LIABILITY OF PUBLIC AUTHORITIES AND DUTIES OF AFFIRMATIVE ACTION

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INTRODUCTION

The question of whether a duty of care is owing is perhaps nowhere more important that in the context of liability of public authorities. New duties do, of course, arise in respect of private parties.[1] But the increasing range of state activity and the diversity of governing statutes means that in practice, difficult questions of duty arise on a continuing basis with respect to public authorities. *Kamloops v. Nielsen*,[2] a modern leading case on the general duty of care, was also a case of public authority liability. The stream has remained steady since then. From public works departments in *Just*, *Brown* and *Swinamer*,[3] to financial regulators in *Cooper v. Hobart*,[4] to current cases involving SARS, West Nile and BSE ("Mad Cow"),[5] difficult questions of law relating to whether a duty of care is owing arise disproportionately in respect of public authorities.

Canada continues to adhere to a modified version of the approach set out by Lord Wilberforce in *Anns v. Merton London Borough*[6] in determining whether a duty of care is owing, but the Supreme Court has rightly recognized that *Anns* alone cannot provide the certainty and predictability required to guide trial judges and litigants. Categories are needed to supplement the *Anns* approach. In this paper I sketch an argument that what I will call "regulatory liability," which corresponds to duties of affirmative action with respect to private individuals, should be recognized as a distinct category of claims brought against public authorities. While the conclusion that generally no duty should be owing, subject to certain exceptions, is the same for public and private actors, I note some differences in the underlying policy rationale in the two cases. The argument is illustrated by a discussion of

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1 For example, negligent misrepresentation in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.); nervous shock in *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310 (H.L.), *Page v. Smith*, [1996] A.C. 155 (H.L.), and *White v. Chief Constable of the South Yorkshire Police*, [1999] 2 AC 455 (H.L.).

2 [1984] 2 S.C.R. 2. [*Kamloops*].

3 *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 [*Brown*]; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445 [*Swinamer*].

4 [2001] 3 S.C.R. 537 [*Cooper*].

5 *Williams v. Canada (Attorney General)*, [2005] O.J. No. 3508 & *Abarquez v. Ontario*, [2005] O.J. No. 3504 (SARS); *Sauer v. Canada (Attorney General)*, [2005] O.J. No. 4237 (BSE); *Eliopoulos v. Ontario (Minister of Health & Long-Term Care)*, [2006] O.J. No. 4400 (C.A.).

6 [1978] A.C. 728 at 751-52 [*Anns*].

Kamloops, which also addresses the relationship between categories of regulatory liability and pure economic loss.

REGULATORY LIABILITY AND DUTIES OF AFFIRMATIVE ACTION

The common law draws a strong distinction between risks caused by the defendant and those caused by a third party. Subject to some exceptions, if a plaintiff is imperilled by a source unconnected with the defendant, the defendant owes no duty to assist, even though it would be easy to do so; there is no duty to be a Good Samaritan.[7] There is no entirely convenient label for this class of cases. Scholarly articles often raise the question as "the duty to rescue", but while rescues are a good example, it is well recognized that the principle applies more broadly than to rescues in a narrow sense. The other commonly used rubric, "duties of affirmative action," is broader, but it, on the other hand, is too broad. It is not really correct to say that the common law does not impose duties of affirmative action generally, as such a duty will normally arise when the defendant itself created the risk.[8] It is more accurate to say that the common law does not impose duties of affirmative action to prevent harm to another when the defendant did not originally cause or increase the harm.[9] I will therefore use the term "regulatory duty" to refer to a duty arising from a duty to prevent harm to caused by third parties, and "regulatory liability" to refer to liability arising from a breach of such a duty. Using a term distinct from that used in the private context also ensures that we do not assume that policy and doctrine will be exactly the same whether a private or public actor is concerned.

In the public authority context, claims for failure to prevent or diminish harm not originally caused by the public authority itself encompass an important subset of government activity, ranging from regulation of air traffic safety, to police prevention of crime, food safety regulation, animal and human disease prevention, and inspection of new homes for building code compliance. My argument is that regulatory duties constitute a distinct category of public authority liability, and that the state should not owe a duty of care in the absence of reasonable reliance on the state activity. In effect, this is an attempt to revitalize distinction between nonfeasance and malfeasance by means of a principled comparison with private duties of affirmative action.

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7 John G. Fleming, *The Law of Torts*, 7th ed. (Sydney: LBC, 1987) at 135; and see *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 at 444, per Gibbs C.J.C.: "Similarly, there is no general duty to warn another who is running into a position of danger or to assist a person who is in peril or distress and 'the general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third'" [citations omitted] [*Sutherland*].

8 See for example *Horsley v. MacLaren*, [1972] S.C.R. 441; *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186.

9 It is common to view creation of the risk as an exception to the general rule against imposing duties of affirmative action. I prefer to characterize the basic rule as applying in cases where the defendant did not create or increase the risk in the first place, so that such cases fall outside the basic rule, rather than constituting an exception to it.

There is a straightforward statutory interpretation argument for recognizing regulatory liability as a distinct sub-category of public authority liability. In Canadian jurisdictions, the statutes waiving the Crown's common law immunity from suit provide that the Crown is subject to liability in tort to the same extent as "if it were a person."[10] Since private individuals are not subject to duties of affirmative action, this statutory wording implies directly that the Crown is similarly not subject to such duties. In most US jurisdictions the statutory waiver of sovereign immunity similarly provides that the state is subject to liability "to the same extent as a private individual under like circumstances."[11] It is well recognized that such statutory provisions mean that the state is not liable as a Good Samaritan except in circumstances in which a private individual would also be liable.[12]

A number of important cases apply this rule in the public authority context, albeit without direct reference to the common law reluctance to impose duties of affirmative action. *South v. Maryland* (subject to exceptions discussed below) established what is now know as the "public duty" doctrine, when it held that absent a special relationship, when a duty is owed by a public official to the public as a whole, a tort action does not lie for neglect: "the officer is answerable to the public and punishable by indictment only."[13] In *Cooper*, the Supreme Court of Canada asserted essentially the same doctrine: "The Registrar's duty is rather to the public as a whole. Indeed, a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public."[14] The question, which was answered in

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[10] See for example *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 3; *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s.5. See Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Scarborough, ON: Carswell, 2000) at 113 for a list of statutes. Strictly, the liability is vicarious liability for the torts of its employees.

