THE NEGLIGENCE LIABILITY OF STATUTORY BODIES: DUTTON REINTERPRETED

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The relationship between ultra vires *and negligence in a statutory body has become important as a result of recent House of Lords decisions. In this article this relationship is examined and found to contain some serious difficulties. A solution to these difficulties is proposed.*

INTRODUCTION

This article is concerned with the impact of the House of Lords decision in *Anns* v. *Merton London Borough Council*[1] upon the law of negligence and upon that aspect of administrative law which deals with the negligence liability of statutory bodies.

As is well known, *Hedley Byrne & Co. Ltd* v. *Heller & Partners Ltd*[2] was concerned with two relatively unexplored areas in the law of torts. The defendant's conduct complained of was a negligent statement. The harm suffered by the plaintiff was economic loss. It was with the former that the House of Lords was primarily concerned. In their speeches the Law Lords focussed on the necessary limits on liability which must be imposed in relation to statements for the very good policy reason stated in that oft-quoted passage of Cardozo C.J. in *Ultramares Corporation* v. *Touche*[3] that, unless a test of proximity narrower than the neighbour principle is applied in cases of negligent statements, a plaintiff would be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[4] Or, as Barwick C.J. put it in *Mutual Life & Citizens' Assurance Co. Ltd* v. *Evatt*:[5] "The necessary relationship . . . must needs be more specific."[6]

Very little was said in the *Hedley Byrne* decision about the limits to recovery which may need to be imposed because the harm claimed for was economic rather than physical loss.[7] There was no need to define

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[1] [1977] 2 W.L.R. 1024.

[2] [1964] A.C. 465.

[3] (1931) 174 N.E. 441.

[4] *Id.* 444.

[5] (1968) 122 C.L.R. 556.

[6] *Id.* 566.

[7] Although their Lordships concentrated on defining the special relationship that must exist as a prerequisite to liability for negligent statements, the fact that the claim was for economic loss must have had its influence. It has not been said that there needs to be a special relationship in relation to negligent statements leading to physical loss: *Clayton* v. *Woodman & Son (Builders) Ltd* [1962] 2 Q.B. 533.

the limits which should be imposed arising out of the type of harm suffered (economic loss) because adequate safeguards had already been laid down due to the nature of the conduct complained of (negligent statement).

Therefore it fell to later decisions to explore the tests of proximity that are appropriate to claims for economic loss. The little that was said in *Hedley Byrne*, and indeed in the dissenting judgment of Lord Denning in *Candler* v. *Crane, Christmas & Co.*[8] in relation to economic loss can be summarised in the words of Lord Hodson. "It is difficult to see why liability as such should depend on the nature of the damage."[9] This reasoning may be superficially attractive but it is clear that economic loss as a type of harm for which the law of torts provides compensation does need to be treated differently for reasons which are very similar to those expressed by Cardozo C.J. in relation to the need for caution when dealing with liability for statements. It is also clear that different types of economic loss need to be treated differently.

In England there have been what might be termed schizophrenic developments in relation to economic loss. On the one hand, the cases of *Dutton* v. *Bognor Regis Urban District Council*[10] and *Ministry of Housing* v. *Sharp*[11] show a boldness which has caused alarm in some quarters.[12] On the other hand, cases like *S.C.M. (United Kingdom) Ltd* v. *W.J. Whittall & Son Ltd*[13] and *Spartan Steel & Alloys Ltd* v. *Martin & Co. (Contractors) Ltd*[14] have shown a cautious approach. Curiously, Lord Denning M.R. has played a part on both sides.

In Australia, the New South Wales Supreme Court in *Hull* v. *Canterbury Municipal Council*[15] and *G.J. Knight Holdings Pty Ltd* v. *Warringah Shire Council*[16] has held in each case a local council liable for the losses suffered by a developer who obtained development consent which was subsequently found to be invalid. The High Court, too, has not been reluctant to explore the boundaries of negligence liability for economic loss in *Caltex Oil (Australia) Pty Ltd* v. *The Dredge "Willemstad"*.[17]

The House of Lords has now joined this adventure in the *Anns* case. One commentator, in looking forward to the *Anns* case in the House of Lords, wrote that it "may live to rank as perhaps the most important

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[8] [1951] 2 K.B. 164, 184.
[9] [1964] A.C. 465, 509.
[10] [1972] 1 Q.B. 373.
[11] [1970] 2 Q.B. 223.
[12] Craig, "Negligent Misstatements, Negligent Acts and Economic Loss" (1976) 92 L.Q.R. 213, 223.
[13] [1971] 1 Q.B. 337.
[14] [1973] Q.B. 27.
[15] [1974] 1 N.S.W.L.R. 300.
[16] [1975] 2 N.S.W.L.R. 796.
[17] (1976) 11 A.L.R. 227.

decision in the law of tortious negligence since *Donoghue* v. *Stevenson*".[18] This hope has not been realised. As shall be seen, their Lordships said very little that is new on the question of economic loss in the law of negligence.

However, the decision is interesting in its treatment of the difficult question of the negligence liability of statutory bodies in carrying out their functions. It is this aspect of the case with which this article is primarily concerned.

THE BACKGROUND TO THE *ANNS* CASE

It is necessary to go back to *Dutton* in order to explore the House of Lords decision in *Anns*. It will be remembered that the plaintiff, who had purchased from the first owner a house with faulty foundations, was able to claim successfully for the cost of repairs against the local council whose surveyor had negligently passed the foundations at the time of building. The case dealt with a number of points of law, many of which cannot be discussed here.[19]

In relation to the type of loss suffered in *Dutton*, it is arguable that the case involved physical rather than economic loss. Lord Denning M.R. however said that both types of loss were suffered but that nothing should turn in this case on the type of damage.[20] However described, it was recoverable. In allowing recovery, Lord Denning M.R. espoused a neighbour test of proximity and it was this development that alarmed Craig.[21] Craig argued that in relation to economic loss claims, the gates would be opened too wide if such a test of proximity were applied. He thought that a more restricted test, akin to that in *Hedley Byrne*, was appropriate. However, Craig failed to distinguish between types of economic loss. His concern may be justified in relation to some types of economic loss (where the range of potential plaintiffs is wide) but not in relation to others. *Dutton* is a good example of the latter because the number of potential plaintiffs was necessarily limited.

