

## NEGLIGENCE IN THE PUBLIC SPHERE: IS CLARITY POSSIBLE?

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The law relating to the liability in negligence of those exercising statutory powers, and in particular of public authorities, is in a confused and uncertain state. In part this is a reflection of current debates surrounding the criteria for resolving negligence claims generally.<sup>2</sup> But it also reflects unresolved questions relating to the position of public authorities in tort litigation, and the extent to which their status may differ from that of other defendants.<sup>3</sup> The confusion is heightened by the fact that these two sources of uncertainty have become intertwined. The continuing controversy is reflected in the June 1999 decision of the House of Lords in *Barrett v Enfield London BC*<sup>4</sup> in which the House narrowly distinguished its own earlier decision in *X(minors) v Bedfordshire CC*,<sup>5</sup> and refused to strike out a negligence claim involving the defendants' statutory responsibilities for the welfare of children. Other recent decisions on welfare provision, and on the liability of highway authorities and the emergency services, also reveal striking differences in approach. In this article the concepts deployed in these cases will be examined, and the restrictive approach of the majority of the House of Lords in *Stovin v Wise*, with its hostility towards liability for "omissions" and its emphasis upon statutory "intention", will be criticised. The relevance or otherwise in this context of such notions as "reliance" and "assumption of responsibility" will also be considered, and the recent revival of interest in the distinction between "policy" decisions and "operational" activities will be welcomed. The concluding argument will be that unstructured pragmatism, which is currently the dominating influence in this area, should be superseded by a more principled basis for liability. In particular, claims to immunity from negligence liability on grounds of public interest should be treated as such, and their merits or otherwise debated openly.

### DIFFERING APPROACHES

At least three different judicial attitudes towards the liability of public authorities can be gleaned from the recent cases. At one extreme there is scepticism as to the very legitimacy of using a statutory power as the basis for liability in negligence. This view, and its associated call for a return to a much older orthodoxy, is reflected in the 1996 speech of Lord Hoffmann in

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<sup>2</sup> For discussion see Kit Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 LQR 461; Jenny Steele "Scepticism and the Law of Negligence" [1993] 52 CLJ 437.

<sup>3</sup> See A.M.Dugdale "Civil Liability and Public Authorities" [1994] 45 NILQ 69 for stimulating consideration of possible approaches to the problems.

<sup>4</sup> [1999] 3 All ER 193.

<sup>5</sup> [1995] 2 AC 633.

*Stovin v Wise*.<sup>6</sup> At the other extreme there is a reluctance to concede that proven carelessness should escape liability merely because it occurred in a statutory context: this approach is apt to emphasise instead the need for “wrongs to be remedied”.<sup>7</sup> Perhaps the most favoured approach is one which seeks to steer a pragmatic course between the two extremes, taking full advantage of the flexibility accorded by such notions as “proximity” and “justice and reasonableness”. It is convenient to begin with *Stovin v Wise*.

### STOVIN'S CASE AND THE RETREAT FROM ANNS

In *Stovin v Wise* Lord Hoffmann added his voice to the now familiar chorus of criticism which has surrounded the speech of Lord Wilberforce in *Anns v Merton London Borough Council*.<sup>8</sup> It will be recalled that in the *Anns* case, which concerned the statutory powers of local authorities to supervise the construction of buildings, the House of Lords held that a statutory power could give rise to liability in negligence for damages if the negligence occurred in the “operational” rather than the “policy” area. The distinction between the two areas, which Lord Wilberforce conceded was “probably a distinction of degree”,<sup>9</sup> was intended to facilitate the imposition of liability in damages for carelessness without simultaneously depriving the authority of freedom to decide, as a matter of policy, to inspect infrequently or even not to inspect at all. The distinction therefore represented an attempt to overcome the logical difficulty of superimposing a private law *duty* upon a public law *power* without subverting the discretion conferred by the latter. It marked a conscious departure from the earlier decision of the House in *East Suffolk Rivers Catchment Board v Kent*.<sup>10</sup> In that case it had been held, in effect, that that difficulty was insurmountable. Accordingly, it was decided that an authority could not be liable for carelessly failing to prevent the occurrence of harm, which prompt use of its statutory powers could have averted, but only for making matters *worse* by adding to the harm which would have been inevitable if the authority had chosen not to exercise its powers at all. The subsequent fate of the decision in *Anns v Merton London Borough Council* is too well-known to need recounting at length here. It led to a substantial increase in claims against local authorities for economic loss, by those whose buildings were reduced in value due to defective construction which the authorities had failed to prevent. And as far as the recovery of economic loss was concerned, it was overruled in *Murphy v Brentwood District Council*.<sup>11</sup> The overruling did not, however, involve the distinction between “policy” and “operations” itself. But that distinction had already fallen into disfavour, and it has continued to be the subject of judicial criticism, not least by Lord Hoffmann in *Stovin v Wise*.

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<sup>6</sup> [1996] 2 AC 923.

<sup>7</sup> See the dissenting judgment of Sir Thomas Bingham MR (as he then was) in the Court of Appeal in *X (minors) v Bedfordshire CC* [1995] AC 633 at 663.

<sup>8</sup> [1978] AC 728.

<sup>9</sup> See [1978] AC at 754.

<sup>10</sup> [1941] AC 74.

<sup>11</sup> [1991] 1 AC 398.

### The “Intention” Of The Statute

In *Stovin v Wise*<sup>12</sup> the plaintiff motor-cyclist suffered serious personal injuries in a collision with a car, the driver of which had had her view obscured by a large bank of earth on land adjoining the highway. An attempt to hold the local highway authority jointly liable for the plaintiff’s injuries, on the ground that the accident might have been prevented if it had exercised its statutory powers to compel removal of the bank of earth, was unsuccessful. A bare majority of the House of Lords, reversing the Court of Appeal, held that the claim against the authority would fail. Lord Hoffmann, speaking for the majority, described the distinction drawn in *Anns* between “policy” and “operational” areas as “inadequate”,<sup>13</sup> and appeared to indicate a preference for the general principle of non-liability embodied in *East Suffolk Catchment Board v Kent*.<sup>14</sup> On the assumption, however, that the *Anns* doctrine was applicable, Lord Hoffmann held that the claim would still fail for two reasons. First, contrary to the interpretation of the facts which had been favoured by the Court of Appeal, he considered that the failure to bring about removal of the bank<sup>15</sup> should be regarded as having fallen within the “policy” rather than the “operational” area. Secondly, even if there had been operational negligence this would not be sufficient in itself to generate liability since there was, in his view, a *further* requirement to satisfy. It was necessary to show, in any given case, not only that the statute in question was designed to facilitate the prevention of harm to the plaintiff, but also “that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised”. He said:

“In terms of public finance, this is a perfectly reasonable attitude. 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. . . . To require payment of compensation increases the burden on public funds. Before imposing such an additional burden, the courts should be satisfied that this is what Parliament *intended*”.<sup>16</sup>

Lord Hoffmann referred by analogy to the law relating to liability in tort for damages for breach of actual statutory *duties*. He observed that “whether a statutory duty gives rise to a private cause of action is a question of construction” requiring “an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach”.<sup>17</sup> He indicated that since a finding in favour of liability in damages for breach of

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<sup>12</sup> [1996] 2 AC 923.

<sup>13</sup> See [1996] 2 AC at 951.

