THE LIABILITY OF BODIES POSSESSING STATUTORY POWERS FOR NEGLIGENT FAILURE TO AVOID HARM

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INTRODUCTION

The subject of this article is the liability in negligence of public authorities for failure to exercise their statutory powers effectively. It is concerned with those cases where the allegation against the public body is not that it was the sole, direct and affirmative cause of the harm suffered by the plaintiff, but that it failed to protect him or her from harm which originated in some source (human or natural) other than the defendant body. Such a failure may occur because the public body does not exercise its powers at all, or because it does so in a way that does not avert the harm.

To illustrate, where a public body, in the exercise of its statutory powers, digs a hole in the footpath and fails to fence it or otherwise warn pedestrians of the danger, the sole and direct cause of injury to a pedestrian who falls into the hole is the conduct of the public body. In contrast, if the hole is dug by some other person, or results from natural forces, and the public body does not fence it or provide a warning, despite having a statutory power to do so, the injured pedestrian's complaint is that the public body failed to avert harm.[1] This harm had an additional cause, the existence of the hole, for which the public body was not responsible.[2] This is also the case when the public body erects a fence which is too low or too weak to save the pedestrian from falling into a hole not dug by the public body itself. In many cases, the distinction between affirmatively causing harm and failing to prevent it is not easy to draw. However, it has been fundamental to the development of the common law liability of public bodies in England and Australia.[3]

While it can be argued that a public body, by reason of its status, is in a special position which justifies the imposition of affirmative duties, the

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[1] Alternatively, it may be said that the public body has failed to confer a benefit on the pedestrian. This terminology is used by M. J. Bowman and S. H. Bailey, 'Negligence in the Realms of Public Law – a Positive Obligation to Rescue?' [1984] *Pub. L.* 277.

[2] Some writers (for example, J. C. Smith and Peter Burns, "*Donoghue* v. *Stevenson* – The Not So Golden Anniversary" (1983) 46 *Mod. L.R.* 147, 154) would argue that the public body did not cause the damage to happen at all, but merely allowed it to happen or failed to prevent it. This is to confuse the explanatory aspect of causation with the attributive aspect, to adopt the terminology of H. L. A. Hart and T. Honoré, *Causation In The Law* (2nd ed., Oxford, Clarendon Press, 1985). This point is dealt with in detail below.

[3] Considerations of space preclude the discussion of other common law jurisdictions.

courts did not adopt this approach until the 1970s. The earlier cases were largely decided without reference to the special position of the statutory body. Instead, liability depended on characterisation of the act or omission complained of as misfeasance or nonfeasance, or on whether the body had caused fresh damage or merely failed to avert externally caused harm. Subsequent reinterpretation of these cases, in an attempt to accommodate them to a theory concerned specifically with the liability of public bodies, has tended to confuse rather than illuminate this area of law.

THE BACKGROUND ISSUES

1. The Duty to Protect Others from Harm

The common law does not impose any general duty to take reasonable care to protect others from harm from a source totally unconnected with the potential rescuer. What J. G. Fleming calls "the demands of elementary civilised conduct", such as warning a blind person who is about to walk over a precipice, or rescuing a baby drowning in six inches of water, are not enforceable by legal sanctions.[4]

However, there may be a pre-existing "special relationship" recognised by law between the plaintiff and defendant which gives rise to duty to protect or rescue. Examples include employer and employee, parent and child, carrier and passenger, and hospital and patients.[5]

Liability for failure to prevent harm, is often confused with liability for omission, or failure to act. For example, Fleming refers to "the distinction . . . between misfeasance and nonfeasance, between active misconduct working positive injury to others and passive inaction, failing merely to take protective steps to benefit others or to protect them from some impending harm".[6]

This tends to create confusion, since on the one hand, a defendant may fail to avert harm because his actions are incompetent, and on the other, an omission may be a positive and direct cause of harm. A well worn example of the latter is the failure of a driver to stop at a red light. It may be said that this represents "an omission in the course of some larger activity" rather than "mere omission".[7] While this is undoubtedly true, it is relevant only because it is the "larger activity" which puts the defendant in a position where his omission is capable of affirmatively causing harm to the plaintiff. In interpreting Lord Atkin's dictum in *Donoghue* v. *Stevenson*[8] that you must "take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour", it is not necessary to qualify "omissions", as long as the requirement that they positively injure the neighbour, and do not merely fail to protect him from harm, is borne in mind. The distinction is nicely illustrated by the problem of the incomplete rescue.

[4] John G. Fleming, *The Law of Torts* (6th ed., Sydney, Law Book Company, 1983) 139.
[5] Ibid.
[6] Id. 136–7. Similarly, F. A. Trindade and Peter Cane, *The Law of Torts in Australia* (Melbourne, O.U.P., 1985) 305–7 discuss failure to rescue under the general heading "omissions".
[7] Trindade and Cane, op.cit. p. 305.
[8] [1932] A.C. 562, 580.

A doctor who chooses to help an accident victim who is in imminent danger of bleeding to death, but applies a tourniquet so carelessly that it fails to check the bleeding, has committed a positive act which has failed to avert harm not caused originally by the negligent doctor.[9]

The use of the terms "misfeasance" and "nonfeasance" in four slightly different ways has tended to magnify the confusion between failure to act and failure to avert harm.

The first usage is the definition given in *Osborn's Concise Law Dictionary*. Nonfeasance is "the neglect or failure to do something which ought to be done", in contrast with misfeasance, "the improper performance of a lawful act".[10] In other words, nonfeasance is a failure to act which results in a breach of duty. Failure to carry out a statutory duty is an example.

The second usage equates misfeasance and nonfeasance with acting and refraining from acting respectively. In *Gorringe* v. *Transport Commission (Tasmania)*,[11] Fullagar J. held that an ineffective attempt to repair a road constituted misfeasance, not nonfeasance:

> "The repairs which it [the defendant] executed were inappropriate and inadequate, because it failed to appreciate what should have been clear to it. There was a 'feasance' and it was a negligent 'feasance' and therefore a 'misfeasance' and actionable."

The statement "a teacher's liability is typically founded on nonfeasance rather than misfeasance" illustrates this usage.[12]

A third meaning of misfeasance is "a failure to act of the kind to which no liability attaches". For example, P. P. Craig states that an omission may constitute misfeasance "if a duty of [sic] relationship already exists."[13]

Finally, nonfeasance can be used to include all cases of failing to prevent harm, either through omission or ineffective action. In *Gorringe* v. *Transport Commission (Tasmania)*,[14] Latham C.J. stated that the plaintiff's complaint that the defendant's repairs were ineffective "is a complaint that the commission failed to exercise in full measure the power to repair the road which it possessed. Such a failure is only nonfeasance".

In the interest of clarity, the terms "nonfeasance" and "misfeasance" will not be used in this article, other than in the course of quotation. "Omission" will be used only in the sense of failure to act, and will not include ineffective action.

[9] The problem of the incomplete rescue was discussed but left open in a Canadian case, *Horsley* v. *McLaren* [1972] S.C.R. 441.

[10] *Osborn's Concise Law Dictionary* (6th ed,, London, Sweet and Maxwell, 1976, by John Burke) 233, 221.

[11] (1950) 80 C.L.R. 357, 380.

[12] Peter G. Heffey, 'The Duty of Schools and Teachers to Protect Pupils from Injury' (1985) 11 *Mon. U.L. R.* 1, 2. See also Trindade and Cane, 307, and P. S. Atiyah, *Accidents, Compensation and the Law* (3rd ed., London, Weidenfeld and Nicolson, 1980) 102.

[13] P. P. Craig, 'Negligence in the Exercise of a Statutory Power' (1978) 94 *Law Q. Rev.* 429, 450. See also Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (Sydney, Law Book Company, 1982) 105–6.

[14] (1950) 80 C.L.R. 357, 364.

Some commentators approve the common law's reluctance to impose a general affirmative duty to rescue. Imposition of affirmative duties may be seen as an intolerable interference with the individual's right of freedom of action. While a duty to avoid positively causing harm can be justified by the need to protect the freedom of those potentially affected by the actions of others, a duty to act to prevent harm occurring is not consistent with the ideology of laissez-faire individualism which has dominated the common law for most of the nineteenth and twentieth centuries.[15]

Even if this point of view is accepted in relation to private defendants, it is less convincing in the case of a public authority which has been granted statutory powers to be exercised for the good of the community. While it may be desirable to limit the liability in negligence of such bodies, the reasons lie not in any general theory that liability should be restricted to affirmatively caused harm, but in considerations peculiar to the position of public bodies in a representative democracy.

Recent English and Australian case law demonstrates a tension between two conflicting principles concerning the liability of public authorities for failure to avert harm. On the one hand, it is recognised that public bodies play an ever increasing role in the regulation of almost every facet of daily life. With the expansion of the power entrusted to these authorities, and the increase in expenditure on regulation in the public interest, comes an increased expectation that those powers will be exercised effectively, and a tendency to look to the public body for compensation when this expectation is not met. On the other hand, it is frequently stated that the private law concepts applied by the courts in deciding an action in negligence are inappropriate to evaluate a public authority's exercise of power conferred for the benefit of the community as a whole or a section of it. Such an action has the effect of substituting the opinion of an unelected and largely unaccountable judiciary concerning the way in which statutory powers should be exercised and public money spent for that of a public body, which is ultimately answerable to an elected government.

The tension between these approaches to the liability in negligence of public bodies is responsible for a good deal of the difficulty and inconsistency of the reported cases.

2. Affirmatively Causing Harm By The Negligent Exercise of A Stautory Power

Until the decision in *Home Office* v. *Dorset Yacht Co. Ltd*,[16] the law concerning liability for harm affirmatively caused by the negligent exercise of a statutory power was fairly straightforward. The classic formulation is that of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir*.[17]

[15] For a modern exposition of this view, see J. C. Smith and Peter Burns, (1983) 46 *Mod. L. Rev.* 147.
[16] [1970] A.C. 1004.
[17] (1878) 3 A.C. 430.

The defendants were authorised by statute to supply water to mill owners along the River Bann. Another river, which was used by the defendants to convey water to the Bann, overflowed due to the defendants' failure to keep the channel clear, combined with the increase in the volume of the water in the river resulting from their activities. This is a good example of two concurrent affirmative causes of harm, one a positive act (increasing the volume of water) and the other an omission (failing to keep the channel clear). Lord Blackburn held:

> "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."[18]

The public character of the defendants was not taken into account in determining what was a reasonable exercise of their statutory power. In an earlier case, *Mersey Docks Trustees* v. *Gibbs*,[19] the House of Lords held that the liability of trustees who controlled the docks and collected tolls purely for the benefit of the public was identical with that of persons who did so under statutory authority for their own profit. In *Geddis'* case, questions of economic feasibility were expressly excluded. Lord Blackburn stated that:

> "What is apparently good ground has been given us for believing that the expense to the Defendants in keeping the channel in a proper state will not be very heavy and severe; but whether it is heavy and severe or not, I think, having the power to do it they were bound to do it before they sent the water down."[20]

For the next ninety years, courts showed little reluctance to pass judgment on the decisions of public authorities. For example, in *Barnes* v. *Irwell Valley Water Board*,[21] the Court of Appeal held the defendant corporation liable for supplying water which was capable of dissolving lead, and failing to warn consumers of the resulting danger. According to Greer L.J., the defendants "delayed a much longer time than was necessary" in installing purification equipment, without giving any satisfactory explanation. His Lordship was unimpressed by the defendants' excuse that they had not warned residents with lead lined pipes to allow the water to run a little before using it because the local authority had advised that such notices might cause alarm. This was "a matter which we can leave out of consideration, because the local authorities are not the final judges as to what is or is not negligence on the part of the water authority."[22]

[18] Id. 455–6.
[19] (1866) L.R. 1 H.L. 93.
[20] *Geddis* v. *Proprietors of Bann Reservoir* (1878) 3 A.C. 430, 457–8.
[21] [1939] 1 K.B. 21.
[22] Id. 37.