Lord Wilberforce in *Anns* classified the potentially recoverable damage as "material, physical damage".[22] It is therefore arguable that *Anns* has nothing to say about economic loss. As shall be seen, Lord Wilberforce said very little on this issue. He was more concerned to ensure that any damages recoverable were only those in respect of harm which the provisions of the relevant legislation, the Public Health Act 1936 (Eng.), were designed to prevent.

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[18] Duncan Wallace, "From Babylon to Babel, or a New Path for Negligence?" (1977) 93 L.Q.R. 16, 21.

[19] Note, (1973) 47 A.L.J. 332.

[20] [1972] 1 Q.B. 373, 396.

[21] Craig, *loc. cit.*

[22] [1977] 2 W.L.R. 1024, 1039.

Dutton was also important because it opened up new areas of potential liability for statutory bodies. The Court of Appeal had said that the wide power of control over building operations which the council exercised pursuant to the Public Health Act 1936 (Eng.) and the by-laws made under it carried with it a duty to exercise reasonable care to ensure that the by-laws were complied with. This duty was owed to subsequent purchasers such as Mrs Dutton and it was broken when the faulty foundations were negligently approved. It is this aspect of *Dutton*—the duty relationship between the council and the plaintiff—which has been re-examined in the *Anns* case.

The *Anns* case like *Dutton* involved faulty foundations, but came before the House of Lords on a preliminary question about the commencement of the six-year period under the Limitation Act 1939 (Eng.). This problem, too, dates back to *Dutton*. In *Dutton*, Lord Denning M.R. had said, "The damage was done when the foundations were badly constructed..."[23] and concluded from this that the limitation period commenced at that time. Subsequently, in *Sparham-Souter* v. *Town and Country Development (Essex) Ltd*,[24] yet another case involving inadequate foundations, Lord Denning M.R. recanted from this and said that, in cases where building work is done badly and covered up so that there is no way of discovering the defect until it manifests itself, the limitation period starts to run when the damage first appears. He apologised to two judges who had relied on what he had said in *Dutton* and who had ruled against plaintiffs for being out of time. One of these judges was Judge Fay, Q.C. in the *Anns* case (which was called *Anns* v. *Walcroft Property Co. Ltd* in its earlier stages).

In *Anns* the foundations of a two-storey block of seven flats or maisonettes were too thin. The owner/builder, Walcroft Property Co. Ltd, was the first defendant, but by the time the case reached the House of Lords, it had undertaken to carry out certain repair work and was not further involved in the proceedings. The other defendant was the local council. In 1962, the foundations had been approved in the plans. It was alleged that subsequently either the completed foundations had not been inspected at all or they were inspected so negligently that employees of the Mitcham Borough Council (which was later superseded by the London Borough of Merton) failed to notice that they were only 2′6″ thick instead of 3′. Not till 1970 did structural movements, cracks, sloping floors, etc. appear. Writs were issued on behalf of seven plaintiffs in early 1972. The council argued successfully before an official referee, Judge Edgar Fay, Q.C., that the claims were statute-barred. He felt bound by what Lord Denning M.R. had said in *Dutton* on this point. The case went to the Court of Appeal[25] which, without

[23] [1972] 1 Q.B. 373, 396.
[24] [1976] 1 Q.B. 858.
[25] [1976] 1 Q.B. 882.

hearing any further argument, allowed the appeal on the authority of the *Sparham-Souter* case but gave leave to appeal to the House of Lords.

Before the appeal to the House of Lords came on, the council successfully petitioned for leave to argue whether the council was under a duty to the plaintiffs at all. In others words, the correctness of the *Dutton* decision was to be challenged.

THE *ANNS* CASE IN THE HOUSE OF LORDS

The House of Lords (Lords Wilberforce, Diplock, Simon of Glaisdale, Salmon and Russell of Killowen) decided in favour of the plaintiffs that a common law duty relationship could exist as between the council and the plaintiffs, but the actual decision as to whether it in fact existed and, if so, whether it was broken should be left to the trial judge. The limitation period started to run when the damage first appeared. Therefore the claims were not statute-barred.[26]

Two questions on the duty issue had to be answered. Was the council under a duty to inspect at all? The second question was: if an inspection was in fact carried out, was there any duty on the council to take reasonable care to ensure that the by-laws were complied with? This second question necessitated an examination of the basis of the *Dutton* decision.

Lord Wilberforce, with whom Lords Simon, Diplock and Russell agreed, gave the main speech. He drew on *Donoghue* v. *Stevenson*,[27] *Hedley Byrne* and *Dorset Yacht Co. Ltd* v. *Home Office*[28] to say that in order to establish whether a duty was owed it was no longer necessary to bring the facts of the situation within those of previous situations in which a duty of care had been held to exist. Instead, the question had to be answered in two stages. First, it had to be asked whether the relationship between the defendant's conduct and the plaintiff's damage was sufficiently proximate

> 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.[29]

Secondly,

> whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to

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[26] Duncan Wallace, "Tort Demolishes Contract in New Construction" (1978) 94 L.Q.R. 60, 64-66 argues that this aspect of the decision has some unforeseen difficulties. These stem from the fact that, in many cases of this sort, the damage will not necessarily manifest itself, yet the defect is known about. In such cases it is very difficult to pinpoint the commencement date of the limitation period.

[27] [1932] A.C. 562.

[28] [1970] A.C. 1004.

[29] [1977] 2 W.L.R. 1024, 1032.

> whom it is owed or the damages to which a breach of it may give rise.[30]

He then instanced *Hedley Byrne* and the economic loss cases as examples of the second stage at work.

To decide on the legal relationship between the council and the plaintiffs, it was necessary to examine the statutory situation in which the parties found themselves. The Public Health Act 1936 (Eng.) governed the council's actions. This Act was designed to protect owners and occupiers of dwellings with regard to health and safety by, *inter alia*, setting standards to be complied with in construction and enabling local authorities, through the by-laws, to supervise and control the operations of builders. Lord Wilberforce concluded that this statutory setting made it clear that a duty could be owed by the council to the plaintiffs and that because the buildings were (presumably) intended to last "the class of owners and occupiers likely to be affected cannot be limited to those who go in immediately after construction".[31]

What was the extent of this potential duty? What was its nature? Lord Wilberforce emphasised that, though a relationship of proximity existed, he did not think that the council's duty could be based on the neighbourhood principle alone, or on such factual relationship of control as suggested in *Dutton*. This was because the council was a public body and "its powers and duties are definable in terms of public not private law".[32]

> The problem which this type of action creates, is to define the circumstances in which the law should impose, over and above, or perhaps alongside, these public law powers and duties, a duty in private law towards individuals such that they may sue for damages in a civil court.[33]

Lord Wilberforce postulated that discretion in a public body, involving as it does policy considerations, generally is not something which can be adjudicated upon. Whereas the "operational" activities of a council may give rise to justiciable issues.

