policy consideration.

After finding most inspection-related decisions to be operational ones, the only other consideration pertaining to liability had to do with the appropriate standard of care in the circumstances. Cory J. suggested that reasonable care for governments might be something less than it would be for individuals; in other words, someone with twenty feet of driveway to maintain might be subject to a higher standard than someone charged with keeping up thousands of miles of highway. A new trial was ordered on the issue of standard of care.

Sopinka J. delivered a strong dissent in the *Just* case, in which he considered Cory J.'s reasoning to go beyond *Kamloops* and *Barratt*. He stated (at 1254):

> ...my colleague is extending liability beyond what was decided in *Anns*.... The system would include the time, manner and technique of inspection. On this analysis it is difficult to determine what aspect of a policy decision would be immune from review. All that is left is the decision to inspect. It can hardly be suggested that all the learning that has been expended on the difference between policy and operational was expended to immunize the decision of a public body that something will be done but not the content of what will be done. It seems to me that a decision to inspect rather than not inspect hardly needs protection from review.

The decision of the B.C. Supreme Court in the retrial in *Just* is reported as ***Just v. British Columbia (No. 2)*** (1991), 60 B.C.L.R. (2d) 209 (S.C.). The court acknowledged that the reasonableness of the inspection had to be assessed in light of the budgetary allotments, equipment and personnel committed to the inspection program. However, on "highly contested evidence," the court found that there had been enough signs of instability on the rock face in question that a climbing inspection should have been done, and would likely have caught the problem and prevented injury. The court also found that this would not have placed any additional stress on the defendant's budget.

2.3 *Swinamer* and *Brown*

Five years after *Just*, during which time there had been a fair amount of criticism of it in academic writing, Cory J. availed himself of the opportunity to revisit some of what he had previously said about the policy/operation distinction.

In ***Swinamer v. Nova Scotia***, [1994] 1 S.C.R. 445, a tree overhanging a highway fell on the plaintiff's vehicle, rendering him a paraplegic. The interior of the tree had become pulpy due to disease although that was not evident to persons without special knowledge of trees. The province had decided to put in place a program to inspect and remove hazardous roadside trees. The tree in question had not been earmarked as hazardous.

The trial court held that the decision to put in place the program was a policy one; once made, however, a duty of care respecting the operation of the program arose. The province was negligent in using an inspector with no training relating to trees, where a minimum amount of training (two hours), at negligible cost, would have given him the skills needed to identify this particular tree as hazardous.

Although the facts of this case and the legal principles applied seem to justify the trial result, the Court of Appeal reversed and dismissed the action, putting some emphasis on the distinction, not found material in other cases, between a power and a duty to maintain roads. The Court found that there was no statutory duty; nor was there a power to enter on private property, where the diseased tree was located. It was noted that the government policy was to remove dead or hazardous trees from within road boundaries,

as opposed to removing diseased trees that were not obviously hazardous and may have been outside the boundaries.

The court was clearly motivated by the "limited resources" of the province in determining the question of duty of care, even though this had not been found to be a factor at trial. The key finding on appeal was that, even assuming that there was a duty to remove dangerous trees from lands abutting the road allowance, there had been no evidence that this tree was dangerous. That finding followed an extensive discussion of tree diseases and their manifestations. The appeal decision in Swinamer really seemed to be about standards of care, reasonableness and the "drawing of lines" in cases of government liability.

The plaintiff's appeal to the Supreme Court of Canada was dismissed. The importance of the Supreme Court decision in this case is largely connected to Cory J.'s review of the policy/operation distinction that he had discussed in *Just*. Indeed, at the very outset of his judgment, he unequivocally stated that this case could be resolved by applying the principles set out in *Just*.

Cory J. found that the provincial Department of Highways owed a duty of care to protect travelers on its public highways against hazards occurring from dead or diseased trees:

> It would be reasonable for him to expect that the road would be reasonably maintained. For the Department, it would be a readily foreseeable risk that harm might befall users of the highway if it were not reasonably maintained.

The province had no statutory duty to maintain, or to expend money on, any highway. At the same time, there was no statutory provision exempting or limiting the province's liability, which would, in any case, have to be explicit. Thus, all that existed was a statutory power to construct and maintain highways. Cory J., however, stated that for purposes of determining whether a duty of care arose, no real distinction was found as between a legal duty and a legal power.

The decision to inspect for dead trees was determined to fall within the realm of policy, stated by Cory J. as "a preliminary step in the policy making process." Thus, no liability attached to that decision as long as it was taken in good faith. Furthermore, in executing the policy decision, that is to say, in conducting the survey, no negligence was found given the extent of highway to be inspected and the limited resources available. Cory J. even found that the lack of special training for the supervisor of the inspection team did not breach the standard of care that could be reasonably imposed in the circumstances.

Brown v. British Columbia, [1994] 1 S.C.R. 420 was heard and decided by the Supreme Court at the same time as *Swinamer*. Although not focused on inspections per se, it was similar to *Swinamer* in so far as it dealt with liability attaching to the maintenance of public highways in safe condition. In this case, the plaintiff's car traveling on a public highway skidded on a patch of black ice and went down an embankment, that being the third accident in that area that morning. The provincial authorities had been alerted to the need for a sanding truck after the first accident. There had, in fact, been some delay before a truck had been sent out in that the driver of the truck could not be immediately

contacted. In addition, the road maintenance crews were still on a summer schedule at the time of the accident and, under the collective agreement governing working conditions, the shift to a winter schedule could not take place without a two-week notice period during which the winter schedule would be posted. No evidence was led as to what had caused the black ice to form on the road.

At trial, the allegation of negligence in respect of the province's failure to respond in a timely manner to the call for sanding was dismissed. The Court found that the system employed to alert the provincial road authorities to the need for sanding was a matter of policy. Similarly, the Court rejected a second allegation of negligence pertaining to the province's failure to maintain the road in a condition such that black ice would not form on it on the ground that this also dealt with matters of policy excluding a duty of care. This was upheld by the Court of Appeal.

In disposing of the appeal, Cory J. explicitly relied on the principles enunciated in *Just* to reject the allegation of negligence pertaining to failure of the provincial roads authorities to respond in a timely fashion on the ground that it dealt with considerations of policy involving financial and personnel matters including, among other things, the setting of work schedules which itself involved labour negotiations with unions. At the operational level, no proof was made of negligence in regard to how the "call-out system" for responding to sanding requests was implemented on the morning in question or how the sanding was actually carried out.

What is perhaps most significant here is Cory J.'s explicit renunciation of the implication coming out of *Just* that policy decisions must be limited to "threshold" decisions, that is to say, "broad initial decisions as to whether something will or will not be done." This was stated by Cory J. to be a misreading of what he had stated in *Just* about policy decisions being capable of being made by persons at all levels of authority and, as a result, be determinable on the basis of their nature rather than on the position of the decision-maker.

A further aspect of Cory J.'s decision in *Brown* was his clarification of earlier statements in *Just* dealing with *bona fides* attaching to policy decisions which seemed to equate good faith with reasonableness which had left the clear impression that a policy decision could be reviewed for reasonableness before it could be considered a "true" policy decision. On this point, Cory J. stated:

> At the outset, the Court of Appeal considered that it had to determine whether the policy was *bona fide* and reasonable or rational. In the vast majority of cases such a consideration will not be necessary. It will always be open to a plaintiff to attempt to establish, on a balance of probabilities, that the policy decision was not bona fide or was so irrational or unreasonable as to constitute an improper exercise of governmental discretion. This is not a new concept. It has long been recognized that government decisions may be attacked in those relatively rare instances where the policy decision is shown to have been made in bad faith or in circumstances where it is so patently unreasonable that it exceeds governmental discretion.

As a final issue, *Brown* also provided Cory J. with the opportunity to offer an analytical framework for discerning "operational" decisions:

> The operational area is concerned with the practical implementation of the formulated policies; it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

This was, in fact, a reiteration of Mason J.'s *dictum* in *Sutherland Shire Council.*

Perhaps as noteworthy was Sopinka J.'s separate brief reasons which seemed to repudiate the policy/operation distinction as a mechanism for finding tort liability of public authorities, although he did concur with Cory J. in the result. In Sopinka J.'s view, either the province had a statutory duty to maintain the road or it did not. In no event could there be a private law duty of care leading to liability. He further noted that the policy/operation distinction had been abandoned in both the U.S. and in England as the exclusive test for finding tort liability of public authorities and was in some doubt as to its continued applicability in Australia.

2.4 Some observations on the policy/operation distinction

Based upon the foregoing, a number of generalizations are possible in regard to policy and operational decisions. Policy decisions are perhaps easiest to identify where they are "legislative" in nature, that is, where they lay down general rules or guidelines which specify how a discretion is to be exercised in individual cases thereafter. This is, in fact, the essence of policy. On the other hand, certain types of administrative decisions, such as those that are allocative, which are based on the public interest considerations specified in *Sutherland Shire Council* are seen as "policy" because of the *dictum* in *Anns* which seemed to equate policy with discretion while, at the same time, acknowledging that operational decisions can have elements of discretion as well. This seems to be the source of most of the confusion surrounding the policy/operation distinction. In any event, a common feature of policy decisions is that they imply some kind of managerial or supervisory authority attaching to the exercise of the discretion in question. For example, a decision as to whether particular resources should be used would be the kind of decision falling to a manager to make within a hierarchy.

By contrast, once particular resources have been selected, decisions on how to go about making best use of them, in a technical or operational sense, will not normally imply managerial authority; accordingly they will be "operational" in nature. Operational decisions will generally be easiest to discern where they are ostensibly tied to, and are intended to implement, some larger policy matter. The problem is that not all operational decisions are directly tied to policy. It is likely that there are all kinds of acts taken at lower levels within public bodies which are not really tied to anything other than, in some remote way, some duty or power set out in the public body's governing statute. The key

factor governing the nature of those decisions is not the presence or absence of a formal "policy" but the nature of the considerations on which those decisions are based.

One further clarification about Lord Wilberforce's formulation of the two-step test in *Anns* should be noted at this point. What he said was that once a *prima facie* duty of care is found under the first step, one must then consider whether there are any considerations which ought to negative or reduce or limit, amongst other things, the scope of that duty of care. On its face, what this seemed to suggest was that the application of the second step of the *Anns* test could produce the result of differentiated duties of care depending on the circumstances within which the duty arises. This was most recently revisited by the Supreme Court in *Ryan v. Victoria (City)*, unreported, January 28, 1999, where it was stated by Major J. (at para 25), that the purpose of that test

> is to establish the existence of a legal duty, not to determine the standard of care required to establish liability. Policy considerations do not give rise to "greater" or "lesser" duties in different cases. A duty of care either exists or it does not. As discussed below, when the language of "duty" is framed in terms of its degree or content, what is really at issue is not the duty but the applicable standard of care. While the distinction is obvious, courts from time to time seem to lose sight of that principle.

3. APPLICATION OF THE POLICY/OPERATION DISTINCTION TO DIFFERENT GOVERNMENTAL DUTIES, POWERS AND FUNCTIONS

This chapter summarizes the case law dealing with the policy/operation distinction organized in relation to specific governmental powers, duties and functions. The selected groupings attempt to reflect the range of discretionary activities of governments and how the courts have distinguished between policy and operational decisions pertaining to them. For the most part, the jurisprudence cited here has come in the wake of *Just* although some of the cases were decided prior to *Just* and tend to reflect the approach taken in *Anns*.

It should be noted that the various categories of governmental functions set out in this chapter for the purposes of cataloguing relevant jurisprudence are not watertight. For example, certain cases considered in relation to the licensing function could just as easily have been placed under the section dealing with inspections. Accordingly, with few exceptions, more emphasis should be placed on the facts of each particular case rather than on the nature of the function involved in seeing how and where the court applied the policy/operation distinction and, most importantly, the appropriate standard of care that was applied to determine whether negligence had occurred.

At various points in this chapter, recent Commonwealth jurisprudence involving a negligence claim in relation to the exercise of a particular governmental function has been added. What must be kept in mind in reading those cases is that most Commonwealth, and particularly English, case law has followed a different path than Canadian jurisprudence in recent years with respect to the rules of negligence both generally and their particular application to public authorities. That is, in fact, discussed at some length in the following chapter. For immediate purposes, it should be noted that, for the most part, English law now places a more stringent requirement as to proximity between plaintiff and defendant in generating a duty of care and has replaced the policy/operation distinction with a somewhat more arbitrary test of whether, regardless of who is involved, it is fair and reasonable to impose a duty of care in the circumstances of the particular claim in negligence. Thus, the Commonwealth cases summarized in this chapter are most significant where they found a duty of care attaching to the performance of a governmental function and imposed liability on a public authority.

3.1 Legislative functions

Undoubtedly, the leading Canadian case dealing with a claim for civil damages arising from the exercise of legislative powers is *Welbridge Holdings v. Winnipeg (City)*, [1971] S.C.R. 957. A developer, relying on a zoning by-law and a building permit issued pursuant to the by-law, had commenced construction of an apartment building. The by-law was subsequently declared invalid for breach of required procedures in its enactment. As a direct consequence, the building permit was revoked. The developer brought a

negligence action against the city based on the claim that, in enacting the by-law, the city had breached its duty of care to ensure that it had acted legally in following the proper procedures. It was further claimed that such duty of care was owed to all persons having an interest in commercially exploiting the lands that were the subject of the zoning by-law.

Speaking for the court, Laskin J. stated the following, at pp. 968-969:

> 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 [legislative] 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.

Laskin J.'s references here to operating level and discretion as applied to the functions of the municipality seemed to foreshadow what Lord Wilberforce was to subsequently say in *Anns* some seven years later.

In *Berryland Canning Co. v. Canada*, [1974] 1 F.C. 91 (T.D.), a claim in damages was brought against the Crown allegedly arising from the failure of the Minister of Health and Welfare, or his officials, to give prior notice that the *Food and Drugs Regulations* would be amended to phase out the use of cyclamates as an artificial sweetener. Although the regulatory change did not legally prevent the plaintiff from selling off its annual inventory of non-sugared canned fruit that had been legally packed with cyclamates, widespread publicity of the impending ban immediately killed the market for those products thereby forcing the plaintiff to take a substantial loss. It was alleged that, among other things, the Crown had a duty of care toward users of cyclamates to privately notify them in advance of planned changes so as to prevent such losses. Inasmuch as the alleged negligence pertained to the exercise of a legislative function, the court explicitly relied on Laskin J.'s above-cited statement in *Welbridge* to reject the claim.

Welbridge was also used in the case of *Bowen v. City of Edmonton* (1978), 4 C.C.L.T. 105 (Alta. S.C.), to reject a claim in damages arising from actions on the part of the city relating to the subdivision of land. The city council passed a resolution approving a scheme for subdividing a tract of land even though the subdivision had been proposed without engineering studies or even the hiring of a consulting engineer to report on the suitability of the land for the purpose contemplated in subdividing it. As it turned out, the land in question was unstable and thus, unsuitable for the urban development purposes underpinning its subdivision. In fact, the resolution approving the scheme offended a provincial statute which prohibited subdivision for unsuitable purposes. The plaintiffs acquired a part of the subdivided land and subsequently discovered that they could not build on it or even resell it. Their action in damages against the city was dismissed on the ground that even if negligent and damaging, the resolution authorizing the subdivision was legislative in nature and thus, immune from attracting liability.

Kwong v. Alberta (1978), 96 D.L.R. (3d) 214 (Alta. C.A.) is probably second only to *Welbridge* in importance in relation to negligence claims pertaining to the exercise of legislative authority. A Dr. Kwong had died of poisoning by carbon monoxide that had escaped from the furnace of his house. The case was a wrongful death claim against various defendants, including the provincial government, for having negligently failed to warn of carbon monoxide danger in respect of the operation of converted residential gas furnaces. Essentially, the cause of action against the Crown was that it had failed to make necessary regulations pursuant to provincial legislation which would have forced the manufacturer or gas fitter to post a written warning on each furnace to keep the blower door on the unit closed at all times while being run. The door on Dr. Kwong's furnace was found open which had allowed the gas to escape into the house.

At trial, the Crown was found liable for having failed to take appropriate measures to ensure that the necessary warning would be given. The Court of Appeal, however, had the advantage of the *Anns* decision which just been rendered by the House of Lords. Basing itself on the policy/operation distinction, the court overturned the trial judge's finding of liability by determining that the decision to impose the requirement of posting a warning was a policy, rather than operational, decision and noted, on the basis of a long list of case law, that liability of public authorities has only been allowed in relation to negligence at the operational level. The court, however, went on to say that, in any event, the alleged negligence on the part of the Crown arose out of nonfeasance rather than misfeasance, thereby seemingly continuing the pre-*Anns* view of the law.

At the Supreme Court, (1980), 105 D.L.R. (3d) 576 (S.C.C.), Martland J. re-focused the issue back to the legislative nature of the Crown's alleged negligence by succinctly stating that it was the Court's view that there could be no liability on the part of the province for having decided not to enact regulations in the circumstances. This underscores the significance of this case: it conferred immunity from liability not only in respect of the damaging effect of legislation, but also in respect of a decision whether to legislate at all.

Kwong was relied on in ***Mahoney v. Canada***, [1986] F.C.J. No. 438 (T.D.) to strike out a claim alleging liability of the federal government attaching to its failure to make regulations pursuant to the *Hazardous Products Act* specifying standards pertaining to the design and strength of hooks holding the mattress and frame of baby cribs together. The suit was a wrongful death claim brought by the parents of an infant who had died by asphyxiation as a result of having become wedged between the mattress and frame of his crib. The court, in fact, found this case to be on all fours with *Kwong*.

Another case where the court showed no hesitation in ruling that a legislative function would not attract liability was ***Birch Builders v. Township of Esquimalt*** (1992), 90 D.L.R. (4th) 665 (B.C.C.A.). The plaintiff developers sued after a court found that their development permit had not been properly issued and were unsuccessful in obtaining another permit. The first permit had not been authorized by a resolution of the council as required. The plaintiffs alleged that failure to pass the necessary resolution amounted to negligence.

The court did not accept that the failure to make the resolution was the fault of the clerk administrator acting at an "operational" level. The court concluded that the principles enunciated by the Supreme Court of Canada in *Just* did not apply where the function under attack was a legislative one and that passing or failing to pass a resolution was a legislative, not an operational, function.

Leave to appeal this case to the Supreme Court was refused without reasons.

The Australian case of ***Bienke v. Minister for Primary Industries and Energy*** (1996), 136 A.L.R. 128 (F.C.A.) relied on *Welbridge* to dismiss a claim in damages in relation to amendments made to a federal statute that had the effect of diminishing the quota allocated to the holder of a fishing licence thereby depriving him of the right to fish for prawns in a particular fishing zone. The claim was brought on the basis of the peculiarly Australian notion of an "administrative tort" pertaining to negligence in the performance of a public function or power. The court made it clear that whatever it scope may be, an administrative tort could not have the reach necessary to provide any remedy in damages where the alleged negligence is in relation to an act of law-making.

3.2 Some observations on tort immunity pertaining to legislative functions

One thing to note is that the personal liability of ministers cannot be engaged for damages caused by legislation on the basis that they were involved in the decision to enact the legislation in question. In *Turner v. Canada*, [1992] 3 F.C. 458 (C.A.), a claim brought against ministers for connivance and negligence in the enactment of retroactive legislation causing the plaintiff serious economic loss was ordered struck out.

What is less clear is whether legislative decisions must be reasonable and made in good faith for a public authority to avail itself of the immunity in relation to tort liability for damages such decisions may cause. At first glance, those limitations, which operate in relation to policy decisions, would seemingly apply to legislative decisions because of the policy underpinning to legislative functions. Indeed, there is language in the case law virtually equating legislative and policy decisions. For example, In *Kwong*, p. 237, McGillivray C.J.A. had stated (at p. 237):

> In my view, there are no regulations governing warnings in respect to converted furnaces, and it is not open to the Court to say that there should be. As I have mentioned earlier, regulations involve considerations of policy, expense and effectiveness.

A policy decision, however, will normally have identifiable persons who would foreseeably be affected by such a decision and thus would be subjects in relation to whom at least a *prima facie* duty of care would seemingly be owed. It is, in fact, the "policy" nature of the decision in question that operates to negate that *prima facie* duty of care under the second of the two-step test stated by Lord Wilberforce in *Anns*, which, as stated at the outset, continues to be good law in Canada.

On general principles, it is arguably difficult to see how a public authority can be said to have a duty of care in relation to the public at large, or to the class of persons within the public who stand to be affected by the exercise of legislative power. The same difficulty is not present in relation to the exercise of an administrative power even where the administrative decision to be taken is in the nature of policy. Beyond this, a regulation made in bad faith, or that is fatally unreasonable, is *ultra vires* and can be quashed through the administrative remedy of judicial review. There is also Stone J.A.'s judgment in the Federal Court of Appeal's decision in *Comeau's Sea Foods*, which is summarized in the next section, that explicitly held that the presence of an administrative remedy in relation to a decision taken by a public body, which would include a legislative decision embodied in a regulation, forecloses a recourse in tort. If a regulation made in bad faith were also capable of engendering liability in tort for damages it causes, it would make nonsense of this latter principle.

The sparse jurisprudence dealing with legislative immunity in tort does not appear to have considered this matter.

3.3 Regulatory functions

The vast majority of cases summarized under this heading deal with alleged negligence pertaining to the manner of enforcement of statutory or regulatory duties or requirements falling on a public body, with many involving municipalities having to do with faulty inspection in relation to the administration or enforcement of by-laws. A handful of the following cases are more specifically focused on negligence pertaining to the execution of the function of issuing licences or permits.

3.3.1 licensing

In *Lapointe v. Canada (Minister of Fisheries and Oceans)* (1992), 51 F.T.R. 161, the Federal Court found the government liable for the wrongful cancellation or suspension of various fishing licences. What happened was that a licensee was being prosecuted for various fishing offences and, in fact, had been convicted on several occasions. Departmental officials sought to suspend or cancel the licences because of the convictions even though they had been given legal advice to the effect that, under the Act and regulations as they existed, that was not a valid basis for suspension or cancellation. The department went ahead anyway. The suspensions and cancellations were quashed in a separate proceeding, and the licensee sued for damages.

The essential question that arose in this case was whether the licensing discretion exercised here was in the nature of a policy decision which then would have required a showing of bad faith in order to attract liability. The court did not address that issue directly but simply concluded that the evidence strongly supported a finding of bad faith. There was a conscious choice to disregard the law in order to maintain credibility with the fishing industry. The plaintiff was awarded $85,000 damages.

The issue of bad faith did come up in *Molaison v. Canada (Minister of Fisheries and Oceans)* (1993), 73 F.T.R. 253. Acting through departmental officials, the Minister of Fisheries refused to issue a lobster fishing licence to someone who had purchased an existing licence-holder's boat with the intention of taking over his fishing business. The grounds stipulated for refusal had to do with residency requirements which were not met. In the end, the Court threw out the plaintiff's suit in damages against the Crown finding that, even if there had been a mistake in wrongfully applying the residency criteria pertaining to fishing licences, there had been no bad faith on the part of the Crown in the exercise of discretion to issue or refuse the fishing licence in question. Without specifically mentioning the policy/operation distinction, the court's search for bad faith in order to attract liability in the first place in relation to the exercise of the Minister's licensing discretion implicitly recognized that it was dealing with policy decisions.

Although this case involved alleged negligence in relation to the exercise of a licensing power conferred on a federal minister under a federal statute, the ultimate finding of liability would had to have been made pursuant to Quebec civil law since the cause of action had arisen in that province. In negligence claims against public authorities governed by Quebec civil law where the impugned acts or decisions are in the nature of policy, the court will generally look for "faute qualifiée" or "faute lourde" which are indicative of abuse of power in order to come to the determination that there had been the required bad faith so as to overturn the immunity that would otherwise shield the policy decision in question.

One fairly recent example can be found in the case of *Quebec (Attorney General) v. Deniso Lebel Inc.*, [1996] R.J.Q. 1821 (C.A.) which, among other things, considered a claim in damages against the provincial government in relation to the exercise of a statutory discretion by the provincial Minister of Energy and Resources having to do with the transfer of concessions and issuance of permits to cut wood on Crown land. At trial, Deniso Lebel Inc. won a judgment against the Crown based on a finding that the minister could not refuse to authorize the transfer of concessions and the permits except for valid cause, which had not been shown. In fact, the trial judge ruled that the minister's decisions were tainted by extraneous considerations. In overturning that decision, the Court of Appeal ruled that the minister had an unfettered licensing discretion in regard to the transfers of concessions and issuance of permits and that his decision to refuse them was in the nature of policy, thus requiring something more than ordinary negligence (at p. 1838):

> [Translation] To hold the Crown liable in tort for decisions made in the context of defining its policies, it is necessary to demonstrate intentional fault equivalent to bad faith, as seems to have been implied by Cory J. in *Swinamer*. Where an administrative decision is not at the "operational" level of routine administration, the gravity of the fault must exceed that of ordinary negligence (faute délictuelle simple).

A leading case dealing with negligence in relation to the exercise of a minister's licensing authority is *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1992] 3 F.C. 54 (T.D.); rev'd [1995] 2 F.C. 467 (C.A.), (1997), 142 D.L.R. 193 (S.C.C.).

The Minister had exercised his statutory discretion pursuant to s. 7 of the *Fisheries Act* to authorize the issuance of certain lobster fishery licences to the plaintiff. That authorization was, in fact, communicated to Comeau's. Later, apparently in response to pressure from other fishermen, he advised the plaintiff that the licences would not be issued. By that time the plaintiff had spent money converting a boat for lobster fishing.

At trial, Strayer J. found that the failure to issue the licences was both unauthorized and negligent. The minister's representation that a licence was authorized and would be issued had created a relationship of proximity and therefore a duty of care toward the plaintiff. Losses were foreseeable, and the fact that they were economic was not material. The only relevant "policy" decision was the initial authorization of the licences. After that, the task of actually issuing the licences was a routine matter in the nature of an operational act. The refusal to carry out the initial authorization for no good reason and without legal authority was negligent. The court further held, based on *Tock*, that even if some discretion remained, the Minister would have to establish that it had been exercised without negligence and that harm to the applicant was inevitable.

The judgment was appealed to the Federal Court of Appeal which, by two-to-one majority, reversed the Trial Division. The majority (Stone and Robertson JJ.) used different routes to arrive at essentially the same conclusion that the minister's "volte-face" did not engage his liability. According to Robertson J.A., the minister's decision to revoke his authorization was no less a policy decision than was his earlier decision to authorize the issuance of licences in the first place. In fact, the revocation decision itself consisted of not one, but two decisions - the minister's decision as to whether he should revoke, as distinct from a separate determination as to whether, in law, he could revoke his earlier authorization. The first question - whether the authorization should be revoked, was considered to be a matter of policy and thus immune from liability. The second decision, however, was regarded as operational because it involved the manner in which the Minister ascertained whether he had the legal authority to revoke his earlier authorization. Accordingly, in this limited sense, the minister had a duty of care to take reasonable means to ensure that he did have the authority to revoke inasmuch as he ought to have reasonably foreseen that revocation would expose Comeau's to financial loss in view of the fact that the latter had relied on the initial authorization. In the final analysis, however, Robertson J.A. held that the fact that the revocation was *ultra vires* did not itself make it negligent and, although he turned out to be mistaken, there was no negligence on the minister's part in concluding that he did have the legal authority to revoke.

Stone J.A. took a simpler approach. The revocation was plainly *ultra vires* giving the plaintiff the remedy of having it quashed by way of judicial review. That would then have opened up the further recourse of *mandamus* to compel the issuance of the licences, as originally promised. The availability of these administrative law remedies are to be considered under the second of the two-step test enunciated in *Anns* as factors negating the existence of a duty of care on the part of the minister in the circumstances. This effectively immunizes the minister from liability in negligence.

In his dissent, Linden J.A. found that the minister's decision to renege on his earlier commitment to issue the licences in question was indeed a policy decision but, because it was *ultra vires*, it should not receive the legal protection of being immunized from attracting tort liability. In other words, the illegal nature of the decision in question, even if in the nature of policy, strips it of having been made in good faith which is necessary to clothe it with immunity in the first place.

Not to put too fine a point on it, the Supreme Court's disposition of this case was disappointing. Speaking for the Court, Major J. distinguished between the minister's power to issue a licence, which once exercised in any specific instance, was expended and could only be revised or revoked under the specific statutory conditions in s. 9 of the *Fisheries Act*. By contrast,

> ....the power to authorize is a continuing power within the meaning of s. 31(3) of the Interpretation Act. I do not think that the authorization to issue the licence conferred upon the appellant an irrevocable legal right to a licence. Until the licence is issued, there is no licence and therefore no permission to do what is otherwise prohibited, namely fish for lobster in the offshore. Unless and until the licence is actually issued, the Minister in furtherance of government policy may reevaluate or reconsider his initial decision to authorize the licence. Until the Minister actually issued the licence, he possessed a continuing power to reconsider his earlier decision to authorize and or issue the licence. (Para 43, p. 203)

Accordingly, not only was the revocation of the authorization previously given not *ultra vires*, that decision was in the nature of policy in respect of which no duty of care arose other than the duty to exercise due care in ascertaining the scope of his statutory authority under s. 7 of the Act and, in that regard, Major J. no breach of the standard of care occurred because the minister had interpreted his statutory authority correctly.