<sup>14</sup> “I...do not say that a statutory ‘may’ can *never* give rise to a common law duty of care. I prefer to leave open the question of whether *Anns*’ case was wrong to create *any* exception to Lord Romer’s statement of principle in the *East Suffolk* case”, *ibid* at 953 (italics supplied).

<sup>15</sup> See below for discussion of the importance which Lord Hoffmann attached to the distinction between “acts” and “omissions”.

<sup>16</sup> *Ibid* at 952 (italics supplied).

<sup>17</sup> See [1996] 2 AC at 952.

statutory duty is exceptional, such a finding should, *a fortiori*, be even rarer in cases in which a mere power had been conferred by the statute. While this particular implication is logical enough, Lord Hoffmann's invocation of the notion of legislative intention, as it is conventionally used in the context of breach of statutory duty, is more questionable. His Lordship did accept that, unlike the statutory duty situation, whether a provision "can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself".<sup>18</sup> Nevertheless, the overall thrust of his remarks, including the use of the word "intention" in the passage quoted above, is that the "policy" of the statute is relevant not only to determine the particular mischief at which it was directed but also to determine whether "Parliament intended" that there should be "payment of compensation [out of] public funds". This approach is essentially the same as that which, in theory, applies in the statutory duty context<sup>19</sup> and, as such, is open to challenge. For many decades commentators in England and in other common law jurisdictions have contended that use of the notion of legislative intention in the context of the action for breach of statutory duty is a patent fiction, which serves only to conceal the policies or intuitions which lie behind the decision to impose or deny liability.<sup>20</sup>

### THE DOMINANCE OF PRAGMATISM

There is a paradoxical sense in which Lord Hoffmann's speech in *Stovin v Wise* has more in common with that of Lord Wilberforce in *Anns v Merton London Borough Council*, than either has with the approach which currently dominates both this area and the law of negligence generally. Both consider that the difficulties surrounding the development of private law *duties*, against a background of statutorily conferred *powers* to be used for public benefit, require a distinctive conceptual basis for their resolution.<sup>21</sup> Notwithstanding Dicey's long shadow, both therefore regard it as inevitable that there will sometimes be an open inequality in the treatment of public authorities, as compared with private defendants, when common law negligence claims are being resisted. By contrast, prevailing orthodoxy as

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<sup>18</sup> *Ibid*, at the same page.

<sup>19</sup> For a recent example see *Maye (a minor) v Craigavon Borough Council* [1998] NI 103.

<sup>20</sup> See, especially, Thayer "Public Wrong and Private Action" (1914) 27 Harv LR at 320. See also Morris, "The Role of Criminal Statutes in Negligence Actions" (1949) 49 Col L Rev 21; Fricke, "The Juridical Nature of the Action upon the Statute" (1960) 76 LQR 240; Williams, "The Effect of Penal Legislation in the Law of Tort" (1960) 23 MLR 233; Alexander, "Legislation and the Standard of Care in Negligence" (1964) 2 Can.B Rev 243; Buckley, "Liability in Tort for Breach of Statutory Duty" (1984) 100 LQR 204. See, generally, Stanton, *Breach of Statutory Duty in Tort*, (1986).

<sup>21</sup> For a different view see Bailey and Bowman, "The Policy/Operational Dichotomy - A Cuckoo in the Nest" (1986) 45 CLJ 430, and the same writers' "Negligence in the Realms of Public Law - A Positive Obligation to Rescue?" [1984] PL 277. Bailey and Bowman deny that the treatment of public authorities requires "the creation of any special legal principle - it is all part and parcel of the traditional private law principles of negligence" [1986] 45 CLJ at p.455). But it is difficult to see how those principles can take the full weight of the special factors which are relevant in this sphere without considerable modification or over-simplification. *Cf* Craig, *Administrative Law*, 4th edn, (1999) pp. 860-864.

enunciated by the House of Lords in the “private law” case of *Caparo Industries plc v Dickman*,<sup>22</sup> holds that the result in any given negligence case should depend upon whether the situation was “one in which the court considers it fair, just and reasonable that the law should impose a duty”. This highly ad hoc approach also makes full use of the opaque concept of “proximity”.

Before *Caparo* the Privy Council invoked the notion of proximity in *Yuen Kun Yeu v Attorney-General of Hong Kong*<sup>23</sup> when declining to impose liability upon a financial services regulatory authority. Overt consideration of the special problems which the imposition of liability would entail is confined to a few lines at the end of the judgment in that case, and is accompanied by a disclaimer that these formed the basis of the decision.<sup>24</sup> In somewhat similar vein the Privy Council in *Rowling v Takaro Properties*<sup>25</sup> described the question whether a government minister should be liable in negligence for damages, for an admitted *ultra vires* decision which had caused loss to the plaintiff company, as “intensely pragmatic”. The Board concluded that, on the facts of the case, even if a duty *had* existed the minister would not have been in breach of it. In so far as the judgment referred, in passing, to substantive reasons the main emphasis was upon the danger of liability making officials over-cautious.<sup>26</sup> But since this danger will frequently be present in cases involving public authorities, the observation does not help to distinguish those situations in which imposition of liability will be legitimate from those in which it will not.

### “Just and Reasonable”

In *X(minors) v Bedfordshire County Council*<sup>27</sup> various claimants sought to impose negligence liability upon several local authorities for the manner of their exercise, or failure to exercise, their statutory powers relating to the welfare of children. In one of the cases a child had been wrongly removed from her mother when a psychiatrist confused the name of the latter’s innocent boyfriend with that of someone suspected of abusing the child. In another case an authority had failed to take action to protect a child despite clear evidence of abuse, and in yet another failure had allegedly occurred in the making of provision for children with special educational needs. The House of Lords struck out all the claims directed against the authorities.<sup>28</sup>

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<sup>22</sup> See [1990] 2 AC 605 at 618 per Lord Bridge.

<sup>23</sup> [1988] AC 175.

<sup>24</sup> See [1988] AC at 198 (Lord Keith delivering the judgment of the Board).

<sup>25</sup> See [1988] AC 473 at 501 (Lord Keith delivering the judgment of the Board).

<sup>26</sup> See [1988] AC at 502 (Lord Keith).

<sup>27</sup> [1995] 2 AC 633. See Hilson and Rogers (1995) 3 TLJ 221.