> It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose on it a common law duty of care.[34]

Having said this, he went on to discuss the two questions relating to the duty issue raised by the appeal.

The first question—whether the council was under a duty to inspect at all—was not answered in *Dutton*, though Lord Denning M.R. said,

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[30] *Ibid.*
[31] *Id.* 1034.
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*

"Those inspectors must be diligent and visit the work as occasion requires".[35] Lord Wilberforce decided that, although the council was not under a duty to inspect, it was under a duty to "give proper consideration to the question whether they should inspect or not".[36] This disposed of the argument that it would be unfair to impose liability on the council for negligently carrying out what it was in any case not under a duty to do in the first place.

> Their immunity from attack, in the event of failure to inspect, in other words, though great is not absolute. And because it is not absolute, the necessary premise for the proposition "if no duty to inspect, then no duty to take care in inspection" vanishes.[37]

Lord Wilberforce went on then to consider the second question on the duty issue—the duty as regards care in inspection if an inspection is in fact carried out. The defence relied heavily on *East Suffolk Rivers Catchment Board* v. *Kent*,[38] but this case was distinguished as it had been in *Dutton*. In *Dutton* the case had been distinguished by Lord Denning M.R. as being a case in which a power was being exercised whereas in *Dutton*, because the council had comprehensive control over building work, a duty of care arose in relation to exercising that control. Sachs L.J. and Stamp L.J. had distinguished the *East Suffolk* case on the basis of causation. In *Anns*, Lord Wilberforce decided that the *East Suffolk* case should be distinguished on two grounds. First, the activity involved in that case was merely discretionary "so that the plaintiff's task in contending for a duty of care was a difficult one".[39] Secondly, the case occurred at a time when the potentiality of the neighbour principle had not been fully realised (though Lord Atkin in his dissenting speech understandably referred to *Donoghue* v. *Stevenson*). In particular, the possibility of a common law duty of care "pervading the sphere of statutory functions of public bodies"[40] was not fully recognised at that time, according to Lord Wilberforce; full recognition came with the *Dorset Yacht Co.* case. (This remark is puzzling in view of, *inter alia*, *Geddis* v. *Bann Reservoir Proprietors*,[41] referred to by Lord Wilberforce, in which a statutory undertaking was found liable for negligently carrying out its statutory functions. Further, in the *East Suffolk* case itself, the Law Lords conceded that, had the activities of the Board created a new source of danger, the plaintiff would have succeeded[42]).

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[35] [1972] 1 Q.B. 373, 392.
[36] [1977] 2 W.L.R. 1024, 1035.
[37] *Ibid.*
[38] [1941] A.C. 74.
[39] [1977] 2 W.L.R. 1024, 1036.
[40] *Id.* 1037.
[41] (1878) 3 App. Cas. 430. Other examples (of many): *Great Central Railway* v. *Hewlett* [1916] 2 A.C. 511, 519; *Fisher* v. *Ruislip-Northwood Urban District Council* [1945] K.B. 584.
[42] [1941] A.C. 74, 85 *per* Viscount Simon L.C.; 88 *per* Lord Atkin; 95 *per* Lord Thankerton; 99, 102 *per* Lord Romer; 104 *per* Lord Porter.

In formulating the basis of the duty owed by public bodies when carrying out their functions, Lord Wilberforce drew heavily on Lord Diplock's analysis of this issue in the *Dorset Yacht Co.* case.[43] Lord Diplock said that there was certainly authority for the proposition that a negligent exercise of statutory duties can give rise to liability at common law: *Geddis.* But he made it clear that this proposition was not a blanket one and that the common law duty of care in such a situation depended on the type of statute and the nature of the activities authorised by the statute. If a statute authorises an interference with proprietary rights, then a negligent exercise of such a function so as to cause avoidable damage would give rise to a cause of action in negligence. But, Lord Diplock pointed out, some statutes confer functions on public bodies which involve activities which do not necessarily give rise to a cause of action in negligence, though damage is a foreseeable result of their exercise. This may be because of the nature of the activity itself, *i.e.* not one which in the private sphere would give rise to a negligence claim. (It was argued unsuccessfully that allowing detainees to escape was such an activity.) Or, it may be because of the way in which the statute authorises the exercise of the function, for example, where the statute confers a very wide discretion on the body. The relevant legislation in the *Dorset Yacht Co.* case was an example of the latter according to Lord Diplock. To illustrate, the adoption of a certain method of relaxed control over detainees would foreseeably give rise to damage to neighbouring property. Yet no action in negligence would be available in these circumstances. A great amount of discretion was conferred by this legislation in relation to the detention, training, etc. of trainees. Lord Diplock said that a court should not readily grant a private citizen adversely affected by the exercise of such a discretion a civil cause of action for damages. Only if the exercise of the discretion was both *ultra vires* and negligent should the possibility of a common law negligence action be entertained, in Lord Diplock's view. Thus a condition precedent to such an action would be that the exercise of the discretion would have to fall outside the limits of the discretion conferred by the legislation.

> In relation to the *Dorset Yacht Co.* case, Lord Diplock said that the allegations of negligence against the Borstal officers are consistent with their having acted outside any discretion delegated to them and having disregarded their instructions. . . .[44]

Lord Wilberforce used this reasoning in *Anns.* He held that there undoubtedly could be a duty to take care if the council did in fact

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[43] [1970] A.C. 1004, 1066-1070.