Public bodies were found liable for negligently supplying water contaminated by typhoid bacillus,[23] for placing posts in a highway without warning,[24] for the inadequate design of an air-raid shelter[25] and for supplying electricity at too low a voltage,[26] to select examples where the act complained of was done in the course of an activity which is generally the province of public bodies. Examples can be multiplied if activities engaged in by both public bodies and private persons are included, such as employment, the operation of schools or hospitals, and provision of transport.[27] In general, the public character of the defendant was not treated as relevant to the imposition of liability.[28]

Certain early cases are cited by some authorities as demonstrating that the courts were aware, prior to the *Dorset Yacht Co.* case, of the need to give some type of immunity to public authorities from liability in negligence.[29] The leading cases cited in this context, *Sheppard* v. *Glossop Corporation*[30] and *East Suffolk Rivers Catchment Board* v. *Kent*[31] both deal with failure to avert harm, and will be discussed in detail under that heading.[32] Other cases concern strict liability,[33] or nuisance,[34] rather than negligence.

Three cases concerning affirmatively inflicted harm require discussion. In *Everett* v. *Griffiths*,[35] the House of Lords held that the chairman of a Board of Guardians could not be liable in negligence for committing a person to a lunatic asylum. Section 16 of the *Lunacy Act* 1890 allowed committal if the chairman was "satisfied . . . that the alleged lunatic is a lunatic". According to Viscount Haldane, if the chairman "has actually satisfied himself, acting honestly and bona fide in arriving at his conclusion and proceeding on it, he has done the very thing which the statute told him to do"[36] and he could not be liable in negligence. Viscount Finlay stated that to hold otherwise would "make him liable to be harrassed in the honest

[23] *Read* v. *Croydon Corporation* [1938] 4 All E.R. 631.
[24] *Morrison* v. *Sheffield Corporation* [1917] 2 K.B. 866.
[25] *Knight* v. *Sheffield Corporation* [1942] 2 All E.R. 411.
[26] *Birch* v. *Central West District Council* (1969) 119 C.L.R. 652.
[27] Examples include *Paris* v. *Stepney Borough Council* [1951] A.C. 367; *Key* v. *Commissioner of Railways* (1941) 64 C.L.R. 619; *Commissioner of Railways* v. *O'Brien* (1958) 100 C.L.R. 211 (employment); *Cassidy* v. *Minister of Health* [1951] 2 K.B. 343; *Collins* v. *Hertfordshire County Council* [1947] K.B. 598; *Roe* v. *Minister of Health* [1954] 2 Q.B. 66 (hospitals); *Fryer* v. *Salford Corporation* [1937] 1 All E.R. 617; *Wright* v. *Cheshire County Council* [1952] 2 All E.R. 789 (schools); *Franklin* v. *Victorian Railways* (1959) 101 C.L.R. 197; *Mercer* v. *Commissioner for Road Transport and Tramways* (1936) 56 C.L.R. 580 (transport).
[28] This generalisation is supported by Aronson and Whitmore, 61–2.
[29] See Trindade and Cane, 497 and Aronson and Whitmore, 77–8.
[30] [1921] 3 K.B. 132.
[31] [1941] A.C. 74.
[32] Other cases cited in this context which involve failure to avert harm include *Wakely* v. *Lackey* (1880) 1 L.R. (N.S.W.) 274, *Crisp* v. *R.* (1904) 2 N. & S. 187 and *Thompson* v. *Williams* (1914) 32 W.N. (N.S.W.) 27.
[33] *Local Board of Health* v. *Mulley* (1904) 1 C.L.R. 702.
[34] *Davidson* v. *Walker* (1901) 1 S.R. (N.S.W.) 196.
[35] [1921] 1 A.C. 631.
[36] Id. 660.

execution of his statutory duty by actions in which a jury would be invited to say that he was negligent in arriving at his conclusion".[37]

In other words, Parliament had authorised committal if the chairman had an honest belief that the person was a lunatic, even if that belief was arrived at carelessly.

While *Everett* v. *Griffiths* has not been treated merely as a decision on the words of the *Lunacy Act* 1890, it has not been regarded as authority for a general proposition that Parliament, in granting discretionary powers, impliedly authorises the negligent exercise of discretion. Rather, it has been treated as an authority on the more specific question of the immunity attaching to the exercise of judicial and quasi-judicial functions.[38]

Davidson v. *Walker*[39] concerned a plaintiff who brought an action in nuisance, claiming that the government's negligence in the construction of a prison had resulted in an unnecessary amount of noise being inflicted on adjoining landowners. The Full Supreme Court of New South Wales rejected the plaintiff's claim. Simpson J. stated that despite the *Claims Against the Government Act* 1897 the Government could not be treated on the same footing as a private defendant:

> "If it were, this would amount to submitting to the control of a jury, the exercise of various important functions of Government, such as the administration of military matters, of justice, the control and management of prisons, lunatic asylums, public schools, etc. Practically, this would render the Government departments in these important matters helpless."[40]

This dictum is virtually irrelevant to the modern law concerning the negligent exercise of statutory powers for several reasons. First, it deals with immunity of the executive government; the prison was not built pursuant to a statutory power. Secondly, if it were applied to the exercise of a statutory power, the result would be inconsistent with the well established principle that there is liability for nuisance resulting from an enterprise authorised by statute, unless the nuisance is an inevitable consequence of the authorised activity.[41] Finally, the proposition that government administration of prisons, lunatic asylums and schools cannot be challenged in an action for negligence is simply no longer tenable.[42]

In *Gibson* v. *Young*,[43] the Full Supreme Court of New South Wales held that neither a prison officer nor the Crown owed a prisoner a duty of care. The plaintiff lost an eye when the gauge of an engine, at which he had been ordered to work, exploded. The court held that to recognise such a duty would

[37] Id. 666.
[38] S. A. de Smith, *Judicial Review of Administrative Action* (4th ed., London, Stevens and Sons, 1980, by J. M. Evans) 338. See also Aronson and Whitmore, 143–4.
[39] (1901) 1 S.R. (N.S.W.) 196.
[40] Id. 212.
[41] *Manchester Corporation* v. *Farnworth* [1930] A.C. 171; *Allen* v. *Gulf Oil Refining Ltd* [1981] A.C. 1001.
[42] Some cases in these areas are discussed below.
[43] (1899) 21 L.R. (N.S.W.) (L.) 7.

be contrary to public policy. This case must be regarded as an anomaly. In *Quinn* v. *Hill*,[44] Smith J. said, "there is no suggestion that any authority existed before the decision in *Gibson* v. *Young* for the rule of public policy there laid down", and the case itself has never been followed.[45]

To sum up, while there are *dicta* in certain cases which appear to support the proposition that the courts were sometimes reluctant to impose liability for the negligent exercise of public powers, none but *Gibson* v. *Young*[46] dealt with the direct and positive infliction of physical injury or property damage. Only one (*East Suffolk Rivers Catchment Board* v. *Kent*)[47] was decided after a unifying theory of liability in negligence was formulated in *Donoghue* v. *Stevenson*.[48] These early cases may be contrasted with the many cases in which public authorities were found liable for affirmatively causing harm in the exercise of a wide range of statutory functions.

FAILURE TO AVERT HARM: THE PRIVATE ANALOGY

1. The General Position

The two cases said to have established the proposition that there is no liability in negligence for failure to exercise a statutory power, or for its ineffective exercise, are *Sheppard* v. *Glossop Corporation*[49] and *East Suffolk Rivers Catchment Board* v. *Kent*.[50] In the course of his judgment in *Fellowes* v. *Rother District Council*,[51] Robert Goff J. stated that these cases:

> "established, apparently without qualification, that where a statute confers on a body a power to do a certain act, then (since no liability can attach to that body for omitting to do that act) even if the body does exercise its power, no liability can attach to it for damage which would have been suffered by the plaintiff in any event if the body had not exercised the power."

The former case concerned a plaintiff who was injured when he fell over a retaining wall bordering an unlit highway. The defendant corporation had erected a street-light at this admittedly dangerous spot. However, it had been extinguished at 9.30 p.m., two hours before the plaintiff's accident, in accordance with a resolution of the corporation's lighting committee, taken two weeks earlier, in order to economise on lighting costs.

The plaintiff succeeded at first instance, but the corporation's appeal was upheld by the Court of Appeal. It was conceded that the defendant was not under any statutory duty to light the borough, and that consequently there

[44] [1957] V.R. 439, 449.
[45] Prisoners sued prison authorities successfully in negligence in *D'Arcy* v. *Prison Commissioners* (1955), *The Times*, 17 Nov. 1955 and *L.* v. *Commonwealth* (1976) 10 A.L.R. 269.
[46] (1899) 21 L.R. (N.S.W.) (L.) 7.
[47] [1941] A.C. 74.
[48] [1932] A.C. 562.
[49] [1921] 3 K.B. 132.
[50] [1941] A.C. 74.
[51] [1983]1 All E.R. 513, 518 (Q.B.)

could be no liability if it had chosen to have no lamps at all.[52] According to Atkin L.J., a local authority:

> "is under no legal duty to act reasonably in deciding whether it shall exercise its statutory powers or not, or in deciding to what extent, over what particular area, or for what particular time, it shall exercise its powers."[53]

However, the council was only free to exercise its discretion in this way if it had not created the hazard (in this case, the retaining wall with its steep drop) in the first place:

> "it is clear that if they had placed in a highway an obstruction which might cause damage in the dark to the public using the highway, then they would be required either by lighting or other proper warning to give notice of the obstruction."[54]

Aronson and Whitmore suggest that this case "contains the beginning of the idea that the liability of public authorities might be different from that of private defendants".[55] Trindade and Cane take this interpretation somewhat further, stating that "the idea of an immunity for policy decisions was also recognised in *Sheppard* v. *Glossop Corporation*".[56] The difficulty with this interpretation is that it does not take into account the reason why no liability attached to the non-exercise of the power to light.

> "In this particular case the local authority did not cause the danger; it was already in existence; there was a steep place adjoining the highway when the local authority took it over. The real complaint of the plaintiff is not that they caused the danger, but that, the danger being there, if they had lighted it he would have seen and avoided it. There was no duty upon them to do so."[57]

There is nothing in the case to suggest that if the council had decided to extinguish a light illuminating a hazard for which it was responsible, it could have escaped liability by arguing that it was exercising a policy discretion. The situation would fall squarely within Lord Blackburn's formulation in *Geddis* v. *Proprietors of Bann Reservoir*.[58] Since by "a reasonable exercise" of the power to light, the damage resulting from the council's creation of the hazard could be averted, it would be "within this rule 'negligence' not to make such reasonable exercise of their power". In fact, the point of the case is almost the reverse of that contended for by Aronson and Whitmore. The defendant was treated in the same way as a private defendant; it was under no duty to rescue the plaintiff from a danger it had not created, and the fact that it had a statutory power to do so was irrelevant.

[52] *Sheppard* v. *Glossop Corporation* [1921] 3 K.B. 132, 139, 145. The assumption that there could be no liability for failure to exercise a statutory power, as distinct from failure to perform a statutory duty, was not challenged until the decision in *Anns* v. *Merton London Borough Council* [1978] A.C. 728.

[53] *Sheppard* v. *Glossop Corporation* [1921] 3 K.B. 132, 150.

[54] Id. 144 *per* Scrutton L.J.