[11] See for example US *Federal Tort Claims Act*, 28 U.S.C. § 2674 (1988).

[12] But "the statutory language is 'under like circumstances,' and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Indian Towing Co. v. United States*, 350 U.S. 61 at 64-65 (1955) [*Indian Towing*]; *Clemente v. United States*, 567 F.2d 1140 at 1145 (1st Cir. 1977), "Moreover, the Restatement of Torts 2d § § 323 and 324A n7 makes it clear that liability in such a situation must be predicated on one of three grounds: the conduct of the employee actually increased the risk of harm to the damaged firm; the harm to the damaged firm resulted from its reliance on the employee carrying out the inspection as ordered; or there existed a prior duty to inspect owed by the employer to the damaged firm."; "In spite of the fact that our tax dollars support police functions, it is settled that the rules concerning the duty—or lack thereof—to come to the aid of another are applicable to law enforcement personnel in carrying out routine traffic investigations." *Williams v. State of California*, 34 Cal. 3d 18, 24 (Cal. 1983). See also the Massachusetts codification of the public duty doctrine: Mass. Gen. Laws c. 258, §10(j).

[13] 59 U.S. (18 How.) 396 at 403, 15 L. Ed. 433 (1856). At the state level see for example *Onofrio v. Department of Mental Health*, 408 Mass. 605 at 609, 562 N.E.2d 1341 (1990), S.C., 411 Mass. 657 (1992). The position in Massachusetts is particularly interesting as the state Supreme Judicial Court announced its intention to abolish the doctrine in its decision in *Jean W. v. Commonwealth*, 414 Mass. 496, 610 N.E.2d 305 (1993), and the legislature responded by codifying the doctrine in Mass. Gen. Laws c. 258, §10(j): see *Carleton v. Framingham*, 418 Mass. 623 at 627-28, 640 N.E.2d 452 (1994) (upholding the constitutionality of the amendment to § 10).

[14] *Cooper, supra* note 4 at para. 44.

neither *South v. Maryland* nor in *Cooper,* is to know when a duty is owed to the public and when it is owed to an individual. One answer is that the scope of a public duty is defined by the scope of Good Samaritan activity: when it is acting to prevent harm caused by a third party, the state owes a duty only to the public as a whole. Brennan C.J. of the Australian High Court made much the same point in *Pyrenees Shire Council v. Day*:

> No duty breach of which sounds in damages can be imposed when the power is intended to be exercised for the benefit of the public generally and not for the protection of the person or property of members of a particular class. And I doubt whether a duty breach of which sounds in damages would be held to exist if the power were conferred merely to supervise the discharge by a third party of that party's duty to act to protect a plaintiff from a risk of damage to person or property.[15]

This is not to suggest that the leading cases never impose a duty of affirmative action on a public authority. This was done in *Kamloops* for example, and indeed Brennan C.J. in *Pyrenees* imposed a duty on the municipality in question to enforce its fire prevention by-laws. Whether these cases fall within recognized exceptions to the rule, or are true counter-examples will be discussed below. The point for the moment is that the "public duty" doctrine generally supports the view that courts are reluctant to impose duties of affirmative action, even on public authorities.

Apart from statutory interpretation argument and this smattering of consistent cases, it is important to consider on its own merits the policy basis for recognizing regulatory liability as a distinct category of public authority liability. If it is a nonsensical category from a policy perspective, to be recognized only because of the demands of the *Crown Liability and Proceedings Act*, it might be interpreted more narrowly than if it is stands independently on a sound policy basis. Moreover, it is not always obvious when a public regulatory activity is analogous to an act of a private Good Samaritan. An understanding at the policy level of differences and similarities between public and private actors will help us decide when the analogy is appropriate. Because the Good Samaritan duty in the private context has been extensively studied, it is useful to take arguments relevant to private actors and consider the extent to which they are applicable to the state.

The argument in favour of a general duty to rescue is very straightforward. The basic insight of law and economics is that liability should be placed on the person able to avoid the accident at least cost in order to provide an incentive to take care to prevent the loss. If a passer-by can prevent a blind person from walking off a cliff

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15 *Pyrenees Shire Council v. Day* (1998), 192 C.L.R. 330 at para. 26 [*Pyrenees*]. See also *Yuen Kun Yeu v. Attorney-General of Hong Kong,* [1988] 1 A.C. 175 and *Graham Barclay Oysters Pty Ltd v. Ryan* (2002), 211 C.L.R. 540, 194 A.L.R. 337 (H.C.).

simply by shouting a warning, then a great loss can be prevented at minimal cost. Whether the least-cost accident avoider happens to have caused the loss in the first place is irrelevant to this basic argument.[16]

The more difficult question is why the common law is reluctant to impose a duty to rescue on a private individual. A very significant literature defends the common law rule on the basis of principles requiring respect for the autonomy of the individual.[17] Whatever their merits, these types of arguments do not apply to the state. The state is not a person, and we need not respect its autonomy.[18]

On the other hand, arguments based on incentive effects, that is, the desire to avoid and minimize harm, are potentially applicable to the state.[19] There are two main arguments. One explanation is the problem of salience, or, as Lord Hoffmann has termed it, the "why pick on me?" argument.[20] It turns on the difficulty of identifying an appropriate 'tortfeasor' when many bystanders could potentially have prevented the harm. Apart from the objection of moral arbitrariness, imposing a duty on an indeterminate class of persons may have unintended incentive effects. None may act, as each reasonably supposes that the other will; or all may act, wastefully

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[16] Nor does the argument depend on the passer-by receiving compensation for her efforts. Whether the passer-by should be compensated to provide an additional incentive is a secondary question. A right to compensation might be important in fine tuning the incentive structure, but it is not relevant to the basic argument. Much commentary is concerned with whether a duty to rescue should be imposed, and whether Good Samaritans should be entitled to claim remuneration against the rescued victim: see for example Hanoch Dagan, "In Defense of the Good Samaritan" (1999) 97 Mich. L. Rev. 1152, arguing that the common law should allow the Good Samaritan to recovery the expected benefit of the intervention from the rescued victim.