[44] *Id.* 1069. It is worth noting here that *ultra vires* covers a variety of situations. For instance in the present context, the Borstal officers could have acted *ultra vires* by disregarding instructions which were themselves *intra vires*; or by carrying out instructions which themselves were *ultra vires.*

inspect. This duty, however, "heavily operational though it may be"[45] was still a duty arising under the Act. The plaintiffs must prove that "action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely on a common law duty of care".[46] He said that an element of discretion was involved here because there was some discretion "as to the time and manner of inspection, and the techniques to be used".[47]

Lord Wilberforce at no stage used the expression "*ultra vires*", as Lord Diplock had in the *Dorset Yacht Co.* case. But it is an unavoidable conclusion from the language that he used (which was very similar to that used by Lord Diplock) that, subject to what is said below in relation to duties as such, a pre-condition for negligence liability of a statutory undertaking is that it must have acted *ultra vires*. He said:

> for a civil action based on negligence at common law to succeed, there must be acts or omissions taken outside the limits of the delegated discretion. . . .[48]

And in conclusion:

> So, in the present case, the allegations made are consistent with the council or its inspector having acted outside any delegated discretion either as to the making of an inspection, or as to the manner in which an inspection was made. Whether they did so must be determined at the trial. In the event of a positive determination, and only so, can a duty of care arise. I respectfully think that Lord Denning M.R. in *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373, 392 puts the duty too high.[49]

Having stressed that this is a prerequisite to a duty of care arising, Lord Wilberforce laid to rest a debate which goes back to the *East Suffolk* case by saying:

> It is irrelevant to the existence of this duty of care whether what is created by the statute is a duty or a power: the duty of care may exist in either case.[50]

He then followed this by saying:

> The difference between the two lies in this, that, in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of the power.[51]

From this sentence it can presumably be concluded that, in the case of a duty (that is, a task involving no discretion), there is no need to show

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[45] [1977] 2 W.L.R. 1024, 1035.
[46] *Ibid.*
[47] *Ibid.*
[48] *Id.* 1037.
[49] *Id.* 1038.
[50] *Id.* 1037.
[51] *Ibid.*

that the statutory undertaking was acting *ultra vires* for it to be liable in negligence. This would be consistent with cases like *Geddis*. Thus the *ultra vires* prerequisite only applies in relation to discretionary exercises of statutory functions.

However, what is problematical here is that Lord Wilberforce in *Anns* itself treats what would seem to be a non-discretionary function as involving a discretion so that the plaintiff's task of proving negligence becomes very much more onerous. Every exercise of statutory functions, even the most operational ones, carries with it at least an element of discretion of the type alluded to by Lord Wilberforce. But, it must be asked, is this the sort of discretion which makes it necessary to formulate a more stringent rule to protect statutory undertakings which must not be curbed in their activities by the spectre of negligence actions when they are making policy decisions?

To say that an inspector carrying out an inspection of foundations has certain discretions is to give to the word "discretion" as it has normally been understood in the sphere of public law an artificial meaning. (For example, according to Lord Reid, the Borstal officers were not given any discretion so as to attract the *ultra vires* doctrine. They were simply given orders which they negligently failed to carry out.[52]) In the *Dorset Yacht Co.* case, Lord Diplock's use of "discretion" was quite different from the way in which Lord Wilberforce chose to use the concept in *Anns*. The examples given by Lord Diplock were exercises of discretion very much at the policy level. However, Lord Diplock in *Anns* endorsed Lord Wilberforce's speech. Previously discretion has been associated with policy and the need for a public body to weigh thrift against the need to get the job done. But when the decision has been made to carry out a particular function, namely actually to inspect the foundations (a decision which undoubtedly fits the description of "discretion" in its ordinary sense), what discretion remains to the inspector as he is in the process of inspecting? More particularly, what does a plaintiff have to prove in order to show that the inspector went beyond the limits of the discretion?

Lord Wilberforce's analysis places the plaintiff in an action of this sort in a most peculiar position. He must show that the public authority through its officer acted *ultra vires* before he can argue that a duty is owed to him. Clearly the circumstances (to take the present case) of inspection are going to be the facts on which the plaintiff must rely in order to show that the inspector went "beyond the limits". And it is those very same facts which will establish, if at all, whether the inspection has been carried out negligently. But, unless by some happy chance the plaintiff can establish that the inspector went "beyond the limits" in some other way, the only way of proving *ultra vires* is to show

[52] [1970] A.C. 1004, 1031.

that the inspection was carried out negligently. But this cannot be done, according to Lord Wilberforce, unless *ultra vires* is first proved, for no duty can arise in the first place unless this is shown. This leaves the plaintiff in a logical limbo.

There is support for the view that carrying out a statutory function carelessly is to act in a manner not authorised by the statute and therefore *ultra vires*. Lord Diplock made this point in the *Dorset Yacht Co.* case when discussing *Geddis*.

> There was no compelling reason to suppose that Parliament intended to deprive of any remedy at common law private citizens whose common law proprietary rights were injured by the careless, *and therefore unauthorised*, acts or omissions of the undertakers.[53]

Lord Wilberforce seemed to imply that a plaintiff must show that the inspector had acted *ultra vires* in some way other than by carrying out the inspection negligently. Indeed, it is not logically possible, as demonstrated above, for the plaintiff to establish *ultra vires* by this method. This emerges in particular from the passage quoted above in which he said: "In the event of a positive determination [that the council or its inspectors had acted outside the limits of any delegated discretion], and only so, can a duty of care arise."[54]

The same question is raised by a passage in Lord Diplock's speech in the *Dorset Yacht Co.* case where he said:

> Even if the acts and omissions of the Borstal officers alleged in the particulars of negligence were done in breach of their instructions and so were ultra vires in public law it does not follow that they were also done in breach of any duty of care owed by the officers to the plaintiff in civil law.[55]

Does the converse follow, however, namely that to carry out the acts and omissions negligently necessarily means that they were carried out *ultra vires*? According to Lord Wilberforce's analysis, this question logically cannot be asked.

The *ultra vires* prerequisite stressed by Lord Wilberforce gives rise to some difficulties which have not been experienced before. There are many cases in which functions involving at least as much or more discretion as carrying out an inspection have given rise to negligence liability yet no mention has been made by the courts of the necessity of first showing that the public body was acting *ultra vires*. *Geddis* itself

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[53] *Id.* 1066. Italics added. This reasoning is appropriate at the very operational level, as in a case like *Geddis*. But is it appropriate simply to transpose it to a quite different level where the statutory task involves discretion and the word "negligence" takes on a rather artificial and technical meaning? This transposition is at the root of the difficulties in this whole discussion. This point will be discussed further below.