[55] Aronson and Whitmore, 62.

[56] Trindade and Cane, 497.

[57] *Sheppard* v. *Glossop Corporation* [1921] 3 K.B. 132, 150 *per* Atkin L.J.

[58] (1878) 3 A.C. 430, 455–6.

This interpretation is supported by the decision in *Morris* v. *Luton Corporation*.[59] The defendant council was held liable for constructing an air-raid shelter in the roadway and failing to warn pedestrians of its existence, for example by illuminating it. The council had made a deliberate decision, on the basis of cost, not to provide warning lights. Lord Greene M.R. stated:

> "The idea that the duties of a local authority in regard to safety on the roads are to be affected by matters of expense (speaking always within reasonable limits) is one which does not appeal to me. The corporation was going to be indemnified by the Ministry [of Home Security] against the expense of any reasonable scheme. Even if the Ministry disapproved there was nothing to prevent the corporation carrying it out; and the argument that it would have been put to expense if it had done so is one which, to my mind, is singularly unattractive."[60]

In *East Suffolk Rivers Catchment Board* v. *Kent*,[61] the failure to avert harm occurred not because the defendant chose not to exercise its statutory powers, but because it did so with a remarkable degree of inefficiency. An unusually high spring tide had caused the River Deben to breach a river wall and flood the plaintiffs' land. The day after the flood, the Catchment Board decided to exercise its powers to repair the breach, in order to prevent the tides from causing further flooding. The Board took almost six months to repair the wall, partly because it did not supply sufficient labourers or material, and partly because for the first three months, its employees, who had "no skilled experience in this type of work" adopted a method of repair which had "only the remotest possibility of success."[62]

The plaintiffs succeeded in the first instance. Hilbery J. held that although the defendants could not have been liable for refusing to repair the wall, once they embarked on the work, they were subject to a duty in exercise reasonable care not to injure the plaintiffs. He regarded the defendants' incompetence as no mere failure to exercise their powers, but as a case of negligent exercise of a power within the rule in *Geddis'* case.[63]

The Board's appeal was dismissed by the Court of Appeal. Mackinnon L.J. adopted the reasoning of the trial judge.[64] However, as du Parcq L.J., who dissented, observed:

> "the well-known words of Lord Blackburn . . . have been quoted before now to support a proposition to which in truth they give no support – namely, that a public body owing no duty to render any service may become liable at the suit of an individual, if once it takes it upon itself to render some service, for failing to render reasonably adequate and efficient service."[65]

[59] [1946] 1 All E.R. 1.
[60] Id. 4.
[61] [1941] A.C. 74.
[62] *Kent* v. *Suffolk Rivers Catchment Board* [1939] 2 All E.R. 207, 223.
[63] Id. 220.
[64] *Kent* v. *East Suffolk Rivers Catchment Board* [1940] 1 K.B. 319, 334. The third member of the court, Slessor L.J., held that the Board owed the plaintiffs a duty of care because it had by its conduct encouraged the plaintiffs to rely on its assistance rather than to help themselves. Id. 327–8.
[65] Id. 338.

In his Lordship's view, while the Board "must, so far as is reasonably possible, exercise its statutory powers in such a manner as not to inflict any injury on others", this duty was restricted to avoiding injury "to a member of the public through lack of care or skill, which he would not have suffered if it had remained passive".[66]

The Board appealed to the House of Lords, this time successfully. The judgments of Lord Romer and Lord Porter amplified the principles on which du Parcq L.J.'s dissent was based. Lord Porter stated:

> "Damage caused by anything negligently done by the appellants in the course of the exercise of their power which would not have occurred if they had refrained from exercising it at all would undoubtedly have to be made good on the principles set out in the well-known words of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* . . . but where, as here, the damage was not caused by any positive act on the part of the appellants but was caused and would have occurred to the like extent if they had taken no steps at all, I cannot see that the loss which the respondents suffered was due to any breach of a duty owed by the appellants."[67]

In other words, since it was admitted that the defendants would not have been liable had they decided not to repair the wall, the plaintiffs could not complain of incompetence which left them no worse off than outright refusal to repair.

Once the premise is accepted, the conclusion follows logically. One may now wish to argue that the Board should have been liable in some circumstances for failure to attempt to repair the wall at all. However, it is hardly surprising that no one attempted such an argument in 1942, given the late development in the United Kingdom of a general tort of negligence, and the limited liability recognised by the common law for failure to avert harm.

According to Lord Thankerton, "the only real question in this appeal relates to causation".[68] His Lordship concluded, "it was in fact still the action of the water, rendered possible by the original breach, that caused the damage during these days, and failure to stop such action of the water cannot alter the fact that it is the water coming through the breach that causes the damage".[69]

H. L. A. Hart and Tony Honoré have demonstrated succinctly the inadequacy of causation as a means of resolving the problems raised by the *East Suffolk* case.[70] It is necessary to distinguish two forms of casual enquiry, the explanatory and the attributive. The former seeks to answer "would this harm have occurred if this act or omission had not?"; the latter "should this harm be treated as the consequence of this act or omission for legal purposes?" If the answer to the former question is yes, the act or omission is a "cause in fact" or "material cause"; if the latter question is also

[66] Id. 337.
[67] *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74, 104–5. See also 98–9 *per* Lord Romer.
[68] Id. 74.
[69] Ibid. See also 85, *per* Lord Simon.
[70] Hart and Honoré, 140–1.

answered affirmatively, the act or omission is also a "legal cause" of the harm. While every fact which is a necessary condition for the harm to occur is a "cause in fact" (although "common sense" principles of selection will exclude those which are not thought to be important for the purposes of the particular enquiry), a "cause in fact" only becomes a "legal cause" if the legal system characterises it as such.[71]

If the facts of the *East Suffolk* case are analysed in these terms, it can be seen that for the first fourteen days (the minimum period in which the repair could have been effected), the flooding of the plaintiffs' land had two significant causes in fact; the breach in the wall and the action of the tide. For the remaining 164 days, there was a third cause in fact, the inefficiency of the defendants' attempts at repairing the wall, since it is clear that the harm (the continued flooding) would not have occurred had the Board carried out the work properly. On this analysis the case raises no factual issue of causation; the only question was whether the court chose to recognise the Board's inefficiency as a legal cause of the harm. It did not, because it denied that the Board had any duty in the first place to abate the flood. The language of causation only serves to obscure the underlying logic of the case.

The relationship between the recognition of a duty of care and the acceptance of the Board's inefficiency as the legal cause of the damage is further illustrated by Lord Atkin's judgment. His Lordship held that although the Board had no duty to repair the wall, once they had embarked on the task, they were under a duty to carry it out with reasonable despatch.[72] As M. T. Bowman and S. H. Bailey have observed, Lord Atkin appears not to have appreciated the significance of the fact that the case concerned failure to avert harm rather than affirmatively causing it.[73] In fact, it is apparent that his Lordship, like McKinnon L.J. in the Court of Appeal, based the existence of a duty to complete the work with reasonable speed on a misapplication of Lord Blackburn's dictum in *Geddis'* case.[74]

Once Lord Atkin accepted that the Board was in breach of a duty of care, the causal question was easily resolved; the continuation of the flooding past the period when the wall could have been repaired was attributed to the breach of the duty to repair the wall with reasonable despatch.[75]

The *East Suffolk* case, like *Sheppard* v. *Glossop*,[76] is sometimes said to recognise the need for different treatment of the liability in negligence of public and private defendants. P. P. Craig states that the premise of the judgment of du Parcq L.J. was that policy or planning decisions made by public bodies should be immune from attack by way of an action for negligence.[77] This view of the judgment of du Parcq L.J. can only be supported by selective

[71] Id. 110. The authors argue, in opposition to 'causal minimalism', that the principles of selection and limitation used to identify legal causes 'are not *inventions* of the law.'
[72] *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74, 90–1.
[73] Bowman and Bailey [1984] *Pub. L.* 277, 290.
[74] *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74, 90–1.
[75] Id. 93.
[76] [1921] 3 K.B. 132.
[77] Craig (1978) 98 *Law Q. Rev.* 429, 433. See also Aronson and Whitmore, 62–4.

quotation. In fact, his Lordship based his judgment squarely on the private analogy, saying, "in this the board is in much the same position as an occupier of land who may do what he likes with his own, provided that he does not wrongfully injure others".[78] His Lordship recognised that the result produced by the private analogy might not be regarded as entirely satisfactory:

> "The law would perhaps be more satisfactory, or at any rate seem more satisfactory in some hard cases, if a body which chose to exercise its powers were regarded as being in exactly the same position as one upon which an Act of Parliament imposed a duty."[79]

However, the issue was not clear-cut:

> "On the other hand, it must be remembered that when Parliament has left it to a public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, there would be some inconvenience in submitting to the subsequent decision of a jury, or judge of fact, the question whether the authority had acted reasonably, a question involving the consideration of matters of policy and sometimes the striking of a just balance between rival claims of efficiency and thrift."[80]

If the judgment is looked at as a whole, this passage, rather than being the premise on which the decision is based, looks more like a *post hoc* justification for a decision based on the old distinction between affirmatively causing harm and failing to avert it. In fact, du Parcq L.J. stated that if:

> "the statement of claim had alleged that the defendants had done this positive injury [depositing sandbags on the plaintiffs' land] to the plaintiffs it is conceded by the defendants' counsel that they would have had no answer to a claim for damages in respect of it."[81]

It is fair to say that the special position of public bodies played a somewhat greater role in the judgments of the majority in the House of Lords. According to Lord Porter:

> "If those who are authorised but not enjoined to act could be successfully sued for a failure to exercise their power I should have thought it unlikely that they would undertake the permitted task, since to do so would be to invite an action at the suit of any person who considered that they had not acted with due vigour and care.
> The result might well be that in circumstances like those under consideration action would not be taken when immediate action was necessary."[82]

Lord Thankerton thought that given the defendants' circumstances, "much may be condoned as well-meant error of judgment, which under other circumstances might be considered as unjustifiably risky".[83] However, it should be emphasised that these considerations were relevant only to the defendants' failure to avert harm; according to Lord Thankerton, it is

[78] *Kent* v. *East Suffolk Rivers Catchment Board* [1940] 1 K.B. 319, 337.
[79] Id. 338.
[80] Ibid.
[81] Id. 340.
[82] *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74, 106.
[83] Id. 95–6.

"impossible to maintain that Parliament intended to authorise the appellants to cause damage to the respondents by want of ordinary care in their operations."[84]

J. A. Smillie also argues, although from a slightly different perspective, that the *East Suffolk* case conferred an immunity on the Catchment Board which would not have been available to a private defendant.[85] According to Smillie,

> "while the common law traditionally imposed no liability in tort for complete failure to embark upon performance of a gratuitous undertaking to act for a plaintiff's benefit, once the performance was commenced the undertaker was subject to a duty to take reasonable care to complete the task."[86]

While "plaintiffs suing private defendants had not been required to show that they had taken positive action to their detriment in reliance on voluntary undertakings to act for their benefit", the plaintiff in the *East Suffolk* case failed because he was unable to point to such positive action.[87]

There are several difficulties with this analysis. First, the general principle seems to have been stated too widely. The only authority cited, *Skelton* v. *London and North West Railway Co.*,[88] merely restates the principle of *Coggs* v. *Bernard*.[89] The latter case, according to Fleming, established that while a promisee cannot recover in tort or contract against a person who fails to carry out a gratuitous undertaking, if the latter commences performance, "he must observe reasonable care not to injure him *in some way other than through mere failure to confer the benefit*"[90] (emphasis supplied). If Smillie means that gratuitous promises can be enforced so long as the promisor has taken some steps towards performance, the proposition does not seem to be consistent with authority.