[17] There are two distinct forms to this argument based on political liberalism and legal formalism: for leading examples see Richard A. Epstein, "A Theory of Strict Liability" (1973) 2 J. Legal Stud. 151 at 197-204 and Ernest J. Weinrib, "Law as a Kantian Idea of Reason" (1987) 87 Colum. L. Rev. 472 at 489, respectively. Weinrib had previously argued in favour of a duty to rescue on moral grounds: see Ernest J. Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L. J. 247; and see generally Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) for a moral argument that a legitimate state "may not use its coercive apparatus for the purpose of getting some citizens to aid others." See Steven J. Heyman, "Foundations of the Duty to Rescue" (1994) 47 Vand. L. Rev. 673 for an excellent discussion of these strands.

[18] See Heyman, *ibid.* at 711, making this point in respect of Weinrib's theory.

[19] Though the literature on duty to rescue is very much concerned with whether a rescuer should be rewarded by a claim against the victim or otherwise, in order to encourage rescue, I also neglect this issue as not being relevant to the parallel between public and private actors. So, for example, Landes and Posner argue *inter alia* that an excessively large reward will sometimes lead victims or owners will take excessive precautions to avoid paying such rewards, or that a rescuer may be motivated by altruism and that legal inducements can impede this motivation: William Landes & Richard Posner, "Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism" (1978) 7 J. Legal Stud. 83 at 91-92.

[20] *Stovin v. Wise*, [1996] A.C. 923 at 944 (H.L.), per Lord Hoffmann, [*Stovin*]. For academic treatments see Saul Levmore, "Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations" (1986) 72 Va. L. Rev. 879 at 889-90 and Alon Harel & Assaf Jacob, "An Economic Rationale for the Legal Treatment of Omissions in Tort Law: The Principle of Salience" (2002) 3 Theoretical Inq. L. 413.

and potentially counterproductively.[21] Whatever the merits of the salience argument as applied to private actors, it has no purchase in the context of a state actor, as Lord Hoffmann has pointed out.[22] The public authority typically has the power and ability to act; indeed, in many cases no other person would have legal authority to act to prevent the harm. The salience problem is solved.

A second incentive oriented argument is that imposition of a duty to rescue may actually *reduce* the number of rescues, as potential rescuers avoid areas where rescues are likely to be needed in order to avoid liability for failure to rescue.[23] We can term this the activity level problem. This argument is not particularly persuasive in the private context, primarily because the chance of being placed in a position to carry out a rescue is so small that it is unlikely that anyone would avoid "high rescue" areas simply to avoid being made liable for failure to rescue.[24] But the state is different from private actors in this respect. It is only by chance that a private party will find herself in a position to carry out a rescue, but the state acts systematically to prevent harm caused by others. The probability of an emergency arising is low for a private individual, but a one in a million chance of being called on to aid a stranger turns into a certainty for a state that receives millions of 911 calls every year.[25]

With that said, why should the fear of liability cause the state to avoid an area of activity? After all, the state is not like a private individual, who may avoid 'high rescue' areas because she is more concerned about her own liability than the fate of a potential victim. The state is actively seeking to prevent harm; that is why it is systematically engaged in preventative behaviour. The state is already spending money on Good Samaritan activity – why should the threat of liability deter it?

The answer is that the state must carry out its purposes with limited resources. The state has to choose between many activities, and it may be that the best the state can do with the resources available is to make only limited efforts at preventing a particular disease, in order to spend more on other activities such as education. After all, "half a loaf is better than none."[26] If engaging upon a harm prevention activity triggers a duty of care, the state would have to choose between spending more on

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[21] Levmore, *ibid.* at esp. 931. The argument is refined by Harel & Jacob, *ibid.*, who argue that insufficient precaution is more likely.

[22] See *Stovin*, *supra* note 20 at 946, per Lord Hoffmann citing the decision of Kennedy L.J. in the Court of Appeal, [1994] 1 W.L.R. 1124 at 1139.

[23] Landes & Posner, *supra* note 19. Their article makes a number of arguments related to the desirability of rewards, such as the possibility of ex ante bargaining, which are irrelevant here as this article assumes that the state is public-regarding and already has sufficient incentive to carry out the rescue. Imposing tort liability on the state is aimed at ensuring non-negligent rescue. A second argument is that altruism and desire for fame may supply sufficient incentives. This is clearly not relevant to the state actor.

[24] Levmore, *supra* note 20 at 889-90.

[25] *Eastburn v. Regional Fire Protection Authority*, 31 Cal. 4th 1175 at 1178 (2003).

[26] *Brown*, *supra* note 3.

preventing the disease and less on education; or not attempting to prevent the disease at all, in order to maintain education spending.