It might be noted in passing that the view expressed by Stone J.A. in the Federal Court of Appeal's treatment of this case on the foreclosure of a tort remedy seemed to be consistent with a number of Commonwealth cases. For example, in the case of ***Jones v. Department of Employment***, [1989] Q.B. 1 (C.A.), the court struck out a negligence claim by refusing to impose a duty of care on a public official in performing a statutory function of making eligibility decisions for unemployment insurance because of the existence of adequate remedies provided through the statutory appeal procedure. Available administrative law recourses was also cited in ***Olutu v. Home Office***, [1997] 1 All E.R. 385 (C.A.), as a ground preventing a negligence claim in respect of the Crown Prosecution Service's failure to bring an arrested person who was in custody to court before the expiry of a statutory time limit.

One rather bizarre case where the Crown was sued in damages in relation to the exercise, or more precisely, the non-exercise, of a statutory licensing authority is ***Société des Alcools du Québec & Tremblay v. Canada***, [1998] A.Q. No. 2920 (Que. C.A.). Apparently, two on-air radio reporters employed at CHRC in Quebec City repeatedly attacked the reputation of the plaintiffs. The plaintiffs formally complained to the C.R.T.C. requesting that it take the necessary regulatory measures at its disposal against the radio station to force the on-air attacks to cease. At a point in time, the plaintiffs brought suit for damages

not only against the broadcasters and their employer, but also against the C.R.T.C. itself for having acted in bad faith in failing to take appropriate regulatory steps against its radio licensee which included, among other things, failing to call the licensee to a public hearing and failing to suspend or revoke its broadcasting licence. In fact, the plaintiffs alleged that the C.R.T.C. had abused its power in renewing the licence of the radio station in the face of the outstanding complaints that had been filed. The Crown was added as a defendant on the basis of being the employers of the members of the C.R.T.C.

The Crown succeeded in getting the claim against itself and the C.R.T.C. struck out by way of a "requête en irrecevabilité." The Court of Appeal dismissed the appeal of that judgment stating that, in the first place, the Crown itself could not be a party as it was not the employer or principal of the members of the C.R.T.C. who each held an office through appointment by the Governor in Council, that the C.R.T.C. had the discretion to act as it chose to act in the circumstances and that, in any event, absent proof of bad faith, there was no recourse in tort because the decisions of the C.R.T.C. pertaining to how it was to deal with the licensee in terms of its supervisory powers were quasi-judicial in nature. The question of whether the C.R.T.C. itself, in its role as an independent tribunal without legal personality, could be sued in damages was deliberately left open.

The same consideration of quasi-judiciality attaching to the exercise of licensing discretion is to be found in the earlier case of *Harrington v. Pappachristos* (1992), 75 B.C.L.R. (2d) 121 (S.C.), where the court considered the claim of an infant plaintiff, who had been injured while attending a day-care centre, against the licensing board that had issued a licence to the day care centre in question. Also sued were supervisory health care workers who carried out investigations or monitoring jobs and whose reports were relied on by the licensing board. The issue was whether the licensing and associated decisions dealing with supervision of licensed facilities were "operational" such as to allow for liability pursuant to *Just*. The court held that the decisions in question were not operational but rather, quasi-judicial and, thus, not actionable unless there was malice.

What makes *Harrington* surprising is that the court completely ignored and, in fact, wound up ruling contrary to, the framework for determining whether a decision is quasi-judicial rather than administrative that had been set out by the Supreme Court of Canada in *Minister of National Revenue v. Coopers & Lybrand*, [1979] 1 S.C.R. 495, the leading case in this area. According to Dickson J., one characteristic that will determine a decision to be quasi-judicial is where the body making the decision is required to apply substantive rules rather than simply exercise discretion or judgment based upon social or economic policy considerations. In *Harrington*, however, in exercising its discretion to issue a licence to operate a day care facility pursuant to the governing provincial statute, the licensing authority had to determine whether an applicant for such a licence had the necessary training and experience and other qualifications as well as the personality, ability, and temperament necessary to operate the facility in such a manner as to maintain the spirit, dignity and individuality of the children being cared for, etc, all of which is plainly suggestive of having the licensing body exercise judgment rather than apply rules.

In *SAQ & Tremblay*, the Court of Appeal did, in fact, mention *Coopers and Lybrand* in reaching its conclusion of quasi-judiciality attaching to the C.R.T.C.'s licensing and supervisory authority. In the final analysis, however, the Court tied its finding of quasi-judiciality primarily to the formality attending C.R.T.C. proceedings, such as the resort to public hearings, as well as the trappings of judiciality embedded in its status, such as the fact that the *Broadcasting Act* expressly makes the C.R.T.C. a court of record.

A more orthodox treatment of negligence in relation to the exercise of licensing authority can be found in *Maska Auto Spring v. Ste. Rosalie*, [1991] 2 S.C.R. 3, which dealt with a negligence claim against a municipality in respect of the wrongful issuance of a building permit and its subsequent revocation. A municipal building inspector had issued a permit even though the construction in question violated the town's building by-law in several important respects. The licence was revoked and construction had to be halted causing financial losses to the owner of the building. An action for damages against the municipality was dismissed at trial on the ground that, in issuing the permit contrary to the by-law, the inspector did not act within the scope of his duties and thus could not engage the vicarious liability of the municipality, his employer.

The Court of Appeal dismissed the appeal on different grounds. Beauregard J.A. stated that the error of the inspector in giving out the permit was not in itself sufficient to engage liability because the plaintiff had committed more serious and important faults in not informing itself of the by-law and not supplying the inspector adequate and proper documentation to enable him to correctly determine whether the building plan conformed to the by-law.

The most important judgment was the dissent of Chouinard J.A. which would have accepted the appeal and imposed liability on the municipality. Relying on *Anns*, he found that the act of issuing the permit was an operational act and that a simple error sufficient to constitute fault in the sense of the *Civil Code* was all that was necessary to engage the liability of the town. He also rejected the proposition that the inspector was acting outside the scope of his duties.

In a one-page decision, the Supreme Court reversed the lower courts explicitly relying on *Laurentide Motels* and on the judgment of Chouinard J.A.

It might be noted that, largely as a result of the trial judgment in *Maska Auto Spring*, the following article was included in the *Civil Code of Quebec* to specifically prevent municipalities and other public authorities from defending vicarious liability claims on the basis an employee had acted illegally:

> 1464. An agent or servant of the State or of a legal person established in the public interest does not cease to act in the performance of his duties by the mere fact that he performs an act that is illegal, unauthorized or outside his competence, or by the fact that he is acting as a peace officer.

In *Littler v. Mission (District)* (1991), 6 M.P.L.R. (2d) 164 (B.C.S.C.), a municipality was found liable for losses caused when a business could no longer obtain a licence to operate.

Sometime after the licence was first issued, the business had moved to a location where it no longer conformed to the applicable zoning by-law. The municipality had continued to renew the licence although the proprietors had indicated on the renewals a change of mailing address. When, after several years, the city received complaints about operation of the business, it discovered the zoning by-law violation and refused to renew the licence. The court apparently found, based on *Kamloops*, a relationship of sufficient proximity such that the city should have had the plaintiffs in contemplation when issuing a licence. There was an "operational duty" on the inspector not to grant a licence in violation of a zoning by-law.

3.3.2 enforcement and inspection functions

The Supreme Court's decision in ***Rothfield v. Manolakos***, [1989] 2 S.C.R. 1259 was released on the same day as that in *Just*. Like *Kamloops*, this case concerned municipal responsibility for building permits and inspections during the course of construction. A permit for the construction of a retaining wall was issued based on a rough sketch prepared by the contractors doing the job, who were not engineers. Neither the owners nor the contractors had advised the city as required when the project reached the stage where an inspection should have been made. An inspection at a later stage was performed too late in the construction to reveal design flaws. The wall collapsed several months later.

The city was found partially liable. Once it had made the policy decision to inspect building plans and construction, it owed a duty of care to persons who might suffer loss by the negligent exercise of these powers. The court held that while the issuance of a permit based on a less-than-professional sketch was not itself necessarily unreasonable, the city was negligent in issuing the permit where that sketch made it obvious that the design was inadequate. While the owner bore some responsibility for not requesting a timely inspection, this did not absolve the city of responsibility. The court noted that the inspector was "armed with all the powers necessary to remedy the situation." For example, he could have ordered a cessation of the work while he determined whether the structure was up to standard. By contrast, permitting the work to continue subject to being "monitored" at a time when a crack had already developed was further evidence of negligence.

There are several other licensing/regulatory cases worth noting. In ***Dha v. Ozdoba*** (1990), 39 C.L.R. 248 (B.C.S.C.), the plaintiff home-owners sued the engineer who had supervised construction of their home as well as the municipality for having approved foundation drawings which contained no information about soil conditions and without checking for compliance with the building code. It turned out that the house was built on fill and had subsided unevenly thereby making it uninhabitable. Both defendants were found negligent. The court relied on *Rothfield* to conclude that a municipality owes a duty of care to owner/builders to see that building regulations are followed. As in *Rothfield*, a by-law imposing some responsibility on an owner did not relieve the municipality of its obligations.

2160-6892 Québec Inc. v. Ste-Thérèse (Ville), [1989] R.J.Q. 1991 (C.S.) concerned a claim for damages by a proprietor who had been refused, and then granted, a permit to turn a cinema into a bar-discotheque. The reason given for refusal was that a proposed by-law, once enacted, would prohibit the kind of business that the plaintiff wanted to operate. The plaintiff, in another proceeding, obtained an order of mandamus requiring the permit to be issued. He then claimed damages in respect of the lost profits caused by the initial refusal of the permit. The court found that while the city would not be liable for its policy decisions as to what zoning regulations to enact, it could be held liable for negligent application of those regulations. In this case, failure to grant the permit was found to be due to ignorance of the law and principles concerning acquired rights. Liability was engaged even though there had been no finding by the court of bad faith.

Swanson Estate v. Canada (1991), 80 D.L.R. (4th) 741 (F.C.A.), involved a liability claim against the federal government for the negligence of Transport Canada employees in their failure to enforce regulations and other statutory instruments. The claim here was that the alleged negligence contributed to the deaths of six persons when a small aircraft, owned by Wapiti Aviation, crashed. The evidence showed that prior to the crash, Wapiti had consistently flouted regulations and safety standards in Air Navigation Orders (ANOs). Wapiti employees had complained to Transport Canada, whose inspectors made two reports of these violations. One report said there was "a total disregard for regulations, rights of others and safety." Apparently all that was decided by Transport Canada was to issue warnings and collect further evidence.

The Court of Appeal considered *Just* and concluded that "tort immunity should be sparingly granted to Crown agencies." Only "true policy decisions," which are usually made at high levels and involve social, political and economic factors, should be exempt from liability. On any analytical basis, however, it was fairly easy to conclude that failure to do anything about Wapiti was an operational decision. It was not a case of carrying out an inadequate policy but a substantial failure to execute an existing policy. Linden J.A. stated that the inspectors and enforcement officials were not supposed to be concerned with the health of the airline industry, with supplying service to remote areas or with employment for young pilots, nor was it their job to worry about airlines "going political." Rather, their task was to enforce the regulations and the ANOs as far as safety was concerned to the best of their ability with the resources at their disposal. This function was clearly operational. Hence, a civil duty of care was owed to the plaintiffs.

Linden J.A. emphasized that what was expected was reasonable care in all the circumstances, in light of "matters such as the resources available...." (at 752). It was found that there was time to have taken stronger action, such as withdrawing permission (i.e., suspension of a permit, licence or other authorization document). Even the ANO description of an inspector's job stated that no deviation from essential safety standards can be permitted. It was also found that any decision not to act concerning Wapiti was "one of professional judgment, not departmental budget.

Transport Canada's failings were described at pp. at 756-757:

> Transport Canada's failure to take any meaningful steps to correct the explosive situation which it knew existed at Wapiti amounted to a breach of the duty of care it owed the passengers. Transport Canada officials negligently performed the job they were hired to do; they did not achieve the reasonable standard of safety inspection, and enforcement which the law requires of professional persons similarly situated. It was not reasonable to accept empty promises to improve where no improvement was forthcoming. It is incomprehensible that a professional inspector of reasonable competence and skill would choose not to intervene in a situation which one of his own senior staff predicted was virtually certain to produce a fatal accident.

While both the pilot and the airline contributed to the cause of the crash, the evidence was sufficient to permit the inference that Transport Canada's negligence also contributed, since that Department's officials could have reduced the risk had they taken action. Instead, they allowed and condoned a practice of careless flying. The court held Transport Canada one-third liable for damages connected to the wrongful death claim.

The recent English case of *Perrett v. Collins*, The Times, June 23, 1998 (C.A.), considered the same issue of negligence in relation to the regulation of aircraft safety. A passenger in a light plane was injured when the plane crashed. The plane had been inspected and issued an airworthiness certificate by a certification authority pursuant to statutory authority. The claim of negligence against the certification authority focused essentially on whether there was sufficient proximity as between that body and passengers to generate a duty of care. The court distinguished other similar cases which, for example, had found no duty of care in respect of the foreseeable loss of cargo from unprofessional certification of seaworthiness of a ship on the ground that different considerations applied when the foreseeable risk of harm involved physical safety as opposed to economic loss. In the final analysis the court found that it was just and reasonable to impose a duty of care on a certification authority of the fitness of aircraft to fly inasmuch as a passenger about to embark on a plane ride is entitled to assume that the plane met the applicable safety requirements and that those involved in inspection and certification had taken proper care.

There have been a number of cases of negligence by municipal authorities leading to flooding. In *Eagle Forest Products Inc. v. Whitehorn Investments Ltd.* (1992), 12 M.P.L.R. (2d) 18 (Ont. Gen. Div.), a developer and the town of Richmond Hill were sued after the town had approved the developer's plan to in-fill its mall property, which had the effect of creating a ditch. During a very rainy period, the ditch flooded, causing damage to other businesses. The court found both the town and the developer negligent on the basis that a reasonable bystander could have seen that any overflow from a nearby creek would empty into the ditch and create a flood risk. The town had both approved the flawed plan and been a party to the construction of the ditch.

Negligence on the part of a public authority in respect of flooding had also been considered by the New Zealand Court of Appeal in the case of *Taranaki Catchment Commission and Regional Water Board v. R & D Roach Ltd.*, [1983] N.Z.L.R. 641 (C.A.). A negligence claim was brought against a public authority for failure to enforce the terms and conditions of a water right it had granted. A pipeline carrying sewage and

industrial waste had been leaking for years causing a rivermouth adjacent to the plaintiff's business to become polluted. The appeal was on a motion to strike out the claim against the public authority. Basing itself on the policy/operation distinction set out in *Anns*, the Court of Appeal agreed that it was not for the courts to interfere with statutory discretions given to public authorities but that did not prevent the courts from looking into claims to determine whether the acts complained of were policy or operational. Thus, the Trial Court's denial of the motion to strike was upheld thereby allowing the court to examine the nature of the impugned decisions and, with it, the cause of action on its merits.

In *Tarjan v. District of Rockyview* (1992), 130 A.R. 181 (Alta. Q.B.), a municipality was found liable for flood damage after it had issued a building permit for a home to be built closer to a creek than the flood control by-law allowed. On the very day the plaintiffs were moving in, the creek flooded, causing damage. There was a sufficiently close relationship between the plaintiffs and the municipality, based on prior communication between them, to support a duty of care. In the circumstances, the municipal development officer who issued the permit had even considered whether the by-law applied, but decided it did not based on what he thought was the slope of the creek's bank. The court, however, found that the by-law was "clearly and unambiguously" applicable and that the officer's job involved no discretion or judgment; he simply should have applied the by-law and rejected the application. Thus, issuing the permit in those circumstances was negligent.

On appeal, this judgment was thrown out and a new trial ordered on essentially procedural grounds, (1993), 13 Alta. L.R. (3d) 220 (C.A.).

In *Oosthoek v. Thunder Bay (City)* (1996), 34 M.P.L.R. (2d) 81 (Ont. C.A.), more than 200 basements became flooded during a violent rainstorm. The cause of the flooding was two-fold: in the majority of cases, it was the result of backup from storm and sanitary sewers that simply could not handle the volume of water; in several cases, however, the flooding was caused by the escape of water from the municipal waterworks system. Action both in negligence and nuisance were launched.

Although it had waited some 20 years to do so following recommendations from its own engineers, the city had passed a by-law in 1985 prohibiting homes from having a direct connection between eavestroughing runoff pipes and sewers. The evidence, however, made it clear that the by-law had never been enforced. The court ruled that the non-enforcement was an operational matter and that furthermore, even if the city had taken a policy decision not to enforce the by-law, that decision could not have been a *bona fide* exercise of policy discretion and thus, would not shield the city from liability. Basing itself on *Tock*, the court upheld the nuisance claim only in relation to the cases where the flooding had come from the escape of water from municipal reservoirs rather than from sewer backup.

A case where no liability was found for failure to enforce a municipal by-law (reversing the trial decision) was *Arsenault v. Charlottetown (City)* (1993), 100 Nfld. & P.E.I.R 204

(P.E.I.C.A.). The plaintiffs alleged that spray painting and sanding at an auto body shop next door to them, in violation of a licensing by-law, caused them illness and property damage. The main difference between the trial and appeal courts was in their assessment of whether by-law enforcement functions, which were the responsibility of the police in this case, were operational or policy. The trial court saw them as operational, saying that a police officer was not a policy-making authority.

The Court of Appeal, however, viewed the matter differently by importing the notion of prosecutorial discretion. It was also noted that the police had investigated but laid no charges. Having to make discretionary decisions at the operational level added a policy element that precluded the finding of a duty of care. One might infer that the court was saying that there were significant policy decisions in the by-law enforcement process and that, unlike *Kamloops*, there was no indication of a failure to consider enforcing the by-law. In other words, there seemed to be a *bona fide* policy decision.

Leave to appeal to the Supreme Court of Canada was refused, (1992), 95 D.L.R. (4th) vii (S.C.C.).

Bisson v. Brunette Holdings Inc. (1995), 15 C.E.L.R. (N.S.) 201 (Ont. Ct., Gen. Div.) involved negligence pertaining to actual work undertaken by a public authority, in this case, the Ministry of Environment of Ontario. This case is somewhat reminiscent of *East Suffolk*. Gasoline in storage tanks located on the defendant's property seeped into the basement of the plaintiff's adjacent building. For the purpose of allowing the accumulated gas fumes to escape and thereby lessen the risk of explosion, the provincial Crown, through a private company supervised by, and acting under the direction of MOE officials, made a small hole in the foundation of the building which caused a wall to collapse. In addition, MOE gave written assurances that it would take charge of cleaning up and restoring the site, which it subsequently failed to do, the effect of which was to further complicate matters for the aggrieved parties. In the end, the Court found the provincial government liable in negligence for the damages caused by the contractor working under its supervision and for its failure to effect the clean-up, in respect of which it had assumed a duty of care. None of the decisions involved were seen as matters of policy relieving the Crown of liability.

There are a number of cases where a public authority's liability has been engaged on this basis, the most notorious being *Roncarelli v. Duplessis*, [1959] S.C.R. 121. For example,

- Department of Fisheries officials forfeited and sold saltfish seized from a fisherman charged with and later acquitted of a fisheries offence, rather than taking a bond from the fisherman, as the statute permitted, to secure the release of the fish, *Rasmussen v. Canada* (1988), 24 F.T.R. 86;

- a municipality demolished a property after its owner repeatedly failed to respond to notices to remedy it, but had ordered the demolition under a statutory power to "remedy" rather than a power to demolish, *Re Watters and Town of Glace Bay* (1987), 34 D.L.R. (4th) 747 (N.S.C.A.);

- officials, in instituting prosecutions under regulatory legislation concerning wildlife conservation, acted in an abusive manner, ***Bouchard v. Quebec***, [1987] R.J.Q. 1304 (S.C.);

- officials acted in a clearly abusive and negligent manner in initiating inquiries and accusations concerning suspected criminal activity, ***Bérubé v. Desarzens***, [1989] R.J.Q. 96 (S.C.);

- officials acted in an abusive and negligent manner in their purported enforcement of the *Customs Act*, ***Rollinson v. Canada*** (1991), 40 F.T.R. 1.

In *Rollinson* the plaintiff, had been "harassed" and made to endure several "bad incidents" at the hands of customs officers at a point of entry in British Columbia. Customs officers had placed a sign containing reporting directions for incoming traffic that differed from *Customs Act* requirements near a pier, and had then exercised their powers of search and seizure in an extremely over-zealous manner when the plaintiff obeyed the sign but failed to comply with the technical provisions of the Act. The officers seized and confined the plaintiff's vessel (which was also his home), as well as his private papers, intimidated and "mocked" him, and threatened to tow his dwelling vessel, among other examples of what Muldoon J. called "deceptive abuse." The court recognized the protection accorded policy decisions in the cases on government tort liability, but also referred to cases that recognized a claim for damages in negligence based on acts done in the implementation of legislation. There was no protected policy decision here. Rather, this was a case of "tortious misconduct." He won his damages suit against the federal Crown on the basis of both negligence and breach of Charter rights.

White Hatter Limousine Service Ltd. v. Calgary (City) (1993), 21 Admin. L.R. (2d) 120 (Alta. Q.B.), is another case of over-enforcement with facts somewhat similar to those in *Lapointe*. A business was set up to provide limousine service in Calgary. The chief taxi inspector for the city informed the business that obtaining the required municipal taxi licence would "not be a problem." The city, however, froze taxi licences thus putting the limousine company's application on hold. Meanwhile, the company obtained a provincial permit as well as a municipal business licence and, under the authority of those permits, commenced operating the limousine service. City taxi inspectors constantly harassed the company by issuing a large number of tickets over several months, and by other means, such as stopping the limousine, questioning passengers, even interfering in radio promotional activities involving the company. The company was awarded general and punitive damages against the city for over-zealous and negligent performance of its enforcement functions.

There are many cases where the alleged negligence of a public authority was focused directly on the faulty performance of inspection duties and functions. In *Attorney General of Nova Scotia v. Aza Avramovitch Associates Ltd.* (1985), 11 D.L.R. (4th) 588 (N.S.C.A.), a building owner hired an architect to design, and supervise the installation of,

a private sewage system which involved septic tanks that would drain into adjacent fields. The system did not work requiring an entirely new system to be designed and installed. The building owner sued the architect who third-partied the provincial government on the ground that provincial department of health officials had failed to inspect the site properly and, as a result of that failure, had wrongfully approved the location and design of the system. The architect claimed that he should have been able to rely on that approval which, in fact, had formed the basis for issuance of the required building permits by municipal authorities.

The Court of Appeal found that the decisions of the health officials to approve the system was an operational one and, in the circumstances, was negligent because of their failure to have conducted a proper inspection of the site which would have required them to dig test holes in the ground to determine whether the ground's drainage capacities were adequate. The Crown was found to have breached its duty of care to those who could be expected to rely on the approval and subsequent permit to install the system. The court, however, went on to absolve the Crown of liability for its operational negligence because there was no proof that the architect had actually relied on the permit and, in any event, could not have done so in the court's view because he was a professional who had been hired to do a job; as such, he could rely only on himself or some other professional that he might have hired to assist him.

A similar result was achieved in the recent case of *Ingles v. Tutkaluk Construction Ltd.* (1998), 158 D.L.R. (4th) 147 (Ont. C.A.). The plaintiff had hired a contractor to dig out the basement floor of his house following plans that his wife had prepared. The plaintiff allowed the contractor to commence the work even before he had obtained the required building permit from the city of Toronto. By the time the permit was obtained, the work had progressed to the point where the inspectors had trouble determining whether the work was properly done. Shortly after the work was completed, the basement began to leak. The plaintiff sued both the contractor and the city for its negligence in failing to have discovered the defective work in the course of its inspection. At trial, the city was found liable.

In reversing the trial judge, the Court of Appeal went back to the second step of the *Anns* test to rule that the plaintiff's actions in allowing the construction to begin in advance of the permit had the effect of constituting a consideration taking him out of the class of persons in relation to whom the city's duty of care in conducting proper inspections was owed. In deliberately placing himself outside the ordinary inspection scheme, the plaintiff knew the risk he was running and could have no reasonable expectation that he could rely on the city's inspectors to find defects in the work.

The facts in *Aza Avramovitch* were virtually reproduced in *Cook v. Bowen Island Realty Ltd.*, [1998] 1 W.W.R. 647 (B.C.S.C.). The plaintiffs purchased a house from a developer containing both water and sewage systems that did not work properly and, in fact, were contrary to applicable codes and regulations. Although the building plans did not conform to statutory requirements, two provincial health inspectors issued a building permit for the sewage system. In addition, those same inspectors failed to carry out a

required inspection of the property before they gave final approval but rather, relied on a certificate from the engineer who designed and built the system certifying that it complied with statutory requirements. Among others, the court, relying on *Rothfield v. Manolakas*, found the public heath inspectors liable in negligence for their failures and omissions in the conduct of their duties.

In *Petrie v. Groome* (1991), 4 M.P.L.R. (2d) 182 (B.C.S.C.), a municipality in B.C. was found partly liable for negligently inspecting a house foundation 13 years beforehand. The house had been built on unstable landfill. Because the municipality did not request soil surveys in advance but relied on on-site inspections as the main method of checking for problems, the court held that the inspections should have been more rigorous than might otherwise be the case. The original inspection report made no mention of the house being built on fill.

Petruzzi v. Coveny (1991), 7 M.P.L.R. (2d) 183 (Ont. Gen. Div.), was a claim against both the vendor of a residence and the township charged with inspecting it. Both were found liable. The vendor/builder had not read the building code and construction was seriously deficient in several respects; water eventually entered the basement because of the defects and extensive repairs were needed. The township did not have an engineer; its building officer/by-law enforcement officer was a carpenter/general contractor with no previous experience in inspections nor any knowledge of the building permit by-law.

Lysack v. Burrard Motor Inn (1991), 58 B.C.L.R. (2d) 33 (C.A.), was a claim against a city and a hotel following the plaintiff's fall on a sidewalk and resulting injury. His claim was dismissed at both trial and appeal. The city's inspection and repair policy was assessed and found prudent and reasonable, and there was no evidence that it was not carried out carefully. Inspections were fairly frequent and written reports were made in which sidewalk damage was given a rating according to its seriousness. The more serious spots were repaired quickly.

In *Davidson v. Kamloops (City)* (1992), 10 M.P.L.R. (2d) 276 (B.C.S.C.), the plaintiff who ran a stop sign and collided with another vehicle, sued the city claiming that his view of the stop sign had been blocked by tree branches and that the city had been negligent in allowing that hazard to exist. Relying on the Supreme Court's ruling in *Barratt*, the court found that the city did have a duty of care pertaining to the inspection and maintenance of stop signs and, in that regard, had made a policy decision some years earlier to inspect all signs every six months. That decision was found to be reasonable and thus, a *bona fide* exercise of policy discretion. While the conduct of such inspections was operational, no negligence was found because the city had, in fact, faithfully carried them out as required.

In reaching its conclusion, the court distinguished the earlier case of *Campbell v. Calgary (City)* (1984), 55 A.R. 73 (Q.B.), which involved essentially identical facts of a collision following the failure of a motorist to stop at an intersection because the view of the stop sign in question was blocked by tree branches. The court found the city liable because it had a duty to keep the sign in clear view and had failed to put in place any system of routine or periodic inspections so as to ensure that its duty would be performed.

Barratt was also relied on, and, in fact, distinguished in ***Jones v. Vancouver (City)***, [1979] 2 W.W.R. 138 (B.C.S.C.) to find the city liable in negligence in respect of physical injuries suffered by the plaintiff from falling on a busy sidewalk as a result of stepping into a depression surrounding a manhole cover. City inspectors failed to follow an inspection system that had been established and, as a result, failed to become aware of the hidden danger presented by the depression in question. That failure amounted to misfeasance engendering liability on the city's part.

This case, however, was subsequently distinguished in ***Gaw v. Porte Industries Ltd.*** (1993), 15 M.P.L.R. (2d) 248 (B.C.S.C.) to enable a municipality to escape liability in respect of injuries suffered by the plaintiff while walking across a grassy strip of land that was owned by the city of Richmond but maintained by an adjacent store. The plaintiff stepped into a post hole that was covered and thus constituted a hidden danger. The city had no duty imposed by by-law or otherwise to maintain the grassy area and, in fact, had made a policy decision not to make any inspections of it. As a result, no duty of care pertaining to the safety of the grassy area in question fell to the city.

In ***Winkler v. Vaughan (Town)***, [1992] O.J. No. 573 (Gen. Div), the town was found not liable after the plaintiff fell and broke her hip on a public sidewalk that was filled with wet leaves, gravel and mud. While the town had a duty to inspect and maintain the sidewalk, it had met that duty. The town did inspect the sidewalk and found no immediate hazard. Nor had it received any notice or complaint of disrepair. Two other defendants were found liable for the plaintiff's injuries.