[54] [1977] 2 W.L.R. 1024, 1038.

[55] [1970] A.C. 1004, 1070.

and *Fisher* v. *Ruislip-Northwood Urban District Council and Middlesex County Council*[56] are just two examples.

Having formulated the basis for a potential common law duty relationship in a statutory setting, Lord Wilberforce went on to consider to whom the potential duty is owed. In order to meet the objection that liability in cases such as *Anns* would give rise to an endless, indeterminate class of potential plaintiffs, he limited such plaintiffs to "an owner or occupier, who is such when the damage occurs".[57]

What damages could be claimed? Lord Wilberforce answered this by saying that all those damages which foreseeably arose from the breach of the duty to use reasonable care to secure compliance with the by-laws could be recovered. This included

> the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement.[58]

Lord Wilberforce said that on the question of damages he had derived much assistance from the minority judgment of Laskin J. in the Canadian Supreme Court in *Rivtow Marine Ltd* v. *Washington Iron Works*[59] and from the judgments of the New Zealand Court of Appeal in *Bowen* v. *Paramount Builders (Hamilton) Ltd and McKay*.[60] It is clear from the reference to the judgment of Laskin J. and from his own words that Lord Wilberforce would confine the damages in relation to the building to expenditure necessarily incurred to render the premises safe, *i.e.* to prevent threatened physical harm to persons or property. This is because of the nature of the duty owed arising, as it does, from the Public Health Act 1936 (Eng.). Laskin J. expressly declined to decide on the issue of the costs of repairing the defective product where there is no threat of physical harm. However the judgments of the New Zealand Court of Appeal showed that recoverable damages included the cost of "cosmetic" repairs and the diminution in value of the property (if any) after it has been repaired.[61] Lord Wilberforce's reference to these judgments is not consistent with his expressed view on the damages issue.

Lord Wilberforce included the "expenses arising from necessary displacement", that is, the cost of moving to and living in alternative accommodation while repairs are being carried out. The much-quoted example given by Lord Roche in *Morrison Steamship Co. Ltd* v.

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[56] [1945] K.B. 584.
[57] [1977] 2 W.L.R. 1024, 1038.
[58] *Id.* 1039.
[59] [1973] 6 W.W.R. 692, 715.
[60] [1977] 1 N.Z.L.R. 394.
[61] *Id.* 411 *per* Richmond P.; 422 *per* Woodhouse J.; 425 *per* Cooke J.

Greystoke Castle[62] of the recoverable cost of unloading cargo from a damaged truck and reloading it onto another is an analogy. Lord Wilberforce, however, did not discuss this head of economic loss.

Lord Salmon gave a separate speech which was not endorsed by any of the other Law Lords. In relation to the first question, he concluded that no action in negligence could arise for a mere failure to inspect. If a council irresponsibly decided not to inspect, the appropriate remedy would be certiorari or mandamus. As to the second question, Lord Salmon endorsed unreservedly the decision in *Dutton*. He disapproved the decision in the *East Suffolk* case, preferring Lord Atkin's dissent.

In dealing with the duty of care, Lord Salmon emphasised certain remarks of Lord Atkin which show that the duty of care is owed irrespective of whether the activity which causes harm to the plaintiff is being carried out by a public body or a private person and irrespective of whether a public duty is being performed or a power is being exercised. Lord Salmon himself said:

> The fact that the inspection was being carried out under a statutory power does not exclude the common law duty of those carrying it out to use reasonable care and skill—for it cannot in any way diminish the obvious proximity between the inspectors and the prospective tenants and their assignees.[63]

As to damages, Lord Salmon said that costs necessary for making the building safe were clearly recoverable. But he added:

> So would the costs of rectifying any damage to the individual maisonettes and the reasonable expense incurred by any of the plaintiffs should it be necessary for them to find alternative accommodation whilst any of the structural repairs were being carried out.[64]

This goes further than Lord Wilberforce and would include non-safety repairs.

Both the majority and minority speeches in *Anns* agreed with what was said by Lord Denning M.R. in *Dutton* in relation to the supposed immunity of builders.[65] It can now be said with confidence that *Bottomley* v. *Bannister*[66] is no longer good law, at least in England, and that a builder (whether an owner builder or otherwise) may be liable in negligence for erecting a potentially dangerous building and that he may also be liable, according to Lord Wilberforce, for breach of statutory

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[62] [1947] A.C. 265, 280.
[63] [1977] 2 W.L.R. 1024, 1046.
[64] *Id.* 1050.
[65] [1972] 1 Q.B. 373, 392-394.
[66] [1932] 1 K.B. 458.

duty in so far as he has failed to comply with the by-laws.[67] The New Zealand Court of Appeal, in *Bowen* v. *Paramount Builders (Hamilton) Ltd*,[68] though indicating that *Bottomley* v. *Bannister* was facing its demise, did not go so far as to say that it was no longer the law in New Zealand.

THE IMPLICATIONS

What can be drawn from the *Anns* decision? On the question of the proximity relationship, the two-stage test discussed by Lord Wilberforce does not expand on what has been said in recent cases. And on the question of what types of damages can be claimed, the decision breaks no new ground.

It can now be concluded that the result of *Dutton* was right, but that the neighbour principle was not properly applied in that case. In Australia, *Dutton* has been applied in *Commonwealth* v. *Turnbull*.[69] Whether the Australian courts will modify their approach to these types of cases in the future in the light of *Anns* or whether they will prefer to avoid the very real difficulties created by that case remains to be seen. These very real difficulties emerge in relation to the public law aspect of the case, and it is on this issue that *Anns* is more important.

What are the principles which govern the negligence liability of public bodies in the light of *Anns*? It is suggested that, in relation to purely operational activities, that is, activities which involve no discretion at all (duties rather than powers), the position has not been changed. The carrying out of such activities carries with it a duty to do so with due care. This is an implied limit in every statutory provision dealing with such activities. To carry out such an activity without due care is negligence. It is also, incidentally, *ultra vires* because negligent. But this is of no importance.

The *ultra vires* prerequisite is also irrelevant in relation to activities which (though necessarily authorised by the legislation) are not governed by the legislation as to the detailed execution of them. An example is the use of motor vehicles by the public body. In such a case, the ordinary common law duty of care is owed in the same way as in the private sphere.