Thus, in light of the problem of limited resources, the activity level effect is likely to be very real. The fear of a standard of care disproportionate to its resources may lead the state not to carry out Good Samaritan activities at all, in order to maintain spending in other sectors. And even if the state increases its spending to meet its duty of care, this has an indirect activity level effect, by diverting funds from other less litigious sectors. As Lord Hoffmann has remarked, "the creation of a duty of care upon a highway authority … would distort the priorities of local authorities, which would be bound to try to play safe by increasing their spending on road improvements rather than risk enormous liabilities for personal injury accidents. They will spend less on education or social services."[27]

The defining feature of duties of regulatory liability is that a duty is to be imposed for failure to prevent harm caused by third parties. So long as no one relies on the regulatory activity, negligence means only that less harm will be prevented. To quote Lord Hoffmann again, "It is one thing to provide a service at the public expense. It is another to require the public to pay compensation when a failure to provide the service has resulted in loss. Apart from cases of reliance ... the same loss would have been suffered if the service had not been provided in the first place."[28] Regulatory activity cannot result in a net social loss (apart from the wasted money), no matter how negligently it is carried out. The loss from negligence and the loss from reduced activity are of exactly the same nature, namely harm caused by a third party is not prevented. The only difference is that in the former case the state will have tried and failed to prevent the harm, while in the latter case it would not have tried at all. Similarly, if liability is not imposed, the worst case would be negligence so rampant that the regulatory program is ineffective and no harm is prevented. If liability is imposed, the worst case would be that the state withdraws from the sector because of the burden of regulation, and no harm is prevented. In contrast, when the state undertakes positive actions, then the result of negligence by the agents may create harm that would not otherwise have occurred.

RULES OF RECOVERY

To this point I have argued that claims against the state for failure to prevent harm caused by third parties form a coherent category with a unique set of policy considerations. My battle will be at least half won if I have persuaded the reader that such cases should be treated as a separate sub-category of public authority liability.

The other half of the battle is to specify the rules of recovery applicable in this category. We have seen above that from a policy perspective, the analogy with a private Good Samaritan duty is not perfect. Some arguments are relevant to private individuals, but not public authorities, and vice versa. But on the whole, the analogy

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[27] *Stovin*, *supra* note 20 at 958.

[28] *Ibid.*, at 952 per Lord Hoffmann.

is sufficiently strong that the same basic rule of no recovery should apply in both cases. There are important exceptions to this rule against recovery. The differences in the relevant policy between the public and private cases entail some differences in the application of the exceptions as well.

The exceptions to the rule against recovery against a Good Samaritan fall into four categories: reliance, which can be sub-divided into special and general reliance; special relationship; and special vulnerability.

The best established exception is that a duty will be imposed when the victim has reasonably relied on the protective activity of the Good Samaritan. The justification for an exception to the refusal to impose a Good Samaritan duty in cases of reasonable reliance is straightforward. In cases of reliance the victim has taken fewer precautions to protect herself in reliance on the defendant's protective activity. In such a case it is not true that the same harm would have occurred absent the defendant's activity. Reliance brings the case outside the justification for refusing to impose a duty.

Reliance falls into two categories. In the case of what may be termed "specific reliance," it is a specific individual or discrete group of individuals that relies on the protective activity.[29] Specific reliance is recognized in both the private and public context. In this context reliance is normally only reasonable when the responsibility was expressly accepted by the party owing the duty. The paradigmatic example in the public sphere is promised protection for a police informant who agrees to inform in exchange for the offered protection. The rationale for the specific reliance exception is the same in both contexts.

"General reliance" occurs when the public as a whole relies on state regulatory activity.[30] By its nature, general reliance has no parallel in the private context. It is controversial in the public context. The argument in favour of recognizing an exception for general reliance is exactly the same as for specific reliance; the victim in fact changed her position. The difficulty with general reliance is one of proof. In the case of specific reliance, the claimant was acting one way, and then changed her behaviour in reliance of a specific acceptance of responsibility by the defendant. In the case of general reliance, everyone in society will have been acting in a particular way – buying houses, eating oysters – in an area subject to some state regulation. It may be that people would have acted otherwise but for the state regulation. But when the state activity is pervasive and everyone's behaviour is uniform, it will be very difficult to know when this is so. Thus it is difficult to establish reliance. It is also difficult to determine whether the reliance was reasonable. In cases of general reliance responsibility in not usually accepted expressly, but rather by a pattern of activity, for example by a practice of conducting building inspections. It will often

[29] See for example *Restatement of Torts* (2d) §323(b), Negligent Performance of Undertaking to Render Services.

[30] The term was coined by Mason J. of the Australian High Court in *Sutherland, supra* note 7, in reliance on US authorities.

be very difficult to determine the precise extent of the responsibility implicitly 'accepted' by a pattern of practice. The problem of general reliance is difficult, as there are sound policy arguments both for and against recognizing this exception. Some cases and dicta are consistent with imposition of a duty on the basis of general reliance,[31] but the few cases to date to have explicitly analyzed the doctrine have doubted its merits.[32]

It is well recognized in the private context that a duty may be imposed when the victim had a "special relationship" with the defendant, though when exactly a special relationship arises remains controversial. The special relationship exception is typically best seen as an attempt to solve the salience problem. If there is one potential rescuer who is in a unique relationship with respect to the victim and the harm suffered, then a duty can be imposed on that particular person without fear of confusion as to who owes the duty. This argument in inapplicable to public authorities. As we have seen, the salience problem has no purchase in the context of the state. *Everyone* is in a "special relationship" with the state, in the sense that the state stands in a unique relationship to every victim (there is only one state in any jurisdiction), and the state normally has the power to act. But this does not justify imposing liability on the state in all cases. Recall that in the public context the rationale for the rule against recovery does not turn on the salience problem. That we have solved the salience problem is no reason for an exception imposing liability, if that was not the problem that gave rise to the rule against recovery in the first place.