In ***Mortimer v. Cameron*** (1994), 17 O.R. (3d) 1 (C.A.), the Ontario Court of Appeal upheld a lower court judgment in respect of a claim brought by the plaintiff who had fallen 10 feet from an outdoor stairway at an apartment building after jostling with another guest at a party in the apartment. He sued the other guest, the party-givers, the building owner and the city. The court found that the stairway and landing complied neither with good building practice, the building by-law, or the building code, which was incorporated by the by-law. The owner had breached the provincial *Occupier's Liability Act* and had negligently failed to obtain a building permit. The city owed a duty of care in respect of ensuring compliance with its by-law which was, in fact, enacted to provide for the health and safety of the public. The city was found vicariously liable for the failure of its inspector to have both noticed, and reacted to, the egregious departures from the building code requirements. The court categorically stated that the city's duty here extended to the plaintiff inasmuch as his actual use of the premises in question fell within reasonably expected usage such as to be reasonably foreseeable. The fact that the plaintiff was mildly intoxicated and contributed to the damage he suffered by engaging in the horseplay leading to the fall was dismissed by the court as not sufficiently proximate. At trial, the building owner and the city were held joint and severally liable in the proportion of 20% and 80% respectively. The Court of Appeal changed these proportions to 60% against the builder and 40% against the city.

Givskud v. Kavanaugh (1994), 147 N.B.R. (2d) 1 (Q.B.) is an important example of how the principles enunciated in *Just* have been applied. The case involved an action for damages arising from the plaintiff's purchase from a seed grower of potato seeds that turned out to be infected with a disease known as Bacterial Ring Rot (BRR). The infected seeds were planted by the plaintiff ultimately resulting in the loss of an entire crop. Among the defendants was the federal Crown in respect of alleged negligence of an Agriculture Canada employee who had, on two occasions, refused requests by the plaintiff to have lots of the seeds in question tested in a laboratory maintained by Agriculture Canada for that purpose.

The Crown's role with respect to potato farming was determined by the *Seeds Act* and the *Seeds Regulations* which created a scheme for the certification of potatoes being sold, imported or exported in Canada. The certification scheme involved visual inspection of all seed operations by Agriculture Canada inspectors for which the farmers paid a fee. There were no regulatory requirements, however, for lab testing of seeds although it was acknowledged that, in fact, lab testing had been part of the certification process for a very long period of time.

In its defence, the Crown claimed that, in the first place, a common law duty of care cannot arise out of a mere statutory power, as distinguished from a statutory duty, which did not exist in regard to testing. This was summarily rejected by the court:

> I think that it is now authoritatively settled that a duty of care in tort may be derived from both a statutory duty and a statutory power.

The Crown further claimed that, in any event, based on pre-*Anns* law set out in *East Suffolk*, it enjoyed an absolute immunity in respect of any act of discretion exercised in good faith. On this, the court said the following:

> In my view, the *Anns* decision has changed the law as previously stated in *East Suffolk* when the House of Lords decided that a common law duty of care could co-exist with a statutory power in certain situations. As a method of determining which situations will be reviewable and those which will not, the Court developed the distinction between the "policy" and "operational" decisions of the public authority. Thus, if the public authority addressed in the exercise of a statutory power the policy considerations in a *bona fide* manner, such decision was immune from tort liability, but otherwise liability could be imposed for "improper exercise of discretion." In the operational sphere, discretionary decisions made by public authorities upon policy considerations are also immune, that is, the public authority is held to the same standard as it is with "pure policy decisions"; if discretionary decisions are not made upon policy considerations, they are subject to review and are governed by the ordinary principles of negligence.

Thus, the prime issue to be determined was whether the discretionary act of refusing to test the plaintiff's seed was a policy decision, that is to say, based upon policy considerations, or whether it was operational in nature, and, if the latter, whether it was reasonable such as to not breach the relevant standard of care. In the circumstance, the Court found that while the decision in question involved discretion, it could not be characterized as policy in that it was not related to the "policy considerations" set out in

Sutherland Shire Council (financial, political, economic, budgetary, etc.) and thus, was an operational decision subject to a private law duty of care.

One of the noteworthy aspects of *Givskud* was the trial judge's extensive review of leading Canadian and other jurisprudence in regard to tort liability of public authorities. The Supreme Court's rulings in *Brown* and *Swinamer* were not included as they had not yet come out when this case was considered.

The case of ***Lewis v. Prince Edward Island*** (1995), 133 Nfld. & P.E.I.R. 271 (S.C.), rev'd (1998), 160 Nfld. & P.E.I.R. 183 (P.E.I.C.A.), also nicely illustrates the application of the policy/operation distinction on facts somewhat similar to those in *Givskud*. This case also involved a damage claim, this time against the province, for losses in respect of actions ordered to combat potato infection. Provincial authorities were informed by a committee of experts that the plaintiff's potato crop had traces of bacterial ring rot, as confirmed by lab tests run by Agriculture Canada. The committee recommended that the provincial minister, pursuant to provincial legislation, order the plaintiff to spray his crop with a chemical known as MH-30, a potato sprout inhibitor. The minister accepted the recommendation and, through a departmental intermediary, ordered the plaintiff to spray his crop. As a result of implementing the order, the plaintiff suffered damage in the sense of a reduced crop yield.

The court found that the minister's decision to order the spraying was a policy decision that attracted no liability. Subsequent steps by departmental officials, however, such as writing to the plaintiff to tell him to spray and supplying him with the chemical were operational steps which could attract liability if negligence were found. In the end, the court did find negligence in ordering the spraying to commence at a particular time which would be most damaging for the crop, as well as in regard to failure to take proper account of the concentration and amount of spraying and attendant weather conditions, all of which were operational acts that contributed directly to the damage.

The Court of Appeal reversed the trial judge in finding that the actions of departmental officials were taken in good faith thus clothing them with immunity from liability by reason of express immunity provisions contained in the provincial statute under which they had been acting. The court went on to note that there may well have been a conflict between the private law duty of care falling on departmental officials not to harm individuals in the exercise of their functions, and their public law duty to exercise the authority vested by legislation to protect the integrity of crops and, in such an event, such a conflict justified limiting the scope of the private law duty where the statutory authority had been exercised in good faith.

3.3.3 other regulatory powers

There are several cases that involved claims of negligence in relation to the manner in which other types of discretionary powers were exercised by public authorities. For example, in ***Newfoundland (Bd. of Commrs. of Public Utilities) v. MacDonald*** (1991), 49

Admin. L.R. 48 (Nfld. C.A.), the basis of the claim was that the Board had approved rates to be used by one trucking company in bidding for a certain contract but had refused to approve rates sought by another company for the same contract or to convene a hearing concerning the rates approved for the first company. The judgments of both the trial court and the Court of Appeal actually dealt with a motion to strike out the plaintiff's claim against the governmental institution.

Both the trial court and the Court of Appeal dismissed the Board's request to have the action dismissed. The Board had claimed that inasmuch as its impugned decision was quasi-judicial in nature, it was shielded from civil liability by both the common law and a statutory immunity provision which provided that "no action lies... for anything done or purported to be done in good faith...." The court, however, held that this provision made it clear that the Commissioners were subject to liability if they had acted in bad faith. Accordingly, the court determined that if the plaintiff could make out an adequate claim in negligence, the Board would then have to disprove bad faith. In the circumstances the court ruled that the pleadings showed at least "an unusual course of behaviour" on the Board's part that called for an answer.

A negligence case brought against a government that did not succeed is ***Kripps v. Touche Ross & Co.*** (1992), 69 B.C.L.R. (2d) 62 (C.A.). Some investors in a mortgage company claimed negligence in connection with the issuing of the prospectuses that had led them to invest in a company that eventually failed. The investors lost their investments and claimed negligence against the accounting company whose opinions accompanied the prospectuses, as well against the government for accepting and not sufficiently scrutinizing them. The accountants also claimed that, if they were negligent, the province, through the Superintendent of Brokers, should have prevented that negligence.

Concerning the claims against the province, the court found that the likely purpose of the legislation was to "improve the overall quality of the market by reducing hazards..." but that this did not mean it was intended to "protect all who might lend money on marketed securities against the danger of accepting as security something which proves to be inadequate...." There was no statutory obligation on the Superintendent to scrutinize every prospectus, which would be impossible in any event. It was clear from the statute that issuing the receipt carried no implication of approval. As a result, it was determined that there was no duty of care owed by the government even if the losses could be said to be foreseeable. Leave to appeal to the Supreme Court of Canada was refused, (1993), 78 B.C.L.R. (3d) xxxiv (S.C.C.).

Much the same issue was tried in a couple of Commonwealth cases. ***Yuen Kun Yeu v. Attorney General for Hong Kong***, [1988] A.C. 175 (P.C.) involved a claim in negligence against the Commissioner of Deposit-taking Companies, an official whose job it was to maintain a register of such companies. He had some information-gathering powers and a power to refuse or revoke registration but did not warrant or otherwise ensure the fitness of the companies. The Commissioner's functions in refusing or revoking registration were quasi-judicial; he did not have any day-to-day control over any registered company.

The court used the occasion to attack the *Anns* two-stage test stating that it may have been "elevated to a degree of importance greater than it merits" and thus was "not... in all circumstances a suitable guide to the existence of a duty of care." The essence of the court's ruling was that while it was foreseeable that investors who invested in non-creditworthy companies on the register might lose money, mere foreseeability did not create a duty of care. The statute did not impose any duty on the Commissioner toward investors. In these circumstances there was no "special relationship" between the Commissioner and depositors to lead to a duty of care. The Commissioner's duties were exercisable in the general public interest, not toward individual members of the public. In addition, the court seemed to favour the argument that a finding of liability here could lead to expanded liability of regulatory agencies generally, and that such a development should be left to the legislature.

Davis v. Radcliffe, [1990] 2 All E.R. 536 (P.C.) was similar to *Yuen Kun Yeu*. Depositors who lost money after a bank's licence was revoked sued the Finance Board and Treasurer of the Isle of Man. The Finance Board provided advice and directions to the Treasurer, whose job it was to issue licences. The defendants were found to have no duty of care toward depositors who suffered financial loss; their functions were exercised in the interests of the public as a whole and involved matters of judgment and policy considerations extending beyond the interests of bank customers. For example, they might, in the public interest, decide to take a risk and try to "nurse an ailing bank back to health" rather than hasten its collapse. Liability was denied based on the *Yuen* case.

Kuczerpa v. Canada (1993), 52 N.R. 207 (F.C.A.), concerned a claim against several federal Ministers for alleged negligence leading to pesticide poisoning. It was alleged that the Minister of Agriculture had been negligent in exercising his statutory power over registration of pesticides, specifically in registering or failing to cancel the registration of "delayed neurotoxins," and that the Ministers of Health and Welfare and the Environment had breached, *inter alia*, the *Canadian Environmental Protection Act* by failing to study and inform the public of the effects of delayed neurotoxins. At trial, Teitelbaum J. allowed a motion to strike out the claim as disclosing no cause of action. He cited *Just* but concluded that the decision to register or cancel registration of pesticides was a policy one relating to the setting of standards and not faulty implementation of standards.

In *Longchamps v. Farm Credit Corp*, [1993] 1 W.W.R. 162 (Alta. C.A.), an applicant who had been refused a loan by the Farm Credit Corporation alleged that the corporation had been negligent in assessing his application. At trial, the court held that there was a lack of proximity between the applicant and the corporation, thus precluding a duty of care. The trial judge, however, did say that if there had been a sufficiently proximate relationship, the acts complained of, specifically reviewing and assessing the financial and farming information supplied by the plaintiff, would have been operational rather than matters of policy. In dismissing the appeal, the Court of Appeal indicated that in its view the scheme of the Act supported no cause of action against the corporation arising from the adequacy or inadequacy of its appraisal of the security offered or the other internal safeguards that are in place to secure the repayment of a proposed Farm Credit loan to a proposed Farm Credit borrower.

It might be noted that this case will be considered again in ensuing discussion of the retreat from *Anns* and the policy/operation distinction to be found in the next chapter.

Another case of alleged negligent assessment of an application was ***Bidulock v. Alberta*** (1992), 2 Alta. L.R. (3d) 35 (Q.B.). The application was for compensation under provincial disaster relief legislation after a business had been destroyed by arson. The government denied the claim twice. In considering a preliminary application to determine, among other matters, whether there was a duty of care, the court found that a *prima facie* duty of care existed; there was sufficient proximity between applicant and government to make it foreseeable that an applicant could suffer losses if his application were negligently assessed. Apart from affirming that discretionary acts could be operational and attract liability, the court left to the trial judge the question of whether the assessment was a "policy" function.

Two rather recent cases will close out this particular discussion. In ***M-Jay Farms Enterprises Ltd. v. Canadian Wheat Board***, [1998] 2 W.W.R. 48 (Man. C.A.), the issue was whether prairie grain growers, who were obliged to sell the wheat and barley that they produced to the Canadian Wheat Board, had a cause of action against the Board if the Board, by design or negligence, failed to obtain the optimum price on the sale of the grain through its regulatory power to fix the selling price. An action was brought by the plaintiff in respect of the sale price fixed for a particular allotment of wheat which they claimed was too high; that allowed the individual producers of the actual wheat in question to retain excess profits instead of having those profits returned to the pool of money for ultimate distribution to all producers. The Board's motion to strike out the statement of claim as disclosing no reasonable cause of action was granted by the Master of the Court of Queen's Bench. On appeal before a judge of that court, the action was restored. On appeal of that order, the Court of Appeal reversed the judge's order to reinstate the original claim and allowed it to be struck out. While the court rejected the view that there could not even be a *prima facie* duty of care on the part of the Board vis-à-vis individual grain growers under the first step of the *Anns* test by reason of insufficient proximity between them, it did find that there were valid policy reasons under the second step of that test to negate the application of any such duty of care falling on the Board, with those policy reasons disclosed by the *Canadian Wheat Board Act* and associated regulations. The Court of Appeal here stated that the governing statute's clearly expressed purpose was not the maximization of producer benefits but rather, the orderly marketing of Canadian grown grain in interprovincial and export trade and, as a result, the Board could not be held accountable to producers but only, through the responsible minister, to Parliament.

The case of *CSL Group Inc. v. Canada*, [1998] 4 F.C. 140 (C.A.) brought into question whether the Crown could be held liable for bureaucratic decisions made in the context of dealing with a strike which ultimately had a deleterious impact on the economic interests of particular persons. In November 1989, the Canadian Coast Guard went on a legal strike. Upon receiving notice of a strike, the *Public Service Staff Relations Act* allows Treasury Board, the corporate employer, to file with the Public Service Staff relations Board a list designating specific employees considered to be necessary for the maintenance

of essential services in respect of the safety and security of the public. The Act stipulates a 20 day period to file such a list running from the day it receives a strike notice from the union. In the circumstances, Treasury Board officials waited 21 days to file the notice designating essential Ships' Crews Group employees within the Coast Guard. Although the 20 day delay had previously been regarded as merely directory, the bargaining unit sought, and obtained an order from the Federal Court effectively preventing the PSSRB from accepting the notice on the ground that the 20 day time limit was mandatory. With no designated employees, there were no available Coast Guard personnel on hand to replace summer buoys with winter spars in the St. Lawrence Seaway in time before the build-up of ice made it impossible to do so without the assistance of ice-breakers which, in any event, would not have been available due to the strike. As a direct result, federal authorities responsible for overseeing navigation in the St. Lawrence had to impose severe restrictions on river traffic causing the plaintiff to suffer economic losses by reason of delays that had become unavoidable in delivering cargo. The plaintiff brought an action to recover those losses claiming that the Crown had a duty to file the list of designated employees which would have made Coast Guard personnel made available to replace the buoys with spars and that, by waiting until the statutory delay had expired, the Crown had been negligent in performing that duty.

The Court of Appeal essentially upheld the judgment of the Trial Division, [1997] 2 F.C. 575 (T.D.), which had dismissed the claim in damages against the Crown on a number of grounds. In the first place, the court ruled that the Crown had no duty whatever to maintain the St. Lawrence Seaway in perfect operating condition so as to ensure that vessels could navigate it without undue delay. As a result, there was no proximate relationship between the Crown and shipping companies or shippers of cargo. The only duty falling on the Crown related to protection and security of the public, which was a public duty. If any common law duty of care arose in regard to the performance of that duty through designating essential employees by filing the required list, it was only in so far as it served those purposes and, therefore, could not create a cause of action for recovery of economic loss. Secondly, the conduct of Treasury Board officials in not filing the list on time was not wrongful in the common law sense of that term, that is to say, negligent. For one thing, there was no fore-knowledge that the late filing would be contested and that the delay would be determined to be anything other than directory, which was how it had always been regarded up to then. In addition, the court found that, in the circumstances, the decision by those officials to wait until they had received all departmental reports on which employees should be designated was a prudent one at the time.

A third ground for excluding liability had to do with the fact that it was Treasury Board officials who had been involved. At trial, Nadon J. noted that public servants employed at the Treasury Board were, pursuant to s. 6(4) of the *Financial Administration Act*, so employed for the proper conduct of the of the business of the Treasury Board which involved, among other things, setting administrative policy in the public service, acting as corporate employer in respect of public servants, financial management of public money, personnel management of the public service, etc..., all of which made the Board in the business of "governing" rather than "servicing" that was typical of other departments. As

such, relying on the dictum of Linden J. in *Swanson Estate* to the effect that errors or omissions in the conduct of governing are beyond the reach of tort law, Nadon J. concluded that the conduct of Treasury Board, or its officials, could not engender liability in tort. The Court of Appeal endorsed that finding by stating (at para 14):

> Even if we could isolate one genuinely wrongful act on the part of an employee, such as lingering at the tavern along the way to filing (and that is somewhat how the appellants present their position, although the evidence is that it was the actual authorities at the Treasury Board who decided to delay filing), it would not be possible, logically, to say there was any liability to the public. The first and only direct consequence of the wrongful act by the employee would be to have created an obstacle to the Treasury Board or the government filing its "list", and the whole thing would end there, since the default by the Treasury Board could not result in civil liability.

3.4 Provision of information by public authorities - negligent misrepresentation

The possibility of tort liability attaching to this function arises in relation to the issuance of false or misleading information on which there is reliance leading, as a direct consequence, to damages, usually in the nature of financial losses. In other words, what this deals with is the application to public authorities of the following *dictum* of Lord Morris of Borth-y-Gest in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.):

> ... if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.

Much of the Canadian case law on this pre-dates *Anns* and in any event, is not dependent on the policy/operation distinction inasmuch as, in the normal course of affairs, the issuance of a false or misleading statement by an employee of a public authority would have been the result of his own act and not mandated by a decision made at a higher level. Negligent misrepresentation cases are nevertheless included in this chapter in so far as they deal with a fairly common function of public bodies where tort liability potentially arises.

Windsor Motors Ltd. v. Powell River Corp. (1969), 68 W.W.R. 173 (B.C.C.A.) appears to be the earliest Canadian example of the application of *Hedley Byrne* within the public sector. A municipality was held liable where one of its officers erroneously issued a licence to establish a used-car business in a location that, in fact, was not zoned for such a purpose and where, as a result, the business had to be dismantled and moved elsewhere. The Court held that the person seeking the licence reasonably ought to be able to trust that the municipal official in question would give him reliable information as to where he might set up his business and that, in the circumstances, that official failed to exercise the care required of him not to give out wrong information.

The ruling in *Windsor Motors* was followed in several other cases dealing with erroneous or incomplete information having to do with zoning or other municipal by-laws. In *Gadutsis v. Milne*, [1973] 2 O.R. 503 (H.C.), erroneous zoning information was provided by a municipal employee whose job it was to provide such information to the public upon request. The Court recognized that persons seeking such information will rely on its validity thus creating a duty on the part of the municipal employees to take appropriate care in ensuring the accuracy of the information they give out.

In *H.L. & M. Shoppers Ltd. v. Town of Berwick* (1977), 82 D.L.R. (3d) 23 (N.S.S.C.), the failure of a municipal employee to correctly interpret a building by-law was found to be on all fours with the facts in *Gadutsis* to find the municipality vicariously liable for the damages caused to the plaintiff for issuing the building permit in error and then having to revoke it.

In *Jung v. District of Burnaby* (1978), 91 D.L.R. (3d) 592 (B.C.S.C.), municipal employees advised the plaintiff that a building which he was interested in buying complied with fire regulations when they knew, or should have known, that, in fact, it did not. The court found the municipality liable on the ground that the plaintiff, not having the required expertise in the matter, was entitled to rely on the municipality to provide accurate information.

In *392980 Ontario Ltd. v. City of Welland* (1984), 45 O.R. (2d) 165 (H.C.J.), a letter sent by the city's solicitor to the plaintiff pertaining to zoning which, although accurate in terms of what it actually said, was incomplete in terms of addressing the particular interests of the plaintiff and thus, was held by the court to be misleading The court also ruled that the fact that the misrepresentation was gratuitous in that the letter in question had not been solicited by the plaintiff does not prevent the *Hedley Byrne* doctrine from operating.

Some of these cases were cited in the Australian case of *Shaddock v. Parramatta City Council* (1981), 36 A.L.R. 385 (H.C.A.). The plaintiff, along with others, purchased a parcel of land for the purpose of redevelopment. Before doing so, the plaintiff's solicitor made a telephone call to the city council to inquire whether there were any proposals pending to widen local roads which would have been adverse to their interests. An unidentified person in the town planning department reported that were no such proposals. Subsequently, in response to filing a document, the plaintiff received a certificate that was, in effect, silent on road widening although the filing in question did not purport to solicit that particular information as such. In fact, road widening proposals that would have affected the land in question had been approved in principle two years earlier. The plaintiff purchased the land and then discovered that he could not develop it because of the road widening approvals. In awarding damages, the court made two significant observations: first, the plaintiff could not reasonably rely on the unconfirmed answer to the telephone inquiry made by an unidentified person; rather it was the silent certificate that was the source of the negligent misstatement because of its misleading effect in causing the plaintiff to reasonably conclude that no road proposals had been made or approved. Second, and more generally, the court suggested that the duty of care to

provide accurate and complete information does not depend upon knowledge by the person providing such information as to the precise use to which that information will be put. It is enough if he knows, or ought to know, that the person seeking the information has a serious purpose in mind, that he proposes to act on it and that he may suffer loss if it proves to be false or misleading.

Public authorities have been found liable for negligent misrepresentation pertaining to other types of information. In *Patrick L. Roberts Ltd. v. Sollinger Industries Ltd.* (1978), 19 O.R. (2d) 44 (C.A.), the Ontario Development Corporation, a provincial Crown corporation, was found liable for misrepresentations made by a loan officer in stating that a loan that had been applied for was "frozen" for the moment but would be forthcoming when, in reality, the loan in question was in trouble because of the failure of the applicant to complete required paperwork, which the loan officer did not mention. That assurance was relied on to enable the plaintiff to order equipment which the loan, once executed, would cover. The loan was never advanced. The loan officer was found not only to have been negligent in misrepresenting the status of the loan but also to have been in a position where he had a duty to provide reliable advice in relation to the status of loans within his portfolio to administer.

The case of *Forbes v. Saint John (City)* (1986), 33 B.L.R. 200 (N.B.Q.B.) involved somewhat similar facts. The city was designated as an agent for Canada Mortgage and Housing Corporation to administer a federal grants program set up to assist in the repair and rehabilitation of family housing units in specified locations. The plaintiff, whose construction company would have been eligible for a loan under the program, asked a city employee who was involved in the day-to-day administration of the program for the city, whether he could proceed with work prior to actually obtaining the loan. The employee said yes and the plaintiff commenced work at his own cost. The city employee in question occasionally advised the plaintiff that the funds were not yet available but would become available in due course. However, in the interval, the program was changed and no money was given for work already completed. The city was held liable because the employee, in fact, knew of CMHC's policy that advance work was at the owner's risk and had not only failed to so advise the plaintiff but also made misleading statements about the availability of the funds. As in *Patrick L. Roberts Ltd*, the court found that the employee occupied a position involving specialized knowledge to know that his statements would be relied on.

Similarly, in *Sevidal v. Chopra* (1988), 64 O.R. (2d) 169 (Ont. H.C.), the Atomic Energy Control Board was found to have breached its duty of care to provide accurate information where one of its employees gave false information to a person about radioactivity in the backyard of a house that she was in the act of purchasing and, indeed, had encouraged the person to go through with the purchase knowing that his advice would be relied on. The breach here amounted to negligent misrepresentation.

Canada Mortgage and Housing was also involved in the case of *Snow v. Cumby* (1987), 31 D.L.R. (4th) 192 (Nfld. C.A.). A negligence claim was brought against CMHC in respect of misrepresentations contained in an inspection report made by one of its appraisers as to

the physical condition of a house which were relied on by the purchasers. The misrepresentations came about as a result of a negligent inspection that had failed to uncover significant defects and problems which the purchasers had to fix at their own cost. The misrepresentations in question actually consisted in omissions in the report. The claim was for the amount of those repairs. Basing itself directly on *Hedley Byrne*, the Court found CMHC liable but, citing *Anns*, and, in particular, the second of the two-step test, limited the damages that would be recoverable only to the cost of the repairs necessary to bring the property up to required standards so as to enable a proper appraisal.

Providing less than complete information has been found to constitute negligent misrepresentation. In ***Fletcher v. Manitoba Public Insurance Corporation*** (1990), 74 D.L.R. (4th) 636 (S.C.C.), the plaintiff, in buying car insurance from the public automobile insurer, was not told of the various types of insurance policies that were available and chose the cheapest package that failed to cover all of his expenses arising from an out-of-province accident. The court found a duty of care relating to the provision of complete information about the various options based upon the fact that such information was in the nature of professional advice. As a result, the plaintiff, as a purchaser, fell into a class of persons which was entitled to rely on the crown corporation, which was in the insurance business, to provide that information.

It might be noted in passing that Wilson J. summarily rejected the defendant's argument that because it was a public body, it should be granted the immunity traditionally accorded to public authorities in respect of their failure to act, a view that would have resurrected the misfeasance/nonfeasance distinction that had been acknowledged in *East Suffolk* and rejected subsequently in *Anns*.

The same point regarding the misleading effect of incomplete information was made in ***Spinks v. Canada***, [1996] 2 F.C. 563 (C.A.). The plaintiff was hired by Atomic Energy Canada Ltd., an agent Crown corporation. At his "signing on" interview with personnel officers of AECL, he was not informed of his right, under applicable regulations, to "buy back" his prior pensionable service with the government of Australia for purposes of his pensionable service with AECL thereafter. It was only after about 13 years of employment with AECL that he became aware of that possibility, at which time the cost of buying back was about $210,000. By contrast, had he elected to buy back upon being hired 13 years earlier, his cost would have been around $68,000. The difference between the two was claimed as damages arising from the alleged negligent misrepresentation on the part of AECL's personnel employee in having failed to advise him fully and correctly of his buy-back options.

At trial, the plaintiff's negligent misrepresentation claim was rejected principally on the ground that the staffing officer who had dealt with him at his signing-on interview did not owe him any duty of care. This, however, was reversed by Linden J.A., speaking for the Federal Court of Appeal. A special relationship between representor and representee is usually created by foreseeability that representations will normally be relied on which obviously existed in the case of the plaintiff as a new employee being interviewed by a staffing officer of his new employer. Thus a duty of care on the part of the employer

arose in regard to the plaintiff in view of the latter's reasonable reliance on the former in relation to pension issues which the staffing officer should have foreseen. No proof of actual knowledge of harm or reliance need be demonstrated by the plaintiff. In any event, AECL had created a manual which explicitly made it the duty of staffing officers to advise new employees of such matters. In addition, misrepresentation can arise not only from positive statements but also from failure to fully divulge appropriate information since that failure can easily mislead. In the circumstance, the court found that the defendant had breached the standard of care that could be reasonably expected of employers vis-à-vis new employees.

Most recently, in *Luo v. Canada (Attorney General)* (1997), 33 O.R. (3d) 300 (Gen. Div.), the court allowed the Trial Judge's finding of negligent misrepresentation to stand even though the plaintiff, in presenting his claim as a case in negligence, had failed to specify that particular theory of recovery. Officials in the Unemployment Insurance Commission advised the plaintiff, a recent immigrant, that if he were to continue English language instruction offered by the Commission, his unemployment benefits would continue. He was, however, not told that his continuation of language training first had to be approved in order for the benefits to continue to be paid. The court took the plaintiff's limited understanding of English into account as a factor in determining the Crown's duty of care to provide full and accurate information regarding the continuation of his benefits, noting as well that this was not a situation where an individual merely sought routine information from a government employee.

There are instances where claims against public authorities for negligent misrepresentation were rejected. In *Coopérative de Commerce de Milles-Îles v. Société des Alcools du Québec*, [1996] R.J.Q. 2112 (C.A.), in response to a public offering by the S.A.Q. to sell off its retail liquor stores, the plaintiffs, which included individuals who had quit their jobs working in S.A.Q. stores to become part of the bidding cooperative, submitted a bid for a particular store and was advised that the bid was accepted and would be the subject of formal adjudication in competition with other qualifying bids. Shortly thereafter, the S.A.Q. advised all bidders, including the plaintiff, that there were administrative problems holding up the adjudication process. Some months later, following a provincial general election, the incoming government took a cabinet decision to shelve the program of privatization altogether. The plaintiffs sued for damages alleging, among other things, delictual (tort) liability based upon misrepresentations by the S.A.Q. which, they claimed, had induced them to quit their jobs and incur bidding expenses and lost profits. Although neither the trial judge nor the Court of Appeal considered that matter in terms equivalent to the common law tort of negligent misrepresentation as such, the Court of Appeal did ultimately find that the S.A.Q. itself did not misrepresent the actual state of affairs about the sale of its liquor stores inasmuch as the change of policy on privatization came from the government and not itself.