Secondly, Lord Porter stated that:

> "No evidence was given nor was there any plea that the appellants by their action had caused either of the respondents to change his position in reliance upon anything which they had said or done. Such a case must wait for decision until facts are alleged and proved such as would create an estoppel."[91]

It is far from clear that Lord Porter meant that the plaintiffs' passive inactivity in reliance on the Board could not constitute changing their position; rather the statement suggests that the plaintiffs failed because they did not plead the necessary facts.

[84] Id. 95. Bowman and Bailey [1984] *Pub. L.* 277, 290 describe the decision in the *East Suffolk* case as 'perfectly in accord' with general common law principles.
[85] J. A. Smillie, 'Liability of Public Authorities for Negligence' (1985) 23 *W. Ont. L. Rev.* 213, 230–1.
[86] Id. 229.
[87] Id. 231.
[88] (1867) L.R. 2 C.P. 631, 636.
[89] (1703) 2 Ld Raym. 909 (92 E.R. 107).
[90] Fleming, 142.
[91] *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74, 107.

The principle of the *East Suffolk* case was applied by the High Court of Australia in *Administrator of the Territory of Papua New Guinea* v. *Leahey*.[92] The plaintiff had attempted unsuccessfully to rid his cattle of tick infestation. The Government supplied two employees to assist him, and also provided money to employ additional labour. The plaintiff alleged that the negligence of the Government's employees had left his cattle with rather more ticks than before (although it was not suggested that this had worsened their plight in any practical sense). The High Court held that the defendant's duty was restricted to taking reasonable care to avoid causing fresh harm to the plaintiff,[93] although as in *East Suffolk*, the language of causation somewhat obscured the duty issue. According to Kitto J., "the failure of the Administration's officers to do more than they did towards eradicating the ticks was not the cause of the damage complained of: it was caused by the ticks."[94]

Other illustrations of the *East Suffolk* principle can be found in cases classified as dealing with nonfeasance of highway authorities.[95]

2. Special Relationships

Public authorities, like private persons, were recognised as being subject to affirmative duties to use reasonable care to protect others from harm where a "special relationship" existed, requiring the public body either to control the agent of the harm or to protect the victim. This body of law does not support the general proposition that prior to the *Dorset Yacht Co.* case the duties imposed on public bodies were less onerous than those to which private defendants were subject. For example, Peter Heffey states that there is no doubt that private and state schools owe pupils the same duty of care.[96]

It appears that on occasion, courts have been less reluctant to impose liability on public bodies than on private defendants. For example, Fleming suggests that the recognition in Great Britain of a non-delegable duty owed by a hospital to its patients came about as a result of the nationalisation of the formerly charitable hospitals.[97] The first case to impose a duty of care on occupiers of land to protect trespassers from harm involved a public defendant.[98] While the duty of schools to prevent young children endangering third parties is said to be analogous to that of parents, in Great Britain

[92] (1961) 105 C.L.R. 6.
[93] Id. 12, *per* McTiernan J.
[94] Id. 21.
[95] e.g. *Gorringe* v. *Transport Commissioner (Tasmania)* (1950) 80 C.L.R. 357; *Burton* v. *West Suffolk County Council* [1960] 2 Q.B. 72 (C.A.). H. W. R. Wade, *Administrative Law* (4th ed., 1977) regards this rule as "a long standing anomaly of the law of highways". In contrast, Trindade and Cane, 503, state that "these principles are not peculiar to highway authorities; they are an application of more general rules". The latter would appear to be the better view, at least of those cases where the highway authority has a statutory power, rather than a statutory duty, to repair the road.
[96] Heffey (1985) 11 *Monash U.L. Rev.* 1,1. In fact, all the reported Australian decisions deal with government schools.
[97] Fleming, 345. See also *Cassidy* v. *Minister of Health* [1951] 2 K.B. 343, 361.
[98] *Herrington* v. *British Railways Board* [1972] A.C. 877 (H.L.).

the existence of the parental duty was first established, obiter, in a case against an educational authority.[99]

There is no direct private analogy for the duty of care owed to prisoners, or to third parties whom they may endanger, since privately run prisons disappeared in the early nineteenth century in Britain,[100] and have never existed in Australia. In *Ellis* v. *Home Office*, [101] the Court of Appeal held that the prison authority's physical custody of the plaintiff gave rise to a duty to take reasonable care to protect him from other prisoners. In *Greenwell* v. *Prison Commissioners*,[102] the defendants were held liable for allowing a prisoner who had escaped three times before to be kept in an open Borstal under no restraint at all. He left the Borstal ("escaped" seems to be something of a misnomer) and damaged the plaintiff's truck. The defendant's duty of care was based purely on the reasonable foreseeability of harm. This County Court case may not be regarded as being of very great authority. However, it is uncomfortably similar to *Holgate* v. *Lancashire Mental Hospital Board*,[103] in which the defendant, who had released a mental patient on licence without ascertaining that adequate supervision was available, was held liable to a person whom he attacked. Lewis J. a judge of the High Court treated the question of whether the defendant's conduct was negligent or mere error of judgment as the only real issue in the case. The existence of a duty of care was simply assumed. The editor of the *All England Reports* evidently agreed with this analysis, since he stated that the case "does not decide any point of law" but was included purely for its factual interest.

These cases suggest that the courts assumed, without discussion, that where a public body's statutory powers enabled it to control a person who, by virtue of his status as a prisoner or mental patient, could be seen to pose a threat to others, it was subject to a duty to take reasonable care to exercise its powers in a way that would protect the public. This assumption remained unchallenged until the *Dorset Yacht Co.* case.

THE IMMUNITY OF THE INTRA VIRES EXERCISE OF DISCRETIONARY POWERS

1. *Home Office* v. *Dorset Yacht Co. Ltd*[104]

The facts of this case were deceptively simple. Three prison officers, employed by the defendant, took a party of Borstal boys on a training exercise to an island in Poole Harbour. All three went to bed, leaving no-one to supervise the trainees. Seven of the boys escaped, stealing and damaging the plaintiff's yacht.

[99] *Carmarthenshire County Council* v. *Lewis* [1955] A.C. 549 (H.L.). The parental duty had been recognised earlier in Australia, again obiter, in *Smith* v. *Leurs* (1945) 70 C.L.R. 256 (H.C.).
[100] Anthony Babington, *The Power to Silence* (London, Robert Maxwell, 1968) 100.
[101] [1953] 2 All E.R. 149.
[102] (1961) 101 L.J. 486.
[103] [1937] 4 All E.R. 19.
[104] [1970] A.C. 1004.

At first glance, the case looks like a straightforward example of failing to prevent the trainees causing harm to the plaintiff.[105] However, it could also be argued that by bringing the trainees to the island, the Home Office had created a positive risk to owners of nearby property, just as the proprietors of Bann Reservoir had created a risk to landowners by increasing the volume of water in the river. Hence the prison officers' failure to supervise the boys, like the failure to keep the river channel clear, could be regarded as an affirmative cause of harm when taken together with the earlier course of conduct which created the risk.

If the case had been decided in accordance with the legal principles outlined above, the distinction between failing to avert harm and positively inflicting it might have been unimportant, since the Home Office could be described as having a relationship of control with the trainees, which imposed an affirmative duty to use reasonable care to protect third parties from harm. However, since new principles of law were laid down, the failure to define exactly to which class of case those principles applied has resulted in the creation of a body of case law of remarkable complexity and inconsistency.

Lord Pearson's judgment is most consistent with the older cases. His Lordship treated the common law's refusal to recognise a duty to take reasonable care to prevent a stranger causing injury to a third party as an exception to the principle of *Donoghue* v. *Stevenson*.[106] However, the exception was not relevant to this case, because there was a "special relation" of control between the prison officers and the trainees.[107] Lord Pearson also adopted the analogy with *Geddis'* case outlined above.[108] He regarded the policy considerations involved in allowing the trainees a considerable degree of freedom as relevant to standard of care, not duty. The Home Office:

> "should exercise such care for the protection of the neighbours and their property as is consistent with the due carrying out of the Borstal system of training. The needs of the Borstal system, important as they no doubt are, should not be treated as so paramount and all-important as to require or justify complete absence of care for the safety of the neighbours and their property and complete immunity from any liability for anything that the neighbours may suffer."[109]

Viscount Dilhorne's dissenting judgment is somewhat similar conceptually, but unlike Lord Pearson, he was not prepared to recognise the existence of a special relationship giving rise to an affirmative duty to protect third parties. The Yacht Company, like the plaintiffs in *East Suffolk*, failed because the defendant was not subject to a common law duty to use reasonable care to avert the harm it suffered.[110] If such a duty had existed, the Home Office would not have been entitled to immunity by reason of its public position;

[105] Bowman and Bailey [1984] *Pub. L.* 277, 284 regard this case as 'a classic example of failure to confer a benefit'.
[106] [1932] A.C. 562.
[107] *Home Office* v. *Dorset Yacht Co. Ltd* [1970] A.C. 1004, 1054–5.
[108] Id. 1055–6.
[109] Id. 1056–7.
[110] Id. 1050. Viscount Dilhorne was the only member of the court to refer to the *East Suffolk* case.

"if there is such a duty under the common law, the creation of such an immunity is a matter for Parliament."[111]

Lord Diplock's judgment now appears to be the most significant as a result of its adoption by the majority in *Anns* v. *Merton London Borough Council*.[112] Lord Diplock, like Viscount Dilhorne, believed that there was no binding authority on the question of whether a defendant with a legal right of control over an adult owes a duty of care to a plaintiff injured by that adult after he has left the physical custody of the defendant.[113] However, there is no explicit recognition in his Lordship's judgment that this is an example of the more general problem of failure to avert harm.[114] While Lord Diplock acknowledged that the case was outside the general principle of *Donoghue* v. *Stevenson*,[115] this was not because it involved failure to rescue, but because it concerned the negligent exercise of a statutory power. In formulating a new test to determine liability, his Lordship cut across the well-established distinction between affirmatively causing harm and failing to prevent it, and appeared to create new restrictions on the liability of public bodies for affirmatively causing harm.

Lord Diplock suggested that if the rule in *Geddis* v. *Proprietors of Bann Reservoir*[116] were applicable "to modern statutes which confer upon government departments a discretion as to the way in which a particular public purpose is to be achieved", the courts would be required to review the Home Office's exercise of its discretionary powers at the suit of any plaintiff who suffered harm through the release of a Borstal boy.[117]

His Lordship concluded that the *Geddis* principle – that Parliament does not authorise the careless exercise of statutory powers – was inapplicable for two reasons. First, the conduct of the prison officers, unlike that of the proprietors of Bann Reservoir, was "not of a kind which would itself give rise to a cause of action at common law if it were not authorised by the statute".[118] As Carol Harlow observes:

> "this is a circular argument. The concept of an act which will not of itself give rise to an action at common law is meaningless, since only when that act is declared by the court *not* to give rise to an action can one safely

[111] Id. 1048. This statement, and the remark at 1050 that "if those responsible for the administration of the Borstal system do what the legislature has authorised negligently, then an action will lie" are difficult to reconcile with the comment at 1048–9 that no action will lie as a result of the exercise of a discretion granted by Parliament. It is possible, given the context, that Viscount Dilhorne meant that harm resulting purely from the statutory body's choice of one discretionary alternative rather than another is not actionable, while an action will lie in respect of harm resulting from the negligent implementation of the chosen alternative.

[112] [1978] A.C. 728.

[113] *Home Office* v. *Dorset Yacht Co. Ltd* [1970] A.C. 1004, 1063–4.