At the other end of the continuum, a wide power conferred on a public body giving it a discretion in carrying out the policy contemplated by that power should not expose that body to possible damages

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[67] [1977] 2 W.L.R. 1024, 1039. This passage was cited with approval and applied in *Batty* v. *Metropolitan Property Realizations Ltd* [1978] 2 All E.R. 445, 457, a case in which the Court of Appeal (Megaw, Bridge and Waller L.JJ.) found both a builder and a development company liable in tort for damage suffered by the owners of a house which was doomed due to unstable soil on which it was built.

[68] [1977] 1 N.Z.L.R. 394, 405 *per* Richmond P.; 418 *per* Woodhouse J.

[69] (1976) 13 A.C.T.R. 14.

claims. This despite the fact that the exercise of the power may foreseeably cause damage to people. A good example is that given by Lord Diplock when he talked of a decision being made to institute a relaxed regime of control over detainees in Borstal institutions. Clearly damage to property in the neighbourhood of such institutions may foreseeably be caused as a result of that decision. But the statute which confers the power to make such a decision at the same time excuses the decision-maker from any damages claim. The statute therefore authorises the taking of a calculated risk. Only if the decision made is outside the power conferred by the statute would it no longer be authorised and therefore potentially the subject of a negligence action. A plaintiff would be faced with a formidable task in trying to prove that the decision was *ultra vires*, given that the discretion is very wide. In this way protection is afforded in respect of policy decisions in virtually all cases.

Previously it was thought that policy decisions could not even potentially attract the law of negligence.[70] Lord Salmon was of this view. He thought that the only possible remedies available for wrongful exercises of discretionary powers should be the prerogative writs. But now, apparently, policy decisions can potentially attract negligence claims.

It is worth noting at this stage that "negligence" here is used very technically. From one point of view it seems strange to even contemplate a possible negligence action as a result of a deliberate policy decision. But, from another point of view, the decision may foreseeably cause damage to "neighbours", so that on this basis it is arguable that a duty of care is owed. Whether in these circumstances the relevant legislative provision prevents a duty from arising (as Lord Wilberforce argued) or whether it excuses "breach", in the sense that the body or officer making the decision deliberately takes a risk but is justified in so doing, may not matter very much. Suffice it to say that a statutory provision conferring a discretion on a body can be said to authorise "negligence", using the word in the narrow and technical sense.

The relationship between *ultra vires* and negligence is, in the present writer's view, more easily understood in terms of breach rather than duty. There is no logical reason why the existence of a duty should depend on whether or not the officer was acting *intra* or *ultra vires*. Why should a duty arise only when he has started to act *ultra vires*? Was not the duty already in existence because of the proximity between the decision-maker and the people foreseeably affected by the decision? On the other hand, the *ultra vires* concept does logically relate to breach. The taking of a risk is either authorised if *intra vires* or not authorised if *ultra vires*. In *Benning* v. *Wong*[71] the discussion of onus

[70] Hogg, *Liability of the Crown* (1971) 85-86. Friedmann, *Law in a Changing Society* (1959) 365. This policy stance is sometimes called the rule in *Everett* v. *Griffiths* [1921] 1 A.C. 631.

[71] (1969) 122 C.L.R. 249.

of proof (in the context of a *Rylands* v. *Fletcher*[72] claim against a gas company) is on the basis of whether the plaintiff has to prove that the defendant has lost statutory protection because he has acted carelessly or whether the defendant has to prove that he is protected against a *Rylands* v. *Fletcher* claim by showing that he has carried out the statutory tasks with due care.[73] The assumption behind this discussion was that statutory authorisation is dependent on breach or no breach of a duty of care rather than on existence of a duty of care.

However, some statutory provisions may well be framed in terms of preventing a duty from arising, in which case, of course, *ultra vires* relates to the question of duty rather than breach.

In the continuum with purely operational activities at one end and purely policy decisions at the other, there exists a whole range of activities which are more or less "operational" or more or less "discretionary". As noted above, the duty of care used to be only owed at the operational level. Of course some difficulties were experienced in deciding when the line was crossed from operational to discretionary. Now, after *Anns*, it is still necessary to decide where the line should be drawn, not for the purpose of deciding duty/no duty, but for the purpose of deciding whether the plaintiff has to prove that the defendant's activity was *ultra vires* or not. Any activity involving any sort of discretion will attract the *ultra vires* prerequisite.

The specific difficulty which arises from the facts of the *Anns* case has been discussed earlier. The operational/discretionary distinction has changed so that something as operational as inspecting foundations falls on the discretionary side of the line, thereby attracting the *ultra vires* prerequisite.[74] This means that a whole range of activities, which prior to *Anns* were analysed simply in terms of a duty of care, must now be analysed additionally in terms of *ultra vires*.

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[72] (1868) L.R. 3 H.L. 330.

[73] Barwick C.J. (1969) 122 C.L.R. 249, 254-258. The discussion of fault in the context of a *Rylands* v. *Fletcher* action may seem puzzling. Briefly, Barwick C.J. argued that, for the defendant to succeed in invoking the protection of the relevant statutory provisions with respect to a *Rylands* v. *Fletcher* claim, he must show that he has acted within the statute. To do this he must show that he carried out his tasks with due care because the legislation impliedly dictates that the gas company must act with due care. If he can do this, he has then shown that the damage was a consequence of the statutory tasks which due care and skill could not prevent. It was thus damage authorised by the legislation as being a consequence necessarily incidental to the carrying out of the statutory tasks.

As regards the onus of proof issue, the justices of the High Court were not unanimous.

[74] On this distinction, compare Phegan, "Public Authority Liability in Negligence" (1976) 22 McGill Law Journal 605, 613. Phegan states that "Decisions not to inspect and decisions not to repair are made at the planning stage; once inspection or repair is embarked upon, the activities become operational . . . and no longer immune from judicial evaluation" (621). At no stage in this discussion is the *ultra vires* prerequisite mooted. (Phegan has adopted the American usage of "planning/operational" rather than "discretionary/operational" used by Lord Wilberforce.)