<sup>28</sup> Claims alleging vicarious liability were also struck out, with one exception, on the ground that to allow them to proceed would allow indirect circumvention of the decision to strike out the direct claims against the authorities: see [1995] 2 AC at 754, per Lord Browne-Wilkinson. See also *Phelps v Hillingdon BC* [1999] 1 All ER 421 in which the Court of Appeal struck out a vicarious liability claim for the same reason (the House of Lords has given leave to appeal). For criticism of the perception of the relationship between direct and vicarious liability in the *Bedfordshire* and *Hillingdon* cases, see respectively, Cane “Suing public authorities in tort” (1996) 112 LQR 13 at 19-21 and Hedley “Negligence -

Lord Browne-Wilkinson, who delivered the leading speech, acknowledged that the statutory context necessitates greater sophistication, when dealing with negligence claims against public authorities, to ensure that appropriate limits on the scope of justiciability are not over-stepped. Nevertheless he was concerned to emphasise that, once justiciability is established, whether there is “a common law duty of care” falls “to be decided by applying the usual principles, ie those laid down in *Caparo Industries plc v Dickman*”, including the requirement for a “proximate” relationship and the need for it to be “just and reasonable to impose a duty of care”.<sup>29</sup>

Lord Browne-Wilkinson’s reasons for concluding that it would not be “just and reasonable” to impose liability on the local authorities in the instant case included the fact that the situations in question were “extraordinarily delicate”, and a “fertile ground in which to breed ill feeling and litigation” which would be a waste both “of money and human resources”. Moreover, “if a liability in damages were to be imposed, it might well be that local authorities would adopt a more cautious and defensive approach to their duties”.<sup>30</sup> Potential litigants should be encouraged to use instead the administrative complaints procedures which existed. With respect, this collection of reasons illustrates the dangers inherent in the subjectivity of the “just and reasonableness” approach. There are few situations in which litigation takes place *without* ill-feeling, and without the expenditure of resources which in happier circumstances could have been spent more constructively. And one person’s “cautious and defensive approach” is another person’s salutary improvement in practice to prevent misfortune re-occurring in the future. Moreover, while the impact of *liability* upon the public finances is of crucial importance, to introduce the cost of litigation *itself* as a reason for denying liability, under the umbrella of “justice and reasonableness”, would soon result in conferring total immunity upon public authorities and placing them outside the law. The point is one which should be directed towards the excessive cost of the legal process generally rather than towards the protection of public bodies. On any view, if Lord Browne-Wilkinson’s reasons were to be widely applied the scope of tortious liability would be drastically curtailed.

### **BARRETT v ENFIELD LONDON BC**

A rather more structured and less pragmatic approach to the issues in this area can perhaps be discerned in the recent decision of the House of Lords in *Barrett v Enfield London BC*.<sup>31</sup> The plaintiff was in the care of the defendant authority from the age of ten months until he was 17. He alleged that the authority had negligently failed to provide him with proper social workers, had made placements for him with inappropriate foster parents, and had moved him too frequently between different residential homes. He claimed that, as a result, he had reached adulthood with profound difficulties of a psychological and psychiatric nature which constituted actionable personal

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Vicarious Liability of Health Authorities - Diagnosis of Dyslexia” [1999] 58 CLJ 270.

<sup>29</sup> See [1995] 2 AC 633 at 739.

<sup>30</sup> See *ibid* at 750.

<sup>31</sup> [1999] 3 All ER 193.

injury.<sup>32</sup> The Court of Appeal struck out the claim,<sup>33</sup> relying on *X v Bedfordshire CC*. But the House of Lords reversed the Court of Appeal and, distinguishing its own decision in *Bedfordshire*, reinstated the claim. Two of the three Law Lords who delivered speeches, Lord Slynn and Lord Hutton, quoted the aphorism that “wrongs should be remedied”.<sup>34</sup>

The reasoning in *Barrett’s* case is also significant for an apparent revival of judicial interest in the distinction between policy and operational activities. The defendant authority had argued that the decisions taken in attempting to discharge its responsibilities for the plaintiff’s welfare had been discretionary, and hence that they could not be actionable in negligence unless, possibly, *ultra vires* for *Wednesbury* unreasonableness. But as Lord Slynn observed, “if an element of discretion is involved in an act being done subject to the exercise of the overriding statutory power” common law negligence is not necessarily ruled out. In determining whether or not what had occurred was non-justiciable<sup>35</sup> for the purposes of the law of negligence the “distinction which is sometimes drawn between decisions as to ‘policy’ and as to ‘operational’ acts” was relevant.<sup>36</sup> While the decision considered in *Bedfordshire* actually to take, or not to take, a person into care was non-justiciable, it did not follow that “having taken a child into care, an authority cannot be liable for what it or its employees do in relation to the child without it being shown that they have acted in excess of power”.<sup>37</sup>

Once justiciability had been established the House did go on to consider, in accordance with orthodox doctrine, whether the possible imposition of liability would be “just and reasonable”. Nevertheless, it is striking how the various factors grouped under this umbrella in the *Bedfordshire* case were considered *not* to “have the same force separately or cumulatively”<sup>38</sup> in *Barrett* so as to outweigh the plaintiff’s right to have his case substantively determined. In particular, both Lord Slynn and Lord Hutton expressly rejected the argument that a decision against the local authority would be objectionable on the ground that it might lead such authorities to “adopt a more cautious and defensive approach to their duties”.<sup>39</sup> On the contrary, observed Lord Slynn, quoting from the dissenting judgment of Sir Thomas Bingham MR (as he then was) in the Court of Appeal in *X v Bedfordshire*

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<sup>32</sup> The contention by defendants that claimants in cases of this type have not suffered any recognisable head of damage has not, on the whole, been favourably received: see *e.g. per* Bingham MR in *E(a minor) v Dorset CC* [1995] 2 AC 633 at 703; *per* Lord Slynn in *Barrett v Enfield London BC* [1999] 3 All ER 193 at 214. *Cf per* Stuart-Smith LJ in *Phelps v Hillingdon BC* [1999] 1 All ER 421 at 432-433.

<sup>33</sup> See [1997] 3 All ER 171.

<sup>34</sup> See [1999] 3 All ER 193 at 207 and 227.

<sup>35</sup> The notion of “non-justiciability” is regularly used, in preference to the distinction between policy and operations, to express the conclusion that what occurred was beyond the reach of the law of negligence. This terminology is appropriate to express a *result* (see below, note 100). But as Craig writes, “even if we do abandon the terms policy and operational, they are likely to guide indirectly the application of the criterion of justiciability” (*Administrative Law*, 4th edn, (1999) p.863).

<sup>36</sup> See [1999] 3 All ER 193 at 211.

<sup>37</sup> *Ibid* at the same page.

<sup>38</sup> See [1999] 3 All ER 193 at 208 *per* Lord Slynn.

<sup>39</sup> See [1999] 3 All ER 193 at 228 (Lord Hutton) and 208 (Lord Slynn).

CC, “the imposition of a duty of care” could contribute “to the maintenance of high standards”.<sup>40</sup>

### RELIANCE AS A BASIS FOR LIABILITY

The decision in *Barrett* clearly demonstrates that, notwithstanding a background which involved the exercise of discretionary power, a common law duty of care may be imposed in respect of negligence by social workers. In effect the House held, albeit without using that phraseology, that the defendants had “assumed responsibility” towards the plaintiff by taking him into care, and that he had “relied” upon them to act with appropriate skill when taking decisions relating to his welfare. A year or so before the decision of the House of Lords in *Barrett*, the Court of Appeal openly deployed the concept of “assumption of responsibility” to reach a decision favourable to the plaintiff in another case involving social workers. In *W v Essex CC*<sup>41</sup> the court was again confronted with the tension between conferring a broad immunity upon public authorities under the “just and reasonableness” umbrella, and the intuitive demand that victims of negligence should be compensated. Foster parents who were anxious for the safety of their own children asked for, and were given, specific assurances that no child suspected of sexual abuse would be fostered with them. Contrary to those assurances a boy known to the authority to have been cautioned for sexual abuse was fostered with the family and proceeded to abuse the other children, who accordingly sought to sue the defendants for negligence. In the Court of Appeal Stuart-Smith LJ would have applied *X v Bedfordshire CC* so as to strike out the claims. But his was a dissenting judgment. Judge and Mantell LJ allowed the case to proceed. Judge LJ placed emphasis upon the “assumption of responsibility”, represented by the assurances which the plaintiffs’ parents had received, which he considered was “integral” to their case.<sup>42</sup> He saw the claim as analogous to cases in which specific assurances given by the police had had the effect of displacing an immunity<sup>43</sup> which that service, in effect, otherwise enjoyed.<sup>44</sup>

### A POSSIBLE DOCTRINE OF GENERAL RELIANCE?

A much broader notion than that of assumption of responsibility towards a specific individual is the concept of “general reliance”. The idea is that the routine exercise of statutory powers may lead members of the public to assume that such exercise will continue and, subconsciously or otherwise, to take that assumption into account when planning their lives or activities. In one Australian case “the control of air traffic, the safety inspection of aircraft and the fighting of a fire in a building” were suggested as possible examples.<sup>45</sup> Although Lord Hoffmann was highly critical of the doctrine in

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<sup>40</sup> See [1999] 3 All ER 193 at 208.