[114] Lord Diplock's generalisation of the facts does not include the particular circumstance that the defendant's employees brought the trainees from the Borstal to the island, and that consequently, allowing them to escape might be regarded as affirmatively causing harm.

[115] [1932] A.C. 562.

[116] (1878) 3 A.C. 430.

[117] *Home Office* v. *Dorset Yacht Co. Ltd* [1970] A.C. 1004, 1066.

[118] Ibid.

declare that it is 'not of a kind which would itself give rise to a cause of action at common law'."[119]

Secondly, in *Geddis*, "the only conflicting interests involved were those on the one hand of the statutory undertakers . . . and on the other hand of the person who sustained damage", while in the instant case, both the trainee and the community had an interest in the most effective method of rehabilitation being adopted.[120]

His Lordship believed that "there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another".[121] His Lordship continued:

"It is, I apprehend, for practical reasons of this kind that over the past century the public law concept of ultra vires has replaced the civil law concept of negligence as the test of the legality, and consequently of the actionability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament as to the means by which they are to achieve a particular public purpose. According to this concept Parliament has entrusted to the department or authority charged with the administration of the statute the exclusive right to determine the particular means within the limits laid down by the statute by which its purpose can best be fulfilled. It is not the function of the court, for which it would be ill-suited, to substitute its own view of the appropriate means for that of the department or authority by granting a remedy by way of a civil action at law to a private citizen adversely affected by the way in which the discretion has been exercised. Its function is confined in the first instance to deciding whether the act or omission complained of fell within the statutory limits imposed upon the department's or authority's discretion. Only if it did not would the court have jurisdiction to determine whether or not the act or omission, not being justified by the statute, constituted an actionable infringement of the plaintiff's rights in civil law."[122]

Consequently, no liability could be imposed for the deliberate release of a trainee, or for escape resulting from the application of a system of relaxed control, unless the system adopted were "so unrelated to any purpose of reformation that no reasonable person could have reached a bona fide conclusion that it was conducive to that purpose. Only then would the decision to adopt it be ultra vires in public law".[123]

In other words, although *Geddis'* case established that Parliament did not intend to authorise the negligent exercise of a statutory power, "the public law concept of ultra vires" establishes precisely the opposite.

Whatever the merits of this approach may be, it has no historical basis. It is simply not possible to maintain that the rule in *Geddis'* case is restricted to private Acts of Parliament, without discarding a large number of cases

[119] Carol Harlow, 'Fault Liability in Public Law' (1976) 39 *Mod. L. Rev.* 516, 531.
[120] *Home Office* v. *Dorset Yacht Co. Ltd* [1970] A.C. 1004, 1067.
[121] Ibid.
[122] Id. 1067-8.
[123] Id. 1068.

holding otherwise, including *Mersey Docks and Harbour Board* v. *Gibbs*,[124] *Read* v. *Croydon Corporation*,[125] *Barnes* v. *Irwell Valley Water Board*,[126] and the cases imposing liability for failing to light air-raid shelters.[127] Lord Diplock cites no authority at all for the proposition that Parliament must be taken to have authorised the negligent but intra vires exercise of a statutory discretion. The inadequacy of certain early cases as the foundation of such a view has been discussed above.

If this restriction on the liability of public bodies was not based on English common law, where did it come from? P. P. Craig has recognised the resemblance of this doctrine to the American "discretionary function" immunity.[128] This derives from the *Federal Tort Claims Act* 1946, which removed the United States Government's immunity from civil action, but retained in Section 1346(b), immunity in respect of any claim based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty". In *Dalehite* v. *United States*,[129] the Supreme Court held that the immunity extended to all "planning" or "policy" decisions involving "considerations more or less important to the practicability of the Government's . . . program".

J. A. Smillie argues that "the American approach of granting public authorities complete immunity from suit in respect of actions involving 'policy' or 'planning' decisions does not provide an appropriate model for Commonwealth countries".[130] The *Crown Proceedings Act* 1947 (U.K.), the *Judiciary Act* 1903 (Cth) and their Australian State equivalents do not incorporate a "discretionary function" exception. While this could be regarded as regrettable oversight on the part of the legislative bodies in question, it is scarcely the place of the Appellate Committee of the House of Lords to remedy the omission.

Secondly, the principle of separation of powers is less rigidly applied in Commonwealth countries. According to Smillie, "the fundamental principle dictates the complete supremacy of the law as formulated by parliament and interpreted by the ordinary courts".[131]

The remaining members of the court, Lord Reid and Lord Morris, decided the case largely on traditional principles, but also gave some support to the ultra vires approach. Lord Reid did not characterise the case as one involving failure to avert harm. His Lordship treated the fact that the harm was

[124] (1866) 11 H.L.C. 686 (11 E.R. 1500) (H.L.).
[125] [1938] 4 All E.R. 631 (K.B.)
[126] [1939] 1 K.B. 21 (C.A.).
[127] *Fisher* v. *Ruislip Northwood Urban District Council* [1945] 1 K.B. 584; *Morris* v. *Luton Corporation* [1946] 1 All E.R. 1; *Knight* v. *Sheffield Corporation* [1942] 2 All E.R. 411. See pp. 76–82 above.
[128] P. P. Craig (1978) 94 *Law Q. Rev.* 428, 444–5. Aronson and Whitmore make the same point about the majority judgment in *Anns* v. *Merton London Borough Council* [1978] A.C. 728.
[129] 346 U.S. 15 (1953), 42.
[130] J. A. Smillie (1985) 23 *W. Ont. L. Rev.* 213, 217.
[131] Id. 217–8.

caused by a third party as relevant to remoteness of damage rather than to the existence of a duty of care.[132]

Lord Reid held that the case did not involve a negligent exercise of a statutory discretion, since the officers were given no discretion; they simply disobeyed instructions. However, he stated that:

> "where Parliament confers a discretion . . . there may . . . be errors of judgment . . . and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his powers. Parliament cannot be supposed to have granted immunity to persons who do that."[133]

The use of the expression "errors of judgment" is unfortunate, since an error of judgment does not necessarily involve negligence. However, it appears that Lord Reid did mean that Parliament intends to grant immunity for the negligent exercise of discretion, since his Lordship contrasted the position concerning the exercise of discretion with the rule in *Geddis'* case which he apparently believed concerned the performance of a statutory duty.[134]

Lord Morris of Borth-y-Gest's judgment is more ambiguous still. His Lordship held that the defendant owed the plaintiff a duty of care because "there was a right to exercise control over the boys [which] makes it sufficiently analogous with cases in which it has been held that there was a duty situation to make it reasonable so to hold here".[135] Although his Lordship stated "there should not be liability merely because unfortunate consequences have followed upon a decision which someone has in his discretion made while acting within his powers",[136] it is unclear if this is because such an error is not a breach of the required standard of care, or because Lord Morris acepted that there should be no liability for a negligent but intra vires exercise of discretion.

2. *Anns* v. *Merton London Borough Council*[137]

This case, unlike *Home Office* v. *Dorset Yacht Co. Ltd*,[138] raised in unmistakeable terms the issue of failure to avert harm as the result of the ineffective exercise of statutory powers. The plaintiffs were lessees of flats in a building which had been erected on foundations which did not comply with bylaws made under the *Public Health Act* 1936. The inadequacy of the foundations resulted in structural movement occurring in the building, with subsequent cracking in the walls and sloping of floors. The local authority

[132] *Home Office* v. *Dorset Yacht Co. Ltd* [1970] A.C. 1004, 1037.
[133] Id. 1031.
[134] Ibid.
[135] Id. 1038. The analogous situations involved the duty of parents and schools to control children in their care.
[136] Id. 1037.
[137] [1978] A.C. 728.
[138] [1970] A.C. 1004.

had a statutory power to inspect the foundations, but it was not known if an inspection had been carried out. It was conceded that if an inspection had been performed without negligence, the defect would have been discovered.

A plaintiff had succeeded in very similar circumstances in *Dutton* v. *Bognor Regis Urban District Council*,[139] although in that case it was established that an inspection had been carried out. The Court of Appeal decided that case on express policy grounds, Lord Denning M.R. stating that "the time has come when, in cases of new import, we should decide them according to the reason of the thing".[140] His Lordship observed that the council:

> "were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet they failed to protect them. Their shoulders are broad enough to bear the loss."[141]

All three members of the Court recognised the need to distinguish *East Suffolk Rivers Catchment Board* v. *Kent*,[142] although their attempts to do so have been convincingly criticised.[143]

The plaintiffs in *Anns's* case failed at first instance on the preliminary issue of whether their claim was statute-barred, but succeeded on this point in the Court of Appeal. The defendants were granted leave to appeal to the House of Lords, and also to argue that they did not owe the plaintiffs a duty of care. Consequently, the House of Lords had the opportunity, not available to the Court of Appeal in *Dutton's* case, to overrule the decision, or at least the reasoning, in the *East Suffolk* case, and place the law concerning the ineffective exercise of statutory powers on a new footing.

According to Bowman and Bailey, "the decision failed to take account of the distinction, well established in the law of tort, between conduct of the defendant which inflicts a loss on the plaintiff, and that which merely fails to confer a benefit"; instead, the court "resorted unnecessarily to the so-called 'policy/operational' dichotomy".[144] As a result, the case appears simultaneously to extend liability to some cases involving failure to avert harm, where a duty of care had not previously been recognised, and to restrict liability for affirmatively causing harm by cutting down the scope of the rule in *Geddis'* case.

Lord Wilberforce (with whom the other members of the court, other than Lord Salmon,[145] concurred), like Lord Diplock in *Dorset Yacht Co.*, held that the council's duty could not "be based upon the 'neighbourhood' principle

[139] [1972] 1 Q.B. 373.
[140] Id. 397.
[141] Id. 398.
[142] [1941] A.C. 74.
[143] Bowman and Bailey, [1984] *Pub. L.* 277, 294-6.
[144] Id. 277.
[145] Lord Salmon, adopting Lord Atkin's dissent in *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74, held that the council would be liable for negligent inspection, but not for failure to inspect. The deficiencies of this approach are discussed at p. 85 above.

alone".[146] This was not because the council had failed to prevent the builder's negligence causing harm to the plaintiff (a circumstance which Lord Wilberforce apparently did not recognise as relevant), but because "the local authority is a public body, discharging functions under statute: its powers and duties are definable in terms of public not private law".[147]

Lord Wilberforce concluded that the council owed the plaintiff a duty of care if two tests were satisfied. First, there must be "a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter".[148] The council's statutory power to supervise and control building operations, which Lord Wilberforce stated was granted "in order to provide for the health and safety of owners and occupiers of buildings",[149] created such a relationship. Secondly the plaintiff must show that "the council or its inspector . . . acted outside any delegated discretion either as to the making of an inspection, or as to the manner in which an inspection was made".[150] The only authority cited for the latter requirement was *Home Office* v. *Dorset Yacht Co Ltd.*[151]

The first major criticism that may be made of Lord Wilberforce's approach is that it fails to explain satisfactorily why the council was under a duty to take reasonable care to rescue the plaintiff from the consequences of the builder's negligence. It will be argued in the conclusion of this article that the fact the council possessed a statutory power to do so, and spent public funds for this purpose, should be sufficient to found a duty of care. However, given the considerable weight of authority to the contrary discussed above the question does require an answer. Lord Wilberforce's judgment fails to provide a satisfactory one.