A parallel case does arise in the public context, which I will call "special vulnerability." An example is *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*[33] in which the police failed to warn the claimant of the presence of a serial rapist in the vicinity, who ultimately did rape the claimant. Here the claimant was not in a different relationship with the police than was any other woman; there was no reason for the police to consider her needs above that of any other citizen. The duty to prevent rape is undoubtedly a duty owed to the public as a whole. The difference is that the risk to the claimant was greater, and the police knew this. The argument in favour of imposing a duty is the general argument in favour of a duty to act as a Good Samaritan – a great harm could have been avoided at little cost. The argument the other way is that imposing a duty in such a case, as was done, requires the court to second-guess the police as to the severity of the threat, and the balancing of interest between the claimant and other potential victims.

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[31] The best known example is the United State Supreme Court decision in *Indian Towing, supra* note 12. See especially the discussion of reliance at 69. As discussed below, *Kamloops, supra* note 2, is arguably also an example of liability imposed on the basis of general reliance.

[32] The most explicit discussion of general reliance has taken place in the Australian High Court. In *Pyrenees, supra* note 15, the majority of the Court rejected general reliance as a basis for recovery per Brennan C.J. at 344; per Gummow J. at 385-88; per Kirby J. at 408-12. McHugh J. and Toohey J. would have accepted its applicability in limited circumstances.

[33] (1990), 74 O.R. (2d) 225 (Div. Ct.), leave to appeal to Ont. C.A. dismissed (1991), 1 O.R. (3d) 416, on the motion to strike the statement of claim; (1998), 39 O.R. (3d) 487 (Gen. Div.) finding that a duty of care was indeed owing.

If the court strikes the balance incorrectly, the risk is that public authorities will take excessive precautions to avoid litigable harms, thereby diverting resources from useful activities that are less likely to give rise to claims. This is the activity level problem. In the extreme, an exception for special vulnerability has the potential to be the exception that swallows the rule. Like general reliance, the problem is difficult, as there are sound arguments on both sides. We should not be surprised that courts have not all come to the same conclusion on similar facts.[34]

Finally, we should note that the emphasis on reliance addresses the central question bedevilling the traditional nonfeasance/misfeasance distinction. This distinction is generally considered problematic, because it is difficult to apply, yet nonetheless useful. The problem is how to distinguish between nonfeasance and misfeasance. The reliance approach says that the true distinction is based on reasonable third party reliance. Nonfeasance is when government behaviour cannot have induced reliance on the particular (in)action asserted to have caused the loss. Misfeasance is when behaviour has induced reliance on the particular (in)action which caused the loss. So, in the hoary example of failure to brake as the cause of an accident, driving itself causes reliance by third parties (e.g. pedestrians) on certain future behaviour (not driving on sidewalks). Because the reliance is reasonable, it does not matter whether the particular act – driving on a sidewalk – is considered to be the result of nonfeasance of misfeasance. The liability flows from inducing reasonable reliance.

The scope of the duty is similarly defined by the scope of reasonable reliance. It is often said that a duty of care is triggered once the state undertakes to act. But what is the scope of such a duty? Does an administrative decision to mark hazards in a waterway trigger a duty do to so even though no steps have been taken to implement it?[35] Does marking one branch of a river entail a duty to mark the entire river? The entire water system? If the scope of both the duty and the standard is defined by reasonable reliance on the actions of the state, the problem is solved. It is actions, not decisions, which may give rise to liability and the duty extends only to the bounds of reasonable reliance.

APPLICATION: *KAMLOOPS V. NIELSEN*

How would the doctrine sketched above actually apply? I will provide an example by re-visiting *Kamloops v. Nielsen*. Not only did *Kamloops* introduce *Anns* into Canadian law, the claim at issue - the failure to prevent a loss by not enforcing a building code - falls squarely into the category of regulatory activity.

Provincial legislation gives municipalities the power to enact and enforce

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[34] Compare *Doe v. Toronto* with *Riss v. New York (City of)*, 22 N.Y.2d 579, 293 N.Y.S.2d 897, 240 N.E.2d 860 (1968), denying liability in the face of extremely compelling facts.

[35] "We doubt that the Supreme Court in *Indian Towing* would have found liability if the government's negligence simply amounted to failing to construct a lighthouse as ordered by a Coast Guard official when the seafaring public was unaware that such an order had been given, and the lighthouse was never operational." *Clemente v. United States*, *supra* note 12 at 1148.

building by-laws. The City of Kamloops had adopted such by-laws. Mr. Hughes Jr. undertook construction of a home for his father. The foundations were inspected pursuant to the by-law and found to be defective. A stop work order was issued. Mr. Hughes ignored the order and proceeded to complete the building. His father, Mr. Hughes Sr., who also happened to be a city alderman, then purchased the home from his son with full knowledge of the defects, and moved in. The stop work order was never lifted and no occupancy permit was ever issued. Mr. Hughes sold the home to Mr. Nielson who discovered the defects and brought the action against the city. The majority of the Supreme Court held that the City had breached a duty to Mr. Nielson. Its duty was to enforce the by-law, by prosecution or seeking an injunction, or it "at the very least had to give serious consideration to taking the steps toward enforcement that were open to it."[36] Thus there is a presumptive duty to enforce the building code by legal action, which can be avoided only by a deliberate policy decision. It must be emphasized that the duty at issue in *Kamloops* was *not* simply a duty to take care in inspecting the building; the inspector had been careful, and had in fact discovered the defect, which led in turn to the issuance of a work order.