<sup>41</sup> [1998] 3 All ER 111.

<sup>42</sup> See [1998] 3 All ER 111 at 136. Cf Kit Barker, “Unreliable Assumptions in the Modern Law of Negligence” (1993) 109 LQR 461, for criticism of the concept of “assumption of responsibility”.

<sup>43</sup> See below.

<sup>44</sup> Cf *Swinney v Chief Constable of Northumbria* [1997] QB 466, discussed below.

<sup>45</sup> See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464 per Mason J.

his speech in *Stovin v Wise*,<sup>46</sup> it is a decision of the High Court of Australia which provides the fullest discussion of the concept to date and also reveals a significant difference of judicial opinion as to its viability. In *Pyrenees Shire Council v Day*<sup>47</sup> the defendant local authority was held liable in damages for failing to exercise its statutory power to insist upon the taking of precautions, after an inspection had revealed the presence of a fire-risk on certain premises. The decision was, however, based upon the perception of the court that the statute in question “intended” to facilitate the award of compensation: that is the test favoured by Lord Hoffmann in *Stovin v Wise*. But the majority also took the opportunity to condemn the doctrine of general reliance. Gummow J could see “no sound doctrinal footing”<sup>48</sup> for such a doctrine and Brennan CJ expressed himself as follows:<sup>49</sup>

“If community expectation that a statutory power will be exercised were to be adopted as a criterion of a duty to exercise that power, it would displace the criterion of legislative intention. In my respectful opinion, if the public law duty of a public authority is relevant to its liability in damages for a failure to exercise that power, the appropriate criterion is legislative intention. I am respectfully unable to accept ‘general reliance’ as the basis of such liability”.

A very different note was, however, struck by McHugh J who said:<sup>50</sup>

“I do not think that it is correct to say that the doctrine of general reliance is a fiction or that it gives rise to common law duties that are inconsistent with the conferment of discretionary powers and functions”.

Any scope for the application of a doctrine of general reliance would be very limited, for a reason which will emerge below. Nevertheless, it is submitted that the view of McHugh J is in principle to be preferred to that of his brethren and of Lord Hoffmann in *Stovin v Wise*. To prefer the notion of legislative “intention” in this context, to that of general reliance, on the ground that the latter, as distinct from the former, “is a fiction” is to reverse reality. The concept of general reliance involves an overt appeal to experience and to intuitive notions of responsibility. Whatever the difficulties associated with it, it is therefore more in accordance with the nature of the law of tort than a search for an unexpressed legislative intention. Moreover, despite Lord Hoffmann’s hostility to the doctrine of general reliance in *Stovin v Wise*, the actual decision of the majority in that case can be perceived as being consistent with it. Motorists and others do not expect roads to be uniformly configured to a consistently high level of safety<sup>51</sup> in the same way that they assume, for example, that competent NHS

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<sup>46</sup> See [1996] 2 AC 923 at 954-955.

<sup>47</sup> (1997-1998) 151 ALR 147. See Doyle and Redwood, “The Common Law Liability of Public Authorities: The Interface between Public and Private Law”(1999) 7 Tort L Rev 30.

<sup>48</sup> See (1997-1998) 151 ALR 147 at 190.

<sup>49</sup> See (1997-1998) 151 ALR 147 at 155.

<sup>50</sup> See (1997-1998) 151 ALR 147 at 177.

<sup>51</sup> But they do expect consistency in the display of road-signs warning of hazards ahead: see *eg Bird v Pearce* [1979] RTR 369 CA; *affmg* [1978] RTR 290.

medical treatment will be available to them should they have the misfortune to suffer an accident. The analogy of NHS medical treatment also demonstrates why wholesale adoption of the principle in *East Suffolk Rivers Catchment Board v Kent* is no longer tenable. It would obviously be impossible successfully to defend an action for admitted medical negligence on the ground that an easily curable condition had merely been left unremedied rather than actually exacerbated and that, in any event, the legislature had intended that only treatment and not compensation should be funded.<sup>52</sup> It is therefore difficult to regard blanket dismissal of any notion of general reliance, in favour of searching silent statutes for an “intention” to facilitate the payment of actual compensation, as anything other than a retreat into fiction.

### Aircraft Inspection

The suggestion by the High Court of Australia that “the safety inspection of aircraft”<sup>53</sup> might provide an example of the doctrine of general reliance foreshadowed the recent decision of the English Court of Appeal in *Perrett v Collins*,<sup>54</sup> even though the concept was not actually referred to in the case. The decision is significant for a particularly robust assertion of the primacy of principle when determining a negligence claim against a body exercising a statutory power, albeit not a public authority as such. The plaintiff had been injured when flying as a passenger in a light aircraft which had been statutorily certified by an inspector as fit to fly. The inspector, and the Popular Flying Association on whose behalf he operated, denied that they owed the plaintiff a duty of care. They contended that it would not be “just and reasonable”, to impose liability upon a statutory regulatory authority in such circumstances.<sup>55</sup> The Court of Appeal had no hesitation in holding that a duty of care existed. The Court placed particular emphasis upon the fact that the claim in the case before them concerned personal injury, and all three members of the Court were critical of attempts to use the “just and reasonable” formula to evade a liability which they considered to be consistent with long-established authority. Hobhouse LJ (as he then was), in particular, said of the defendants’ contention that:

“. . . it represents a fundamental attack upon the principle of tortious liability for negligent conduct which had caused foreseeable personal injury to others. That such a point should be considered shows how far some of the fundamental principles of the law of negligence have come to be eroded. The arguments advanced in the present case. . . illustrate the dangers of substituting for clear criteria, criteria which are incapable of precise definition and involve what can only be

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<sup>52</sup> “There is no doubt that once the relationship of doctor and patient or hospital authority and admitted patient exists, the doctor or the hospital owe a duty to take reasonable care to effect a cure, not merely to prevent further harm”: *per* Stuart-Smith LJ in *Capital and Counties plc v Hampshire CC* [1997] QB 1004 at 1035.

<sup>53</sup> See note 45, above.

<sup>54</sup> [1998] 2 Lloyd’s Rep 255. See also *Swanson et al v The Queen* (1991) 80 DLR (4th) 741.