A similar result had been achieved earlier in the Australian case of *San Sebastian Pty. Ltd. v. Minister Administering the Environmental Planning and Assessment Act* (1986), 68 ALR 161 (H.C.), where a misrepresentation by a public authority was alleged to have been contained in a redevelopment plan published by two public authorities, one state, one

local. The misrepresentation was claimed to have been made without due care and which the plaintiffs, who were local developers, had relied on to their detriment. It was also claimed that the public bodies were negligent in not announcing publicly that they were abandoning elements of the plan on which the plaintiffs relied. At trial, the public authorities were found liable. This was reversed by the Court of Appeal. The High Court upheld the Court of Appeal in determining that there was no duty of care on the part of the public authorities toward the plaintiffs in respect of the content of the development plan and thus, no representation made in respect of which detrimental reliance might be claimed. More generally, inasmuch as the plan had no binding characteristics or legal effect on property rights, it was regarded by the High Court simply as an expression of "policy" and, as such, could not engender a duty of care and liability in relation to changes made to it, whether such changes were or were not made public.

Contrasting decisions may be found in ***Unilan Holdings Pty Ltd. v. Kerin*** (1992), 107 A.L.R. 709 (F.C.A.), and in ***Meates v. Attorney General***, [1983] N.Z.L.R. 308 (C.A.). In *Unilan*, the federal minister responsible for the wool trade made a public statement in the course of a speech given at a conference of the international wool cartel in which he said that he had given a "cast-iron guarantee," which he was repeating then and there, that the Australian government would not contemplate, under any circumstances, any further downward movement in the floor price for wool. Eight months later, the government suspended the entire wool marketing scheme which had the immediate effect of allowing the price of wool to slump. The plaintiff had relied on the minister's statement to hold on to large quantities of wool and thus suffered serious losses in the value of their inventory. A claim was brought against the minister based on breach of statutory duty as well as for negligent misrepresentation. The defendant moved to strike out the claim as disclosing no reasonable cause of action. The court, however, relying on the ruling in *Shaddock* (*supra*) and *Meates* (considered next), found that there could indeed be a duty of care in relation to public statements by ministers or others about future government policy and thus allowed the statement of claim to stand in respect of those elements dealing with negligent misrepresentation.

In *Meates*, the representations in question consisted of advice and encouragement given by the Prime Minister and other ministers of the New Zealand government to investors to continue to sink money into a commercial venture on the undertakings that they would be indemnified. When ultimately no financial assistance ever came, those representations were found to constitute negligent misstatements under *Hedley Byrne* because of the detrimental reliance such statements foreseeably produced.

The recent case of ***Superior Auto Sales Inc. v. Canada (Minister of National Revenue)***, [1997] F.C.J. No. 920 (T.D.), dealt with the same issue of assurances coming from government officials which were relied on by the plaintiff to its detriment. The plaintiff, an American automobile broker, was in the business of buying vehicles previously imported into Canada and then exporting them across the border to the U.S. Although the customs duties paid by the importer would be tacked onto the retail price paid by the broker for those vehicles, he could ordinarily get a refund of the duties paid where he obtained a document from the importer or manufacturer effectively waiving their own

right to such a refund. At some point in time, the importer began to refuse issuing the waiver thereby jeopardizing the export business of these brokers. According to the plaintiff, assurances were given by Mrs. E. Fournier, an official at Revenue Canada, that special orders in council would be passed that would allow the refunds of customs duties to be made notwithstanding the absence of required waivers. The plaintiffs relied on those assurances and continued to purchase and export cars, paying the import duties, in the expectation of eventual refund. In the end, the promised orders were never made and the plaintiff claimed damages on the basis of negligent misrepresentation and detrimental reliance. The court dismissed the action. For one thing, the trial judge came to the conclusion that the plaintiff had not proved to his satisfaction that that the assurances of forthcoming orders in council had, in fact, been given. More significantly, however, the trial judge went on to say the following (at para 103):

> I should state that, even if Ms. Fournier had given the assurance alleged, it would not have been reasonable for the Plaintiff to rely on that assurance. Bearing in mind that an order-in-council had to be passed in order to remit the duties to the exporters and that the Plaintiff was aware that an order-in-council was necessary, the Plaintiff ought to have known that Ms. Fournier could not have given a valid assurance. No one but the Minister himself had the authority to do so. In my view, the Plaintiff ought to have known that it was taking a calculated risk in continuing to do business, at a loss, in the hope that a refund would be obtained.

There are cases where the courts have refused to impose liability in respect of statements or representations that were actually found to be false or misleading, but where negligence itself had not been proved. For example, *Wilfred Nadeau v. The Queen*, [1977] 1 F.C. 541 (T.D.), aff'd [1980] 1 F.C. 808 (C.A.), involved advice given by public servants to ministers regarding the awarding of a tendered contract to someone other than the lowest bidder. The advice leading to the award of the contract was found to be "questionable" in the light of applicable government policies regulating tendering and contracting. The court refused to hold the Crown liable in the absence of proof of malice or improper considerations or some other conduct that could be seen as negligent.

In *Sebastian v. Saskatchewan* (1979), 7 C.C.L.T. 236 (Sask. C.A.), where a public servant misinterpreted a statute which ultimately caused damage to the plaintiff, the court stated that this kind of mistake, made "honestly and in good faith by a government employee carrying out his duties, is not a tort or a wrong that gives rise to a right of action or a claim for damages."

Similarly, in *Inland Feeders v. Virdi* (1981), 18 C.C.L.T. 292 (B.C.C.A.), the Court of Appeal rejected the view that a municipality could be liable in connection with the issuance of erroneous zoning information by an employee without negligence on the employee's part.

Earlier, in *Hodgins v. Nepean Hydro-Electric Commission*, [1975] 60 D.L.R. (3d) 1 S.C.C.), the Supreme Court held that provision of an erroneous estimate as to the additional cost of electricity necessary to heat an extension to the plaintiff's house that would contain an indoor swimming pool would not engender liability based on negligent misrepresentation where the defendant, although wrong in its estimate, had used generally

accepted standards for calculating electricity consumption. The court held that inaccuracy of the estimate was not conclusive of negligence.

The recent English case of *Welton v. North Cornwall District Council*, [1997] 1 W.L.R. 570 (C.A.), was a case on negligent misrepresentation unlike any of the others summarized here. The plaintiffs owned a guest house with a kitchen and dining room and thus fell under statutory requirements pertaining to inspection by local health authorities. An inspector, on repeated occasions, visited the premises and instructed the plaintiff to make substantial alterations to the premises in order to comply with applicable regulations, failing which he threatened to close the premises down. The plaintiffs complied and, in fact, had significant changes made at their own cost. Subsequently, the plaintiffs discovered that 90% of the physical improvements made at the instruction of the inspector were, in fact, unnecessary to comply with applicable regulations. The court awarded damages covering the cost of the unnecessary expenditures on the ground that, in issuing detailed building requirements under threat of closure, the inspector had assumed a responsibility to take care in the statements he made as to their accuracy in relation to complying with health regulations, which he had failed to do, knowing that the plaintiffs would rely on his instructions so as not to be closed down. The court went on to suggest that because the acts of the inspector were outside his statutory powers, it was unnecessary for the court to consider whether it was just and reasonable in the circumstances to impose a duty of care on the defendant.

3.5 law enforcement and correctional services

Although, as discussed in the succeeding chapter, English and Canadian jurisprudence dealing with negligence in relation to public authorities has diverged in their application of the policy/operation distinction, the section will consider English case law dealing with police liability along with Canadian cases. In recent years, the English courts have shown a greater reluctance than Canadian courts to attach a duty of care to police in relation to the ordinary law enforcement functions they perform. For the most part, this reticence is simply the application of the "fair and reasonable test" coming out of post *Anns* jurisprudence that had become determinative of whether a duty of care arose. The prime significance of English jurisprudence lies in those particular cases where the police have been found negligent.

Until fairly recently, there hadn't been a great deal of jurisprudence directly focused on negligence in the performance of policing functions. There was some case law, however, dealing with the nature of police discretion in the performance of law enforcement duties. A leading case is *R. v. Metropolitan Police Commissioner, ex parte Blackburn*, [1968] 2 Q.B. 118 (C.A.). Although this case dealt with an application for *mandamus* on the part of a private citizen to compel the police to enforce gaming laws, it did have something to say about police discretion within the framework of the overall duty to enforce the law. Lord Denning stated the following at p. 136:

> I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post

> his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought..... Although the chief officers of police are answerable to the law, there are many fields in which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide, in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought.

The last statement concerning police discretion in any particular case is most important to note. What the court found intolerable in this case was the failure to enforce the gaming laws based on a "policy decision" taken by the Commissioner not to do so. In fact, Salmon L.J. suggested that a failure to enforce the law based upon this kind of *a priori* policy decision would go beyond the limits of police discretion to constitute a clear breach of duty:

> In my judgment, the police owe the public a clear legal duty to enforce the law - a duty which I have no doubt they recognise and which generally they perform most conscientiously and efficiently. In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene. For example, if, as it is quite unthinkable, the chief police officer in any district were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in the district would be able to obtain an order of mandamus for the instruction to be withdrawn. Of course, the police have a wide discretion as to whether or not they will prosecute in any particular case. In my judgment, however, the action I have postulated would be a clear breach of duty. It would be so improper that it could not amount to an exercise of discretion. (pp. 138-9)

Virtually the same issue arose in Canada in the case of ***R. v. Catagas***, [1978] 1 W.W.R. 282 (Man. C.A.). Expressly for the purpose of overcoming a Supreme Court decision that had ruled that Indians were subject to the *Migratory Birds Convention Act*, provincial officials formulated a policing policy, given effect by the RCMP, that Indians would not be charged with offences under that statute in stipulated conditions. The accused was charged; at trial, he was found not guilty on the ground that the no-charge policy gave him a lawful excuse to hunt and thus, he did not commit an offence under the statute. This was reversed on appeal with a guilty verdict substituted.

Neither of these cases, of course, speak to whether the exercise of discretion, in any particular instance, even if not amounting to a breach of duty, is or is not negligent. An early case testing that issue arose in ***O'Rourke v. Schacht*** [1976] 1 S.C.R. 53, where the Court had found partial contributory negligence on the part of a police officer in his failure to replace a road hazard warning sign which had been knocked down in an accident and where that failure led to another accident. The court saw the failure to replace the sign as a breach of the duty to warn which arose out of the statutory duties of the police to maintain a traffic patrol.

The failure of a constable either to warn on-coming motorists of a treacherous stretch of highway owing to ice, or to report the condition to headquarters so that a road crew could be dispatched, was found to constitute negligence in ***Millette v. Coté; Dennery v. Coté***,

[1971] 2 O.R. 155 (H.C.). That was reversed on appeal simply on the ground that whatever negligence there may have been on the part of the police did not have a causal connection to the accident that was the subject of the suit. The court, in fact, took pains to make it clear that it was not reversing what the trial judge had said about the duty of the police to warn of dangerous conditions as contained within their statutory duties in relation to the conduct of highway patrols.

A constable's failure to warn of imminent danger also arose in *Beutler v. Beutler* (1983-84), 26 C.C.L.T. 229, which involved an accident resulting in the escape of gas from a gas pipe that had been ruptured when a car crashed through a storefront window. A constable on the scene was told by others brought in to remove the car and repair the damage that there was no risk of an explosion. An explosion did occur and suit for damages was brought against the police, among others. The court acknowledged that the statutory duty of the police to patrol highways includes a duty of a police officer to warn motorists of a dangerous condition which he has observed. In the absence of a statutory duty, there may be a common law duty to warn of a dangerous situation coming out of a constable's common law duty to protect life and property. Both of those duties will require that the constable form an opinion as to whether a dangerous situation exists. In the circumstances, the court concluded that in view of what he had been told, the constable had a valid reason not to believe that an explosion was imminent and thus, no duty to warn people in the immediate vicinity.

An application of this duty was considered in the English case of *Clough v. Bussan*, [1990] 1 All E.R. 431 (Q.B.), where an accident occurred at an intersection where the traffic lights were not functioning properly. The claim against the police was based upon their alleged negligence to take proper steps to ensure the safety of an intersection once they had learned of the malfunctioning lights. The court held that the police's general duty to protect life and property does not translate into a duty of care to every individual motorist who might pass through a particular intersection. The missing link in this case was the required proximity between the police and members of the public at large to engender a duty of care.

By contrast, in the earlier case of *Rigby v. Chief Constable of Northamptonshire*, [1985] 2 All E.R. 285, the Court found the police negligent in failing to ensure the availability of adequate fire-fighting equipment, and thus liable for damages caused by a fire which erupted from tear gas which they propelled into a building to flush out a dangerous psychopath. In this case, the court found sufficient proximity between the plaintiff and the police to give rise to a duty of care. It might be noted that negligence was also claimed in respect of the decision made by the police as to the type of tear-gas they used in the circumstance. More specifically, it was claimed that the negligence lay in having chosen, for reasons of economy, to purchase a cheaper type which was susceptible to combustion whereas, had another, more expensive type been used, the fire would never had occurred. The court rejected this cause of action on the ground that the decision pertaining to the selection of the tear-gas was a policy one and thus could not engage liability for negligence.

The question of proximity also arose in *Alexandrou v. Oxford*, [1993] 4 All E.R. 328 (C.A.), where police officers responded to an alarm generated by forced entry into a shop. The alleged negligence pertained to the failure of the police to check out the rear of the shop on the assumption that the alarm was a false one when, in reality, the shop was actually being robbed. The court held that the police do not owe general a duty of care to the public to respond adequately upon being informed of a crime in progress so as to prevent the crime from being successfully completed. According to Lord Diplock:

> The risk of sustaining damage from the tortious acts of criminals is shared by the public at large. It has never been recognized by the common law as giving rise to any cause of action against anyone but the criminal himself.

The case of *Hill v. Chief Constable of West Yorkshire*, [1989] 1 A.C. 53 (H.L.), is widely regarded as having the defined the current English law of negligence in relation to the provision of policing services. A claim in negligence against the police for its alleged failure to capture a notorious criminal was struck out as showing no reasonable cause of action. In the circumstance, the plaintiff's daughter had been murdered by someone who had committed 20 previous similar acts, all perpetrated against young women. The Court held that the police did not owe a general duty of care to identify or apprehend an unknown criminal or a duty of care to individual members of the public even though the police should have known that the murderer was likely to strike again and that his victim would be another young woman.

The issue of a police officer's duty to warn also arose in *Danzas (Canada) Ltée et al. v. The Queen*, [1986] 1 C.T.C. 174 (F.C.T.D.). A damage claim was brought against the Crown in respect of, among other things, the alleged negligence of the RCMP to take appropriate measures, such as warning importers and customs-brokers, to prevent the occurrence of the crimes going on at Mirabel Airport of which it was aware. The claim was founded on the statutory duty of all members of the RCMP to perform all duties assigned to peace officers in relation to the preservation of the peace, prevention of crime and offences against the law, the apprehension of criminals and offenders, etc. The plaintiffs were victims of fraud and theft at Mirabel Airport committed by Customs officials, among others. While inferentially acknowledging the possibility of liability with respect to negligent performance of its duties, the Court found that, in the circumstances, the RCMP had, in fact, conducted itself without fault in that it had taken prompt and effective steps to respond to the criminal activities although, unfortunately, not soon enough to prevent the crime perpetrated against the plaintiffs. More generally, the Court refused to hold the Crown liable as an insurer in respect of the losses suffered at its facility.

There seems to have been a spate of cases recently that have tested the liability of police for damages to the reputation of individuals. In *Hamel v. Canada (Attorney General)* (1996), 141 D.L.R. (4th) 357 (F.C.T.D.), the plaintiff, who had a business of importing horses from the U.S. into Canada, had his truck, which was carrying 10 horses, stopped at the border and was escorted to a veterinary hospital where the horses were tested to see if they were carrying cocaine internally. That information was leaked to the press. Eventually, the horses were returned when no drugs were found. The plaintiff brought suit claiming damages to his reputation caused by the media reports. In addition, he

claimed damages on the ground that the RCMP had committed a fault in detaining the horses on the flimsy ground of having a report of smuggling via horses without having conducted a serious investigation as to the soundness of that information.

The court found that the RCMP had no statutory authority to detain the horses as there had been no real investigation so as to give them reasonable grounds to do so under the *Customs Act*. As a result, the RCMP officers acted wrongfully in detaining the horses. In addition, the court found that the RCMP had leaked to the media the details of the detention and suspicion of Mr. Hamel of smuggling, which also constituted an wrongful act causing damage to his reputation.

Helliwell v. Chief Constable of Derbyshire, [1995] 4 All E.R. 473 (Q.B.), raised similar issues. The plaintiff was fingerprinted and photographed at a local police station in connection with certain offences on which he was later convicted. A few years later, a group of store-owners who were concerned about the rising level of shoplifting and harassment of shopkeepers, revived a local vigilance scheme and asked the police to supply them with photographs of people who had caused problems for shopkeepers in the past so that they might be forewarned. The police complied and supplied photos taken from their files, including the plaintiff's picture. The photos in question made it clear that they were taken of persons who were in police custody. The plaintiff sought declaratory relief and an injunction restraining the police from disclosing his photograph to the public. He also sought damages for the tort of breach of confidence. The defendant moved to strike out the claim as disclosing no reasonable cause of action and in particular, that the facts pleaded were incapable of sustaining a claim for breach of confidence. The court ruled that, in the circumstances, the police were entitled to make reasonable use of the photo for the limited purpose of prevention and detection of crime and other related law enforcement purposes and, within those parameters, there was an obvious and vital public interest in such use being allowed. Accordingly, inasmuch as the police had not breached the narrow purposes permitted and had acted in good faith, the court accepted the motion to strike.

The issue of negligence in respect of the failure to conduct a careful investigation came up in the case of ***Beckstead v. Ottawa (City) Chief of Police*** (1995), 37 O.R. (3d) 64 (Gen. Div.). The plaintiff was arrested and charged with theft of money from a friend's bank account by fraudulent use of the account holder's bank card. Charges were laid against the plaintiff after a cursory investigation based on one twenty minute interview with her where the officer in question had made up his mind in advance to charge her. The charges were ultimately withdrawn by the Crown Attorney after 8 court appearances. She sued for false arrest, slander and negligence. The claim of slander was rejected. The court did, however, find that the police had been negligent in their investigation which led directly to bringing charges. In making that finding, the court explicitly rejected the contention that the common law immunity from liability absent malice given to prosecutors extends to police officers in respect of their law enforcement functions, such as the investigation of crime.

That last issue had, in fact, been at the heart of two other cases. *In Challenger v. Nepean (City) Police Service*, [1994] O.J. No. 2804 (Gen. Div.), a police investigation in relation to alleged drug offences led to a raid at a residence during which a person was shot and killed by a police officer. Among other things, the claim against the police for damages alleged negligence in relation to the investigation and the manner in which the raid had been conducted. The defendants, which included numerous individual police officers, brought a motion to strike on the ground that the immunity recognized under the common law attaching to prosecutors requiring the showing of malice should be extended to police in carrying out their law enforcement duties. In dismissing the motion, the court ruled that the defendants had failed to make out a case as to why such as extension should be permitted in view of the significantly different duties between prosecutors and police. The court added that the wide-ranging policy considerations inherent in such a departure from the long-standing current law on this matter made it imperative that such a change should be left to the legislature and not to the courts.

By contrast, in *Reynan v. Canada* (1993), 70 F.T.R. 158, a motion to strike was granted in respect of a claim of negligence by the RCMP in respect of charges laid by the RCMP which were subsequently dropped. Although it wasn't clear exactly what specific law enforcement function was involved, the court suggested that the requirement of malice applies to the police where they act not so much as police but in concert with prosecutors in the conduct of a prosecution.

The issue of false arrest and imprisonment based upon negligent investigative work by the police also arose in *Proulx v. Quebec (Attorney General)*, [1997] R.J.Q. 2509 (C.S.). The plaintiff was arrested and charged with the murder of his ex-lover some 9 years after her death. At trial, he was convicted and sentenced to life imprisonment. The Court of Appeal acquitted him, ruling most of the evidence on which he had been convicted to have been inadmissible. In the final analysis, the provincial Crown was held liable for having arrested and brought charges against the plaintiff based on suspicions, hypotheses and conjectures, all of which resting on illegal investigative methods involving entrapment. The Crown's liability was vicarious in relation to the acts of its Crown prosecutors who had endorsed the police actions, indeed had even participated in them, and had decided to proceed despite the ostensible weakness in the evidence in their possession.

On its face, the judgment seemed to permit an action against prosecutors, or against the Crown in respect of the misdeeds of prosecutors, without the need to show malice. The Court Appeal, by majority decision, reversed the trial judge's decision precisely on that point.[6] All judges were agreed that to succeed in an action for damages where an acquittal is obtained in a criminal proceeding, the plaintiff has to prove not merely that he had been prosecuted without reasonable and probable cause, but that the prosecutor had been animated by malice (malveillance) which was a fraud on the criminal justice system involving abuse of power by the prosecutor and resulting in the perversion of the system. The court acknowledged that a manifest absence of reasonable and probable grounds to

[6] [1999] Q.J. No. 373

lay a charge could be tantamount to malice but, in the circumstances of this case, that had not been present.

In *Allard v. Biron*, [1997] R.J.Q. 1420 (C.S.), the plaintiff, who was involved in a boundary dispute with his neighbour, was arrested and jailed for a weekend on a charge of mischief having to do with his construction of a fence on the disputed boundary line. The arrest was made without warrant, and was found to have been arbitrary, intemperate and without reasonable and probable cause. In addition, the police officers in question did not take account of suggestions appropriately made by the plaintiff's lawyer who had advised them, correctly, as to the legality of the plaintiff's acts. The Attorney General was also held vicariously liable for the faults committed by the Crown prosecutor located in the municipality who had played a preponderant role in ordering the arrest and detention at a time when he knew that he plaintiff could not be arraigned and would thus have to spend the weekend in jail. The prosecutor took that decision without being informed of the details of the case, and without taking the precaution of informing herself as to the criminality of the plaintiff's conduct. The court concluded that summary conviction procedure involving a summons would have been sufficient and appropriate in any event.

Swansburg v. Smith (1996), 141 D.L.R. (4th) 94 (B.C.C.A.) is an important case in so far as it deals with the ambit of a police officer's immunity from civil liability pursuant to s. 25(1) of the *Criminal Code* in relation to use of force. A police officer was called to investigate a complaint about a lakeside party. He followed a vehicle onto a private driveway where he saw the plaintiff get out of the car holding a beer. The officer demanded that the plaintiff stop and answer questions. When he refused, the police officer advised him that he was under arrest. A scuffle erupted with the plaintiff being injured. The plaintiff sued for damages based on false arrest, false imprisonment and battery. At trial, the court found that the constable had no reasonable and probable grounds to arrest the plaintiff but found that s. 25(1) of the *Criminal Code* immunized the officer from civil liability. This was reversed by the Court of Appeal which categorically stated that this provision does not operate in respect of false arrest or false imprisonment.

There have been recent suits in respect of police liability that are not grounded in false arrest or imprisonment but rather, on ordinary negligence in relation to the care of persons while in police custody. In *Kirby v. British Columbia (Attorney General)* (1998), 40 B.C.L.R. (3d) 45 (S.C.), the plaintiff, who was 72 years old at the time but still very fit and active, was found very drunk, slumped over the wheel of his van. Two police officers roused him, removed him from the vehicle and propped him up against his van while they searched him. They momentarily left the plaintiff unattended while they went to secure the van and in that moment, he stepped away and fell straight back loudly striking his head on the pavement causing him severe permanent physical and mental injuries. The supervising officer was found to have committed gross negligence in failing to take adequate care to prevent a severely intoxicated person in his custody from harming himself.

In *Fortey (Guardian ad litem of) v. Canada (Attorney General)* (1998), 45 B.C.L.R. (3d) 264 (S.C.), the plaintiff injured himself while intoxicated and, after repeated refusals to

allow himself to be taken home or to a hospital, he was locked up in the drunk tank for the night. As a result of his injuries, he suffered internal bleeding in his head leaving him severely impaired. He sued the Crown for the RCMP's negligence in not providing him with medical attention while he was in their custody, as is explicitly required by the RCMP manual. Although the court ruled that the common law right of a person to refuse medical treatment, which is sanctioned by the tort of battery for the administration of unconsented treatment, overrides what the manual may have had to say, that refusal of treatment must be a rational decision in order for the RCMP not to have been negligent in not following through on their duty as per the manual. In the circumstances, the court found that the RCMP custodial officer knew, or ought to have known that the detainee, being drunk and injured in the head, was incapable of making the required rational decision, thereby causing him to be negligent in not getting the plaintiff the medical attention he obviously required.

Swinney v. Chief Constable of the Northumbria Police, [1996] 3 All E.R. 449 (C.A.), appears to be a significant case on police liability under modern English negligence law. The plaintiff was a police informant who gave the police information about the identity of someone implicated in the killing of a police officer. The information was given in confidence with the request that her identity be kept secret. The police knew that the named person was violent; nevertheless, the information was recorded in a document which identified the informant by name. The document was left unattended in a police car which was broken into by criminals and stolen and eventually given over to the person implicated. Thereafter, the informant and her husband were threatened with violence and arson and suffered severe emotional distress. The plaintiff sued for damages alleging negligence on the part of the police in failing to keep the confidential information about her identity secure on the basis that it was reasonably foreseeable that they would be harmed if their identity leaked out. The claim was struck out as disclosing no reasonable cause of action, then restored on the basis that there was a special relationship of proximity as between the police and the plaintiff engendering a duty of care. The Court of Appeal dismissed the appeal of that decision thereby allowing the claim to stand on the ground that the police had assumed a responsibility of confidentiality to the plaintiff and that while, in general, police were immune from suits on grounds of public policy in relation to their activities in the investigation and detection of crime, that immunity was not absolute but rather, had to be weighed against other considerations of public policy, such as the need to protect informers. The court concluded that, on the facts pleaded, it was at least arguable that a special relationship of proximity existed to overcome the general policy of immunity, and thus allowed the suit to go forward to trial.

No equivalent general policy-based immunity is accorded police with respect to their law enforcement activities in Canada. That was made evident in the recent case of *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Gen. Div.), in which it was alleged that the police had been negligent in failing to warn potential targets of a rapist known to frequent a certain area and to have assaulted women meeting a given description, while waiting for him to strike again. On an application to strike out a statement of claim, the court found that some of the police functions alleged to have amounted to negligence were sufficiently "operational" to have created a duty of

care and that others that might have been "policy" at least raised the question of whether or not they were *bona fide* or reasonable policy decisions. The claim was therefore not struck out. On the merits, the court found that the police had been negligent in utterly failing in their duty to protect the plaintiff and other victims by failing to warn them so that they might have had the chance to take steps to protect themselves, with such duty owing at the very least to the women who were at particular risk. The breach of that duty was not justified by the strategic decision not to warn in order to prevent hysteria among the women at risk which they feared would scare the aggressor off. The police further breached the appropriate standard of care as applied to their overarching statutory duty to protect life and property in conducting their investigation into the sexual assaults that had occurred without sufficient urgency and generally, in an incompetent manner because of underlying sexist stereotyping about sexual assaults.

It might be noted that within law enforcement organizations, there does not appear to be a duty of care on the part of senior officers toward their subordinates in respect of operational decisions directly affecting the latter in the context of their law enforcement functions, at least not as far as the English courts are concerned. In ***Hughes v. National Union of Mineworkers***, [1991] I.C.R. 669 (Q.B.D.), an action in negligence was brought against a chief constable by a junior police officer in respect of injuries inflicted while controlling picketing during a strike, as assigned by his superiors. Basing itself largely on Hill, the court reversed a decision of the registrar and allowed a negligence claim against a chief constable to be struck out not for lack of proximity as between plaintiff and defendant but chiefly on the ground that it would not be good public policy to allow this kind of operational decision to attract liability.

Virtually the same matter was decided in ***Frost v. Chief Constable of South Yorkshire Police***, [1997] 1 All E.R. 540 (C.A.), although with an opposite result. A number of police officers were on duty at a soccer stadium where a senior police officer made a decision to open a gate allowing access into standing room spectator areas which produced a surge of people into that area causing crushing and resulting in 96 deaths and 730 injuries. The police officers were each involved in some way in the gruesome aftermath involving attending the injured, shifting bodies into a makeshift morgue, and other things. The officers brought a claim against their employer for emotional distress as secondary victims based upon a breach of his duty of care to them as employer or in their capacity as rescuers. The chief constable admitted vicarious liability in respect of the negligence of the senior officer in allowing the incident to occur by reason of his unwise decision to open the gate and allow the crowd to surge forward. The Court of Appeal, reversing the trial court, found that as between the chief constable and the officers in question, there was a duty of care giving those police officers a right of action if their injuries, which could include emotional distress, came about as a result of the antecedent negligence of their employer, whether that liability itself was direct or vicarious.