Kamloops set out an extreme position in imposing a duty not just to take care in carrying out municipal duties, but also to take active steps to enforce the by-laws. Few other courts have gone so far. Of course *Anns* was reversed in *Murphy v. Brentwood District Council*, not only on the general point of the correct approach to a duty of care, but also on the specific point of the duty owing by the municipality to the subsequent purchaser.[37] But even *Anns* itself did not impose a duty to enforce; the issue was simply not raised in *Anns*, as it was not established on the facts whether an inspection had ever been made. The court certainly did not impose such a duty. On the contrary, Lord Wilberforce's express statement was that "The duty is to take reasonable care, no more, no less, to secure that the builder does not cover in foundations which do not comply with byelaw requirements."[38] In other words, the duty was to take reasonable care in conducting the inspection.[39] *Kamloops* has since been legislatively reversed on this point in British Columbia, preserving a duty to inspect with due care, but negating liability for any loss sustained "as a result of neglect or failure, for any reason, to enforce, by the institution of a civil proceeding or a prosecution" arising out of a building code bylaw.[40] Note that the municipality

[36] *Supra* note 2 at 24.

[37] [1991] 1 A.C. 398 [*Murphy*].

[38] *Anns, supra* note 6 at 758.

[39] *Ibid.* The plaintiffs claimed a duty to ensure compliance with the plans, which was expressly rejected by Lord Wilberforce.

[40] *Local Government Act*, R.S.B.C. 1996, c. 323, s. 289. This is not to say that all jurisdictions have arrived at the same point. In some jurisdictions no duty of care is owed at all, either by common law or by statute: see for example California Code Art. 818.6 (no liability for negligence building inspection). So far as I am aware, no jurisdiction has statutorily imposed a duty to enforce; *Kamloops* is very much an outlier in this respect. For a review of US law see Thomas M. Fleming, J.D., "Municipal Liability for Negligent Performance of Building Inspector's Duties" 24 A.L.R. 5th 200. And see for example *Myers v. Moore Eng'g*, 42 F.3d 452 (8th Cir. 1994), holding that there is no duty absent a special relationship.

remains liable for negligence in implementation of duties it does carry out, but the municipality is not liable for failure to take the final step of enforcing a work order or other remedy against a non-compliant builder.[41]

Consider first the issue of recovery for pure economic loss, which was a central issue in *Kamloops*. Recall that *Kamloops* was decided before the categorical approach to pure economic loss was adopted in *Norsk*.[42] Accordingly, a divergence is in order to discuss how the various categories relate to one another.

It is often said that it is not necessary to conduct an inquiry regarding proximity if the facts fall into an established category.[43] Does it follow then that a duty of care is always owing in respect of foreseeable physical harm, even if the harm also falls into a conflict category such as a policy decision by a public authority?[44] More generally, some categories overlap. What happens if a claim falls into two categories and the rule applicable in each category would give different results?[45] The answer, unfortunately, is that it depends on the nature of the categories and their underlying policies. When a case falls into two categories at the same time, it cannot be said to fall into "an" established category. The overlap itself establishes that competing policy concerns are at issue, and further analysis must be made to determine which should prevail. Otherwise we would simply be choosing at random between conflicting principles.

Consider for example the case of physical injury caused by a policy decision of a public authority. The general rule for physical injury is recovery, subject to foreseeability; a key rule of public authority liability is that there is no recovery for loss consequent on a policy decision. This is an easy case, as the very first decision establishing the rule against recovery for policy decisions, that of the US Supreme Court in *Dalehite*,[46] was just such a case (the harm was the destruction of a large part of Texas City). The Court held that in such a case, the plaintiff cannot recover. The highest courts in Canada, Australia and England have all reached the same

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[41] Supreme Court decisions such as *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, which impose liability for negligence inspection, or similar cases in British Columbia, for example *Strata Plan NW 3341, Owners v. Canlan Ice Sports Corp.* (2001) BCSC 1214, imposing liability for negligent approval of plans and negligent inspection, do not go as far as *Kamloops* and are not affected by the B.C. statute.

[42] *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021.

[43] "[F]or example, no trial judge need inquire for himself whether one motorist on the highway owes a duty to another to avoid causing injury to the person or property of the latter, or what is the scope of that duty." Gibbs C.J.C. in *Sutherland, supra* note 7 at 441-42; similarly *Cooper, supra* note 4 at para. 39 "The second step of Anns generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations that would negative the duty of care."

[44] This argument was made, and correctly rejected, in *Williams v. Canada (Attorney General)*, [2005] O.J. No. 3508 at paras. 57-59.

[45] Of course if the established rule in each category gives the same results on the facts, then there is no conflict.

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

conclusion in cases involving physical injury when the decision alleged to have caused the harm was one of policy.[47] The policy in the category of physical injury is that liability is necessary for deterrence. The policy in the public authority cases is that separation of powers requires that political decisions, often involving the allocation of scarce resources, must be respected by the courts. They cannot be reviewed in the guise of a tort action. Accordingly, the rule applicable to cases in this category is that a public authority is not liable for losses consequent on policy decisions (though the line between policy and operational distinctions is notoriously difficult to draw). That the latter trumps the former is the fundamental rationale for the policy / operational dichotomy.

Another example is the overlap between the categories of loss caused by an operational decision by a public authority and pure economic loss. One example is *Martel Building Ltd. v. Canada*[48] which involved a claim for damages for pure economic loss arising out of the conduct of pre-contractual negotiations. The Court declined to impose a duty, primarily because the loss was not a net social loss, as when physical property is destroyed, but merely a transfer of wealth from one party to another.[49] This principle applies to a public entity just as much as to a private party, and indeed the Court made no distinction on that ground.[50]

These results can be summarized by saying that there is no rule that a public authority is liable for operational negligence. The rule is that a public authority is *not* liable for policy decisions. This follows directly from the underlying rationale for the rule, which is that the courts must respect the decisions of the legislature. The rationale is not that the courts must impose liability unless the legislature has made an express contrary decision. This implies that liability does not follow from a determination that harm was caused by a negligent operational decision; that simply implies that no bar against liability for policy decisions is applicable; we still must ask whether some other rule bars liability. In contrast, once a determination has been made that the harm resulted from a policy decision, there is a rule, or at least a very strong presumption, against recovery.