<sup>55</sup> *Cf Rich (Marc) & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1996] AC 211, upon which the defendants relied.

described as an element of subjective assessment by the Court: such ultimately subjective assessments tend inevitably to lead to uncertainty and anomaly which can be avoided by a more principled approach”.<sup>56</sup>

Even if the welcome decision in *Perrett v Collins* can be treated as an example of general reliance, it is nevertheless clear from recent cases involving the emergency services that the courts remain markedly sceptical of the doctrine.

## EMERGENCY SERVICES

### Fire

In *Capital and Counties plc v Hampshire CC*<sup>57</sup> a number of claims against the fire service were heard together by the Court of Appeal. In one case the fire brigade had allegedly been negligent in failing to ensure that a fire which they had been fighting had been fully extinguished before they left the scene. In another case the senior fire officer present at the scene ordered sprinkler systems in the affected building to be switched *off*. This was a very unusual order and had the unfortunate effect of causing the fire to spread more rapidly than it otherwise would have done. In the first case the Court was pressed with the argument that the doctrine of general reliance applied to the fire service but Stuart-Smith LJ, who delivered the judgment of the court, rejected the argument referring to Lord Hoffmann’s criticisms of that doctrine in *Stovin v Wise*. Stuart-Smith LJ also rejected the submission that, by accepting the summons to attend a particular fire, a fire-brigade “assumes responsibility” to the specific individuals whose property is under threat. As a result the Court held that the fire brigade could not be liable in the first case, even if carelessness were to be proved, because “a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to come under a duty of care merely by attending at the fire ground and fighting the fire”.<sup>58</sup> In the case in which the sprinklers had been turned off, on the other hand, the Court reached a different result and held that liability could be imposed on the principle derived from *East Suffolk Rivers Catchment Board v Kent*, that is, that the order to turn off the sprinklers had actually made matters *worse*. The general approach of the Court to the issues in the cases before it was accordingly encapsulated as follows by Stuart-Smith LJ:<sup>59</sup>

“In our judgment the fire brigade are not under a common law duty to answer the call for help and are not under a duty to take care to do so. If therefore they fail to turn up in time because they have carelessly misunderstood the message, got lost or run into a tree, they are not liable. . . . But where the rescue/protective service itself by negligence creates the danger there is no doubt in our judgment that the plaintiff can recover”.

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<sup>56</sup> See [1998] 2 Lloyd’s Rep 255 at 257-258.

<sup>57</sup> [1997] QB 1004.

<sup>58</sup> See [1997] QB 1004 at 1038.

<sup>59</sup> *Ibid* at 1030-1031.

Although the Court of Appeal therefore declined, on the ground of absence of “proximity”, to impose liability for a negligent failure to extinguish a fire, it nevertheless *rejected* a defence argument that imposition of liability would not be “just and reasonable”. Stuart-Smith LJ responded to this submission as follows:<sup>60</sup>

“. . . the courts should not grant immunity from suit to fire brigades simply because the judge may have . . . a visceral dislike for allowing possibly worthless claims to be made against public authorities, whose activities involve the laudable operation of rescuing the person or property of others in conditions often of great danger. Such claims may indeed be motivated by what is sometimes perceived to be the current attitude to litigation – ‘if you have suffered loss and can see a solvent target – sue it’. None the less, if a defendant is to be immune from suit such immunity must be based upon principle. . . . If we had found a sufficient relationship of proximity. . . . we do not think we would have found the arguments for excluding a duty of care on the grounds that it would not be just, fair and reasonable convincing”.

In itself this emphasis upon principle is to be welcomed. But it is not easy, in the circumstances, to see a fundamental difference between denying liability on the basis of lack of “proximity” and doing so under the umbrella of “justice and reasonableness”. The result is the same: failure of a claim for damage which would have been prevented in the absence of carelessness.

### Coastguard and Ambulance services

*Capital and Counties plc v Hampshire CC* was applied in *OLL v Secretary of State for Transport*,<sup>61</sup> in which May J held that it necessarily followed from it that the coastguard service would not be liable for an allegedly negligent failure to prevent the deaths of several young canoeists who had got into difficulties at sea. Nevertheless, in the later case of *Kent v Griffiths*,<sup>62</sup> which involved another emergency service, the *Capital and Counties* decision was distinguished by the Court of Appeal which declined to strike out the claimant’s action. In this case a 999 call was made to summon an ambulance for the claimant who was suffering from an asthma attack. Unfortunately there was a long delay in responding to the call. The claimant alleged that this delay, and the treatment which she received once in the ambulance on the way to hospital, was negligent and responsible for the tragic outcome of the situation, including personality changes consequent upon a respiratory arrest, and a miscarriage. Kennedy LJ observed<sup>63</sup> that since “if in an emergency an ambulance is sent for and does not attend or takes a long time to attend there is a foreseeable risk of *physical harm*” the case was “in a different category from those where the risk is one of financial loss against which it may be possible to insure”. Moreover, whatever the position might have been if the 999 call had been rejected, it was at least arguable that “a

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<sup>60</sup> See [1997] QB 1004 at 1040 and 1044.

<sup>61</sup> [1997] 3 All ER 897.

<sup>62</sup> *The Times* 23 December, 1998.

<sup>63</sup> LEXIS transcript.

sufficiently proximate relationship” is created “once a call for an ambulance is accepted”. The claimant could, after all, have made alternative arrangements to get to hospital if she had known that a delay was likely to occur. The emphasis in this case on the fact that the claim was one for personal injury is notable, as is the implicit proposition that, assuming a degree of policy-based immunity to exist, a specific undertaking to a particular individual may displace it.

### Difficult Distinctions

It is submitted that *Kent v Griffiths* was correctly decided, although it is not easy to see a clear distinction in principle between the ambulance service on the one hand, and the fire and rescue services on the other, once a distress call has been accepted. Nevertheless there *may* be grounds for conferring what amounts to an immunity on the one and not on the other. In *Capital and Counties plc v Hampshire CC* Stuart-Smith LJ said:<sup>64</sup>

“ . . . the fire brigade’s duty is owed to the public at large to prevent the spread of fire and this may involve a conflict between the interests of various owners of premises. It may be necessary to enter and cause damage to A’s premises in order to tackle a fire which has started in B’s. During the Great Fire of London the Duke of York had to blow up a number of houses not yet affected by fire, in order to make a fire break.”

In reply, it might be contended that situations of that kind would justify a finding of no negligence rather than a claim to a blanket immunity. But other distinguishing factors might be prayed in aid. For example, a “floodgates” type of argument might contrast the potential effect of major fire-claims upon the public finances with the isolated claims for personal injury which the ambulance service will typically face.<sup>65</sup> But whatever the validity of these contentions, the debate surrounding them is likely to more satisfactory if conducted openly than if the issues are left partially veiled behind the language of “proximity” or “justice and reasonableness”.

### A MORE STRUCTURED APPROACH?

How then should the law deal with the problems surrounding the negligence liability of public authorities, both in the context of the emergency services and more generally? It is submitted that clarity would be promoted if the various issues were examined under *three* distinct headings. The first two headings will be familiar, even if the second has recently been regarded with undue scepticism. But the third is, in this particular context, a new phrase to highlight ideas which are in themselves familiar but which are rarely articulated with the degree of openness which their sensitivity requires. The first heading is the *statutory framework*, the second is the distinction between *policy and operations*, and the third is the concept of *official immunity*.

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<sup>64</sup> See [1997] QB 1004 at 1036.