His Lordship rejected the view, derived from the *East Suffolk* case, that in exercising a statutory power, the council was under a duty only "to avoid causing extra or additional damage beyond what must be expected to arise from the exercise of the power".[152] Where the power was "directed to preventing harm from occurring . . . the duty is the normal one of taking care to avoid harm to those likely to be affected".[153] As Bailey and Bowman observe, the difficulty with this approach is that "normally there is no duty to protect the plaintiff from harm caused by other agencies".[154]

Lord Wilberforce also rejected the proposition that if the council"need

[146] *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 754.
[147] Ibid.
[148] Id. 751.
[149] Id. 753.
[150] Id. 758.
[151] [1970] A.C. 1004.
[152] *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 754. His Lordship stated that the case had been decided before the concept of a general duty of care extending to bodies exercising statutory powers had been recognised, a view difficult to reconcile with the extended discussion of *Geddis'* case contained in the judgments.
[153] Ibid.
[154] Bowman and Bailey, [1984] *Pub. L.* 277, 293.

not inspect at all it cannot be liable for negligent inspection".[155] His Lordship observed that if local councils failed to exercise their discretion to inspect:

> "responsibly and for reasons which accord with the statutory purpose . . . they can be challenged in the courts. Thus, to say that councils are under no duty to inspect, is not a sufficient statement of the position. They are under a duty to give proper consideration to the question whether they should inspect or not. 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."[156]

As Aronson and Whitmore have observed, this reasoning involves a *non sequitur*.[157] It is difficult to see why the fact that mandamus would be available to compel a council to exercise its discretion properly establishes that the council is liable in negligence if the exercise of discretion is both ultra vires and careless.

Lord Wilberforce's use of the public law concept of ultra vires has been the subject of vigorous criticism elsewhere,[158] and for this reason will be dealt with relatively briefly.

The links with the United States "discretionary function" immunity are even clearer than in *Dorset*; Lord Wilberforce adopted the American distinction between the "policy" area and the "operational" area. However, he also stated that even in the "heavily operational" function of inspecting foundations there may be:

> "a discretionary element . . . discretionary as to the time and manner of inspection, and the techniques to be used. A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely upon a common law duty of care."[159]

As Aronson and Whitmore observe, Lord Wilberforce appears to use "discretion" in two different senses. In the passage quoted above, it appears to mean no more than "a power to choose between alternative courses of action".[160] The requirement that a negligent act be outside the scope of a bona fide exercise of "discretion" in that sense would confine the liability of public bodies to cases where their employees had disobeyed orders so detailed as to leave no room for choice. Read literally, this passage would suggest that a psychiatrist employed by the Department of Health would owe no duty of care to a psychiatric patient unless his act was so unreasonable that he could not be said to have exercised bona fide his discretion under the *Mental Health Act* as to how the patient should be treated. Such a conclusion appears

[155] *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 755.
[156] Ibid.
[157] Aronson and Whitmore, 73.
[158] Craig, 94 *Law Q. Rev.* 428; Bowman and Bailey [1984] *Pub. L.* 277; Smillie, 23 *W. Ont. L. Rev.* 213; Aronson and Whitmore, 99–103.
[159] *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 755.
[160] Aronson and Whitmore, 101.

to be indefensible in principle as well as inconsistent with the body of law predating the *Dorset Yacht Co.* case.

However, Lord Wilberforce also stated that:

> "most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this 'discretion', meaning that the decision is one for the authority or body to make and not the courts".[161]

This suggests that "discretion" is being used in the American sense of "the power given to an official to formulate policy, to balance competing interests by criteria which a court is not equipped to evaluate".[162] This meaning is consistent with the policy reasons given by Lord Diplock in the *Dorset Yacht Co.* case for imposing this restriction on the liability of public bodies.

Even if it is accepted that it is undesirable for the courts to adjudicate, by way of a negligence action, decisions of public bodies concerning the ways in which their resources should be allocated and their objectives achieved, the ultra vires requirement is not calculated to achieve this end.

If the defendant's act is said to be ultra vires because it is so unreasonable or careless as not to amount to a real exercise of discretion, the court is still obliged to enquire into the adequacy of the public body's reasons for acting as it did. The only difference is that the existence of a duty of care depends on a threshold requirement of "unreasonableness" rather than liability depending on a finding of negligence. This aspect of the ultra vires requirement seems to amount to no more than the imposition of a lower standard of care on public bodies.

It is hard to see why the plaintiff's ability to show that the exercise of discretion was invalid on some ground other than unreasonableness (for example, breach of natural justice or failure to take a relevant consideration into account) has any bearing on the question of whether the pubic body owes him a duty of care. As Aronson and Whitmore ask, what merit would there be in giving the green light for a negligence action only to a plaintiff lucky enough to find a technical flaw?[163] In short, the question of the validity of an exercise of discretion is logically irrelevant to the question of whether it is the type of decision which a court should adjudicate in a negligence action.

3. Applications of *Anns's* case

Some of the difficulties created by the ultra vires doctrine can be seen in the attempts of courts in both England and Australia to apply the decision in *Anns's* case. Of the cases located which purported to apply *Anns*, eleven dealt with negligent approval of building plans, or negligent inspection. *Anns*, being decided on a preliminary point of law, established only that a council owes an occupier or owner of premises a duty of care if the failure to inspect or careless inspection was not within the limits of a statutory discretion,

[161] *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 754.
[162] Aronson and Whitmore, 69.
[163] Ibid. 101. In *Dunlop* v. *Woollahra Municipal Council* [1982] A.C. 158 the Privy Council held that failure to observe the rules of natural justice did not of itself amount to negligence.

exercised bona fide. The task of the lower courts was to determine what acts or omissions were outside such a discretion. By and large, they failed to do so.[164]

Some judges mis-stated the ratio of *Anns's* case with the result that the issue did not arise. In one of the earliest reported cases,[165] an acting judge of the High Court, Sir Douglas Frank Q.C., stated that *Anns* "established or confirmed the principle that there is a duty on a building inspector to exercise reasonable care to ensure that the regulations applicable to foundations are complied with". His Honour went on to hold that failure to sink a twenty foot bore hole to determine if foundations were adequate was not a breach of this duty of care.

Similarly, Mohr J., a judge of the Supreme Court of South Australia, disposed of the duty issue by saying:

> "Since *Anns* v. *London Merton Borough Council*, it has been clearly laid down that a body such as the defendant corporation owed a duty to persons in the position of the present plaintiffs. The question arises as to whether or not the defendant corporation in this instance was in breach of that duty."[166]

In *Acrecrest Ltd.* v. *W. S. Hattrell & Partners*,[167] Donaldson L.J. appears to have thought that the ultra vires requirement was relevant to standard of care, rather than existence of duty. His Lordship stated that:

> "a plaintiff complaining of negligence must prove not only a breach of common law duty of care, but also that the action of a local authority was not within the terms of a discretion bona fide exercised. On the facts in the instant appeal, this qualification is not material, since if the duty exists, it was admittedly broken."

In *Dennis* v. *Charnwood Borough Council*,[168] Templeman L.J. after quoting Lord Wilberforce's test, added that the plaintiffs "were entitled to claim damages against the council if the council were negligent in breach of their duty to take reasonable care in the consideration of the plan of the house or in the exercise of their supervisory and discretionary power of inspection". The latter test was the one applied to the facts of the case, and was quoted with apparent approval by the House of Lords.[169]

[164] Three of the cases (*Cynat Products Ltd* v. *Landbuilt Ltd* [1984] 3 All E.R. 513 (Q.B.D.), *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson Ltd* [1985] A.C. 210 (H.L.) and *Investors in Industry Ltd* v. *South Bedfordshire District Council* [1986] 2 W.L.R. 1937 (C.A.), were concerned with the class of plaintiffs to which the duty is owed and the type of damage recoverable, and did not discuss the scope of the discretionary immunity.

[165] *Stewart* v. *East Cambridge District Council* (1979) 252 E.G. 1105, 1107.

[166] *Carosella* v. *Ginos and Gilbert Pty Ltd* (1981) 27 S.A.S.R. 515, 521.

[167] [1983] 1 All E.R. 17, 28. The case was overruled on other grounds in *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson Ltd* [1985] A.C. 210.

[168] [1983] Q.B. 409, 414-5 (C.A.). As the plaintiff was the original owner of the house, the case could have been treated as one involving negligent mis-statement but apparently was not.

[169] *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson Ltd* [1985] A.C. 210. The same test was quoted and applied by a judge of the Queensland Supreme Court in *Travis* v. *Vanderloos* (1984) 54 L.G.R.A. 268, 272. A similar approach is evident in *Sutherland Shire Council* v. *Heyman* [1982] 2 N.S.W.L.R. 618, 627 *per* Huttley J.A.

Ellis v. *City of Bendigo*[170] concerned a building permit deliberately issued by a surveyor who knew the plans did not conform to Uniform Building Regulations, this apparantly being common practice in Bendigo at the time. Given these facts, it is not surprising that Murphy J. dealt very briefly with the duty issue, saying only:

> "questions of proximity such as loomed large in *Dutton* v. *Bognor Regis* [1972] 1 QB 373 and *Anns* v. *Merton London Borough Council* [1978] AC 728 have not been raised again here. Clearly the plaintiff was in such a direct relationship to the defendant that no issue on this score arose: see also Lord Atkin's speech in the *East Suffolk Catchment* case [1941] AC 74 at 89."[171]

In *Wollongong City Council* v. *Fregnan*,[172] Huttley J.A. held that the council owed a "duty of care to the respondents in exercising its powers to approve the building of their home" without stating the legal theory on which the existence of a duty was based.

The only case to discuss the extent of a building inspector's discretion was *Clarke* v. *Gisborne Shire Council*.[173] The council's building surveyor had set a minimum depth of fifteen inches for foundations throughout the municipality. Gibbo J. held that the failure of a building inspector to take into account the soil characteristics of a particular site, and to consider whether, as a result, footings deeper than fifteen inches were required, meant that there had been no boda fide exercise of discretion. This conclusion is unexceptionable. However, it is difficult to see what policy objectives were furthered by asking "did the inspector exercise his discretion bona fide" rather than "was the inspection negligent", or even that there would be much difference in the grounds on which the answers would be reached.

The ultra vires doctrine was also applied in several cases to facts entirely different from those in *Anns's* case.[174] In *Haydon* v. *Kent County Council*,[175] the plaintiff fell on a footpath which had been dangerously icy for two days. The defendant's policy was to de-ice main traffic roads and any footpaths about which a complaint was received. No complaint had been received about the footpath in question prior to the accident, although it was known to be particularly steep and dangerous.

The plaintiff failed to establish the existence of a statutory duty to de-ice the footpath or a negligent failure to exercise a statutory power to do so. According to Goff L.J., the decision to give priority to de-icing roads "lies within the discretionary field", and the plaintiff had not begun to make out

[170] (1983) 56 L.G.R.A. 250 (S.C.V.).

[171] Id. 255. This case and the following one would probably best have been dealt with as negligent mis-statements, following *L. Shaddock & Associates* v. *Parramatta City Council* (1981) 150 C.L. 225 (H.C.).

[172] [1982] 1 N.S.W.L.R. 244, 247.

[173] [1984] V.R. 971 (S.C.).

[174] The *ultra vires* doctrine was also referred to briefly in *Minister Administering the Environmental Planning and Assessment Act 1979* v. *San Sebastian Pty Ltd* [1983] 2 N.S.W.L.R. 268 (C.A.) and *Jewson* v. *Rural Water Commission* (Victorian Supreme Court, unreported, no. 21 of 1986), but these cases were decided on other grounds.

[175] [1978] 1 Q.B. 343 (C.A.).

that the defendants had not exercised a bona fide discretion.[176] Again this appears to be a reasonable decision, but in practice, how does it differ from saying that the plaintiff did not establish that the defendants had acted negligently in adopting their policy?