In addition to claims against police, there are number of cases involving corrections authorities that are worth a brief look. In ***Wilson v. Correctional Service of Canada*** (1994), 155 N.B.R. (2d) 359 (Q.B.), the plaintiff, an inmate in a penitentiary, was assaulted by another inmate. The attack was sudden and unprovoked, and happened without

warning. There had been no indication whatsoever of any trouble between the inmates in question. The plaintiff claimed negligence in relation to the C.S.C.'s failure to adequately supervise the aggressor and thus, prevent the attack from occurring. The court dismissed the claim on the ground that standard supervision procedures, which had been followed, constituted an appropriate standard of care, and that, not having been reasonably foreseeable, the attack could not have been prevented.

In *S. (J.) v. Clement* (1995), 22 O.R. (3d) 495 (Gen. Div.), a dangerous sexual offender, confined in a minimum security penitentiary, escaped and while, at large, sexually assaulted a woman living about two miles away. The inmate had been paged to appear before a corrections officer at 8:00 a.m. and had failed to respond. No search of the cell had been ordered until 9:00 a.m. at which point the escape was detected. The police, however were not informed until 10:10, by which time the assault had occurred. The decision to delay reporting the escape was stated by the Correctional Service of Canada to be a "policy" one to allow for search within the penitentiary and a count of all inmates. That "policy", however, was generally implemented where corrections officers had only a suspicion of escape; if the officers were certain, no search was conducted and police would be immediately notified. In the circumstance, the escape of the defendant fell somewhere between a suspicion and a certainty thereby leaving it to the reasonable discretion of the corrections officers as to what should be done. That decision would, however, be regarded as operational. Consequently, on the basis of *Dorset Yacht*, the court concluded that the decision would attract a duty of care in respect of proximate and foreseeable damages arising from it and liability if it breached the standard of care appropriate in the circumstances.

The court relied on the Divisional Court's ruling on the strikeout motion in *Doe* to find sufficient proximity as between the victim and the corrections officers in reference to the latters' duty of care. The court also found that the decisions not to immediately search for the inmate after his failure to respond to being paged, as well as to delay informing the police, to have been negligent, taking account of the inmate's propensity to violence against women. Accordingly, the Crown was held liable in damages.

By contrast, in *Curadeau v. Canada*, [1996] F.C.J. No. 238 (T.D.), an action in negligence against the Crown in respect of alleged failings by both police and correctional officers was dismissed. The plaintiff, who was an inmate in a maximum-security penitentiary being held in segregation, was taken hostage by other inmates during a riot and was savagely beaten and tortured. His specific allegations of negligence were addressed to the police's decision to wait for the arrival of the tactical unit before intervening as well as their refusal to capitulate which caused him to suffer more unnecessary attacks. In addition, negligence was also claimed in relation to the practice of the corrections officials in keeping only one key that would open all the doors in the segregation unit where he was taken hostage and held. The court found all such decisions and practices to be reasonable in the circumstances.

One interesting recent tort claim against corrections authorities is the Australian case of *Swan v. South Australia* (1994), 62 S.A.S.R. 532 (S.C.). The plaintiff, a young minor, was

sexually assaulted on numerous occasions by a convicted child molester who was out on parole. In addition to a suit against the parole authority for releasing the aggressor, the plaintiff brought an action in damages against the Crown in respect of the alleged negligence on the part of parole officers who were employees of the state correctional service for failing to properly supervise the parole and, more specifically, for failure to properly check up on complaints that the parolee was actually violating the conditions of his release from prison. The court ruled that, in general, for want of sufficient proximity, the correctional service had no duty of care to members of the public at large, including the plaintiff, in respect of its supervision of persons out on parole. However, when the correctional service receives information that a parolee is breaching the conditions of his parole and where it is reasonably foreseeable that the breach in question would be likely to cause harm to a particular person, then the requirement of proximity is met to generate a duty of care vis-à-vis that person.

R v. Governor of Brockhill Prison, ex p. Evans (No 2), [1998] 4 All E.R. 993 (C.A.) involved a negligence claim against a correctional authority in respect of an entirely different aspect of custodial duties. Evans was sentenced to four concurrent terms of imprisonment totaling two years for a series of offences. The Governor of the prison where she was confined had the legal duty to determine the date of release taking account of judicial decisions instructing how periods spent in custody prior to conviction were to be remitted in relation to multiple concurrent terms. Applying what he thought were the correct principles, the Governor determined the release date to be November 18, 1996. Evans was granted *habeas corpus* and released on November 15 by the Divisional Court which determined that her release date should have been September 17 in accordance with correct principles. Her claim for damages based on false imprisonment for the 59 extra days spent in custody was rejected by the Divisional Court on the ground that the Governor had legal justification for the imprisonment because he was entitled to rely on the earlier decisions regarding method of calculation of remissions until they were held to be in error and overturned. The Court of Appeal, however, relied on the historical common law principle to rule that restatements of the law by higher judicial authorities operates retrospectively to declare what the law was not only from the date of the decision but what it always was, thus transforming the plaintiff's confinement for the extra 59 days into false imprisonment. The court also ruled that false imprisonment is actionable in and of itself irrespective of any question of negligence or fault on the part of the imprisoning authority.

3.6 Provision of public services

The vast majority of the case law on tort liability in regard to the provision of public services by public authorities concerns either "slip and fall" cases against municipalities in relation to faulty sidewalk maintenance or claims against provincial or other authorities responsible for road maintenance arising out of automobile accidents occasioned by snow or ice or other hazards. Generally, these functions do not fall to federal authorities except perhaps as an occupier in relation to sidewalks adjacent to Crown-owned or occupied buildings or roads in national parks or on other Crown lands. As a result, the significance

of the jurisprudence in this connection lies not so much in illuminating the appropriate standard of care in respect of particular factual examples of this governmental function but rather, in judicial discussion of where the policy-operation line is to be drawn pertaining to the decisions that go into it. This has already been illustrated in earlier consideration of *Laurentide Motels*, *Just*, *Swinamer* and *Brown*. The same can be said of some of the summaries dealing with inspection of traffic signs by municipal authorities insofar as that function, just as the functions of road repair and snow clearance, relates to the overarching public responsibility of keeping roads safe for use.

Some of the cases dealing with road maintenance are significant in another respect: they arise in situations where the public authority engaged the services of a private, independent contractor to perform road maintenance functions. While there is discussion in those cases of where the policy-operation distinction is to be drawn, the most important element of the judicial reasoning there has to do with the issue of whether the public authority in question retained liability for the damages caused by faulty road maintenance performed by the contractor on the basis of having contracted out what the common law understands to be "non-delegable duties." This is, admittedly, a difficult legal issue that has been complicated, perhaps unnecessarily, by a spate of recent Canadian judgments. As noted in the preface to this document, the jurisprudence dealing with contracting out and government liability has been moved into Appendix Three which includes some of the summaries of cases, along with their updates, that were located in this section in previous editions.

There are, however, a handful of cases dealing with road maintenance or associated functions falling to provincial or municipal authorities that are important in that they go beyond discussion of statutory duties or powers to consideration of common law duties of care that arise in the particular circumstances in question. For example, in ***Ploughman v. Newfoundland*** (1993), 101 Nfld. & P.E.I.R. 8 (Nfld. S.C.), an accident occurred after a grader had broken and lifted the corner of a culvert so that it protruded from the roadway. That protrusion had been reported but the authorities decided that it did not pose a hazard and that nothing would be done until the culvert was due to be replaced. No warning signs had been posted. These turned out to be unwise decisions that resulted in liability. The court found that the accident was caused by the protruding culvert, that there was a duty of reasonable road maintenance and that harm due to lack of maintenance was foreseeable. It was also found that the decisions to delay repair, post no warnings and to do only cursory inspections in the meantime were operational. The standard of reasonable care had not been met.

Gould v. Perth (County) (1983), 42 O.R. (2d) 548 (H.C.), provides an excellent summary of judicial discussion on the common law duty of a public authority to keep roads under their jurisdiction clear of snow and ice. The plaintiff's car slid on ice across the highway directly into the path of an on-coming truck. The ensuing collision severely injured him and killed the driver of the truck. The plaintiff brought a claim against the county government for its failure to keep the stretch of road in question in a safe condition. The essential facts were that the stretch of highway in question was icy the day of the accident and that the employee in charge of snow removal for that area of road knew of the icy

condition hours before the accident occurred and had time to spread salt or sand. Although there was no statutory duty to salt or sand roads by the body responsible for their maintenance, the court determined that a common law duty to do so may arise in particular circumstances as part of the statutory duty to keep the road in good repair. Such a common law duty comes into play where the situation gives rise to an *unreasonable risk of harm* to persons using the road and where the authority in charge has failed to take reasonable steps to eliminate or reduce the danger within a reasonable time after it became aware, or ought to have become aware, of its existence. The trial judge reached this conclusion upon examination of earlier case law dealing with essentially the same factual matter which had decided the issue of the public authority's liability not on the basis of municipal or provincial statute law, but on general principles relating to foreseeability in negligence cases.

The test of unreasonable risk of harm was applied in *Thiessen (Next Friend of) v. Friesen*, [1998] 3 W.W.R. 74 (Man. C.A.), where the hazard to road safety was not snow or ice but rather, a dense stand of bush that blocked a clear view at the corner of an intersection. A car, whose driver was intoxicated, entered that intersection at excessive speed colliding with a truck entering the same intersection at a right angle. The intersection was uncontrolled by lights or stop signs. The plaintiffs, who were passengers in the car, sued the municipality on the ground that it had been negligent in not trimming back the bush in question. The court dismissed the claim on the ground that, as a factual matter, the bush did not pose an unreasonable risk of harm.

An interesting contrast to this case can be seen in the English case of *Stovin v. Wise*, [1996] 3 W.L.R. 388 (H.L.), which considered virtually the same kind of road hazard. An accident between a motor cycle and an automobile occurred at the intersection of a main road and a side road where a mound of earth on adjoining land effectively obscured the view of drivers turning onto the main road. The local highway authority responsible for road maintenance, a county council, was aware of the hazard and prevailed upon the landowner, British Rail, to allow it to reduce the mound. The council's overtures to British Rail went unanswered. Nothing further was done before the accident occurred. The court quite categorically stated that it became the duty of the highway authority again to take appropriate action, in reality to press British Rail for a reply, and its failure to do so amounted to negligence at common law. Beyond reconfirming the existence of a common law duty of care arising from the statutory duty of road maintenance placed on the highway authority, this case is significant in terms of what it said about the appropriate standard of care in the circumstances.

The House of Lord's decision to reverse the Court of Appeal and dismiss the claim shows how the Canadian and English law on negligence, and particularly, the finding of a duty of care in relation to public authorities, has diverged since the English courts began abandoning *Anns* in the mid-1980s. In its view, the highway authority had neither a statutory duty to act to remove the hazard nor a common law duty to do so. The court went on to suggest that while there may be circumstances where the failure to exercise a statutory power (as opposed to a duty) may engender negligence, that would be

determinable by looking at the "policy" of the statute in question[7] and, in any event, the absence of a statutory provision expressly conferring a right of action for damages for breach of the statute would normally mean that no common law duty of care would be found underpinning the statutory powers. The court specified two minimum requirements for basing a duty of care on the existence of a statutory power: (a) there must be a public duty to act; and (b) there must be exceptional grounds to hold that the statute required compensation for those injured by the non-performance of that duty. Neither requirement was found to exist in the circumstances of this case.

The following three cases dealt with liability of local authorities pertaining to the provision of water services. In *Hunt v. Westbank Irrigation District*, [1991] 6 W.W.R. 549 (B.C.S.C.), it was claimed that the decision during a water shortage to shut off water that supplied the irrigation for a vineyard was negligent. While the court agreed that there was sufficient proximity to found a duty of care and that the regulation of water supply was operational, it found that the standard of reasonableness had been met. Several general rules resulting from the *Just* case were set out. The town had a well organized system of assessing water needs and use. It considered available information, such as weather forecasts, and lifted restrictions as more water became available and attempted to accommodate the plaintiff where possible. It had no duty to ascertain the specific needs of the plaintiff as opposed to the general needs of all residents.

Riverscourt Farms v. Niagara-on-the-Lake (1992), 8 M.P.L.R. (2d) 13 (Ont. Gen. Div.) had to do with water supply for fire fighting purposes. A large building that was part of a fruit packing operation was very quickly destroyed by fire. There was clear evidence that the town had, for at least five years, and possibly as long as fourteen years, known about the inadequacy of the water supply and water pressure in the area of the fire. The court ruled that even with an adequate water supply the building might not have been saved and, more importantly, that the decision not to implement the many recommendations to upgrade the water main system, for mainly budgetary reasons, was a policy one. That decision had been made at a political rather than administrative level, and had been based on the kinds of factors referred to in *Just* as indicating a policy decision.

Much the same result was arrived at, but for different reason, in the English case of *Church of Jesus Christ of Latter Day Saints (Great Britain) v. West Yorkshire Fire and Civil Defence Authority*, [1997] 2 All E.R. 865 (C.A.). A fire broke out in a schoolroom attached to the plaintiff's chapel. Although the fire brigade arrived promptly, it was unable to fight the fire because four of the hydrants surrounding the premises failed to operate and the remaining three were not discovered in time to be of any great use. Although the defendant local authority was in breach of its statutory duty to take all reasonable measures to ensure the provision of an adequate supply of water available for use in case of a fire, the court found that it was not fair and reasonable to impose a duty of care on the defendant in relation to the content of the statutory obligation and more

[7] Interestingly, the court used the case of *Swanson Estate* to point to a statute dealing with air navigation safety as an example where a common law duty of care underpinning the exercise of statutory powers would likely be found.

particularly, that the statutory obligation was not intended to confer a private right of action on a member of the public in respect of any breach of it.

There are also some interesting cases having to do with a public authority's duty of care in the construction of public works or facilities. In ***Balan v. Newfoundland*** (1995), 128 Nfld. & P.E.I.R. 99 (Nfld. S.C.), the issue tried was the negligence of the province in relation to the design and installation of a guardrail on a section of elevated highway that proved to be too short to effectively prevent cars from sliding down the embankment. The standard "warrant" or specification for guardrails was that one was to be installed where the elevation of the road itself was four metres or more. The length of guardrail to be installed in any location was left to field personnel, in this case, to a non-professional technician who was responsible for directing the contractor where and in what lengths to install it. The usual method was to calculate from the point of greatest elevation along the road backward and forward to points where the elevation diminished to two or three metres, with some discretion left to the field personnel to add a little extra length at either extremity depending on whether the grade, curve or traffic direction warranted it. In the case at hand, the plaintiff's car left the road, which was snow-covered, some 20 feet before the guardrail started.

The court was not prepared to find a statutory duty on the Minister of Works, Services and Transportation to construct highways. Relying principally on *Just*, the court stated that once a decision was taken to construct a highway, the province became subject to a *prima facie* duty of care to those whom it was reasonably contemplated would use the highway in its intended fashion, and that such a duty of care required that the province exercise reasonable care in designing and constructing it. Decisions pertaining to the installation of guardrails, however, were determined to be policy decisions and thus, not subject to a duty of care. But, once having decided to install a guardrail, the decisions as to actual location and length, which involved some discretion, were regarded as manifestations of the implementation of the policy decision engendering a duty of care. In the circumstances, the court found that the province had been negligent in failing to have installed an additional 17 feet of guardrail taking account of the hazardous nature of the particular location in question. Using the same language as in *Gould v. Perth (County)*, the court concluded that the absence of the required additional 17 feet exposed users of the highway to *an unreasonable risk of harm*.

Virtually the same issue arose in the case of ***Botting v. British Columbia*** (1996), 27 B.C.L.R. (3d) 106 (S.C.). A bridge across a river was wide enough to allow for a single car to pass. It had no railings, only a tireguard to keep a car's wheels aligned with the roadway on the bridge. The province built a second bridge right beside the first one, with a one metre gap separating the old and new bridges. The new bridge, however, had waist-high railings. Neither bridge was lit at night. The plaintiff's husband, who was unfamiliar with the bridges, was driving across the old bridge one night in the dark when a protruding tireguard caught a wheel and incapacitated his car. His headlights illuminated the near railing on the adjacent new bridge. Thinking that it was affixed to the bridge he was on, he stepped over the tireguard and fell through the gap between the bridges to his death. His widow brought a wrongful death claim against the province alleging negligence

in the design and construction of the new bridge. The court upheld the claim stating that while the decision to build a second span was a policy matter, once having made it the province owed a duty of care to potential users of both spans to take reasonable care in the design and construction of it. In the circumstances, the court concluded that it was reasonably foreseeable that there would be pedestrians crossing the bridges at night who would not be familiar with them, and that, without illumination other than moonlight, the appearance of a railing on the new bridge adjacent to the old one would create the illusion that the old bridge itself had the railing and that the floor of the old bridge would extend right up to it without a gap. The leaving of the gap constituted a flaw in the design of the new bridge which breached the standard of care of a reasonably competent bridge designer.

The case of *Byk v. Canada* (1994), 79 F.T.R. 163, didn't address issues dealing with the provision of public services as such but did, nevertheless, raise some bizarre grounds for attributing negligence to the Crown. The plaintiff was an arriving passenger at Pearson Airport. After deplaning, while waiting for her bags to descend onto a carousel, the plaintiff was struck in the knee by a luggage cart handled by a porter causing her quite severe personal injuries. The porter was an employee of Allcap Baggage Services Inc., an independent contractor which had been given an exclusive contract to perform porter duties for departing and arriving passengers. The contractor had, in fact, been engaged by the airlines who had assumed responsibility for porter duties in the early 1980s. To give effect to that engagement, the Crown entered into a lease with Allcap for space needed to operate its porter service. In the circumstance, the contractor had no general insurance to cover claims of this sort even though it was a condition of the lease that such a policy be in place. The lease for space was the only contractual relationship between the Crown and Allcap.

The plaintiff sued the Crown alleging negligence in the implementation of its policy regarding porter service at Pearson Airport, and more particularly, negligent failure in respect of its duty, as operator of a public facility, to "ensure that compensation would be available for damages caused to an individual by any entity operating on the premises." The issue of vicarious liability of the Crown in respect of negligence by an independent contractor was not raised. The court, however, did make a number of findings relevant to negligence and liability: first, that the decision to transfer the porter function to the airlines was a pure policy decision dictated by financial considerations; as such, it did not engender a duty of care and thus did not engage the Crown's liability in tort; second, the Crown's failure to ensure that Allcap complied with the terms of the lease did not constitute negligence committed in the course of carrying out a policy decision. The court did state that even if the Crown had been negligent in this regard, there was no nexus whatever between such negligence and the damages caused to the plaintiff. In other words, whatever negligence there may have been on the part of the Crown was too remote to engage the Crown's liability for the damages caused by the act of the porter.

There are two recent English cases that have to do with the provision of "emergency" services by local authorities. *Capital and Counties plc v. Hants County Council*, [1997] 2 All E.R. 867 (C.A.), concerned a negligence claim in respect of the conduct of a fire

brigade. The court ruled that a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of a building so as to generate a duty of care vis-à-vis the latter merely by answering an alarm and fighting a fire. On the other hand, if, through their actions or omissions, they increase the risk of danger, such as by shutting off a sprinkler system, the fire brigade would be liable for damages unless it could be shown that the damages attributable to such act or omission were inevitable.

In *Kent v. Griffiths*, The Times, December 23, 1998 (C.A.), it was decided that while an ambulance service does not have a duty of care to the public at large to respond to emergency calls, it is arguable that a duty of care comes into existence vis-à-vis a particular person making such a call once the service accepts the call and agrees to send an ambulance. The fact that the risk involves physical harm rather than mere economic loss was a factor for the court in determining that there is an argument to be made as to the existence of a duty of care in those circumstances. Accordingly, the court reinstated a claim in negligence that had been struck out at a lower level.

There are cases involving claims against public authorities in relation to the provision of a social service. In *G.(A.) v. British Columbia (Superintendent of Family and Child Services)* (1989), 61 D.L.R. (4th) 136 (B.C.C.A.), social workers employed by the province entered a home and removed several children on the ground that they believed that they were being subjected to sexual abuse by their father. The father brought suit claiming that the social workers had been negligent in not conducting a careful enough examination of the facts before acting. The claim was dismissed essentially on the ground that simple errors in judgment attending the exercise of their statutory powers will not engage liability where the discretion in question was exercised with due care. The court further stated that such due care entails the duty to consider a particular factual situation potentially engaging the power in question and that the absence of due care will arise only where there has been a failure to carry out that duty or where, in considering the matter, a conclusion was reached that was so unreasonable as to amount to the failure to carry out the underlying duty, neither of which occurred here.

MacAlpine v. T.H. (1991), 57 B.C.L.R. (2d) 1 (C.A.) was somewhat similar. In a reversal of the trial decision, the Court of Appeal found the Superintendent of Child Welfare not liable for a fire that had been set by two boys under his care who had been placed in the same foster home. The trial judge had found the Superintendent negligent in placing the boys together in a location too remote to permit regular inspection by a social worker. It was also held at trial that a statutory immunity provision would not apply because a negligent act could not be protected by an immunity for "good faith" decisions.

The Court of Appeal decision is a little confusing because it focuses on the statutory immunity provision but, in effect, may be saying there was no negligence. The court found that it was foreseeable that lack of care in the placement of the children could lead to property damage or other harm. Thus, there was a sufficiently proximate relationship to give rise to a duty of care. But the statutory immunity provision shielded the Superintendent from liability in that he had exercised his judgment honestly and thus, in good faith when placing the boys.

Although the court seemed at first to reason that something could be done negligently and still be protected by an immunity provision if done in "good faith," Macfarlane J.A. equated good faith with honesty. He then went on to say that if the Superintendent had had information sufficient to put him "on inquiry" or notice concerning factors or risks that could have affected the placement decision, then he could not have acted "honestly" in making the placement. This seems to import a reasonableness requirement into good faith which would make it difficult for someone to be acting both negligently and in good faith at the same time.

The ruling in *MacAlpine* was upheld and applied in *D. (B.) v. British Columbia*, [1997] 4 W.W.R. 484 (B.C.C.A.) which involved a negligence claim in respect of alleged errors and omissions by a social worker in advising foster parents of the full extent of the sociopathic tendencies of a young teenager placed in their care who subsequently attacked one of the foster parents' own infant children. Reversing the trial judge, the Court of Appeal ruled that social workers have to be able to make mistakes in order to do their jobs properly and thus, absent bad faith, should not be found negligent in relation to errors in judgment.

Similar facts arose in the recent English case of *W. v. Essex County Council*, [1998] 3 All E.R. 111 (C.A.). The plaintiffs, a married couple, agreed to become foster parents of a 15 year old boy. The defendant and a social worker in its employ gave oral assurances to the plaintiffs they would not be given a foster child who was known or suspected to be a sexual abuser and, in reply to a specific question posed by the plaintiffs, had stated that the boy to be placed with them was not so known or suspected. In fact, the defendants knew that three years previously, the boy in question had been cautioned by juvenile authorities in relation to indecent assaults that he had committed on his sister. As it turned out, the boy committed repeated sexual assaults on the parents' own children while in their foster care. Apart from breach of contract and negligent misstatement, the parents claimed that the defendant had been negligent in placing the boy in their care where other children were present when it was reasonably foreseeable that, given his history, he would be reasonably likely to assault his foster siblings. The claim was struck out.

On appeal, the Court of Appeal made some far-reaching statements that reveal how the law of negligence has evolved in English law. First, it stated rather categorically that as a general rule, no claim in damages lay in respect of decisions made by a local authority in the exercise of a statutory discretion. An exception, however, could be made where the decision was so unreasonable that it could be considered as falling outside the ambit of the discretion conferred. More significantly, the court conceded that while the requirements of proximity and foreseeability had been satisfied to give rise to a duty of care on the part of the defendant toward the plaintiffs, in the particular circumstances of the case, it was not just and reasonable to impose a duty of care on the defendant for various reasons: a common law duty of care would cut across the entire statutory framework for the protection of children at risk exacerbating the already difficult and delicate duties of the defendant and of the social workers who must carry out those duties on a day-to-day basis; the imposition of a duty of care could make child welfare authorities more defensive in their approach to child protection thereby undermining their effectiveness; and the

damages suffered by the children of the foster parents were compensable under the *Criminal Injuries Compensation Scheme.*

One of the cases looked at by the court in its disposition of the matter was ***Barrett v. Enfield London Borough Council***, [1997] 3 W.L.R. 628 (C.A.) which, although not predicated on sexual assaults, also was concerned with whether a duty of care should be imposed in relation to decisions taken in the course of child protection. The plaintiff was placed in the care and custody of the defendant at the age of ten months and remained in care until he was almost 18 years old. During that 17 year period, he was put into 9 different foster placements and developed a psychiatric illness. He sued the local authority claiming that it, and its social workers who had been in charge of his case, had failed to provide him with the standard of care that was to be expected of a responsible parent which among other things, meant protecting him from injury, including psychiatric or emotional harm, providing him with a home where his safety would be supervised, promoting his personal development and planning his future, securing his rights to family life and, at the very least, providing competent experienced social workers to monitor his welfare. The claim was struck out.

On appeal, the Court of Appeal held that the local authority in charge of child welfare should be in no worse a position than that of a parent who, absent specific incidents to which foreseeable harm may be attributable, cannot be held to a duty of care in respect of the general course of conduct in exercising parental discretion in relation to the care and upbringing and overall welfare of his own children even if some of the day to day decisions required in that connection turn out to be wrong. Thus, it was not just and reasonable to impose a duty of care on child welfare authorities or their employees in terms of how they generally exercise their statutory powers. On the other hand, the court did say that social workers could be held "operationally" negligent in relation to a child in care, such as in their negligent implementation of a particular decision made by the local authority.

In recent years, there has been a flurry of abuse cases involving children placed in foster care by provincial authorities thus engaging potential liability of the province on several different basis, such as its own negligence in choosing unsuitable foster parents or failing to conduct adequate supervision, or as a result of a breach of its own non-delegable duties pertaining to protection of children in its care through retention of the legal guardianship of those children vested in specified provincial officials. While doubtlessly interesting in their own right in terms of what they may have had to say about the extent of the duty of care or the appropriate standard of care in the circumstances, those cases do not really provide much of a potential basis for federal government liability, except perhaps in the narrow area of claims in respect of physical or sexual abuse at Indian Residential Schools. However, where those cases may have an indirect impact on federal Crown liability is in terms of what they have had to say in relation to the nature and extent of fiduciary duties as between the victim of such abuses and the aggressor's employer, be it a governmental or other entity, and in such circumstances, how scope of employment should be discerned for purposes of the latter's vicarious liability. This is immediately considered in the following section.

3.7 A note on vicarious liability

Assuming that an employer-employee or principal-agent relationship can be proved, the employer's or principal's vicarious liability for torts committed by the employee or agent will depend on whether they were expressly or impliedly authorized by the employer or principal, or if not authorized, whether they were committed within the scope of the employee's or agent's duties. In this latter regard, the courts generally relied on the so-called "Salmond test" which stated that:

> ...a master.... is liable even for the acts which he has not authorised, provided they are so connected with acts which he has authorised that they rightly be regarded as modes - although improper modes - of doing them.[8]

There is, in fact, very little case law where the issue of scope of employment or agency itself was litigated in respect of claims of vicarious liability brought against public authorities. One instance where it was accepted as a defence was in the case of *General Engineering Services v. Kingston and St. Andrew Corp.*, [1989] 1 W.L.R. 69 (P.C.) where it was decided that no vicarious liability for negligence could attach to a municipality in respect of its firefighters who, because of an industrial dispute, purposely traveled as slowly as possible to a fire. This action by the firefighters was determined to be outside the course of their employment.

The Salmond test recently came under scrutiny in a series of cases where the question of whether an employer's vicarious liability should be engaged arose in connection with sexual assaults or other misconduct committed by an employee against children who were either in their care or with whom they had some other kind of involvement. For example, in *T.(G.) v. Griffiths* (1997), 31 B.C.L.R. (3d) 1 (C.A.), the central issue was the vicarious liability of the Vernon Boys and Girls Club, a voluntary association, for sexual assaults committed by one of its employees who was hired to lead after-school and weekend programs for teenagers. What was common in all such cases was that the parental or quasi-parental authority assumed by the adult aggressors or their employers, and the admitted vulnerability of the children who were victims, satisfied the criteria for finding a fiduciary relationship between the plaintiff and defendant which, in turn, appeared to make a significant difference in determining how scope of employment was to be discerned. More specifically, the central factor considered by the court was that the tort involved an overarching breach of trust that defines the nature of a fiduciary relationship and underpins the fiduciary duties owed by the tortfeasor to his victim.