<sup>65</sup> Similiar considerations of public policy might warrant restricting the subrogation rights of indemnity insurers to prevent them from recouping their losses by bringing negligence actions against the emergency services. *Cf per* Lord Hoffman in *Stovin v Wise* [1996] AC 923 at 955. See also Reuben Hasson, “Subrogation in Insurance Law - A Critical Evaluation” (1985) 5 OJLS 416.

### Relevance Of The Statute

In *X(minors) v Bedfordshire County Council* Lord Browne-Wilkinson emphasised a point which is undeniably of fundamental importance. He said:<sup>66</sup>

“ . . . the question whether there is . . . a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done. . . a common law duty of care cannot be imposed. . . if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties”.

The inevitability of using the statute in this way as a starting point must not be confused with implausibly ascribing the outcome entirely to the statute itself. Lord Browne-Wilkinson’s insistence that the duty is a *common law* one is important. The court should seek to ascertain, in general terms, the broad purpose of the legislation as a preliminary to itself determining whether the imposition of a tortious duty of care in negligence would be appropriate. But the need to have regard to the statute *does* mean that distinctions which the common law draws elsewhere might be disregarded and, conversely, that other constraints may be imposed which would normally be irrelevant.

If the claimant has suffered personal injury, and if the statute was concerned, albeit not necessarily exclusively, with risks to health and safety, the courts appear more ready to impose liability than if the claim was for financial loss or damage to property.<sup>67</sup> Thus in both *Perrett v Collins* and *Kent v Griffiths*, the Court of Appeal placed special emphasis upon the fact that the claimants had suffered personal injury.<sup>68</sup> The unquestioned assumption that the National Health Service is rightly held liable routinely in medical negligence cases is also in point here. Conversely, in *Reeman v Department of Transport*<sup>69</sup> the Court of Appeal rejected a negligent misstatement claim for substantial financial losses which resulted from the allegedly negligent certification as safe of a dangerous, and hence unsellable, fishing vessel. “The purpose of the certificate”, observed Lord Bingham CJ, “was to safeguard the physical safety of the vessel and her crew; it was not directed in any way to the market value of the vessel”.<sup>70</sup> A similar approach could also hold the key to the enigma represented by the decision in *Anns v London Borough of Merton*. The real flaw in that case may have been to use the Public Health Act 1936 as a device for compensating victims of insolvent builders for their financial losses in owning buildings which were worth less than they should have been. On the other hand, if the statutory power is expressly concerned with financial matters that may, in theory at least,

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<sup>66</sup> See [1995] 2 AC 633 at 739.

<sup>67</sup> This parallels the situation in the context of the action for breach of statutory duty where safety legislation, particularly in the employment field, is pre-eminent as a source of actionability: see Stanton, *Breach of Statutory Duty in Tort*, (1986), chapter 4.

<sup>68</sup> See above.

<sup>69</sup> [1997] 2 Lloyd’s Rep 648.

<sup>70</sup> See [1997] 2 Lloyd’s Rep 648 at 685.

facilitate a finding in favour of liability for pure economic loss which the ordinary law of negligence would not countenance.<sup>71</sup>

The majority of negligence claims involving statutory powers are based upon the argument that the defendant authority failed to act to protect the claimant from harm, often inflicted by a third party, when it could have done so. In ordinary negligence such claims would face the difficulty that liability can only very exceptionally be based upon a mere *omission* to act. But by providing an opportunity to come effectively to the claimant's aid, which a private individual would not have enjoyed, the statute itself can give rise to an exception to the general rule of non-liability for omissions.<sup>72</sup> In *Stovin v Wise* Lord Hoffmann nevertheless suggested that the fact that the claim concerned an omission represented a fundamental difficulty in that case.<sup>73</sup> Although he observed that "some of the arguments against liability for omissions do not apply to public bodies like a highway authority", he added that that did "not mean that the distinction between acts and omissions is irrelevant to the duties of a public body".<sup>74</sup> His Lordship even appeared to suggest that causal arguments could be invoked.<sup>75</sup> In the particular context of negligence liability based upon statutory powers Lord Hoffmann's view is consistent with his apparent preference for a return to the "additional damage" principle in the *East Suffolk* case. But in so far as negligence liability in the public sphere is a feature of the current law, it follows that cases involving statutory powers can constitute an exception to the general principle of non-liability for omissions provided that the imposition of liability in the particular circumstances is not inconsistent with the relevant statutory framework.<sup>76</sup> Lord Hoffmann's observations on this point must no doubt be seen in the context of concern for the potential resource implications of liability in this field. While this is a crucially relevant factor, it is submitted that the essentially conceptual debate surrounding the distinction between acts and omissions is not an appropriate context in which to reflect it. It should be considered instead when "policy" decisions, which may relate to the discretionary allocation of resources, are being

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<sup>71</sup> See *e.g. per* Browne-Wilkinson V-C in *Lonrho plc v Tebbit* [1991] 4 All ER 973 at 985-986.

<sup>72</sup> See Craig, *Administrative Law*, 4th edn (1999), at p. 868; Arrowsmith, *Civil Liability and Public Authorities*, (1992), at p 179 *et seq.*

<sup>73</sup> See [1996] AC 923 at 943 *et seq.*

<sup>74</sup> *Ibid* at 946. In particular the libertarian, or "why pick on me" argument is inapplicable.

<sup>75</sup> "Mr Stovin's injuries were not *caused* by the negotiations between the council and British Rail or anything else which the council *did*": see [1996] 2 AC 923 at 945 (*italics supplied*).

<sup>76</sup> *Cf per* Lord Nicholls (dissenting) in *Stovin v Wise* [1996] AC 923 at 933-934: "The authority did not create the loss, but it failed to discharge its statutory responsibilities with proper care. Had it behaved properly, the loss would not have occurred. Expressed in traditional tort terms, the loss in this type of case arises from a pure omission. Any analysis must recognise this. But the omission may also constitute a breach of the authority's public law obligations. . . *Anns* showed that a remedy in the form of an award of damages is possible without confusing the uneasy divide between public and private law. The common law is still sufficiently adaptable. The common law has long recognised that in some situations there may be a duty to act. So a concurrent common law duty can carry the strain, without distortion of principle".

distinguished from “operational” activities, and it may also arise when the desirability of conferring a general “immunity” from liability for operational carelessness is under consideration in the particular area in question. Accordingly, overcoming the omissions difficulty, and establishing that the harm and its occurrence were within the mischief at which the statute was aimed, is not enough in itself to guarantee a claimant’s success. There remain the formidable hurdles represented by the other two headings, which have yet to be considered.

### Policy And Operations

The revival of interest, by the House of Lords in *Barrett v Enfield London BC*, in the distinction between policy questions and operational activities is to be welcomed. Despite the criticism which has been directed at it on grounds of uncertainty, no better formulation has yet emerged of a limitation of fundamental importance upon the negligence liability of public authorities.<sup>77</sup> If a discretion is conferred, especially if it involves the allocation of substantial resources, attempts by the courts to use the machinery of the law of negligence to second-guess the decisions arrived at would constitute, at best, an inappropriate use of that machinery for a purpose to which it is ill-suited and, at worst, an undue interference with the democratic process. But those objections do not have the same force if a specific act of carelessness is committed in the actual carrying out of an agreed course of action, when all the relevant policy and resource allocation decisions have been taken. Nor is it an objection in itself to a legal principle that certainty cannot be guaranteed, and that difficult borderline cases will arise.<sup>78</sup> *Stovin v Wise* appears to have been just such a case. The allocation of resources for road improvements is certainly a matter of discretion. But the argument that, since a decision had apparently been taken to act with respect to the junction in question, the context was operational has considerable force.<sup>79</sup> Nevertheless, the works had not actually been commenced and, in those circumstances, the proposition apparently favoured by the majority in the House of Lords, that the matter remained in the administrative sphere, while not free from difficulty,<sup>80</sup> is at least tenable.