The above discussion as to the relationship of *ultra vires* to potential negligence liability has not tackled the difficult problem of causation. If the statutory provision authorises what may be termed remedial activities which are designed to prevent damage arising from dangers created by others (the builder in *Anns*), to be contrasted with activities which themselves can create dangers (such as building a dam), should this affect potential negligence liability? In the past this distinction has been relied on as making the difference between no liability and liability. Only if the statutory body creates the source of danger should it be potentially liable.[75]

This issue was not dealt with and indeed was not required to be dealt with by Lord Wilberforce.[76] Suffice it to say that in *Dutton* it presented no barrier to liability, though naturally it was stressed in argument. As a tentative conclusion, it may be said that now so long as the duty is established under the legislation, it matters not whether that duty is a duty to take care to avoid causing damage in relation to either positive or remedial activities. As Stamp L.J. in *Dutton* put it, "the house would on the balance of probability never have been built but for the carelessness of the defendant council".[77]

The overall problem here, which was recognised by Lord Wilberforce, is to try and draw the line between those activities of public bodies which should, and those which should not, as a matter of policy, expose such bodies to potential negligence claims. Phegan discusses this in the American, Canadian, British and Australian contexts.[78] He points out that the discretionary or planning/operational criterion has had little acceptance in the courts of Commonwealth countries[79] which have tended to rely on the unsatisfactory nonfeasance/misfeasance dichotomy as illustrated by the *East Suffolk* case. Lord Wilberforce's use of the discretionary/operational criterion has done little to make more precise the circumstances in which public authorities should be held liable in negligence. Because, on the one hand he has restricted potential negligence claims against statutory bodies by apparently making the *ultra vires* prerequisite necessary at the operational level; and, on the other hand, he has widened the scope of such potential negligence actions by saying that *any* decisions made *ultra vires* and negligently can give rise to a damages claim. This could apply at the highest levels of decision-making, though a plaintiff in such a case would be faced with a formidable task, as noted before. Whether an action for damages should be an additional potential remedy must in the end be a policy decision for the courts to make. The Australian courts may well be

[75] *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74.

[76] All that he said was that he was not prepared to distinguish the *East Suffolk* case on the basis of causation. He hinted that the Board's incompetence in that case was a cause of the damage: [1977] 2 W.L.R. 1024, 1036.

[77] [1972] 1 Q.B. 373, 413.

[78] Phegan, *loc. cit.*

[79] *Id.* 617.

reluctant to expose governmental bodies who are carrying out discretionary functions to this danger.[80]

However, *Hull* v. *Canterbury Municipal Council*[81] and *G.J. Knight Holdings Pty Ltd* v. *Warringah Shire Council*[82] indicate that Australian courts are willing to award damages in respect of discretionary decisions made *ultra vires*. The negligence alleged and proved in these two cases was lack of due care by the respective defendant councils in scrutinising their own powers. Because they gave development consent invalidly they were held to be negligent. This sort of negligence must be arguable in very many cases where a body has acted *ultra vires*. The development consents in these two cases were in favour of the two plaintiffs who then in reliance went ahead and incurred expenditure which turned out to be money thrown away when the development consents were later found to be invalid. The more usual situation in the *ultra vires* cases is where a plaintiff has been prevented from pursuing some activity and he wishes to challenge that decision which so prevents him. Can any distinction be drawn between this sort of case and cases like *Hull* and *G.J. Knight*? Should a plaintiff also be able to claim damages for economic loss in the more usual circumstances of denial of development consent (or as the case may be)? The answer to this is that a distinction can be drawn so as to exclude the alarming proposition that in such a case a plaintiff could successfully claim for such economic loss. The distinction is that made between damages in the law of torts and damages in the law of contract. In the law of torts, generally only reliance losses can be claimed.[83] Expectation losses are appropriate to the law of contract. Therefore reliance losses of the sort actually suffered in *Hull* and *G.J. Knight* are legitimately claimed in an action for negligence. If, on the other hand, in such a case development consent had been refused and it was found that such decision was made *ultra vires* and as a consequence of negligence in that the council failed to exercise due care in observing the rules which bound it, then no damages in negligence could be claimed because all losses experienced by the plaintiff would necessarily be expectation losses. (In *Hull* it was unsuccessfully argued that there was a contract between the plaintiff and the council because a fee had been paid. Nagle J. relied on *Administration of the Territory of Papua and New Guinea* v. *Leahy*[84] to hold that there was no intention to create legal relations. Had he decided otherwise, very real problems concerning the appropriate measure of damages would emerge, as Nagle J. himself noted.[85])

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[80] Similar misgivings are expressed by Buxton, "Built upon Sand" (1978) 41 Modern Law Review 85, 89-90.

[81] [1974] 1 N.S.W.L.R. 300.

[82] [1975] 2 N.S.W.L.R. 796.

[83] The exceptions to this are not material to the present discussion.

[84] (1961) 105 C.L.R. 6.

[85] [1974] 1 N.S.W.L.R. 300, 312.

A POSSIBLE SOLUTION

It is suggested that the difficulties raised by the *Anns* case could be avoided if the plaintiff was not burdened with the task of first proving that, in relation to discretionary decisions, the defendant had acted "beyond the limits" of its discretion. If the defendant bore the burden of using the relevant statutory provision to justify or excuse its harm-causing activity, then the role of *ultra vires*, or more accurately *intra vires*, in relation to negligence claims against statutory bodies would have its proper place.

In the present writer's view the plaintiff would have to make out a *prima facie* case of negligence against the public body by showing that its activity was one which foreseeably would cause harm to the plaintiff and that it did cause the type of harm foreseen and that this was as a result of carelessness in the carrying out of the activity. The defendant would then have to show that it acted with statutory authority. In effect the defendant would have to show that the harm caused to the plaintiff was a necessary incidence of the activity in question. This would involve either showing that the defendant owed no duty; or was not required to take care in the sense that it was justified by the legislation in taking calculated risks; or that the harm could not be avoided by the exercise of due care.

It is suggested that the no duty or justified risk argument will tend to be more appropriate at the policy end of the continuum. In fact, a plaintiff would be most unlikely to bring an action in the first place. The argument that the defendant has taken due care will be appropriate at the operational end of the continuum (albeit operational activities involving some discretion, in the Lord Wilberforce sense). This argument entails the assertion that the statute by implication authorised all incidental harm which ensued despite due care being taken, but not that harm which was avoidable by the exercise of due care. This does throw the burden of disproof of negligence on the defendant statutory body. This defence (rather than the no duty or justified risk defences which simply turn on statutory interpretation) will now be examined.