The key case is *B. (P.A.) v. Curry*, [1995] 10 W.W.R. 339 (B.C.S.C.), aff'd [1997] 4 W.W.R. 431 (B.C.C.A.), which involved sexual abuse of a child while in a residential facility operated by The Children's Foundation, a non-profit organization, committed by an employee of that outfit. At trial, the court applied the Salmond test to find the employer vicariously liable (at p. 344):

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[8] Salmon & Heuston, *The Law of Torts*, 20th ed., (1992), at pp. 456-457.

> ... the duty the Foundation assumed to provide a safe environment is obvious. It engaged Curry and others to fulfill its obligation to the children who had no choice about where they lived and were treated. It did not authorize Curry's misconduct but it did authorize his physical contact with the children in his care -- a contact that was a necessary part of his acting as a parent having total intervention in the lives of the children he supervised. The mode he employed, whereby his authorized physical contact with the children degenerated into protracted sexual abuse, was nonetheless a mode (albeit a most wrongful and clearly unauthorized mode) of conducting himself while undertaking the responsibilities of his employment for which he was engaged.

On appeal, however, Huddart J.A departed from the Salmond test to suggest that for purposes of determining "course of employment" in the context of sexual assault committed against young children, particularly where they occur in a residential setting, the courts should be guided more by the jurisprudence pertaining to fraud and breach of trust than that relating either to assaults committed outside of a residential setting where no incidence of parenting arises (at pp. 460-461):

> When a small child is seduced by a substitute parent into sexual behaviour and secrecy, fraud or conversion are more appropriate analogies than physical assault. Like fraud and conversion, sexual assault of a child is a breach of trust, an abuse of authority or power. Mr. Curry's conduct was, like the superior's conduct in *Boothman*, a breach of trust. Importantly, Mr. Curry's conduct was also like the superior's conduct in *Boothman* and the police officer's conduct in *Mary M.*, primarily a breach of job-created authority. Without the power given to Mr. Curry by the appellant, the breach could not have occurred. The appellant did not merely provide the opportunity for seduction to take place and a wrong to occur, it made the wrong significantly more probable by conferring parental power over the respondent, then a young and vulnerable child, and permitting that power to be exercised in the absence of any other person....
>
> .... When the appellant conferred the authority of a parent on Mr. Curry, it put him in the place of the most powerful person a child can know -- that of a parent upon whom the child is totally dependent. It encouraged the development of the intense emotions that predictably can be mishandled, particularly in the absence of the incest taboo. With the acceptance of parental authority and its delegation must, in my view, come acceptance of responsibility for the consequences of its abuse by the person upon whom you conferred it.
>
> The assault cases cited by the appellant do not deal with a situation like the one before us where parental authority has been conferred over a child. Teachers, police officers, bouncers or priests who abuse in non-residential settings do not have the same degree of control over every aspect of a child's emotional and physical well-being as a parental figure does. Moreover, the assault cases depended on the application of the Salmond test for scope of employment.

As a result, the Court found the Salmond test to be inapplicable in cases dealing with sexual assault inasmuch as, in order to find vicarious liability, it required a conclusion that the sexual assault of a child is an unauthorized mode of parenting. By contrast, a new approach was preferred as appropriate to the unique nature of sexual assault:

> The unique features of sexual assault cases require a contextual approach that permits courts to examine the nature of the authority conferred on the employee

> and the likelihood that the conferral of that authority will increase the probability of a wrong occurring.
>
> It is implicit in this approach that the imposition of vicarious liability on those who undertake the protection of children is necessary to control the abuse of job-created authority. This need justifies the strict liability of an employer, whether its imposition is seen as a return to first principles or an extension of existing principles.

Precisely this last remark has been carried into the federal sphere in ***Scaglione v. McLean*** (1998), 38 O.R. (3d) 464 (Gen Div.). The plaintiff, while a private in the Canadian Forces, claimed to have been the victim of an attempted sexual assault by the defendant who was, at the time, a superior non-commissioned officer. The attempted assault was alleged to have occurred on a Canadian Forces base after the parties had had a drink and had taken a sauna together. The plaintiff sued both the aggressor and the Crown as employer. The Crown moved to strike out the claim on the ground that it was time barred under a provision of the *National Defence Act*. Ruling on that motion, the court concluded that the statutory limitation did not apparently apply in relation to the alleged tort committed by the defendant and, more generally, it would not give an automatic defence to the Crown with respect to vicarious liability because cases such as *Curry*, referred to here as *B.(P.A.)* (at p. 471):

> suggest that a new approach to vicarious liability may be emerging in circumstances where there are deliberate acts constituting an abuse of power by an employee for which the employer should be held liable. *B.(P.A.)* dealt with the situation of sexual abuse of a child, but reference was also made in the reasons of that case to the expanding liability of employers, under human rights legislation, for sexual harassment in the workplace based on a principle that the employer bears some responsibility for malfeasance by those placed in a position of power over other employees.

Accordingly, the court refused to strike the claim in so far as it dealt with the Crown's vicarious liability.

It might be noted that English courts have not followed the more liberal path beyond the Salmond test for vicarious liability in relation to sexual abuse torts committed against minors. In *T. v. North Yorkshire County Council*, The Times, September 10, 1998 (C.A.), a teacher at a special needs school sexually abused a mentally disabled schoolboy entrusted to his care while on a school trip to Spain. At trial, the Salmond test was used to find the defendant vicariously liable on the ground that because the aggressor was effectively *in loco parentis* in respect of the plaintiff with a duty to care for and supervise him, the sexual assaults were so connected with his authorized responsibilities that they could be regarded as improper mode of performing his duties. Without disturbing the application of the Salmond test, the Court of Appeal reversed that finding in holding the sexual misconduct was as an independent act outside the course of employment, noting that it had difficulty visualizing that kind of behaviour as being an improper mode of carrying out an authorized act.

3.8 A note on liability in tort for breach of statutory duty

The leading Canadian case in this area is *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, where it was argued that the delivery of infested grain contrary to a provision in the *Canada Grain Act* should permit a claim in damages representing the cost of detaining and fumigating the grain and ship. The court disagreed, stating that simple breach of a statutory duty was not a tort; the plaintiff would have to prove a duty of care and breach thereof causing damage. Negligence had been neither pleaded nor proven.

Sask. Wheat does not address the policy/operation distinction but rather the relationship between breach of a statute and negligence. A breach is not itself a tort (unless the statute so provides) but may provide evidence of the tort of negligence. Dickson J. indicated that if simple breach of a statute were intended to entail civil liability, the statute should say so expressly. The court found no proof of negligence in that inspections had been carefully made.

Sask. Wheat buried earlier tort theory pertaining to the necessity of discerning the legislative intention underpinning a statute in order to determine whether a breach of it might be tortious. According to Linden, the significance of this case lies in the following:

> It located liability for breach of statute squarely within negligence law. It also rejected the view that unexcused breach constitutes negligence per se giving rise to absolute liability, and the position that it furnished *prima facie* evidence of negligence, preferring instead the approach that proof of statutory breach be admissible as evidence of negligence. In other words, the court held that a statutory formulation of a duty of care in a penal statute may provide a specific, useful standard of reasonable conduct, upon which a civil court (or jury) may rely, if it chooses to do so.[9]

Devloo v. Canada (1990), 33 F.T.R. 1, aff'd (1991), 129 N.R. 39 (F.C.A.), is representative of a group of eight cases concerning the Canadian Grain Commission. The Commission was empowered under the *Canada Grain Act* to license grain dealers. Those dealers bought grain from farmers. A company called Econ, which was licensed by the Commission as a dealer, failed to pay certain farmers for their grain and eventually went bankrupt. The farmers sued the Commission for their losses, alleging that as the licensing body it was responsible for ensuring that dealers could meet their liabilities.

Two statutory provisions were important to the plaintiffs' case. The first prohibited issuance of a grain dealer's licence unless the applicant established to the Commission's satisfaction his financial ability to carry on his grain dealer's business and gave security sufficient to ensure that all obligations for the payment of money would be met. The second empowered the Commission to require licensees to post additional security if at any time the Commission had reason to believe that security already given was not sufficient to ensure that all of a licensee's obligations for payment for grain would be met.

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[9] *Canadian Tort Law*, 5th ed., pp. 190-191.

The court interpreted this as a legal duty on the part of the Commission to ensure that producers were fully protected against loss in the event that a dealer could not pay. The court then had to consider whether, notwithstanding this statutory duty (and clear breach thereof), there was a basis for liability. For an action to succeed, either the statute had to expressly provide for liability or the acts complained of had to amount to negligence at common law.

In *Devloo*, the court found negligence on the facts but also found that the statutory duties described above and the focus in the statute on the "interests of grain producers" could lead to an entirely plausible inference that civil liability was intended by the statute and did not need to be grounded in common law negligence alone.

On the negligence issue, the court found that the Commission was negligent in failing to ensure that the dealer used proper payment documents for issuance to producers, as required by the Act and regulations, and was also negligent in failing to require the dealer either to file financial information or to post additional security. The court found that the published policies of the Commission relating to filing requirements evidenced "the utterly clear foreseeability - and acknowledgement - of the risk which was ultimately rectified...." Also noted by the court was the lack of training of Commission personnel - the person who became the registrar and licensing officer could not read financial statements. Even when problems with the particular grain dealer were noted in a financial review, it took some time for the Commission to appreciate the risk or to do anything about it.

Counsel for the Commission apparently argued that at least some of the duties in question were discretionary and that part of the problem lay with the legislation. Muldoon J. gave short shrift to this argument and, while agreeing that the Act did not make the Commission an insurer, stated that it "does require a high standard of care which has not been attained...." Nor were the negligent acts within the realm of "policy." Rather, the "defendant's servants' breach of duty occurred solidly within the operations which they were employed to carry out...."

The Court of Appeal agreed that the provisions of the Act provided evidence of a private duty of care by the Commission toward producers, and that the implementation of policy decisions concerning how the Commission should be satisfied as to the sufficiency of security could give rise to liability. The appropriate standard of care was reasonableness and the Commission had not acted reasonably.

Perhaps the best statement of where a private law duty of care will arise under a statute in respect of the duties that it imposes is the following made by Taylor J.A. in ***Kripps v. Touche Ross & Co.***, (1992) 94 D.L.R. (4th) 284 (B.C.C.A.), (at pp. 291-292):

> The duty in these cases is based on the nature of the statute under which the public authority has implemented a scheme being such that the court will infer that the authority in implementing the scheme thereby assumed a "private law duty of care" towards individual members of a particular class of person for whose benefit the scheme is intended, and to which the plaintiff belongs.
> ....

> While the duty in these cases arises from the exercise by the defendant authority of functions under a scheme which is found by the court to be intended to protect the interests of persons in the plaintiff's position, the resulting "private law duty of care" is not derived from the words of the enabling legislation by application of ordinary principles of statutory interpretation, but by inference. The duty arises without an intention to create such a duty being stated in the legislative language.
>
> The duty may, of course, be legislatively limited or negatived by the legislation, and where the legislation cannot be said to demonstrate an intention to benefit individual members of a particular class of persons, it cannot arise.

Sask. Wheat was applied in ***S.D. v. D.W.S.*** (1995), 160 A.R. 61 (Q.B.) in relation to a claim for damages against the provincial Crown for alleged failures of provincial government social workers to fulfill their duties pertaining to protection of children created by a provincial child welfare statute. In the circumstance, the plaintiff had suffered sexual assaults while under the protection of the provincial government. The court allowed the claim to be struck out as disclosing no reasonable cause of action inasmuch as there was no cause of action at all arising from breach of the statute in question and that, in any event, whatever damages arose came not from anything the social workers did or did not do but rather, from the acts of the person committing the assaults.

How the English courts have dealt with statutory duties and negligence is nicely illustrated in the case of ***X and others (minors) v. Bedfordshire County Council***, [1995] 3 All E.R. 353 (H.L.). In all, five appeals were filed against lower court judgments striking out statements of claim in each case for damages arising out of injuries allegedly caused by public authorities in the performance of, or failure to carry out, functions imposed upon them by statute. The claims fell into two groups: those alleging negligent misfeasance or nonfeasance in respect of statutory duties imposed for the purpose of protecting children from abuse; and those alleging failure on the part of public authorities to carry out statutory duties imposed upon them as education authorities in regard to children with special education needs.

The significance of this case lies not so much in the fact that it ultimately upheld the lower courts but rather in its treatment of what rules are to govern liability claims against public authorities in the light of English jurisprudence that had seemingly thrown this area of the law into confusion. The basic starting point for the Court was the view that where Parliament has imposed statutory duties upon a public body, a claim in damages against that body arising from its breach of such duties must be founded on a private law cause of action. In this sense, the Court here was saying much the same thing as the Supreme Court of Canada had said in *Sask. Wheat* that a breach of statute is not in itself actionable as a tort.

The Court identified four separate categories of private law causes of action that can potentially arise in relation to a breach of statutory duty:

1. misfeasance of public office, requiring intent to injure (malice) or bad faith, or knowledge of illegality in the performance of an act under statutory authority;

2. breach of statutory duty *simpliciter*, that is to say, where carelessness is not required to found an action. This will be available, however, only where, as a matter of statutory construction, it can be shown that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for a breach of that duty. The limited and specific nature of such a duty rules out the application of this right of action in respect of general administrative functions imposed on public bodies which involve the exercise of administrative discretions;

3. claim based solely on careless performance of a statutory duty in the absence of any other common law right of action. The court categorically ruled this out as a valid cause of action;

4. claim based on a common law duty of care arising from either the imposition of a statutory duty or from the performance of it.

It is specifically in regard to this last category that the court reviewed the principles of negligence as applied to public authorities in the case law. It began by drawing a distinction between two sets of cases in which a common law duty of care may be alleged to arise:

- on one hand, there are those cases where a public authority is alleged to owe a duty of care in the manner in which it performs the statutory duty imposed on it. An example would be, in the case of an educational authority, a decision to close a school;

- on the other hand, there are those cases in which the duty of care is alleged to arise from the manner in which the statutory duty has been implemented. The example given was in the actual running of a school pursuant to the statutory duty where a common law duty to take reasonable care for the physical safety of the pupils will arise.

This looked awfully like the policy/operation distinction coming out of *Anns* and *Just*. In any event, the court specifically acknowledged that most statutes imposing a duty on a public authority will confer discretion as to the extent to which, and the methods by which, such duty is to be performed and stated that no liability will ensue in respect of such decisions involving a discretion in regard to the extent or methods of performing the duty unless the discretion was exercised in so unreasonable a fashion as to exceed the statutory authority of the public body. Citing *Dorset Yacht*, *Anns*, and *Takaro Properties*, the court summarized the applicable principles in the following way, at p. 371:

> Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the courts to exercise the discretion; nothing which the authority does within the ambit of the discretion can be actionable at common law. If the decision complained of falls outside the statutory discretion, it can (but not necessarily will) give rise to common law liability. However, if the factors

relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such matters of policy and therefore cannot reach the conclusion that that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist.

3.9 a note on statutory immunity clauses

Having an immunity provision in legislation is not a guarantee of protection. Courts can get around applying an immunity or limitation provision if they find that it does not cover the activity in question. In *Australian National Airlines Commission v. Newman* (1987), 70 A.L.R. 275 (H.C.), the claim was for damages for injuries arising when the plaintiff slipped and fell on a greasy patch of floor in the flight services kitchen. A provision in the legislation imposed a two year limitation on actions "arising out of anything done or purporting to have been done under this Act...." The court held that the Commission's failures concerning the conduct and maintenance of the kitchen were not something "done or purporting to be done" under an Act that did not deal at all with either the failure to provide or the provision of safe access to work premises or maintenance of floors. It was the particular act or omission complained of that had to have been "done under" the Act for the limitation to apply.

Alternatively, a legislated immunity provision can contribute to a court's finding a duty of care. In *Williams v. Attorney General*, [1990] 1 N.Z.L.R. 646 (C.A.), the majority of the court found the Crown liable to the owner of a yacht that had been damaged during the period in which it was forfeited to the Crown. Not only did the Crown have knowledge of the identity of the owner and the fact that the yacht might be returned to him, but it was required by statute to take all seized goods to a secure place. This together with a legislated immunity provision constituted evidence that a duty of care could exist. That provision provided that the Crown was not liable for loss of or damage to goods occasioned by anything done or omitted in the exercise of powers under the Act unless the public servant had not acted in good faith or had acted without reasonable care. This wording showed a Parliamentary recognition that there could be liability for negligence.

A similar conclusion was reached in *Newfoundland v. Macdonald* (*supra*). The plaintiff alleged negligence and bad faith on the part of the Board of Commissioners of Public Utilities who had allegedly approved trucking rates to be used by one company on a contract it was bidding for while at the same time denying another company a hearing to consider a similar application in relation to the same contract. In applying to have the action dismissed the Board invoked a statutory provision stating that "no action ... lies against the Board or any member... for anything done or purported to be done in good faith under or in pursuance of this Act." The court refused to dismiss the action. The immunity clause was interpreted to mean that an action may lie against the Board members for an actionable thing which was not done in good faith under or in pursuance of the Act, something that could only be determined on the evidence at trial.

A legislated immunity provision was also considered in ***Erickson v. Elsom*** (1992), 72 B.C.L.R. (2d) 106 (S.C.). The Public Trustee, as guardian of the minor plaintiff, settled a claim on his behalf for injuries resulting from a car-bicycle collision. The plaintiff then sued, claiming that the settlement was made negligently for an amount much less than should or could have been negotiated.

The court agreed, finding that the Public Trustee exerted almost no effort in settling the plaintiff's claim and that the decisions in question were "operational." It then considered the effect of a statutory immunity clause similar to those considered above. While the court could not conclude that the evidence indicated bad faith, the clause was held not to apply because the activity in question, making a settlement for a minor, was authorized under a different, albeit related, statute than the one where the immunity provision was found. The reference in the immunity provision to "...powers conferred by this Act" therefore did not go far enough.

4. NEGLIGENCE CLAIMS FOR ECONOMIC LOSS: THE ASSAULT ON *ANNS*

4.1 Economic loss and its application to public authorities

The concept of economic loss was neatly stated in ***Ontario (Attorney General) v. Fatehi***, [1984] 2 S.C.R. 536 as the diminution of worth incurred without any physical injury to any asset of the plaintiff (p. 542). Its most straightforward application is loss of income or profits or other sums of money. It also encompasses such things as loss of value in an asset, such as real estate or other property.

Historically, for a variety of public policy and administrative reasons, not the least of which having to do with difficulties in drawing lines, proving causation and the desire to minimize needless litigation, the common law had a problem in awarding compensation for damages consisting purely of financial losses. The nineteenth century English case of ***Cattle v. Stockton Waterworks Co.*** (1875), L.R. 10 Q.B. 453 is widely regarded as having imposed an "exclusionary rule" as to pure economic loss. With some attenuations along the way, this exclusionary rule remained in place, at least in England, until it was lifted by the House of Lords in *Hedley Byrne* to allow for recovery of pure economic loss arising from negligent misrepresentation. In *Anns*, Lord Wilberforce appeared ready to forego the exclusionary rule altogether in stating that recovery of damages in respect of negligence should depend on the two-step test he formulated rather than on the nature of the damages incurred.

Even before *Anns*, Canadian courts had allowed negligence claims for economic loss in particular instances, such as where positive outlays of money were incurred, or where economic loss was contingent or consequent to property damage or personal injury. "Negative outlays," such as foregone income or profits were generally denied as too remote even if, in particular cases, they were foreseeable.

In 1974, the Supreme Court had the opportunity to bring fresh analysis to this area of tort law in ***Rivtow Marine Ltd. v. Washington Iron Works***, [1974] S.C.R. 1189. Although not a case involving a public authority, it is worth considering briefly in that it established the framework for economic loss claims against public authorities in respect of negligent performance of statutory functions or duties. The plaintiff operated a barge for water carriage of logs. It was fitted with two cranes designed and manufactured by the defendant which allowed the loading and unloading of logs without assistance of dockside apparatus. In its busiest time of the year, the plaintiff's barge was on its way to Kitimat to take on logs there when it was ordered back to Vancouver for inspection of its on-board cranes. The inspection was ordered because an identical crane on another barge had collapsed, killing its operator. Upon inspection, the plaintiff's cranes were found to have serious structural flaws forcing it to take the barge out of service to allow for necessary repairs and replacement of parts. The plaintiff brought suit for special damages for the cost of repairs and for loss of income during the repair period. The claim was based on negligent design of the cranes, failure to promptly warn the plaintiff of the danger posed by the design flaws and negligent misrepresentations which were relied on to the plaintiff's detriment.

At trial, the defendant was found to have breached its duty, as a manufacturer, to warn the plaintiff of the defects in question of which it was aware. As a result, the plaintiff was awarded damages for economic loss amounting to the difference between foregone profits suffered from loss of use of the barge in the busy season and losses of profits that would have resulted had it received a prompt warning in time to have the repairs made during a slower period. Recovery of the cost of the repairs themselves was not allowed. The Court of Appeal overturned the trial decision and disallowed recovery of any damages. The Supreme Court restored that trial judge's decision stating that those lost profits were the direct and demonstrably foreseeable result of the breach of the defendant's duty to warn. That duty imposed on a manufacturer was held in this case to continue in respect of its products after they had been distributed and ultimately sold to customers.

Using *Rivtow Marine*, Canadian courts have allowed negligence claims against public authorities for economic loss in some cases while rejecting them in others. The test or basis for allowing recovery of economic loss was set out by Wilson J. in *Kamloops* in the following terms, at pp. 33, 35:

> It is noted that in the *Dutton* case [10], Sachs L.J. put great emphasis on the fact that the defendant was a public authority and stated that the type of loss recoverable was the type of loss the private law duty arising under the statute was designed to prevent. If economic loss was within the purview of the statute, then it should be recoverable for breach of the private law duty arising under the statute whether or not it is recoverable for breach of a duty at common law. In my view, the private law duty in this case was designed to prevent the expense incurred by the plaintiff in putting proper foundations under his house.... The purpose of the By-law in this case was to prevent the construction of houses on defective foundations.
>
> Finally, and perhaps this merits some emphasis, economic loss will only be recoverable if as a matter of statutory interpretation it is a type of loss the statute intended to guard against.

Apart from *Just*, *Brown*, *Swinamer* and the few others which dealt with personal injuries and/or property damage, virtually all the post-*Kamloops* case law summarized in this document involved claims for economic loss of one form or another. For the most part, that fact alone did not seem to put the court off from considering liability. There were, however, instances, both in Canada and elsewhere, where the court appeared to be reluctant to allow certain kinds of damages to fall on the shoulders of public authorities. For example, in *Wirth v. Vancouver*, (1990), 47 B.C.L.R. (2d) 340 (C.A.), a property owner sued the city alleging that the value of his property had been reduced due to the city having negligently issued a permit in respect of construction on an adjoining lot in contravention of a by-law. The city admitted the negligence. The court dismissed the claim primarily because the plaintiff had another remedy - an injunction to prevent unlawful construction but also stated that the city was made up of ratepayers and that the residents of a municipality should not "pay for the kind of economic loss asserted here."

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[10] *Dutton v. Bognor Regis United Building Co.*, [1972] 1 All E.R. 462 (C.A.)

Another case suggesting that there should be a limit on the kinds of losses recoverable in tort is ***Birchard v. Alberta Securities Commission*** (1987), 42 D.L.R. (4th) 300 (Alta. Q.B.). One of the issues under consideration was whether the Law Society shared any responsibility for losses suffered by lenders when a mortgage company, whose directors included a firm of lawyers, collapsed. The Law Society had some knowledge of the questionable practices of the mortgage company. In the course of finding that the Law Society had no duty to protect persons who had business (as opposed to legal) dealings with lawyers, the court also noted the mounting criticism of *Anns*. Agrios J. stated that the extent of the duty of care is partly a policy question which is dependent on all the circumstances, including applicable legislation. Echoing the words of Wilson J. in *Kamloops*, he concluded that "economic loss will only be recoverable if as a matter of statutory interpretation it is a type of loss the statute is intended to guard against," but seemed to say that this question should be addressed first before looking at proximity.

It is to be noted that the Supreme Court of Canada has declined to follow this approach.

4.2 The assault on *Anns*: departing from the two-step test

Anns was in place only a few years when the highest courts in both England and Australia began having a great deal of trouble with its two-step test in imposing a duty of care and liability on public authorities for pure economic losses arising from the exercise of their statutory powers. The English case of ***Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co.***, [1985] A.C. 210 (H.L.), is widely regarded as the moment when serious questioning of *Anns* began to occur. A local authority was ultimately found not liable to a developer for alleged failure to carry out its duties. Plans for construction of a housing development showed a drainage system of flexible design, recommended by the plaintiff's architects, to allow for soil movement. After these plans were approved, an older-style rigid-design drainage system was installed upon the advice of a trainee architect employed by the firm of architects engaged by the plaintiff. The approving authority, or at least its drainage inspector who actually was untrained, knew of the deviation from the plans but took no action. The drains eventually had to be reconstructed, causing a three-year delay, extra costs and resulting losses in rent.

At trial, the local authority was found liable for failure to ensure that the construction conformed to the design it had approved. The Court of Appeal and House of Lords disagreed with the trial judge. Lawton L.J. in the Court of Appeal found that the duty to comply with statutory requirements governing drainage was imposed upon the developer. Could the developer claim that the Lambeth Borough Council was liable for not requiring it to do what it was statutorily required to do anyway? The Court of Appeal answered in the negative. While, as in *Kamloops*, a subsequent owner, who was intended to be protected by the by-laws in question, might have been owed a duty of care by the local authority in the circumstances and thus would have had a claim against the local authority, that duty was not owed to a builder. Fox L.J. used the language of the second step of the *Anns* test to rejecting the duty of care in regard to the builder (at p. 233):

> But where the local authority has actually approved a satisfactory system and the owner, albeit on the advice of independent contractors, abandons the system and unlawfully installs an unsatisfactory one, I think it is material when considering whether a duty of care to that owner is negatived, to have regard to the fact that the owner has acted unlawfully.

The House of Lords agreed: the purposes for which the local authority had been given approval and inspection powers - health and safety of occupants - did not include protecting builders from losses caused by not complying with building by-laws. Lord Keith of Kinkel did, however, remark that the temptation to treat the tests for determining duty of care and liability as set out in *Anns*, and before that, in *Dorset Yacht*, as definitive should be resisted (at p. 240):

> The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case.

In the final analysis, however, he abandoned the two-step test and stated the test for finding a duty of care in other, simpler terms (at p. 241):

> So, in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so.

That test was used in the New Zealand case of ***Stieller v. Porirua City Council***, [1986] 1 N.Z.L.R. 84 (C.A.). A home-owner sued the city for the cost of repairing construction defects that were not found by city inspectors. The court agreed that the inspection had, in fact, been negligent and that the council's responsibilities extended to the construction of soundly built houses and the safeguarding of persons who might occupy them. Rather than the *Anns* test, the Court stated that the proper question to ask was "whether it is just and reasonable that a duty of care of particular scope should be placed upon the defendant."

Somewhat similar facts were involved in ***Curran v. Northern Ireland Co-ownership Housing Assoc.***, [1987] A.C. 718 (H.L.), where a house extension was built with the aid of an improvement grant given by a local loan-granting authority on the condition that the dwelling meet certain standards of habitation and be built to its satisfaction. The grant conditions were directed at ensuring that public money was properly spent rather than protecting subsequent home-owners against loss. The granting authority had no supervisory or inspection powers; the most it could do if defective construction came to its attention was to withhold payment of the grant. Although the extension was so badly constructed that it had to be completely rebuilt, the court held that, in the circumstances, it would not be *fair or reasonable* to hold the granting authority liable.

The Australian case of ***Sutherland Shire Council v. Heyman***, (1985), 60 A.L.R. 1 (H.C.) was a significant attack on *Anns*. A house suffered damage due to inadequate footings.

The damage appeared about seven years after the house was built; the plaintiffs were the then-owners. The specifications for the footings were imprecise but the permit conditions did require notice of various stages of construction and an inspection upon completion. These were apparently not followed. It was alleged that there had been either no inspections or negligent inspections by the Council that had issued the building permit, and that this breached a duty of care leading to the resulting loss.

The issue here was precisely the same as in *Kamloops* and *Peabody*: whether a local authority which gives approval for construction of a house owes a duty to subsequent purchasers and occupiers to take reasonable care to ensure that the house is built according to plans and specifications that it had approved. It also considered the question of what duty, if any, it owes to such persons in deciding whether to make inspections, and in the carrying out such inspections as are made during the period of construction.

At trial, it was held that while the Council had not been negligent in approving the plans and specifications that had been submitted, it had a duty of care to the plaintiffs in respect of adequately inspecting the premises during construction which it had breached either in not conducting any such inspections or conducting them in a negligent manner. That ruling was upheld by the Court of Appeal.

The High Court reversed the lower level decisions and denied liability, essentially on the basis of finding no duty of care as between the Council and the purchasers. Four of the five judges gave separate, extensive reasons. Although Mason J. stated that he could not follow *Anns*, his reasons are more significant in two other respects, namely in its specification of financial, economic, social or political factors or constraints underpinning policy decisions which Cory J. in *Just* imported into Canadian law, and, more generally, for its succinct statement of deficiencies in the case law in settling where and to what extent the common law pertaining to negligence should operate in regard to public authorities (at p. 26):

> This is partly because the decided cases on some occasions distinguish unnecessarily between a statutory power and a statutory duty and on other occasions distinguish insufficiently between a common law duty of care and a statutory duty. And it is partly because the unsatisfactory dichotomy between a misfeasance and nonfeasance has had a significant influence in this branch of the law of negligence.