In so far as the doctrine of “general reliance” has a place within the conceptual structure of the negligence liability of public authorities, it will operate to constrain the discretionary freedom of an authority at the policy level. This makes it easier to understand why that doctrine is to be regarded

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<sup>77</sup> See, generally, Craig “Negligence in the Exercise of a Statutory Power” (1978) 94 LQR 428.

<sup>78</sup> Since the distinction is essentially one of degree (see above, note 9), an activity does not cease to qualify as “operational” merely because there is *some* element of discretion, even if it involves a degree of choice in relation to expenditure. Cf Cane, *An Introduction to Administrative Law*, (3rd ed, 1996), pp. 252-253.

<sup>79</sup> See the reversed decision of the Court of Appeal: [1994] 3 All ER 467.

<sup>80</sup> It would be too simplistic to confine the “operational” sphere merely to physical work on site. Presumably clerical errors (*eg* mis-filing), as a result of which instructions to commence work in the field are never sent out, may be operational? In *Stovin*’s case itself the reason why the work was not carried out was because a letter offering to do it, having been left unanswered, was not followed up: see [1996] AC 923 at 942.

with caution. Its capacity to convert a power directly into a duty, and thereby subvert the distinction between policy and operations, means inevitably that the opportunities for its successful invocation will be few in number. It is likely to have its greatest utility in situations in which the statutory power has been in existence for many years and has been so regularly exercised that, although in form a power, it has come to be regarded by authorities, as well as by the public at large, as being in substance a duty.

If a decision is established as falling on the “policy” side of the line it will normally be free from attack in a negligence action regardless of whether it was *intra vires* or *ultra vires* although, if it was the latter, it will be susceptible to judicial review. It is axiomatic that, merely because a decision was *ultra vires*, it will not give rise to liability in damages for negligence.<sup>81</sup> Nevertheless it is conceivable that it might do so in extreme cases if recklessness or bad faith was involved. Such a claim has succeeded in the Canadian Supreme Court.<sup>82</sup> It may therefore be going too far to assert, as did Lord Browne-Wilkinson in *X(minors) v Bedfordshire CC*, that “a common law duty of care in relation to the taking of decisions involving policy matters cannot exist”.<sup>83</sup> But an activity which falls on the “operational” side of the line should, in principle, always be susceptible to investigation in a negligence action.<sup>84</sup> Despite some uncertainty in the early cases,<sup>85</sup> the distinction between *ultra vires* and *intra vires* should, it is submitted, now be regarded as irrelevant in such cases.<sup>86</sup> It is in this sense that it is correct to say, in the words of Lord Browne-Wilkinson in *X(minors) v Bedfordshire CC*, that it is not “helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence”.<sup>87</sup>

If a claimant succeeds in establishing that the harm suffered fell within the framework of the statute, and also that it occurred as the result of an operational activity rather than a policy decision, he or she will have satisfied two of the conditions normally insisted upon for the imposition of negligence liability in the public sphere. But it does not follow that liability will necessarily be imposed. The Privy Council emphasised over a decade ago, in *Rowling v Takaro Properties Limited*, that while “classification of the relevant decision as a policy or planning decision. . . may exclude liability. . . a conclusion that it does not fall within that category does not. . . mean that a duty of care will necessarily exist”.<sup>88</sup> Unfortunately, despite the validity of

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<sup>81</sup> See *eg Dunlop v Woollahra Municipal Council* [1982] AC 158 (PC); *Rowling v Takaro Properties* [1988] AC 473 (PC).

<sup>82</sup> See *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641. *Cf* the tort of “misfeasance in public office”.

<sup>83</sup> See [1995] 2 AC 633 at 738.

<sup>84</sup> *Cf* Brodie “Public authorities-negligence actions-control devices” (1998) 18 LS 1.

<sup>85</sup> See, especially, *Home Office v Dorset Yacht* [1970] AC 1004, per Lord Diplock at 1067-1068.

<sup>86</sup> *Cf* Cane, *An Introduction to Administrative Law*, (3rd ed, 1996) at p 250. See also *per* Lord Slynn in *Barrett v Enfield London BC* [1999] 3 All ER 207 at 211 (see above: fn 37). *Cf* Craig, *Administrative Law*, 4th edn, (1999), at pp 872-875.

<sup>87</sup> See [1995] 2 AC 633 at 736.

<sup>88</sup> See [1988] AC 473 at 501.

this insight, the *Rowling* case has contributed to much of the confusion in this area because it fuelled the perception that the distinction between policy and operations had become discredited. But this perception seems to have been based, at least in part, on the fallacious assumption that that distinction purported to be a *comprehensive* statement of the conditions required for the imposition of negligence liability upon public authorities. In reality the distinction remains crucial, since a claimant who is unable to show that his loss occurred as a result of an operational activity will normally fail at the outset: he will have failed to prove that the defendant authority had been “negligent” in any meaningful private law sense. Conversely, a claimant who *does* succeed in proving operational carelessness will have surmounted a major obstacle, and it will be up to the *authority* to put forward cogent reasons why it should nevertheless escape liability.

### “Official Immunity”

The full significance of declining to impose liability on the defendant, when operational carelessness has caused harm of a kind which the statute was enacted to prevent, is obscured by the use of bland and opaque expressions such as “proximity” or “justice and reasonableness”. It is submitted that a much more focused approach would develop if an explicit category, which could be called “official immunity”, were to be recognised. Indeed it is significant that, despite the reticence about invoking it formally in the context of other public authorities,<sup>89</sup> the immunity approach appears to have been substantially adopted in a line of cases involving claims against the police.

The police cases, while far from being completely satisfactory,<sup>90</sup> do provide some indication of the kind of approach which can emerge when the legitimacy of barring claims on policy grounds is confronted openly. In the well-known case of *Hill v Chief Constable of West Yorkshire*<sup>91</sup> the House of Lords declined to impose liability upon the police for culpable failure to catch a serial murderer of women. The primary reason given was that there had been no “proximity” between the defendant and the deceased, who had been the killer’s last victim, since she had been at no greater risk than any other female member of the public. “Public policy” as such was, however, also invoked, Lord Keith observing that “the imposition of liability” could lead to police activity “being carried out in a detrimentally defensive frame of mind”.<sup>92</sup> Subsequent decisions have begun to clarify the extent of this policy immunity and have established, *inter alia*, that it is not confined to the main policing function of detecting and suppressing crime, but can extend even to activities such as traffic<sup>93</sup> and riot<sup>94</sup> control. More significant for

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<sup>89</sup> The word “immunity” was used in the speech of Lord Browne-Wilkinson in *X(minors) v Bedfordshire CC*, but only in the special context of “witness immunity”: see [1995] 2 AC at 754-755.

<sup>90</sup> See, generally, Clayton and Tomlinson, *Civil Actions Against the Police*, (2nd ed, 1992).