Is this reversal of the normal burden of proof in relation to negligence actions against statutory bodies supportable in principle or by authority?

In principle it is supportable. In normal negligence actions, if the defendant wishes to show that what would otherwise amount to negligence is excused by the defence of necessity (which, it is submitted is analogous to statutory authority) the burden is obviously on the defendant to make out this argument.[86] Similarly, if the defendant wishes to argue that the normal standard of reasonable care does not apply to him, he must bear the burden of proving this. *Watt* v. *Hert-*

[86] Fleming, *The Law of Torts* (5th ed. 1977) 115-116.

fordshire County Council[87] and *Daborn* v. *Bath Tramways Motor Co. Ltd*[88] are examples.

If the burden of disproof could be seen not so much as reversing the normal burden of proof in a negligence action, but more as the defendant bringing itself within the relevant statutory provision which just happens to entail, in the appropriate cases, proving that it has acted with due care because there is an implied limit in all statutory provisions at this operational end of the continuum that the activities authorised should be exercised with due care—then the proposition here being argued for is not so alarming. "The onus of proving that the harm resulting from the exercise of a statutory power is inevitable [that is, unavoidable by the exercise of due care] is on those who wish to escape liability."[89]

As far as authority is concerned it is possible to find judicial pronouncements both in support of and against this argument. For instance in *Fisher* v. *Ruislip-Northwood Urban District Council and Middlesex County Council*[90] Lord Greene M.R. made an exhaustive examination of the conflicting authorities in this general area. One case specifically approved and followed was *Polkinghorn* v. *Lambeth Borough Council*[91] in which Scott L.J. and Farwell L.J.[92] had said that the burden of disproof of negligence rested on the defendant council and these remarks were summarised with approval by Lord Greene M.R. in *Fisher*.[93]

On the other hand this issue had led to a diversity of opinions, as is illustrated by *Benning* v. *Wong*,[94] a case dealing with a *Rylands* v. *Fletcher*[95] claim against a gas company. Certainly Barwick C.J. and Windeyer J. thought that the defence of statutory justification in relation to torts of strict liability cast on the defendant the burden of showing that it had not acted negligently. More directly in point, because it involved a negligence claim, was *Cox Brothers (Australia) Ltd* v. *Commissioner of Waterworks*,[96] in which the High Court held that a plaintiff had to prove negligence against the statutory authority. But the present writer would not disagree with this. As stated above, a *prima facie* case of negligence must first be made out against the defendant. The burden then shifts to the defendant to show statutory justification which, in the appropriate cases, will involve proof of no

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[87] [1954] 1 W.L.R. 835.
[88] [1946] 2 All E.R. 333.
[89] Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed. 1971) 302.
[90] [1945] K.B. 584.
[91] (1938) 158 L.T. 127.
[92] *Id.* 129 and 130 respectively.
[93] [1945] K.B. 584, 605-606.
[94] (1969) 122 C.L.R. 249.
[95] (1868) L.R. 3 H.L. 330.
[96] (1933) 50 C.L.R. 108.

negligence. In the *Cox Brothers* case, the plaintiff did not even prove a *prima facie* case, according to the majority.

CONCLUSION

There is no doubt that the negligence liability of statutory bodies is a burgeoning area of the law in Commonwealth countries. Disquiet at this development has been expressed recently.[97] It may be that the floodgates argument is, for once, a valid one.

The public law aspect of the *Anns* case has raised some difficult issues. The wider implications of holding public bodies liable in damages for the negligent exercise of their peculiarly governmental functions raise questions about the suitability of this form of redress. Is the negligence action, which is capricious in where and when it strikes, the most appropriate remedy for the victims of administrative action? Why should those fortunate enough to be the victims of ***negligent*** administrative decision be compensated whereas those who cannot prove negligence in the public body go uncompensated? And looking at it from the statutory body's point of view, will the threat of potential negligence suits cause local bodies to tread so carefully that they will be ineffective? Or will they simply further complicate the forms that have to be filled in by adding a disclaimer?

As to the more detailed aspects of the *Anns* case, the case has closely confined the *Dutton* decision so that the latter's potentiality for the development of the law of negligence is somewhat lessened. As regards the negligence liability of statutory bodies, this article has questioned the validity of placing on the plaintiff the burden of showing that the government body has acted both negligently and *ultra vires*. The *ultra vires* prerequisite, as a burden which the plaintiff has to bear at the outset, is logically unsound.

It is submitted that public body negligence liability can be dealt with in the following ways:

1. Is the harm-causing activity one which, though authorised by the legislation, is not the subject-matter of detailed legislative enactment (*e.g.* sending vehicles onto the highway)? If so, the ordinary rules of negligence apply.

2. Is the harm-causing activity purely "operational" involving no discretion? If so, the ordinary rules of negligence apply.

3. Is the harm-causing activity basically "operational" but one which carries with it some discretion as to its exercise? If so the ordinary rules of negligence apply as far as the plaintiff is concerned. However, the defendant statutory body may have a defence of statutory authoris-

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[97] Buxton, *loc. cit.*

ation if it can show that it carried out the activity with due care and that the harm was therefore unavoidable.

4. Is the harm-causing activity one which involves policy issues in the sense that a large measure of discretion is conferred on the statutory body in its decision-making? If so, the decision which adversely affects the plaintiff may be the subject of a negligence action and, as far as the plaintiff is concerned, the ordinary rules of negligence apply. But the statutory body will invariably have a powerful defence of statutory authorisation which will usually take the form of showing that the relevant legislation either precluded a duty from arising or excused the taking of calculated risks.

5. Only in those cases in which the defendant has pleaded statutory authorisation will the plaintiff then have to show that the defendant acted *ultra vires*. One way of discharging this burden is to prove that the statutory body acted negligently.

POSTSCRIPT

The trial of *Anns* v. *Merton London Borough Council* has been fixed for 19 February 1979.[98] If the case is not settled, it will be most interesting to see how the plaintiffs discharge the burden cast on them by the speech of Lord Wilberforce.[99]

[98] Private communication from Matthews & Co. of Sutton, England, solicitors for the plaintiffs.

[99] I am grateful to Colin Phegan of Sydney University and to Professor Harold Luntz of Melbourne University for their advice and suggestions in connection with this article. The views, interpretations and errors are, however, entirely my own.