A stronger and more coherent attack on *Anns*, and particularly, Lord Wilberforce's two-step test, can be found in Brennan J.'s reasons. He declared that he could not accept that the first step - a *prima facie* duty of care arises where it is reasonably foreseeable that carelessness by act or omission will be likely to cause damage to another who comes to suffer that damage - can be applied to a public body to determine whether a failure to act in the exercise of a statutory power is negligent. His problem was that foreseeability of injury never had been applied as an exhaustive test for determining whether there is a *prima facie* duty to act to prevent injury arising either from the acts of another person or from circumstances for which the alleged wrongdoer is not responsible. In essence, what he was saying here was that the approach adopted in *East Suffolk* in distinguishing between nonfeasance and misfeasance was correct and that the rejection of it in *Anns* was wrong.

Accordingly, using *East Suffolk* language, he concluded that unless the risk of structural damage to the house was created or increased by the Council, it had no duty to inspect the foundations.

Deane J. also expressed difficulty accepting *Anns* but his problem was that the deficiencies in *Anns* pertaining to proximity make it unsuitable not only in respect of nonfeasance but also where the damages complained are in the nature of economic loss.

The House of Lords' approach in *Peabody* was applied in ***Minories Finance Ltd. v. Arthur Young***, [1989] 2 All E.R. 105 (Q.B.), where the Court found that the Bank of England was not under an obligation to an individual commercial bank to exercise reasonable care and skill in carrying out its supervisory functions over that bank. It was alleged by the auditors of a commercial bank that the Bank of England had negligently failed to discover or take action in relation to the imprudent manner in which the bank had been conducting its commercial loan activity. The court emphasized that a relationship of proximity was not enough to found liability. Instead, the court referred to statements made in *Peabody* as to whether it would be "fair and reasonable" that a duty of care should be owed by the public authority to the person concerned, as determined by the ambit and purpose of the authority's statutory powers. In this case, it was determined that because the primary purpose of the *Banking Act* was the protection of depositors, it would not be *fair and reasonable* to impose a duty of care on the Bank of England in regard to commercial banks.

Another case that criticized *Anns* and perhaps hinted at what was to come in *Murphy* (infra) was ***Caparo Industries v. Dickman***, [1990] 1 All E.R. 568 (H.L.). The claim dealt with negligent provision of information or advice by auditors. Although no public authority was involved, the court commented on the attempt in *Anns* to set out a general principle to be followed by courts in deciding whether a duty of care existed. The post-*Anns* decisions were canvassed, in which the House of Lords had "emphasized the inability of any single general principle to provide a practical test ...to determine whether a duty of care is owed...." On that point, Lord Oliver stated (at pp. 585-586):

> ...for my part, I think it has to be recognized that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the-wisp. The fact is that once one discards, as it is now clear that one must, the concept of foreseeability of harm as the single exclusive test, even a *prima facie* test, of the existence of a duty of care, the attempt to state some general principle which will determine liability in an infinite variety of circumstances serves not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense.

The approach of Brennan J. in *Sutherland Shire Council* was quoted with approval:

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

The ruling of the House of Lords in ***Murphy v. Brentwood District Council***, [1991] 1 A.C. 398 (H.L.), is widely thought to have driven the last nail into the coffin of the two-step test enunciated in *Anns*. Negligence was alleged against a local council which had approved plans and calculations for a "concrete raft foundation" of two semi-detached houses. The design had been approved after having been checked by consulting engineers. The foundation turned out to be defective and cracked and distorted in response to differential settlement of the soil beneath it. The plaintiff sold the house at a loss to a buyer who was aware of the defects.

Both the trial judge and Court of Appeal found that the Council owed a duty of care to the plaintiff to see that the house was properly built. The Council was therefore initially found liable for the engineers' negligence in approving seriously deficient plans in providing for insufficient steel reinforcement.

The House of Lords, in several separate extensive speeches, reversed the lower courts to find that the Council owed no duty of care to the plaintiff in respect of the damages suffered in the form of economic loss. The significance of those judgments lies in their unanimous and unequivocal assertions that, contrary to what was thought at the time, *Anns* dealt with economic loss rather than physical damages and, as such, was wrongly decided. According to Lord Keith (at p. 471):

> In my opinion it is clear that *Anns* did not proceed upon any basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide variety of situations, involving chattels as well as real property, in which it had never hitherto been thought that the law of negligence had any proper place.

He then suggested that *Anns* could be regarded as "a remarkable example of judicial legislation," thus concluding (at p. 472):

> I would hold that *Anns* was wrongly decided as regards the scope of any private law duty of care resting on local authorities in relation to their function of taking steps to secure compliance with building byelaws or regulations and should be departed from.

From *Peabody* to *Murphy*, the focus of attacks on *Anns* was the inadequacy of the two-step test in determining whether a *prima facie* duty of care arose as between defendant and plaintiff so as to enable a breach of that duty to be determinative of negligence, assuming the absence of any countervailing or mitigating factors under the second step of the test. For the most part, the inadequacy seemed to be rooted in the view that the test, at least in terms of how it had been applied, had supplanted the requirement of proximity or neighbourhood as between wrongdoer and victim with mere foreseeability of consequences. That was regarded as contrary to modern tort theory established by Lord Atkin in *Donaghue v. Stevenson* and especially unsuitable where the consequence of the breach of duty of care was economic loss rather than physical damages.

In all of this, little, if any, explicit attention was given to the other important aspect of *Anns*, namely the policy/operation distinction. In fact, for the most part, it simply

appeared to be ignored as the analytical starting point for determining whether the impugned decision of the public authority might engender a duty of care.

Combined with the continuing attack on *Anns* generally, the authority and value of the policy/operation distinction was eroded by the time the Judicial Committee of the Privy Council actually dealt with it head-on in ***Rowling v. Takaro Properties Ltd.***, [1988] 1 All E.R. 163 (P.C.). That case involved a claim in negligence brought against a minister of the New Zealand government for his refusal to give statutorily required consent to particular financing arrangements that were necessary to save a failing tourist resort from collapse. The Minister's refusal was based on irrelevant considerations (foreign ownership concerns) for which judicial review was ultimately granted. By the time the Minister's refusal was quashed, the foreign interests had pulled out forcing the resort into receivership. A claim for damages was taken against the Minister on the basis that his refusal to consent was negligent - specifically that he had failed to avail himself of legal advice as to whether the foreign ownership aspects of the matter were relevant. At trial, the action was dismissed on the ground that although the Minister owed the plaintiff a *prima facie* duty of care, the plaintiff had not established that the Minister had breached that duty or had exercised his statutory powers maliciously. The Court of Appeal reversed that decision to find that, in taking irrelevant considerations into account and not seeking appropriate legal advice on that matter, the Minister had breached his duty of care.

On appeal to the Privy Council, Lord Keith of Kinkel used the opportunity to revisit the policy/operation distinction on which the Court of Appeal had explicitly relied, although not without some difficulty, to find the Minister's *prima facie* duty of care vis-à-vis the plaintiffs (at p. 172):

> Their Lordships feel considerable sympathy with Quillam J.'s difficulty in solving the problem by simple reference to this [policy/operation] distinction. They are well aware of the references in the literature to this distinction (which appears to have originated in the United States of America) and of the critical analysis to which it has been subjected. They incline to the opinion, expressed in the literature, that this distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it was made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of resources or the distribution of risks....If this is right, classification of the relevant decision as a policy or planning decision in this sense may exclude liability; but a conclusion that it does not fall within that category does not, in their Lordship's opinion, mean that a duty of care will necessarily exist.

In other words, the only apparent value of the policy/operation distinction was for the purpose of discerning that a particular decision was in the nature of policy so as to exclude liability categorically, that is, without reference to whether the policy decision was made in good faith, as stated in *Anns*. The fact that a decision was "operational" ceased to have any importance for attributing even a *prima facie* duty of care under the first step of the *Anns* test.

4.3 Canadian reaction

The result of the decision in *Murphy* is that the kinds of loss that are recoverable in the United Kingdom and Canada are now different. In Canada, if the relevant statute seems to be aimed at protection against economic losses, then those losses are recoverable provided negligence is proven. In the United Kingdom, recovery of economic loss may be precluded, even if within the scope of the legislation, if the court concludes that such recovery would not be "fair and reasonable" in all the circumstances. One of the "circumstances" is whether the plaintiff expressly relied on the defendant.

A Canadian case that considered but did not follow *Murphy* on this point is ***Brewer Brothers v. Canada***, [1992] 1 F.C. 25 (C.A.). This was another Grain Commission case where the plaintiff's losses arose after an operator of a producer elevator could not pay for the plaintiff's grain and eventually had its elevator licence canceled.

The evidence and reasoning were very similar to that in *Devloo*, but the court also addressed the argument, based on *Murphy* and other English cases, that liability should be limited because the loss was economic. The court in *Brewer Brothers* recognized that the English cases seemed to be saying that the presence of damages in the form of economic loss should be relevant to a duty of care, either in the sense that the duty did not go as far as preventing that kind of loss, or that a high degree of reliance has to have been present in order to establish a duty of care.

The court ruled that, according to *Just*, the governing authority in Canada, the presence of a duty of care was distinguishable from, and not dependent upon, the kind of damages suffered. The court relied on *Kamloops* to rule that economic loss would be recoverable if the statute intended to guard against such damages. As far the *Canada Grain Act* was concerned, the court held that it intended that grain producers were to be protected financially. Thus, *Kamloops* was followed and *Murphy* was held not to apply.

That approach was confirmed by the Supreme Court in ***Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd.***, [1991] 1 S.C.R. 1021. The issue was whether a company whose barge damaged a railway bridge was liable to compensate railway companies for losses they suffered because they could not use the bridge during the repair period of several weeks. Although the Crown, as owner of the bridge, was able to recover damages from the barge owners, the contracts between the Crown and the railways did not provide for compensation in case of disruption of bridge service. The railways companies were, therefore, left to proceed directly against the barge owner if they hoped to recover their losses.

Although like *Rivtow Marine*, this case did not involve a public authority as defendant of a tort claim, it is worth considering inasmuch as it put the issue of recoverability of economic losses in the light of *Murphy* directly before the court. The court upheld the lower courts' decisions in favour of the plaintiff. Both McLachlin J. for the majority and LaForest J. for the minority took the opportunity to comment on the development of the law concerning recovery of economic losses.

McLachlin J., while agreeing that some limiting principles were necessary in the determination of tort claims, found the existing Canadian law sufficient, particularly the concept of "proximity:"

> The fact is that situations arise... where it is manifestly fair and just that recovery of economic loss be permitted. Faced with these situations, courts will strain to allow recovery.... They will refuse to accept injustice merely for the sake of the doctrinal tidiness which is the motivating spirit of *Murphy*. This is in the best tradition of the law of negligence.... (p. 1146)

> It is my view that the incremental approach of *Kamloops* is to be preferred to the insistence on logical precision of *Murphy*. It is more consistent with the incremental character of the common law. It permits relief to be granted in new situations where it is merited. Finally, it is sensitive to the danger of unlimited liability. (p. 1149)

LaForest J., for the minority, made it clear that he did not disagree with the proposition that economic losses are recoverable in certain cases, but restricted his comments to cases where the plaintiff had a contractual relationship with the owner of the property that was damaged by a tortfeasor. LaForest J. would have denied liability here for the reason, among others, that the risk was known and could have been provided for contractually. But he did state (at p. 1054):

> ...I fully support this court's rejection of the broad bar on recovery on pure economic loss in *Rivtow* and *Kamloops*. ... I agree with McLachlin J. that *Murphy* ... does not represent the law in Canada.

It might be noted that *Murphy* now seems not to apply to economic loss claims in New Zealand. In ***Invercargill City Council v. Hamlin***, [1996] 1 All E.R. 756 (P.C.), the Judicial Committee of the Privy Council upheld the New Zealand Court of Appeal's ruling that, notwithstanding *Murphy*, a city council owed a duty of care to a house owner in respect of negligent inspections of the foundations during construction and thus, will be liable for loss of value. The Court consciously departed from English law on the ground that conditions in New Zealand were different.

Leaving aside the issue of economic loss, as far as can be discerned, the only example in Canadian jurisprudence that has expressly based itself the *Peabody* line of English cases in determining whether a duty of care arose is the Queen's Bench judgment in ***Longchamps v. Farm Credit Corporation***, [1990] 6 W.W.R. 536. which, as noted earlier, dealt with a negligence claim in relation to the Crown corporation's handling of an application for a loan. McDonald J. expressly relied on the speech of Lord Roskill in *Caparo v. Dickman* to state (at pp. 543-4):

> I find the notion of what is "just and reasonable" to be helpful. For that formulation invites the courts, in deciding whether a duty of care exists, to look behind convenient but imprecise labels and examine the justice and reasonableness involved in finding that such a duty does or does not exist. In other words, the courts are invited to articulate what is just and what is reasonable. I propose to analyze the present allegation that a duty of care was owed by the defendant to the

plaintiff, by articulating whether it is just and reasonable that such a duty of care be recognized.

Appendix One

THE DUTY TO WARN

The common law recognizes factual situations where a duty of care specifically translates into a duty to notify or warn particular individuals or classes of persons of potential harm. In such instances, the failure to provide the required notification or warning would constitute actionable negligence where harm is suffered that could otherwise have been avoided, or at least, mitigated had the warning been given.

The duty to warn most prominently arises in two situations - as an occupier's duty in relation to physical hazards affecting real property under that person's occupation or control,[11] and as a duty falling upon manufacturers and suppliers in regard to defects or inherent risks in products that they put on the market. Occupier's duties extend beyond land and buildings to "structures," which can include mobile structures such as airplanes, trains and ships. Indeed, as discussed below, much of the case law on the duty to warn involving the Crown, some of it quite old, actually pertains to occupier's duties as applied to wharves or jetties or even to the sea-bed of harbours that fell within Crown property.

As far as defective or inherently risky products are concerned, *Donoghue v. Stevenson*, which had been a products liability claim arising from the discovery of a snail in a bottled drink, laid the groundwork for finding sufficient proximity as between the manufacturer or seller of the product and a consumer to engender a duty of care and thus, liability in negligence. The leading Canadian authority on the duty to warn in relation to defective or dangerous products is now widely regarded to be *Rivtow Marine* which, as already noted, involved defective cranes installed on a barge. According to Ritchie J., the duty to warn on the part of both the manufacturer or supplier of the cranes arose from the moment either of them became "seized with the knowledge" of the defect in them and thus, the danger involved in continued use of the cranes for the purpose for which they had been designed. In *Modern Livestock v. Elgersma* (1989), 74 A.L.R. (2d) 392 (Q.B.), the notion of a defective product was applied to animals infected with a contagious disease so as to impose a duty of care on the sellers of such animals in circumstances where they knew, or should have known, of such infection. On the other hand, in *Canadian Pacific Forest Products Ltd. v. Conamara*, [1996] B.C.J. No. 2265 (S.C.) the court made it clear that a duty to warn will not arise in relation to a product where the risk to health or safety attaching to that product arises from its misuse rather than from some defect or inherent danger.

A duty to warn has been imposed in other situations of risk where inherently dangerous or defective products were not in issue. For example, in *West Fraser Mills Ltd. v. Chouinard*, [1993] B.C.J. No. 1979 (S.C.), the defendant was sued in negligence for having cut underground cables while doing dredging work. The action failed because the plaintiff, having placed the cables too close to the surface and thereby having created the

[11] See, for example, *Veinot v. Kerr-Addison Mines*, [1975] 2 S.C.R. 311

risk of damage, was found to have been in breach of his own duty to warn the defendant of the location of underground cables and of the precise risk of being severed by the use of heavy machinery.

In *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, where a guest at a ski resort was seriously injured as a result of his entry in a sledding competition, the court found the resort operator negligent in not having adequately warned that person, who was visibly intoxicated, of the serious risks of injury inherent in that kind of activity. Similarly, in *Efford v. Bondy*, [1996] B.C.J. No. 171 (S.C.), an outfit running whale watching excursions was found to have been negligent in failing to warn its passengers of the likelihood of rough water, with which it was obviously familiar, as well as in failing to have indicated where safe handholds were located so as to avoid injury. In *Arndt v. Smith*, [1994] B.C.J. No. 1137 (S.C.), there was *obiter* to the effect that an obstetrician has a duty to warn an expectant mother who suffered chicken pox during her pregnancy of the risks to the foetus of serious birth defects.

A duty to warn has been held to arise in certain other spheres of governmental activity. For example, within the framework of licensing and/or regulatory functions, there are cases dealing with liability arising out of omissions, specifically the failure to warn particular persons in relation to dangers or hazards brought to the attention of the public authority as a consequence of its statutory duties or functions. In *Teachers Investment and Housing v. Jennings* (1990), 44 B.C.L.R. (2d) 203 (S.C.), aff'd, 56 B.C.L.R. (2d) 145 (C.A.), the court refused to strike out a statement of claim in a negligence suit brought against provincial regulatory authorities for failing to warn a regulated investment cooperative that its investment activities were imprudent or possibly unauthorized by governing legislation. The court found that the statutory powers and duties of the official in question, the Superintendent, included protection of a cooperative association. In addition, the absence of sufficient proximity such as to give rise to a duty of care was not obvious to the court.

In *Brown v. Heathcote County Council*, [1986] 1 N.Z.L.R. 76 (C.A.), aff'd, [1987] 1 N.Z.L.R. 720 (P.C.), the plaintiff applied to the county council for a permit to build a house on a section of land adjacent to a river. The council referred the application to the local municipal drainage for advice as to drainage and plumbing, the provision of which was part of their mandate. Although the drainage board had no statutory duty to warn landowners of flood risks to their property, its usual practice was to do so based upon the fact that it had comprehensive and accurate knowledge of such risk. Despite three inspections and evidence of a risk of flooding, the board failed to warn the plaintiff of any such risks. The plaintiff suffered flooding in three successive winters forcing him to raise his house and shore up the land. He then sued both the County Council and the Board for damages in the amount of the cost of those renovations. While the claim against the County Council was dismissed, the action against the drainage board succeeded, with the court finding that in failing to warn the plaintiff of the flood risk, the board had breached its duty of care to the plaintiff which came from its specialized knowledge of flood risks and its proximity to the plaintiff stemming from the inspector's visits.

For the most part, negligence claims against public authorities arising out of a failure to warn have arisen in the context of navigation and shipping, some of which are actually quite old. A leading case in this regard is *R. v. Canada Steamship Lines*, [1927] S.C.R. 68, which involved a claim for property damage and personal injuries sustained by the shipping company's passengers while disembarking onto a landing slip which collapsed under their weight. The landing slip, which was on a government wharf, had been inspected in a perfunctory manner by a government engineer who became apprised of the danger but failed to take proper steps to prevent the damages. More specifically, the court stated that his failure to warn the shipping company of the danger of using the slip was a dereliction of duty amounting to negligence engaging the vicarious liability of the federal government.

Virtually the same cause of action arose in the case of *Sarnia Cranes Ltd. v. Canada* (1992), 50 F.T.R. 81. The plaintiff had been asked to bring a crane to a public dock owned by the federal government for the purpose of hoisting some equipment onto a freighter that was tied up there. Once on the dock, the weight of the crane caused the dock to collapse which, among other things, caused physical damage to the crane and economic loss to the plaintiff in lost profits while the crane was out of service. The Crown knew that the timber underpinnings to the dock were susceptible to rotting and, in fact, knew that they were weak. The Crown was found liable for the damages caused by the collapse by reason of having failed to post a warning that would have alerted the plaintiff to the dock's weakened condition.

Another leading case in this area is *R v. Hochelaga Shipping & Towing*, [1940] S.C.R. 153. The federal government began construction of a jetty extending out at a right angle from a pier. Prior to completion, the upper portion of the jetty broke away during a storm leaving only the lower portion which was completely submerged and thus constituted a hazard to navigation. A ship collided with the submerged structure. The Crown was found liable as a result of its negligence in failing to place adequate warning buoys alerting ships to the hazard.

On the other hand, in *Owners of S.S. Panagiotis Th. Coumantaros v. National Harbours Board*, [1942] S.C.R. 450, the court found that the Crown was not liable for damages caused to ship which struck an underwater obstacle while leaving the port of Montreal because it had taken reasonable care in providing for a safe passage. The court stated that the duty to warn of hazards arose only in those circumstances where the defendant knew or should have known of the danger in question.

A leading English case dealing with failure to warn is *Workington Harbour and Docks Bd. v. Towerfield (Owners)*, [1951] A.C. 112 (H.L.). A ship, while under the control of a pilot, ran aground in a channel within the jurisdiction of a harbour. Damage was caused to both the harbour and the ship. The harbour authority was found negligent for having failed to warn the ship's master and/or pilot of the conditions of the channel. The court stated that the harbour authority's duty to warn arose out of the invitor/invitee relationship it had with ships entering into its waters which, in effect, cast the duties of an occupier onto the harbour authority.

More recently, the Crown's liability was engaged for failure to warn in the navigation context in *Hendriks v. The Queen*, [1970] S.C.R. 237 and in *Rideau St. Lawrence Cruise Ships v. Canada* (1988), 19 F.T.R. 1. *Hendriks* involved both a wrongful death and negligence claim arising out of an accident where a small boat went over a waterfall killing the plaintiff's wife. The Crown was found contributorily liable as a result of the failure to replace warning buoys that had earlier been swept away. *In Rideau St. Lawrence Cruise Ships*, the Crown was found liable for damages to a launch that struck a rock embedded in the bed of the Rideau Canal. The court stated that the Canal authority had committed gross negligence in that it knew about the rock and the hazard it created but, for some inexplicable reason, simply failed to do anything to remove it or to warn canal users of the danger.

There are instances where negligence claims have been founded on alleged failures to warn in non-maritime contexts. In *Grossman v. R.*, [1952] 1 S.C.R. 571, a light airplane was damaged beyond repair when it ran into a ditch intersecting a grass runway while attempting to take-off. The Crown was found liable for the negligence of the airport manager in not adequately marking off the ditch with red warning flags. By contrast, in *Sturdy v. Canada* (1974), 47 D.L.R. (3d) 71 (F.C.T.D.), the court declined to find the Crown liable for the personal injuries sustained by a camper in Jasper National Park who was attacked by a bear at a garbage dump situated not far from a campsite. Although no warning signs advising of bears had been posted at the garbage dump specifically, there were general notices to watch out for bears posted throughout the park which the court found to be adequate.

Appendix Two

CROWN LIABILITY AND CONTRACTING OUT

[Much of this text is taken from a paper entitled *Tort Liability of the Crown and Contracting Out*, by Kenneth Katz and Marie-Claude Goulet, both of the Constitutional and Administrative Law Section, which was presented at the Department of Justice's Administrative Law Seminar in April, 1997.]

A fundamental principle of both common law and civil law is that no person can be held liable for the damages caused by the wrongful conduct of someone else who is of full age and capacity and is not that person's servant or agent. By definition, an independent contractor is no one's servant or agent. The Supreme Court of Canada recognized, long ago, that independent contractors hired to work for the Crown are not servants of the Crown.[12]

Both our common law and civil law traditions seem to have developed a notion of "exceptional circumstances" wherein a person hiring the services of an independent contractor may, in fact, be liable for damages he causes in performing the contract. One instance where that will operate is where the law imposes a "duty" on the employer relating to the contracted work that is not transferable to the contractor. Where such a duty arises in regard to contracted work, the employer's liability lies essentially in his contractor's negligence attaching to the manner in which the contract was performed. That failure, however, is regarded as the employer's own because the duty underlying what had to be done and, in the circumstances, was not done, fell on the employer and could not be transferred to the contractor.

The duty arising here is what has been variously described in the case law as an *independent duty of care* or, more simply, as a *non-delegable duty*. Rather than the ordinary duty of care that underpins negligence, the employer's non-delegable duty consists of an extraordinary duty to "provide that care is taken," and it is that exceptional duty that will have been breached where the contractor's negligence, in the course of carrying out his contracted work, causes damages to third parties. In strict terms, the employer's liability on the occasion of damages caused to a third party by his contractor will be personal and direct, based upon a breach of some duty of his own. By contrast, where an employer-employee or principal-agent relationship is present, the employer's liability is vicarious, based entirely on the tort of the employee or agent without regard to his own conduct.

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[12] *McKearney v. Stephen Oakes*, (1890), 18 S.C.R. 148; *Théberge v. The King*, (1916) 17 Ex.C.R. 381; *Brown v. The King*, [1939] 4 D.L.R. 641; *Puckrin v. The King*, [1946] Ex.C.R. 406; *Palmer v. The King*, [1951] Ex.C.R. 348, conf'd [1959] S.C.R. 401; *Dulude v. The King*, [1952] B.R. 503; *Palmer v. Miron et Frères*, [1959] S.C.R. 397; *La Caisse Populaire de Saint-Calixte de Kilbenny v. The Queen*, [1964] Ex.C.R. 882.

This basis of liability for an employer in relation to damages caused by an independent contractor has been recognized in the common law for well over a hundred years, first articulated in *Dalton v. Angus* (1880-81), 6 App. Cas. 744, at 829 (H.L.):

> ....a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.

There is quite a lot of case law dealing with this issue, both English and Canadian, much of it dealing with contracts for services given out by municipalities or some other kind of local authority. Recently, a series of cases originating in British Columbia looked at non-delegable duties falling on provincial authorities pertaining to the function of road maintenance. Those judgments are, in certain respects, somewhat at odds with the "traditional" rules governing an employer's non-delegable duties vis-à-vis work assigned to independent contractors that had developed more or less on an *ad hoc* basis since *Dalton v. Angus*. A more serious failing, however, is that, from the outset, the courts never really established a coherent framework for determining when a non-delegable duty should arise or what it should entail.

Independent contractors and their employers' liability

1. origins

The imposition of liability upon an employer for damages to a third person caused by his contractor came about as an exception to the more general rule established in *Quarman v. Burnett* (1840) 151 E.R. 509, that excluded an employer's vicarious liability in such circumstances:

> But the liability, by virtue of the principle of master and servant, must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable... consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable.

In fact, this exclusion of an employer's liability for damages to third parties caused by an independent contractor was itself formulated as an exception to the older rule of vicarious liability for employers vis-à-vis torts of servants that had been around since the fourteenth century.

Within only a few years of excluding an employer's liability for torts committed by their contractors, as distinguished from their servants, the courts started to find ways of limiting that exclusion's application. For example, in *Burgess v. Gray* (1845), 1 C.B. 578, an employer was found liable for damages suffered by a third party who collided with heaps of gravel on a highway which had been dug up by his contractor while excavating for the

purpose of making a sewage drain. Similarly, in ***Ellis v. The Sheffield Gas Consumers' Company*** (1853), 118 E.R. 955, where a company given a contract to lay underground gas lines had hired a sub-contractor to dig trenches for that purpose, the sub-contractor's employer was found liable for damages caused to the plaintiff who had injured herself by tripping over stones that had been excavated by the sub-contractor and simply left lying in the street.

This idea of an employer's liability being tied to his contractor's performance of assigned work as specified in the contract was captured in ***Hole v. The Sittingbourne and Sheerness Railway Company*** (1861), 158 E.R. 202 (at 205):

> ...when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act and is responsible for it.

The issue in that case was the contractor's construction of a lift-bridge over a river which failed to open thereby blocking navigation and causing economic loss to cargo owners.

The concept of a duty falling upon an employer as being the foundation of his liability for damages caused by his contractor comes out of ***Pickard v. Smith*** (1861), 142 E.R. 535. A lessee of a couple of "refreshment rooms" and a coal cellar in a railway station hired a contractor to load coal into the cellar which was done via a trap door situated in a poorly-lit passageway through which travelers would enter or leave the station. On one occasion, after loading coal, the trap-door was left open causing the plaintiff, an arriving passenger, to fall through, which resulted in severe personal injuries. The court found the lessee liable (at 539):

> Unquestionably, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable ... That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which *the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned.*
>
> [emphasis added]

The idea that the duty spoken of here should be non-delegable was clearly articulated in the leading case of ***Hardaker v. Idle District Council***, [1896] 1 Q.B. 335 (C.A.), which considered the liability of a municipal authority for damages caused by a contractor who had been engaged to build sewers and who broke a gas main in the course of the work, causing an explosion and fire (at p. 340):

> The powers conferred by the Public Health Act, 1875, on the district council can only be exercised by some person or persons acting under their authority. Those persons may be servants of the council or they may not. The council are not

> bound in point of law to do the work themselves - i.e., by servants of their own. There is nothing to prevent them from employing a contractor to do their work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more.....If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly. This principle lies at the root of the modern decisions on the subject....

This was, in fact, a restatement of what had earlier been said by Lord Blackburn in *Dalton v. Angus*.