What then of the relationship between the proposed category of regulatory activity, a sub-category of public authority liability, and the category of pure economic loss? The majority in *Kamloops* largely swept this issue aside:

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47 See for example *Brown*, *supra* note 3, and *Swinamer*, *supra* note 3.

48 [2000] 2 S.C.R. 860. [*Martel*]

49 *Ibid.* at paras. 62-63.

50 Indeed, the Court stated, that the claim at issue did not fall within any of the existing categories, including "The Independent Liability of Statutory Public Authorities," even though the alleged negligence was that of the Department of Public Works. Surely the claim does indeed fall within the category of liability of public authority. Presumably if the conduct of the negotiations had been the result of high level planning decisions, perhaps involving a sudden change in stance as a result of a new budget, the decision would have been insulated as being one of policy. But it appears that this point was never argued. It seems the Court may have meant simply that nothing turned on the fact that a public authority was the defendant, since the principles in issue were general ones.

> 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. . . . 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.[51]

With due respect, this reasoning illustrates the danger of ignoring general principles as soon as a statute is implicated. It is often very difficult to discern from a statute what duty was intended. It is one thing to determine the goal of a statutory scheme, and quite another to decide whether the legislature intended a duty to be owed, and what the extent and scope of that duty might be. It seems quite reasonable to infer from the Act that the by-laws were aimed at preventing the cost which actually occurred.[52] But what is the extent of the duty? The majority was of the view that once the municipality chose to act, it was obliged to act reasonably in all ways, from the decision whether to inspect in the first place, to the inspection itself,[53] to enforcement or the decision as to whether to enforce,[54] subject throughout only to immunity for policy decisions. As noted, we now know that the majority was wrong as a matter of policy, at least in the opinion of the legislature, as the effect of the statutory response to *Kamloops* is that the duty extends only to taking care in the inspection, and not to enforcement by legal action.

It is true that the governing statute is always important in cases of public authority liability, and it *may* mandate recovery when other policy considerations do not.[55] If in some future case a governing statute imposed a common law duty on a public authority to take care not to cause harm in pre-contractual negotiations, then no doubt a plaintiff could recover for such loss, notwithstanding *Martel*. This means that a statute may trump the general principles behind categories of recovery. But it does not mean that those general principles are irrelevant, even when a statute is implicated.

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[51] *Supra* note 2 at 33.

[52] Even this is open to debate: see the remark of Lord Oliver in *Murphy*, *supra* note 37, that "There is equally nothing in the statutory provisions which even suggest that the purpose of the statute was to protect owners of buildings from economic loss." My own view is that the *Kamloops* court was correct on this point.

[53] *Kamloops*, *supra* note 2 at 1, following Lord Wilberforce's decision in *Anns* on both points.

[54] *Ibid.* at 23-24.

[55] As the Supreme Court said in *Cooper*, *supra* note 4 at para. 43, "In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public." And as Bruce Feldthusen has pointed out, "if a common law duty can be derived from a statute which is concerned with economic harm or benefit, and the plaintiff complains of precisely such a harm, it would be absurd to deny that claim simply because the loss was economic." Bruce Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, 4th ed. (Scarborough, ON: Carswell, 2000) at 264.

To pretend that the answer will always be found in the statute invites the uncertainty of legal fiction. In refusing to recognize a nominate tort of breach of statutory duty in Canada, the Supreme Court noted that "The pretence of seeking what has been called a 'will o' the wisp', a non-existent intention of Parliament to create a civil cause of action [for breach of statutory duty], has been harshly criticized."[56] It is no better to base a common law duty on essentially the same question – whether Parliament intended to protect against a certain type of economic loss.[57] Of course, statutes do sometimes directly address the duty issue, in which case the Act should be determinative.[58] Absent such a direct statement, there is no reason to believe that a search for legislative intent that a particular class of plaintiffs, or the public as a whole, was the intended beneficiary of the regulatory scheme would be any more productive.

The one point established by *Anns* that remains universally accepted is that creation of new duties of care must be based on sound policy. Respect for the intention of the legislature is a policy of paramount importance, but when it provides no answer, other principles remain useful. One reasonable presumption in this context is that the legislature would not have intended to impose a duty unless it is sound policy to do so. For example, the Supreme Court in *Martel* held both that it is bad public policy to allow recovery of transfer losses, as this would over-deter useful conduct, and that this is equally true whether the defendant is a private individual or the government. If the Court was correct in this respect – and my own view is that it was – allowing recovery of transfer losses will over-deter useful conduct whether the duty is imposed on government purely as a matter of the common law, or as a matter of interpretation of its statutory duty. Surely then, it should be presumed that any statute does not impose a duty to prevent transfer losses. This presumption can of course be displaced by sufficiently clear language, but this does not make the broad policy considerations irrelevant.

More generally, if the policy rationale underpinning a rule is not dependent on whether the defendant is a public or private party, then the rule should apply equally in either case. When determining whether a duty is imposed by a statutory scheme,

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56 *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 215-16 [*Sask. Wheat Pool*].

57 See *Cooper*, *supra* note 4 at para. 27, per Newbury J.A. citing the foregoing passage from *Sask. Wheat Pool* in remarking that the task of determining whether the statute is intended to protect against pure economic loss "seems no less difficult than that of deciding whether a statute is intended to create a cause of action for breach thereof."

58 With that said, s. 20 of the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313, at issue in *Cooper* provided that "An action may not be brought or continued against the registrar or a person acting under the authority of the registrar for anything done by the registrar or the person in the performance of duties under this Act or the regulations or in pursuance or intended or supposed pursuance of this Act or the regulations, unless it was done in bad faith." This provision appears on its face to be a clear statement of legislative intent that the Registrar should not be subject to any action, including tort actions, and Huddart J.A. in the Court of Appeal invoked it to this effect. Curiously, the Supreme Court merely noted it in the context of determining that the Act set up a general scheme for the protection of the public, and did not apply it directly to hold that the plaintiff's action was barred. Also, the Court did not look to the statute in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263.

it is wrong to rely, or pretend to rely, solely on the statute. Established categories in which recovery is admitted, or barred, are relevant. They are simply demoted from the status of rule to that of presumption.