<sup>91</sup> [1989] AC 53.

<sup>92</sup> See *ibid.* at 63.

<sup>93</sup> See *Clough v Bussan* [1990] 1 All ER 431; *Ancell v McDermott* [1993] 4 All ER 355.

<sup>94</sup> See *Hughes v National Union of Mineworkers* [1991] 4 All ER 278.

present purposes, however, is that it would now seem that the two reasons for the decision in the *Hill* case were inter-related rather than separate, and that the supposedly subsidiary justification is in reality the more fundamental of the two. That is to say, the absence of “proximity” is better perceived as a condition for the existence of immunity rather than as a free-standing justification for the denial of liability. To deny liability on the basis of “proximity” alone is always apt to appear questionable once foreseeability and carelessness are conceded, as they appear to have been in *Hill*.<sup>95</sup> But against the background of an overt immunity from liability in negligence, the *absence* of a high degree of “proximity” may be a legitimate requirement for successful invocation of the immunity in as much as the court might be disposed to override it in situations where close “proximity” between the police and the claimant was in fact *present*.<sup>96</sup> Thus in *Swinney v Chief Constable of the Northumbria Police*<sup>97</sup> the defendant was unsuccessful when attempting to rely upon the *Hill* case to invoke public policy immunity to strike out a claim by an informer, whom the police had put at risk by negligently disclosing her identity. Ward LJ observed that “proximity” was “shown by the police assuming responsibility” towards the plaintiff, and that this made it arguable that there was “no overwhelming dictate of public policy” to prevent further consideration of her claim.<sup>98</sup> Peter Gibson LJ emphasised that “when one is considering whether the police have an immunity from liability in negligence. . . the court must evaluate *all* the public policy considerations that may apply”.<sup>99</sup>

The specific use of the word “immunity” does, therefore, serve to concentrate minds since it makes it obvious that the point at issue is whether an operationally negligent tortfeasor should be discharged from liability for overriding reasons of public policy unconnected with the *merits* of the case against it.<sup>100</sup> If the immunity approach were to be adopted, instead of the rather haphazard collection of pragmatic considerations reflected in the reasoning in cases such as *X(minors) v Bedfordshire CC* and *Rowling v Takaro Properties*, a much sharper jurisprudence should therefore emerge.<sup>101</sup>

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<sup>95</sup> If pre-identification of a particular claimant were always necessary the establishing of negligence liability would frequently be logically impossible!

<sup>96</sup> *Cf Doe v Board of Commissioners of Police for Metropolitan Toronto* (1989) 58 DLR (4th) 396 in which the High Court of Ontario distinguished *Hill's* case, notwithstanding similar facts, on the ground that the police had had reason to suppose that the plaintiff was particularly at risk from a serial rapist who was active in her vicinity.

<sup>97</sup> [1997] QB 464.

<sup>98</sup> *Ibid* at 486.

<sup>99</sup> [1997] QB 464 at 486 (italics supplied).

<sup>100</sup> A possible source of ambiguity here is that the term “immunity” is sometimes used to denote an authority’s freedom from negligence liability for discretionary decisions: see *eg* Arrowsmith, *Civil Liability and Public Authorities*, (1992), at p 169 *et seq.* The notion of (non-) “justiciability” would, however, seem to be more appropriate in that context; with that of “immunity” being reserved for situations in which it *alone* prevents the imposition of a liability which would otherwise exist.

<sup>101</sup> *Cf* per Lord Browne-Wilkinson in *Barrett v Enfield London BC* [1999] 3 All ER 193 at 199: “. . . the word ‘immunity’ is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants

Appropriate comparisons could more readily be made with similar controversial areas such as advocate's immunity<sup>102</sup> and the law relating to Public Interest Immunity certificates.<sup>103</sup> The relevance of the Human Rights Act 1998 would also become obvious.<sup>104</sup>

*Some* of the arguments currently deployed to avoid the imposition of liability *might* survive the thorough testing required to substantiate an overt claim to immunity, while others might *not* do so. Thus "floodgates" type fears of enormous numbers of claims, with devastating consequences for the public finances, could turn out to be justified in certain circumstances. Conceivably, the need to avoid undue pressure upon those making finely balanced judgments in tense and emotive situations might also be accepted. But more general concerns that the mere possibility of the harassment and cost of litigation would itself be too unsettling, for the minds of those discharging public responsibilities, could prove less easy to support.

Accurate mapping of the conceptual geography of the law of negligence in this area also makes it easier to understand those cases in which claimants who have relied upon specific assurances or undertakings given by public bodies have successfully resisted the striking out of their claims. In such cases the court is, in effect, weighing the affront to justice to the individual caused by denying the claim, against the policy considerations underlying a possible immunity. It is interesting to note that such claims will indeed normally only be possible in situations in which operational negligence is established, but to which an immunity would otherwise apply. They could not be advanced, except in very exceptional circumstances, at the prior level of a policy decision. This is because to permit an authority to assume specific responsibility towards an individual in those circumstances could constitute an inappropriate fetter or estoppel upon the authority's freedom of action in public law.<sup>105</sup> Conversely, the policy side of the policy and operations distinction will normally be the appropriate point at which to make any submission based on the notion of "general reliance". If it failed to convert a power into a duty at *that* stage it is hardly likely to do so if the case becomes one of operational negligence attracting official immunity, since that would simply contradict the immunity.

## CONCLUSIONS

There is an urgent need for a more principled approach to the negligence liability of public authorities, and for a clear structure which exhibits the substantive issues. The decision in *Barrett v Enfield London BC* is therefore to be welcomed. It has breathed new life into the vital distinction between policy decisions and operational activities. But that distinction alone cannot

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whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject". *Sed quaere*.

<sup>102</sup> For a recent example see *Kelly v Corston* [1998] QB 686.

<sup>103</sup> See *eg* Sir Richard Scott, "The Acceptable and Unacceptable Use of Public Interest Immunity" [1996] PL 427.

<sup>104</sup> *Cf Osman v United Kingdom* [1999] 1 FLR 193 in which the European Court of Human Rights held that a general immunity from negligence liability for the police could constitute a violation of art. 6.1 of the European Convention on Human Rights (right of access to a court).

<sup>105</sup> See, generally, Craig, *Administrative Law*, (4th ed, 1999), Ch 19.

determine whether or not liability should be imposed. The statutory framework within which the power is contained will provide the starting point, and enable successful claimants to contend that what occurred was not a mere “omission”. The suggestion that those exercising statutory powers should only be liable for “additional” damage is no longer viable as a general proposition. Consideration of the statutory framework must not, however, be confused with a fictional search for a non-existent statutory intention to “compensate”. Very occasionally the doctrine of “general reliance” may assist a claimant to overcome the defence that what occurred was a matter of discretion rather than one of operational negligence. But in the more typical type of case, it will be necessary for the claimant to show *both* that the harm which he or she suffered was within the general mischief at which the Act was aimed, *and* that operational negligence in fact occurred. The imposition of liability *should then follow*, unless the authority can establish a specific immunity on grounds of public interest.

Even if such an immunity would normally apply, a claimant who was given undertakings or assurances, upon which he or she relied, may be able to overcome it. In any event, however, the need overtly to *justify* the claim to immunity should ensure that only the most powerful of countervailing considerations are permitted to override the principle that “wrongs should be remedied”.