In all of this, what appeared to be lacking was a conceptual framework for identifying the duty spoken of in *Hardaker* as falling on an employer in relation to work performed by a contractor. Obviously that duty could not arise in all cases where a contractor had been engaged, as that would result in eliminating any effective difference as between an independent contractor and a servant in regard to an employer's vicarious liability.

Beginning in the mid-1870's, the case law began to tie the notion of an employer's independent, non-delegable duty of care in respect of work assigned to an independent contractor to the element of *extraordinary risk of harm* associated with the work in question. Two particular situations where such risk would normally arise were identified: where the contracted work was especially dangerous to the safety of other persons or their property, or where the work was on or over a highway. Later on, English case law extended the basis of non-delegable duties to include various duties falling upon employers per se, that is, simply by reason of being an employer of others. There is also a more recent line of English and Australian cases that base an employer's non-delegable duty of care upon the doctrine of assumption of responsibility, whether express or implied.

Above and beyond all of these foregoing categories, there are situations where statutory duties fall upon employers, such as occupational health and safety requirements stipulated in federal and provincial legislation, or more generally, any duty to achieve a specified result statutorily imposed on a minister or designated official or other public authority. This kind of statutory duty is non-delegable. It is to be noted, however, that, at least as far as Canadian law is concerned, the breach of a statutory duty will not, in and of itself, engage liability unless expressly stipulated in the statute setting out the duty. Thus, the actual non-delegable duty of the employer, which will be the source of his liability for damages caused by his contractor where statutory duties are involved, will be the extraordinary common law duty of ensuring that appropriate precautions are taken underpinning the carrying out of statutory duties, and not the statutory duty itself. The case law dealing with contracted work having a statutory basis, however, is often confusing because the courts speak of statutory duties appertaining to the work contracted out by a public authority to an independent contractor where, in reality, the statutes in question simply confer powers rather than impose duties.

2. exclusion of "collateral" negligence

In any situation involving damages to a third party caused by an independent contractor in the carrying out of his contract for services, the employer will never be liable for the contractor's collateral negligence. This limitation goes back to the judgment of Pollock C.B. in *Hole*:

> Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act.

This statement suggests that a collateral act is something incidental to, or outside the direct ambit of, the services and result envisaged by the contract, that is to say, something other than the very act delegated to be done. The concept of collateral negligence is, however, somewhat more complex in that it is actually tied to the employer's independent duty rather than to the actual work given over to the contractor to perform.

Much of the case law dealing with liability of employers for damages caused by independent contractors has, as its primary focus, the question of whether the contractor's negligence causing the damages was or was not collateral. The English case of ***Padbury v. Holiday & Greenwood Ltd.*** (1912), 28 T.L.R. 494 (C.A.), provides an early example of collateral negligence and remains one of the clearest statements of the governing legal principle. In that case, A employed B to fit casement windows into certain premises. B's servant negligently put a tool on the sill of the window where he was then working and the wind blew the window open knocking the tool off and injuring a passing pedestrian. Holding the employer not liable, the court stated (at p. 495):

> ....before a superior employer could be held liable for the negligent act of a servant of a sub-contractor, it must be shown that the work which the sub-contractor was employed to do was work the nature of which, and not merely the performance of which, cast on the superior employer the duty of taking precautions.

In other words, the employer is liable for those risks of harm created by the work itself which he is having done under contract and "collateral" means collateral to the risk which marks the limit of the duty of the employer. The theory underpinning this is best explained by Prosser[13]:

> The test of "collateral" negligence, therefore, appears to be, not its character as a minor incident or operative detail of the work to be done, but rather its dissociation from any inherent or contemplated special risk which may be expected to be created by the work. The employer is not liable because the negligence is "collateral" to the risk created - which is to say, that the performance of the work contracted for in the contract in the normal manner contemplated by the contract would involve no expectation of such a risk of harm to the plaintiff, and it is the abnormal departure from the usual or contemplated methods by the servants of the contractor which has created the danger.

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[13] *Law of Torts*, 4th ed., p. 475.

3. application of non-delegable duties

3.3.1 dangerous work

The notion that a non-delegable duty lies in the commissioning of dangerous work was first stated in ***Bower v. Peate***, (1876), 1 Q.B.D. 321. In the course of excavating his land to rebuild the defendant's house, the defendant's contractor caused damage to the plaintiff's house by reason of having failed to install adequate building supports. The court held the defendant liable for the damages caused by his contractor on the following basis (at p. 326):

> ...that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else - whether it be a contractor employed to do the work from which the danger arises or some independent person - to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventative measures are adopted.

This was restated a few years later by Lord Watson in *Dalton v. Angus*, (at p. 831):

> When an employer contracts for the performance of work, which, properly conducted, can occasion no risk to his neighbour's house which he is under an obligation to support, he is not liable for damage arising from the negligence of his contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, as well as the contractor, to repair any damage which may be done.

Both these cases dealt with the particular circumstance of danger arising from contracted work that involved the withdrawal of support from neighbouring land thereby posing a risk to property. The same principle was applied in ***Black v. Christchurch Finance Co. Ltd.***, [1894] A.C. 48 (H.L.), where a fire that had been deliberately started to clear bush on land spread to neighbouring property causing damage to crops, (at pp. 54-55):

> The lighting of a fire upon bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precaution to prevent the fire extending to his neighbour's property (*sic utere tuo ut alienum non laedas*). And if he authorizes another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences...

The step from work posing danger to property to work posing safety risks to the public at large was taken in *Hardaker*. The court applied the same principle of non-delegability of an employer's underlying duty to ensure that care is taken to contracted works in relation to excavation of municipal streets to build sewers where there was an obvious danger of gas escaping, with "its attendant consequences," by the failure to ensure that gas pipes were not left unsupported. Shortly thereafter, this idea of the generality of danger to others inherent in contracted work was succinctly stated in ***Penny v. Wimbledon Urban District Council***, [1899] L.R. 2 Q.B. 72, which is a widely cited authority on the non-delegability of the duty to take precautions (at p. 78):

> When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take these precautions.

English authorities now seem to prefer the expression "extra-hazardous acts" when referring to work assigned to independent contractors in respect of which an independent and non-delegable duty on the part of the employer to take appropriate precautions arises. That duty, however, will not arise where the act in question, if done with ordinary elementary caution by skilled men, presents no hazard to anyone at all.[14]

Canadian law has adopted this framework for imposing an independent duty of care on an employer, although not in the precise terminology used in England. The best Canadian authority on this point is the judgment of Anglin J. in ***Saint John (City) v. Donald***, [1926] S.C.R. 371, at p. 383:

> ... it is, no doubt, the general rule that the person who employs an independent contractor to do the work in itself lawful and not of a nature likely to involve injurious consequences to others is not responsible for the results of negligence of the contractor or his servants in performing it ... His vicarious responsibility arises, however, where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable. That duty imposed by law he cannot delegate to another, be he agent, servant or contractor, so as to escape liability for the consequence of failure to discharge it.

It might be noted that Québec civil law has accepted the concept of inherently dangerous work as the basis for an employer's liability for damages caused by an independent contractor. The leading case on this is ***St. Louis v. Goulet***, [1954] B.R. 185, where a fire started on the defendant's land to clear a pathway for power transmission lines got out of control and caused damage on neighbouring land. Citing both *Saint John v. Donald* and *Black v. Christchurch Finance*, the Court of Appeal stated (at p. 192):

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[14] *Salsbury v. Woodland*, [1970] 1 Q.B. 324, at 338 (C.A.)

> [Translation] But where, as in this case, the contract has as its precise object, an operation that, by its nature, poses a serious threat to the very survival of neighbouring property, the solution is different. In effect, in this case, the person who awarded the contract wanted a dangerous thing to be accomplished and, by that fact alone, he became obligated not only to stipulate that the contractor adopt appropriate measures to prevent damage to neighbours, but also to see to it that such measures were taken ... I would therefore say that he who undertakes a dangerous operation vis-à-vis his neighbours is not, solely by having conferred the task on an independent contractor, relieved of his obligation to ensure that his neighbours are not harmed by the work in question.

3.3.2 work done on or over a highway

This second basis for attributing a non-delegable duty to an employer in relation to contracted work also comes out of mid-nineteenth century English case law. Thus, the notion of "highway" is, for this purpose, quite extensive in that it includes any kind of roadway or footway allowing for the passage of persons, animals or vehicles. There is even case law that includes a waterway where the court found a ship-owner liable for damages caused to a third person who collided with the ship-owner's wreck lying in a navigable river which his contractor had failed to illuminate.

The precise origin of an employer's non-delegable duty pertaining to contracted work performed on or over a highway is not entirely clear. One school of thought is that this comes out of the remarks of the trial judge in *Penny v. Wimbledon U.D.C.* who had stated (at p. 217):

> When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown on the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor.

Even earlier, however, without explicitly assigning a non-delegable duty specifically in reference to a highway or thoroughfare as such, courts found employers liable in respect of injury caused to passers-by on highways from nuisances created by independent contractors. In *Tarry v. Ashton* (1875-76), 1 Q.B.D. 314, a lamp affixed to the defendant's house hung out over the sidewalk, thereby constituting an obvious danger to passers-by if it were to fall, did actually fall as a result of the decayed state of its supporting iron bracket, and injured a pedestrian. Although the defendant had, in fact, hired a contractor to fix the bracket, the court ruled that the defendant had an occupier's duty not to create a nuisance which he could not discharge by hiring a contractor and which, in the circumstances, had not been performed.

Canadian courts appear to have generally followed their English counterparts in imposing a non-delegable duty on an employer in relation to contracted work that causes dangers on

or to, or otherwise interferes with the safe use of thoroughfares by the public.[15] As in English cases, the non-delegable duty that the law imposes in this situation is not an independent duty of care pertaining to the taking of special precautions but rather the simple and straightforward duty not to create a nuisance.

3.3.3 other situations involving public safety

Leaving aside statutory requirements, an employer is under a common law duty to provide competent staff, proper plant and equipment, a safe work environment for employees and a safe system of work.[16] Early twentieth century case law appeared to allow an employer to escape liability in relation to at least some of these duties, such as the duty to ensure a safe system of work, where, for example, he had appointed a competent person to run an operation and where it was that person's negligence that was the cause of damages.[17] Since 1942, however, it has been the case that none of these duties falling on an employer is delegable to another person, including an independent contractor.[18]

A more problematical source of a non-delegable duty to ensure safety of others is where a person puts himself in a situation that would give rise to a reasonable belief that he has assumed responsibility toward the party suffering the damages. The essential ingredient here is that the assumption of responsibility creates a special relationship between plaintiff and defendant akin to that between an employer and employee. This was aptly stated by Mason J. in ***Kondis v. State Transport Authority*** (1984), 154 C.L.R. 672 (H.C.A.), at p. 687:

> The element in the relationship between the parties which generates a special relationship or duty to see that care is taken may be found in one or more of several circumstances. The hospital undertakes the care, supervision and control of patients who are in special need of care. The school authority undertakes like special responsibilities in relation to children whom it accepts into its care.... In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or *is so placed in relation to that person or his property as to assume a particular responsibility for his or her safety, in circumstances where the person affected might reasonably expect that due care will be exercised.* .
>
> [emphasis added]

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[15] *Ostapowich v. Benoit* (1982), 14 Sask. R. 233 (Q.B.); *Canada (Attorney General)* v. *Biggar (Town)* (1981), 10 Sask. R. 401 (Q.B.); *Carroll v. Kepic*, [1954] O.R. 768 (H.C.); *McLean v. Crown Tailoring Co.* (1913), 15 D.L.R. 353 (Ont. C.A.).

[16] *Regal Oil and Refining Co. Ltd. v. Campbell*, [1936] S.C.R. 309; *Carl v. Warren* (1960), 23 D.L.R. (2d) 156 (Ont. C.A.); *Fairbrother v. Fegles Bellows Engineering Co.* (1919), 48 D.L.R. 248 (N.B.S.C.); *Hudson v. Ridge Manufacturing Co.*, [1957] 2 Q.B. 348; *Latimer v. Atomic Energy Commission*, [1953] A.C. 643 (H.L.).

[17] *Ainslie Mining & Railway Co. v. McDougall* (1909), 42 S.C.R. 420; *Western Canada Power Co. v. Beraklint* (1914), 50 S.C.R. 39.

[18] *Marshmont v. Bergstrom*, [1942] S.C.R. 374.

There are cases where the special relationship arising from a reasonable belief that responsibility to ensure safety had been assumed by a person led the court to impose liability on that person for damages caused by an independent contractor. In ***Toronto General Hospital v. Matthews***, [1972] S.C.R. 435, the hospital was held liable for injuries suffered by a patient during an operation as a result of the negligence of the attending anesthesiologist who was employed there on a part-time basis under a contract for services. Although not stated by the court, the employer's non-delegable duty to ensure the taking of appropriate precautions here could also have been attributable to the inherently dangerous nature of the work.

In the English case of ***Rogers v. Night Riders***, [1983] R.T.R. 324 (C.A.), the court arrived at the same result of imposing a non-delegable duty on an employer vis-à-vis a contractor in relation to the performance of contracted work even though there was nothing inherently dangerous about the work in question. The defendant leased mobile radio sets to mini-cab drivers for a weekly rent. In return, the defendant took calls from the public ordering mini-cabs and would use the radio to contact a driver and direct him to the appropriate address to pick up the fare. The mini-cabs were owned and operated by their drivers who retained the fares collected from their passengers. On one particular occasion, the door of a mini-cab that had been hired using the radio-dispatch service operated by the defendant flew off, rebounded off a stationary car, and struck the plaintiff. The Court of Appeal held that, irrespective of whether the driver was an employee of the defendant or an independent contractor, the defendant had undertaken to provide a mini-cab to take the plaintiff to her destination and, in so doing, had assumed a non-delegable duty toward the plaintiff to take reasonable steps to ensure that the mini-cab was safe.

The concept of assumption of responsibility does not appear to have made its way into Canadian law as a source of an employer's non-delegable duty underpinning his liability for his contractor's negligence. In fact, it may well be the case that in similar factual situations, Canadian courts will simply impute a contract between the employer and the victim of the contractor's negligence and base the employer's liability on breach of contract. For example, ***Fraser v. U-Need-a-Cab Ltd.*** (1985), 17 D.L.R. (4th) 584 (Ont. C.A.), presented essentially the same facts as *Rogers v. Night Riders* where a passenger was injured as a direct result of a defective door on a cab ordered through a dispatch company but operated by an independent contractor. The court found liability on the part of the dispatch company on the basis of a breach of an implied warranty as to the safety of its cabs within the context of a contract entered into between the plaintiff and the dispatch company.

3.3.4 statutory powers and duties

This is by far the most important source of potential liability of public authorities for negligence of their contractors based upon the legal premise of non-delegable duties.

The complexity of the jurisprudence dealing with employer liability for contracted work having its source in statutory authority is illustrated by the following citation from *Charlesworth & Percy on Negligence*, 7th ed., at p. 133:

> When the employer employs the contractor to perform an absolute duty, which is thrown by statute upon the employer, the performance of it cannot be delegated so as to allow the evasion of liability. It makes no difference whether the duty is owed to the public at large or just to a section of it, because the same principle applies. Where a railway company were authorised by statute to construct a bridge, provided that it was capable of being opened so as to allow vessels to pass along the river, and employed contractors, who constructed the bridge, which in fact would not open, the railway company were held liable.

The railway company case referred to by the authors is *Hole v. Sittingbourne and Sheerness Railway Co.*, which, as mentioned earlier, involved a negligence claim against the defendant for losses caused by a bridge built by an independent contractor which did not open as required to allow passage of river navigation. The statutory duty in question here was the requirement falling on the employer that any bridge built under the authority of the authorizing statute be capable of being opened to allow for unimpeded navigation, a duty that was not delegable to a contractor, even though there was nothing in the nature of the work that was inherently dangerous. In brief, the statutory duty involved the achievement of a specified result which, in the circumstances, was not fulfilled thereby engaging the liability of the railway company on whom the statutory duty was imposed.

This kind of statutory duty which, on its own, can engage civil liability, is rare. In the overwhelming majority of cases where an employer was a public body who had hired work out to an independent contractor, the work had been merely authorized or empowered by statute rather than specifically imposed as a duty. The doctrine of non-delegability of the employer's duty in such instances pertained to its duty to ensure that care is taken that underpinned the exercise of the statutory power, but only in the circumstances where that non-delegable duty arose, that is to say, where the contracted work in question was inherently dangerous or posed danger on a highway. Accordingly, the public body *qua* employer was really in no different a position than a private employer.

The distinction between statutory power and duty as applied to a public body in its capacity as an employer of an independent contractor was nicely captured by the Québec Court of Appeal in ***Commission Scolaire Régionale Honoré-Mercier v. St-Onge***, [1980] C.A. 247. A young student, after exiting a school mini-bus, was struck by an on-coming car. The mini-bus was owned by the driver who had been engaged as an independent contractor by the school board to drive students to and from school. The driver of the mini-bus was found partially responsible because, in the circumstances, he had violated a provision of the Highway Code requiring that he watch over the safety of his passengers at all times. The issue before the court was whether the school board was liable for the damages caused by the fault of its contractor. At trial, the court found the school board liable. This was reversed by the Court of Appeal in the following terms (at pp. 253-254):

> The trial judge said that he had reached this conclusion...not because the work entrusted to the independent contractor was dangerous per se but rather because the work entrusted to the independent contractor and which he had either failed to carry out or had carried out badly...was work which the principal (who entrusted the work to the independent contractor) was personally responsible for carrying out ... The trial judge then suggests that Appellant's position is that of any public body which, although not obliged to do so, installs service of some kind, and becomes responsible by so doing for the carrying out of these services. In his view, once the School Board organized a transportation service for its school children, even though not obliged to do so, it became responsible for the security of the children being transported and cannot escape its responsibility by entrusting the task to a third party and then pleading that the inexecution of the obligation of safeguarding the children was not its fault but that of the party to whom it had entrusted the obligation.
>
> With all respect, I disagree. I can see a clear distinction between the legal obligation imposed on a public body to provide a service, for example, the duty imposed on a city to keep its sidewalks safe for pedestrians, and the position of Appellant here which, in virtue of an optional right granted to it by statute, decided to have school children under its jurisdiction transported by a third party, particularly when the empowering statute indicates that the transportation service may be contracted out (section 207 of the Education Act). Moreover, no child is obliged to utilize the service which the School Board provides. In my opinion, the School Board would only be responsible if the claimant established that it had committed a personal fault, such as, for example, awarding a transportation contract to an incompetent driver whose incompetence led to an accident, etc...

This distinction seemed to have been lost on the trial Judge in ***Tucker (Public Trustee of) v. Asleson***, [1991] B.C.W.L.D. 1314 (S.C.), which involved a negligence claim against the province of British Columbia for deficient highway maintenance that had, in fact, been carried out by an independent contractor:

> In cases where the legislature has entrusted a certain body with the power to do something, and that body delegates performance of the work to a third party, the law requires the body entrusted by the legislature with the power, to discharge the duty of seeing that the work is performed with reasonable care. The arm of government owes the duty of care in exercising its powers, whether it does so by means of servants or contractors.
>
> On that view of the law, it is clear that in this case the Crown cannot escape liability for the negligence of its contractor's employee. It is the Minister who is authorized and empowered by statute to maintain highways. The Minister may delegate the work involved in doing so, but he may not delegate the duty. That duty accompanies the power, and not the doing of the work.

Presumably, in speaking of "duties imposed by law," the trial judge was alluding to the provincial government's duty to maintain the highway free and clear of ice and snow which, in his view, could not be delegated. If such a duty fell on the Crown, however, it was not a statutory duty. The only statutory reference to the function of maintaining highways is to be found in s. 14 of the *Ministry of Transportation and Highways Act* which merely empowers rather than obliges the minister to maintain highways. In addition, no statutory duty pertaining to highway maintenance arose under the provincial *Occupier's Liability Act* because of the express exemption of the Crown from its application in

respect of a public highway or public road. Thus, to the extent that any duty pertaining to highway maintenance fell on the province, it was simply the common law duty of care.

In fact, what the trial judge did here was to extend the doctrine of non-delegable statutory duties to the common law duty of care underpinning the exercise of statutory powers. That would have been consistent with the case law dealing with the non-delegability of an employer's duty of care if it were referable to the particular characteristics of contracted work that the courts had identified as necessary to give rise to such non-delegability in the first place, such as its inherent dangerousness. The court, however, appeared to reject that basis of non-delegability as applied to an employer exercising statutory powers:

> It appears to me that the true foundation for the employer's liability in these cases does not depend upon the distinction between independent contractors, and other servants or agents over whom the employer retains control; *nor does it depend upon the distinction between work that is inherently dangerous or hazardous, and work that is not.* Rather, the employer's inability to avoid liability arises from the fact that it cannot delegate duties imposed by law. Where a statute authorizes or empowers an arm of government to carry out certain work, the power and authority carry with them the implied duty on the empowered body to see that the work is performed to a reasonable standard of care
>
> [emphasis added]

On its face, this rather bald assertion was contrary to the Supreme Court ruling in *Saint John (City) v. Donald*. Even so, *Tucker* was relied on in the subsequent case of ***Mochinski v. Trendline Industries*** (1994), 5 M.V.R. 140 (B.C.S.C.), aff'd (1996), 23 B.C.L.R. (3d) 291 (C.A.), which held the provincial government liable for damages caused by faulty road maintenance that had been contracted out on the basis of finding a non-delegable duty attaching to keeping the road clear of hazards. In a third case dealing with precisely the same issue, ***Lewis (Guardian ad litem of) v. British Columbia***, [1996] 1 W.W.R. 489, the Court of Appeal overturned a lower court's finding of negligence on the part of the province's contractor but went on to make the following statement (at p. 499):

> Notwithstanding vast factual differences, I believe the cases following *Dalton* and *Hardaker* must now be taken to have settled the law that a principal under an independent duty of care cannot delegate its responsibility to an agent or independent contractor.

But it will be recalled that both *Dalton* and *Hardaker* expressly tied the employer's non-delegable duty to the fact that the contracted work fell within the "inherently dangerous work" exception where an employer's liability for his contractor's negligence would be engaged - something that was not raised at all here.

The opportunity to clarify the law in regard to this difficult issue presented itself when the Supreme Court gave leave to appeal both *Mochinski* and *Lewis* exclusively on the issue of the provincial government's liability based upon whether there were non-delegable duties in play. The court disposed of both appeals in its decision in *Lewis*, reported at [1997] 3 S.C.R. 1145. Writing for the majority, Cory J. began by asserting a general principle that an employer's liability for his contractor's negligence "will depend to a large extent upon

the statutory provisions involved and the circumstances presented by each case." In that regard, he immediately noted the following: firstly, the relevant statutory provisions indicated that the Ministry of Transportation and Highways had management and direction of all matters relating to construction, repair and maintenance of highways and must direct those operations; and secondly, that statutory authority, when exercised, gives rise to a duty to perform the work with reasonable care which requires reasonable care in the performance of the work not only by the employees of the Ministry who undertake it, but also by independent contractors engaged by the Ministry for that purpose. In his view, the attribution of liability to the employer was "but fair when a public authority exercises the statutory authority and power granted to it in circumstances which may have serious consequences for the public interest." Cory J. further stated that the specific non-delegable duty in question pertained to the statutory duty falling on the ministry set out in s. 48 of the *Ministry of Transportation and Highways Act* to personally direct highway construction, repair and maintenance which (at para. 25)

> clearly demonstrates that the legislature intended to foreclose any possibility of the Ministry delegating work to a contractor and thereafter abandoning any responsibility for the execution of the work. The imposition of personal liability on the Ministry for its contractor's failure to discharge the duty to take care ancillary to the Ministry's statutory power flows from this section and the overall general scheme of the applicable statutes, particular the *Highway Act* and the *Ministry of Transportation and Highways Act*.

Relying on *Kondis*, Cory J. more or less suggested that the nature of the work in question and the expectation of the motoring public in regard to safe highways would mean that the province, in undertaking its statutory powers of road maintenance, should be regarded as having assumed responsibility for a contractor's negligence. Accordingly, the Court of Appeal's judgment was set aside and the original trial judgment against the province was restored.

Apart from this recent trilogy of road maintenance cases, there are extremely few cases that have considered the issue of vicarious liability of the Crown at either the federal or provincial level in respect of negligence arising on the part of an independent contractor in the performance of his contracted duties or functions. The concept of non-delegable duties was applied against the Crown in ***Darling v. Attorney General***, [1950] 2 All E.R. 793 (K.B.). Two ministers, acting in conjunction under statutory authority, engaged an independent contractor to prospect for coal on the plaintiff's land. The contractor, in performing his work, left a pile of timbers on the ground which the plaintiff's horse ran into, laming it, and eventually leading to the plaintiff having to sell off the horse at a loss. The plaintiff brought suit against both the Crown and the contractor in respect of the alleged negligence of the contractor directly causing him the loss.

In its defence, the Crown claimed that the careless act of the contractor causing the damage was in the nature of collateral negligence in respect of which it is not vicariously liable, as per the rulings in both *Dalton* and *Hardaker*. The Court disagreed and held the Crown liable by finding that the negligence arose within the framework of the performance of the public powers which the contractors were hired to perform. The Court determined that not only did the exercise of a statutory power by the ministers give

rise to a duty on their part to take reasonable care so as to avoid causing danger or damage to the plaintiff, but, on the basis of *Dalton*, the ministers in this instance could not absolve themselves from that duty by employing an independent contractor.

The key point here is that the duty of care, and ultimate liability, was attributed to the ministers in regard to their statutory powers and how they had been performed. Thus, although not actually stated in the judgment, the Crown's vicarious liability would have been engaged by reason of the finding of liability on the part of the ministers who are Crown agents.

In *Weisler v. District of North Vancouver* (1959), 17 D.L.R. (2d) 319 (B.C.S.C.), a municipal servant, relying on advice from a private contractor, broke a gas line while digging a trench for the installation of a watermain. Both the municipality and the contractor were found negligent, the latter for improper advice as to where its gas mains were located, the former for breach of its duty of care in respect of preventing harm in the carrying out of its trenching, knowing that buried gas lines were present in the vicinity. Citing *Hardaker*, the court ruled that the municipality could not "delegate" that duty of care to a private entity by claiming that the damage was caused by the negligent advice given by the contractor on which it innocently relied.

A clearer application of the principle expressed in *Hardaker* can be found in ***Beaulieu v. Village of Rivière-Verte et al.*** (1970), 2 N.B.R. (2d) 304 (S.C.) where a well on private property adjacent to a road was polluted by sewage leaking from a sewage system negligently constructed by an independent contractor for the defendant municipality. Relying explicitly on *Hardaker*, Hughes J.A. ruled, at p. 310: "The construction of the sewer imposed a duty on the District to take reasonable care to protect wells in adjacent property from becoming polluted by sewerage entering the system and in my opinion could not avoid liability for damage resulting from a breach of that duty by employing an independent contractor to construct it."

Oswald v. The Queen, [1997] F.C.J. No. 203 (T.D.) offers what may be the clearest illustration of how and when statutory duties might engage the Crown's liability in relation to damages caused by an independent contractor. The Crown was sued by an inmate of a federal penitentiary for damages arising from medical malpractice in respect of oral surgery performed by a dentist hired under contract to provide dental services to inmates. Although the independent contractor status of the dentist in question was not contested, the Crown's liability was advanced on the basis of its non-delegable statutory duty set out in s. 16 of the *Penitentiary Service Regulations*, C.R.C. 1978, c. 1251, as applicable at the relevant time, which provided that "[E]very inmate shall be provided, in accordance with directives, with the essential medical and dental care he requires." The Court ruled that the actual duty falling on the Crown here, which it acknowledged was not delegable, was to arrange for the provision of essential dental care which could only be satisfied by arranging for such services to be provided by qualified professionals, either by employing them or by contracting for their services. That duty, however, did not include actual provision of the necessary medical or dental care itself or ensuring the achievement of a particular medical result. Accordingly, the Crown's non-delegable duty stipulated by

the regulation was satisfied where the necessary arrangements were made with competent, qualified doctors and dentists. Interestingly, the Court did not entertain a theory of non-delegability attaching to the Crown's statutory duty here based upon risk inherent in the nature of the contracted services.

This last case can be seen as an unequivocal example of proper application of the theory of liability attaching to non-delegable duties, the best expression of which remains the following statement found in *Winfield and Joliwicz on Tort*, 13th ed., at p. 582:

> The true question in every case in which an employer is sued for damage caused by his independent contractor is whether the employer himself was in breach of some duty which he himself owed to the plaintiff. Such a breach of duty may exist if the employer has not taken care to select a competent contractor or has employed an inadequate number of men. It may also exist if the contractor alone has been at fault, provided that the duty cast upon the employer is of the kind commonly described as "non-delegable". Strictly speaking, no duty is delegable, but if my duty is merely to take reasonable care, then if I have taken care to select a competent contractor to do the work, I have done all that is required of me. If, on the other hand, my duty is, *e.g.* "to provide that care is taken" or is to achieve some actual result such as the securing fencing of dangerous parts of machinery, then my duty is not performed unless care is taken or the machinery is fenced. It is no defence that I delegated the task to an independent contractor if he failed to fulfil his duties.