With that said, the majority was right to conclude that the issue of economic loss is irrelevant in this case. Since *Kamloops* we have come to recognize that "pure economic loss" is not a sound category. The question is what *type* of pure economic loss. The most fundamental distinction is not between economic and physical loss; it is between transfer loss and true social loss. *Martel* was correct in recognizing that recovery of transfer losses should presumptively be denied. And it is true that physical loss is never a transfer loss, while pure economic loss often is. After some debate, the courts, at least in England, seem to have settled on the view that losses from shoddy building that have not yet been manifested in physical damage are pure economic loss.[59] Nonetheless, this is a true social loss; a defective structure is less valuable to the owner than one that is sound, and no one else benefits from the owner's loss. The other main reason for denying recovery for pure economic loss is the problem of indeterminacy. This does not arise in the context of building inspections because there is no ripple effect, which is a major source of indeterminacy in economic loss cases where recovery is denied.[60] The loss is tied to the house and owner in exactly the same manner as if the latent defect manifested itself in physical damage. The sub-categories of pure economic loss at issue in *Martel* and *Kamloops* are completely different.

In summary, while the majority in *Kamloops* was probably right in concluding that the building inspection system in issue was intended to prevent against the kind of loss which occurred, the majority was probably wrong in its assessment of the extent of the duty. The reason for the error, I suggest, is that statutory interpretation never takes place in a policy vacuum, and absent an express statutory provision on the duty of care, the statutory scheme was open to the court imposing whatever duty it saw fit, based on its underlying policy presumption. *Anns*, as commonly understood at the time, was a test which invited a duty of care on finding foreseeable harm. The majority interpreted the statutory regime in light of this simple presumption, and accordingly found a duty. It was really the presumption flowing from the *Anns* test rather than the statute itself which gave rise to the duty.

How would the regulatory liability category affect the analysis? The presumption is that in the absence of reliance, no duty is owing. This is of course contrary to the presumption implied by *Anns* as then understood. The no duty presumption reflects the policy consideration that when a public authority seeks to prevent harm caused by a third party, half a loaf is better than none. The court may easily conclude that the public authority wanted to prevent a certain type of harm,

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[59] *Murphy, supra* note 37 per Lord Keith at 466, citing to the same effect *Sutherland, supra* note 7 at 503-05 per Deane J.

[60] *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding*, [1997] 3 S.C.R. 1210 at para. 62.

but to impose a duty the court has to decide whether the authority wanted to provide a full loaf worth of protection, or half a loaf – or indeed a quarter or an eighth of a loaf. If the court guesses wrong, the public authority will have to abandon its preventative activity altogether, or divert resources in order to meet the judicially imposed standard of care.

Reliance changes the picture.[61] This is why the distinction between a duty to take due care in inspection and a duty to enforce, as currently found in the BC legislation, is sensible. If the lawyer for the purchaser in *Kamloops* had inquired of the municipality, presumably he would have been told that the foundations were not sound. If the inspector had conducted an inspection, and negligently certified that the foundations were sound, then a prospective purchaser might well rely on that assurance. But there was certainly no such specific reliance in this case. It seems that the lawyer for the purchaser simply never inquired regarding the occupancy permit or outstanding work orders, presumably because that was not the practice at the time. If there was to be a novel duty of care imposed on the fact in *Kamloops*, it would have been preferable to impose a duty to make such inquiries on the purchaser's lawyer, rather than imposing a duty to enforce on the municipality.

The best argument in favour of the result in *Kamloops* is that of general reliance. Perhaps the majority of the Court was of the view that purchasers generally rely on municipalities to ensure that houses are built according to code. As we have seen, there are good arguments both for and against accepting general reliance as a basis for imposing a duty. A key argument against it turns on the difficulty of proving general reliance. If general reliance were to be accepted, then special rules would be needed to address the evidentiary problems it raises. It would have to be established in some manner, and it is far from clear that it could be established in the context of municipal building inspections.[62] In any event, the most important point is not *how* general reliance should be dealt with, but that it *should* be dealt with explicitly. Even though general reliance is the best argument in favour of the majority's result, the closest the majority came to dealing with it was in Wilson J.'s causal remark , "I [see the *Anns* principle] as a useful protection to the citizen whose ever-increasing reliance on public officials seems to be a feature of our age."[63] This cursory treatment of a crucial issue is unsatisfactory. If we accept regulatory liability as a category, then we can debate the place of general reliance within it.

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[61] See also Stephen R. Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 U.T.L.J. 247, arguing that reliance is central in establishing a duty of care to protect against pure economic loss. Perry's argument is developed on the basis of principles of moral responsibility rather than policy considerations such as deterrence that are central in this article, and it is striking that his conclusion is nonetheless much the same.

[62] See *Murphy*, *supra* note 37 per Lord Bridge at 481 and Lord Oliver at 483, doubting whether reliance could be established.

[63] *Supra* note 2, citing only Allen M. Linden, "Tort Law's Role in the Regulation and Control of the Abuse of Power," *Special Lectures of the Law Society of Upper Canada: Abuse of Power* (1979) 67, which of course is not evidence.

CONCLUSION

I have argued that regulatory liability should be recognized as a category of claims brought against public authorities. The category is required by statute, well-established in the US, and generally consistent with Commonwealth cases. Most importantly, this category raises an important unified constellation of policy issues. While I have sketched some of the rules of recovery which I believe should apply in regulatory liability cases, my fundamental concern is that the category be recognized in Canadian law so that a broader debate on the applicable rules can take place.