The Vicar of Writtle v. *Essex County Council*[177] concerned a child who was placed in the custody of a local authority while on remand on criminal charges. The defendant's social worker knew the police suspected the child of arson, but decided not to pass on "mere suspicions". As a result, the child was placed in a "community home" and not closely supervised. He subsequently wandered out and set fire to a church. In finding against the council, Forbes J. held that the council had not exercised any kind of discretion in choosing not to supervise the boy closely, since it had not been given the information on which it could have exercised such a discretion. Nor did the social worker have any discretion to suppress the information as "those above him in authority considered that the suppression of such information effectively prevented them from dealing properly with the matter".[178]

This seems to suggest that if the social worker's superiors, rather than the social worker, had deliberately disregarded police suspicions, no liability would have attached, unless to do so was so unreasonable as not to amount to a bona fide exercise of discretion. This does not appear to be a particularly satisfactory distinction.

Sasin v. *Commonwealth*[179] is even less satisfactory. The plaintiff was injured in a light aeroplane crash when his seatbelt reel failed. The Department of Civil Aviation, which had approved the reels (described as "cheap war surplus") was aware that they were unreliable, and that the recommended method of testing them was not always effective. The only consideration in favour of the reels appeared to be their cheapness. Approval of their use was withdrawn eighteen months after the plaintiff's accident.

Hodgson J. held that the defendant owed the plaintiff no duty of care in deciding not to withdraw approval of the reels.

> "Decisions of the Director-General as to what types of equipment to approve . . . are discretionary rather than operational decisions . . . to be made at a level of generality and . . . on the basis of factors which may have to be weighed against each other on policy considerations."[180]

The decision to continue approval of the reels was said to fall within the Director-General's discretion, because the purpose of the Act under which the regulation in question was made was the "safety, regularity and efficiency of air services". Hence the Director-General was entitled to take factors other than safety into account when deciding to approve the reels. Two comments must be made. First, surely the purpose of the particular regulation rather than the Act as a whole should have been considered. More importantly,

[176] Id. 363–4.
[177] (1979) 77 L.G.R. 656 (Q.B.D.).
[178] Id. 673.
[179] (1984) 52 A.L.R. 299 (S.C., N.S.W.).
[180] Id. 317.

it is hard to see why this was a decision a court is "not equipped to evaluate in terms of 'reasonableness' ".[181] If a commercial airline had chosen to use a seatbelt it knew to be unreliable because it was cheaper than the alternative, a court would have no difficulty in adjudicating the reasonableness of decision. As in the *Vicar of Writtle's* case, the existence of the immunity was determined by reference to the status of the decision maker, rather than the nature of the decision.

All the cases in which *Anns* was applied concerned failure to rescue rather than positively caused harm,[182] and with the possible exception of *Vicar of Writtle* v. *Essex County Council*[183] did not involve the kind of "special relationship" where an affirmative duty to rescue had been recognised prior to *Anns's* case. In other words, these cases have not limited liability in negligence by comparison to the law prior to 1970.

In contrast, the ultra vires doctrine appears not to have been applied at all where there is authority pre-dating the decisions in *Dorset* and *Anns* that an affirmative duty exists.

Peter Heffey, in an exhaustive treatment of the liability of schools and teachers in negligence, does not refer to any immunity for negligence within the limits of a bona fide exercise of discretion.[184] The doctrine appears never to have been applied to educational authorities. In fact, the courts have not hesitated to substitute their views of the best way in which to achieve educational objectives for those of teachers and educational authorities. In *Nicholas* v. *Osborne*,[185] a Victorian County Court judge held the Victorian Education Department liable to a child injured while bushwalking, on the basis that the educational benefits of the expedition did not justify the degree of risk involved.

In *Page Motors Ltd.* v. *Epsom and Ewell Borough Council*,[186] Ackner L.J. refused to apply *Anns* to an action in nuisance, saying "this submission runs quite contrary to the established principle that a public body, whether a trading body or not, is not authorised to create a nuisance or otherwise affect private rights unless compensation is provided". In fact, the defendant had adopted the nuisance, rather than creating it, by failing to remove gypsies from land it leased to the plaintiffs.

The defendant's position as a public body was not ignored. His Lordship held that the council, as a local authority, had obligations to all the ratepayers in the area. Hence, the council had acted reasonably in refraining from ejecting the gypsies until a site where they would not cause a nuisance to others was found, and "in carrying out the democratic process of consulta-

[181] Id. 315.

[182] It is clear from Robert Goff J.'s judgment in *Fellowes* v. *Rother District Council* [1983] 1 All E.R. 513 that his Honour regarded the principle of *Anns's* case as applicable to both. However, the decision was on a preliminary point of law, and it is not entirely clear from the facts how the case should be classified.

[183] (1979) 77 L.G.R. 656.

[184] Peter G. Heffey (1985) 11 *Mon. U.L. R.* 1.

[185] Unreported, delivered 15 November 1985 by Lazarus J.

[186] (1981) 80 L.G.R. 337, 346 (C.A.).

tion . . . [which] as the judge found, takes time". The council was entitled to "a reasonable time to find the right solution to the problem", but not to the five years it actually took.[187]

Bird v. *Pearce*[188] is equally instructive. The local council had established a priority road system, indicated by white lines on the road. While exercising its statutory power to maintain the road surface, the lines were obliterated. The plaintiff, driving along the priority road, was struck by a car whose driver, as the result of the removal of the lines, did not realise that he ought to have given way.[189] The council argued that its decision to obliterate the white lines and not erect a temporary warning sign was a conscious policy choice within its discretion. The trial judge rejected this submission, holding that the council had made a policy decision to create and maintain a system of warning signs. The resurfacing was "carried out at the operational level", to which no discretionary immunity attached.[190] It appears that his Honour did not accept that there was a deliberate decision not to provide a temporary warning, since he stated that erecting a sign would have been "a very simple process if only someone had thought of it".[191]

The Court of Appeal's approach to the *Anns* argument was even simpler. Their Lordships ignored it. Brandon L.J. held that:

> "it is well established that, where a body exercises a statutory power, it must use reasonable care to exercise it in such a manner so as not to cause avoidable damage or injury to those who [sic] it can reasonably foresee may be affected by such exercise: *Geddis* v. *Bann Reservoir Proprietors (1978) 3 App Cas 430,* by Lord Blackburn at pp 445–456; *Dorset Yacht Club Ltd* v. *Home Office* [1970] AC 1004, by Lord Reid, at p 1030, and Lord Morris of Borth-y-Gest, at p 1036."[192]

Their Lordships' major concern was to distinguish *Sheppard* v. *Glossop Corporation*.[193] It was as if *Anns's* case had never been decided.

COUNCIL OF THE SHIRE OF SUTHERLAND *v.* HEYMAN[194]

Although *Anns's* case was discussed and applied several times by Australian courts,[195] the High Court of Australia did not have an opportunity to consider it until 1985.

The facts of *Heyman's* case were similar to those of *Anns*. In 1978, the plaintiffs purchased a house erected six years earlier. The defendant council, exercising its powers under the *Local Government Act* 1919, had approved the plans and specifications for the house, which merely stated that footings

[187] Id. 350.
[188] [1979] R.T.R. 369 (C.A.).
[189] The case was a third party action brought by the defendant driver, but the question at issue was whether the council owed the plaintiff driver a duty of care.
[190] *Bird* v. *Pearce* [1978] R.T.R. 290 (Q.B.D.).
[191] Id. 300.
[192] *Bird* v. *Pearce* [1979] R.T.R. 369, 376.
[193] [1921] 3 K.B. 132.
[194] (1985) 59 A.L.J.R. 564.
[195] See pp. 100–103 above.

were to be made to "a depth necessary to secure solid bottoms throughout". Approval was subject to a requirement that once the foundation trenches were open, the builder was to give the council forty-eight hours notice in writing before laying the foundations.

The council had established a system of providing builders with cards to be posted back when each stage of the building was completed. A record of the resulting inspection was kept on the back of each card. The council had no record of an inspection of the foundation trenches or footings, but did have a card establishing that an inspection of the framework had been carried out. Hope J.A. in the Court of Appeal held that it would have been practicable during this inspection to check the footings by removing part of the soil, but this was apparently not done.[196] The foundations proved to be inadequate, causing subsidence and structural damage to the house, which did not become apparent until after the plaintiffs had purchased it.

The plaintiffs succeeded at first instance, and the council's appeal was dismissed by the Court of Appeal. Hope J.A. adopted the reasoning of Lord Wilberforce in *Anns's* case,[197] and held on that basis that the council owed the plaintiffs a duty of care. This conclusion was reinforced by the requirement imposed by section 310 of the Act, that every building erected in the area be erected, to the satisfaction of the council, in conformity with both the Act and the ordinances, and with the application, plans and specifications on which the council's approval for the erection of the building was based. Hope J.A. concluded that, as a consequence of this provision, "it is apparent that the council has a duty to ensure that it is so satisfied".[198] It is not clear if his Honour was referring to a statutory duty or a common law duty of care.[199]

Hope J.A. concluded that since, in this case, neither the plans nor the specifications identified the precise nature of the footings, the requirements of section 310 could not be met without inspection of the footings.[200] Hence, the council was liable even if the inspection of the framework had been the sole inspection:

> "Where no earlier inspection has been carried out . . . the inspection would be intended, as the building permit states, to ensure that the whole of the work was in accordance with the approved plans and specifications. If no earlier inspection had been made, as would be apparent to the council from its records, the council would in my opinion have failed to exercise reasonable care if it failed to take what practicable steps were available to it to ensure that the foundations and footings had been constructed, to its satisfaction, in accordance with the plans and specifications and the Act and ordinances."[201]

[196] *Sutherland Shire Council* v. *Heyman* [1982] 2 N.S.W.L.R. 618, 619.
[197] Id. 627-8.
[198] Id. 626.
[199] Some confusion between an action in negligence and the strict liability action for breach of statutory duty is apparent in his Honour's judgment. See *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 568 *per* Gibbs C.J.
[200] *Sutherland Shire Council* v. *Heyman* [1982] 2 N.S.W.L.R. 618, 627.
[201] Id. 628-9. The reasoning of Reynolds J.A. was similar to that of Hope J.A. Mahoney J.A. did not give reasons for agreeing with the orders proposed.

If an inspection of the footings had been carried out, "a conclusion that the plans and specifications had not been complied with would not have involved the exercise of any relevant discretion".[202]

The council appealed to the High Court,[202a] where the appeal was upheld by all five judges who sat on the case. The High Court decided the case on the basis that the Act and ordinances gave the council a statutory power to inspect foundations, but did not subject it to a statutory duty to do so.[203]

Gibbs C.J. (with whom Wilson J. agreed[204]), adopted the reasoning of the majority in *Anns's* case.[205] Although "the decision that a public authority carrying out statutory functions may be liable in negligence for taking no action, or for failing to exercise its discretion as to whether it should take action, may appear to go beyond previous authority",[206] the decision could be reconciled with cases such as *Sheppard* v. *Glossop Corporation*,[207] "if it is understood as holding that the statutory provisions in question conferred on the Borough Council powers which it was intended should be exercised in the interests of public health and safety, and that the Borough Council should therefore be regarded as under a duty to give proper consideration to the question whether it should exercise the powers".[208]

Consequently, the Sutherland Shire Council "owed to the plaintiffs, as owners and occupiers of the house erected subject to its approval and under its control, a duty at common law to give proper consideration to the question whether it should exercise its powers, including its powers of inspection".[209] However, it did not owe the plaintiffs a duty to inspect the house at any time during its construction. While section 310 "may entail an obligation on the part of the Council to decide, when called on to do so, whether it has the requisite satisfaction, and to act in accordance with law in making its decision", it did not impose a statutory duty to inspect.[210]

> "There was nothing in the relationship between the Council and the building owners, or in the circumstances, that gave rise to a duty to make an inspection. The Council had a discretion as to how and when it should

[202] Id. 629.

[202a] *Council of the Shire of Sutherland* v. *Heyman* (1986) 59 A.L.J.R. 564.

[203] The council was under a statutory duty to inspect once it had received notice from the builder that the building was completed. The duty never arose because the builder, in breach of the Act, did not notify the council.

[204] Wilson J. differed from Gibbs C.J. on one point; he did not decide if the damage to the house represented physical harm or pure economic loss.

[205] Gibbs C.J. differed from Lord Wilberforce in rejecting reasonable foreseeability of harm alone as determining the existence of a prima facie duty of care. Like Deane J., Gibbs C.J. required a relationship of 'proximity or neighbourhood', not equivalent to foreseeability of harm. However, unlike Deane J., he held that the council's statutory powers established such proximity.

[206] Id. 571.

[207] [1921] 3 K.B. 132.

[208] *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 572.

[209] Id. 573.

[210] Id. 568. It could be argued that s.310 imposed a statutory duty on the council to carry out such inspections as were required to allow it to attain the required state of satisfaction on reasonable grounds. However, this might not confer a civil remedy on the plaintiffs, who, in any event, were suing in negligence.

exercise its powers, and it could not be rendered liable for negligence unless it were shown that it had not properly exercised that discretion."[211]

Gibbs C.J. held that the plaintiffs had not established that the Council's failure to detect the inadequacy of the foundations had resulted from the improper exercise of its discretion. His Honour observed that the Council had only eight building inspectors in the field in 1969, and added that, "the evidence does not show . . . whether the number of inspectors was adequate to enable all necessary inspections to be made, and if not whether it was financially practicable to appoint more inspectors".[212] Nor was there any evidence that the council had failed to give proper consideration to the question of what inspections should be made.

Not only does this approach require the plaintiff to prove a negative, it requires him to do so using evidence likely to be unavailable to him, even if it is known to the defendant. It is for these reasons that United States courts have required defendants to offer evidence supporting the existence of a "discretionary function" immunity.[213]

In fact, in *Heyman's* case, the evidence suggested the council did intend to inspect the footings but failed to do so because the builder did not send in the notification card. According to Mason J.:

"the evidence demonstrates that the appellant adopted the practice of making inspections of building in the course of erection according to a procedure the object of which was to ensure, though it may not have been achieved in this case, that the foundations were checked."[214]

The condition requiring notice to be given before the foundations were laid is inexplicable unless there was an intention to inspect them. On this analysis, the council should have been liable if its failure to institute a system of checking whether the notification had been received could be characterised as negligence. However Gibbs C.J. held that the Council's choice of system also involved the exercise of discretion which the plaintiff would have to demonstrate had not been exercised bona fide in order to succeed. Gibbs C.J. appears to extend the requirements that the plaintiff prove that the act complained of was ultra vires to every activity of a public body involving a choice between alternatives.

The difficulties that this creates for the plaintiff are evident in his Honour's discussion of the inspection of the framework. Gibbs C.J. did not accept the Court of Appeal's view that the inspector who examined the framework was negligent in not including the foundations in his inspection, since he knew, or ought to have known, that there had been no previous inspection. According to his Honour:

"It is not known, and indeed may have been impossible to discover . . . whether Mr Pollard gave consideration . . . to the question whether he

[211] Id. 573.
[212] Ibid.
[213] Aronson and Whitmore, 58.
[214] *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 577.

should inspect the foundations and, if so, what his reasons were for not doing so. Although he was going about a task which could properly be called 'operational', there was in what he had to do an element of discretion. There is no evidence that Mr Pollard acted other than in the bona fide exercise of his discretion in inspecting the frame only, if that is what he did."[215]

If a plaintiff is required to provide evidence of the state of a building inspector's mind six years after the event, it is hard to see how he can ever hope to succeed. Nor is it clear what policy object is served by this requirement, other than the provision of a virtually complete immunity for public bodies.

If Gibbs C.J.'s judgment is a fairly straightforward application of *Anns's* case, Brennan J.'s can best be described as unadulterated *East Suffolk*. His Honour rejected completely the view that a public body is subject to a common law duty to make reasonable use of its statutory powers to rescue a plaintiff from harm which it has not created. His Honour stated:

"I can be liable only for an injury that I cause to my neighbour. If I do nothing to cause it, I am not liable for the injury he suffers except in those cases where I am under a duty to act to prevent the injury occurring. Indeed, he is not in law my neighbour."[216]

Failure to avert harm was not within the principle of *Donoghue* v. *Stevenson*,[217] unless the defendant:

"whether a public authority or not . . . does something which creates or increases the risk to another . . . [and] brings himself into such a relationship with the other that he is bound to do what is reasonable to prevent the occurrence of that injury unless statute excludes the duty."[218]

While "the Council's actions did nothing to minimise the risk of defective footings . . . they did not create or increase that risk. The Council's omission to exercise its powers of inspection more rigorously do [sic] not make it liable for the consequences of the builder's negligence."[219]

Brennan J. added: "a public authority, which adopts a practice of so exercising its powers that it induces a plaintiff reasonably to expect that it will exercise them in the future, is liable to the plaintiff for a subsequent omission to exercise its powers, or a subsequent exercise of its powers, if the plaintiff has relied upon the expectation induced by the authority and has thereby suffered damage", but held that the evidence in the present case did not establish such reliance.[220]

There is a good deal to be said in favour of Brennan J.'s approach. It is logical, intelligible, and consistent with the authorities prior to *Dorset* and

[215] Id. 573.
[216] Id. 586-7. Brennan J. was clearly using "cause" to mean "positively and directly cause".
[217] [1932] A.C. 562.
[218] *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 587.
[219] Id. 591.
[220] Id. 590.

Anns. But is it the most appropriate approach to the liability of public bodies in the late twentieth century?

According to Brennan J., "a private purchaser in the market place cannot look to public funds to underwrite the information on which he makes his purchase".[221] This does not take into account that the private housing market is already underwritten from the public funds expended in the attempt to ensure that purchasers are not left with dangerous or defective housing. As Stamp L.J. asked in *Dutton* v. *Bognor Regis Urban District Council*,[222] "Unless the local authority was carrying out an academic exercise, for what other purpose, except primarily to protect future owners of the house, was the exercise performed?" While this is not logically equivalent to stating that the local authority owes future owners of houses a duty of care, it is at least worth taking into account in deciding if such a duty should be imposed.

Mason J., like Brennan J., was critical of *Anns's* case, although from a different perspective. His Honour stated:

> "although a public authority may be under a public duty, enforceable by mandamus, to give proper consideration to the question whether it should exercise a power, this duty cannot be equated with, or regarded as a foundation for imposing, a duty of care on the public authority in relation to the exercise of the power. Mandamus will compel proper consideration by the authority of its discretion, but that is all."[223]

However, Mason J. did not deny that a public body could be subject to a duty of care to make effective use of its statutory powers. His Honour stated:

> "statutory powers are not in general mere powers which the authority has an option to exercise or not according to its unfettered choice. They are powers conferred for the purpose of attaining the statutory objects, sometimes generating a public expectation having regard to the purpose for which they are granted that they will be exercised. There is, accordingly, no reason why a public authority should not be subject to a common law duty of care in appropriate circumstances in relation to performing, or failing to perform, its functions, except in so far as its policy-making and, perhaps, its discretionary decisions are concerned."[224]

Mason J. rejected the requirement imposed in *Anns's* case that a plaintiff establish that the public body was acting ultra vires,[225] adopting instead the American approach of conferring a complete immunity on policy decisions, defined as those which "involve or are dictated by financial, economic, social or political factors or constraints".[226]

While his Honour acknowledged that the American doctrine derived from the "discretionary function" exception in the *Federal Tort Claims Act* 1946, he remarked that the object of this Act "is similar to that of s.64 of the

[221] Id. 593. Brennan J. excepted the purchaser whose loss resulted from negligent mis-statement by the public body.
[222] [1972] 1 Q.B. 373, 411.
[223] *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 580.
[224] Id. 577–8.
[225] Id. 580.
[226] Id. 582.

Judiciary Act 1903 (Cth)".[227] So it is, but for the minor difference that section 64 does not contain a "discretionary function" immunity, but merely states "in any suit to which the Commonwealth or a State is a party, the rights of the parties shall, as nearly as possible be the same ... as in a suit between subject and subject". Furthermore, it is difficult to see what possible relevance the liability in tort of the Federal Government of the United States or of Australia has to a claim against a local authority.

It is possible that his Honour intended the restriction of liability in negligence to acts or omissions "the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness"[228] (whatever the last mentioned may be) to apply only to failure to avert externally caused harm. However, this is not stated explicitly, and the American analogy suggests otherwise. If Mason J. intended to propound a rule of general application, the effect would be to undermine the principle, over a century old, that public bodies are liable for affirmatively causing harm on exactly the same basis as private defendants. It is difficult to think of a more inappropriate change in the law to be brought about by judicial intervention.

Mason J. held that the discretionary function immunity did not arise on the facts of *Heyman's* case, since the Council had adopted a practice of universal inspection, although they had failed to implement it in this case.[229] His Honour accepted that the inspector who carried out the inspection of the framework "knew or ought to have known that the footings had not been inspected previously".[230] Since Mason J. held that "the reasoning of the majority in *East Suffolk* should not be acepted",[231] one would expect that these findings would have entitled the plaintiffs to succeed. They did not.

Mason J. held that the general rule that a public authority has no common law duty to exercise a statutory power,[232] is displaced when it by its conduct places itself "in such a position that it attracts a duty of care which calls for exercise of the power".[233] It might do so by creating a danger, by virtue of its position as an occupier of land, or by placing itself "in such a position that others rely on it to take care for their safety".[234] None of this is particularly controversial.

However, Mason J.'s conclusion that "if there is a firm foundation for a duty of care in this case, it is to be found in reliance or dependence rather than mere foreseeability of physical damage or economic loss",[235] represents an entirely new departure for this area of law. His Honour stated:

[227] Ibid.
[228] Ibid.
[229] Id. 577.
[230] Id. 576.
[231] Id. 583. His Honour also rejected the reasoning of *Leahy's* case.
[232] The authority for the general proposition, *Revesz* v. *Commonwealth of Australia* (1951) 51 S.R. (N.S.W.) 63 is rather dubious, since it involved a claim for pure economic loss.
[233] *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 578.
[234] Id. 579.
[235] Id. 581.

"Inspection generally results in the issue of a certificate – in which event the principles regulating liability for negligent misstatement apply . . . Because liability in respect of a certificate depends not only on foreseeability but also on reliance it is a fortiori that liability in negligence for inspection or failure to inspect, not resulting in the issue of a certificate depends on foreseeable and reasonable reliance or dependence."[236]

Such reliance may be "specific", meaning that the defendant's conduct contributes to the plaintiff's reliance and the plaintiff acts to his detriment as a result,[237] or "general", meaning that reliance by a person in the plaintiff's position is reasonably foreseeable, even though the particular plaintiff may not have relied on the defendant. Liability based on general reliance was said to be "in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection".[238]

Mason J. concluded that the plaintiffs had not established that the defendant owed them a duty of care because they had not demonstrated either specific or general reliance. Section 317A of the *Local Government Act* 1919 provided that:

"(1) Any person may . . . apply for a certificate to the effect that in the opinion of the council a building in all respects complies with the Act, the ordinances, and the plans and specifications, if any, approved by the council . . .

(2) The production of the certificate shall for all purposes be deemed conclusive evidence in favour of a bona fide purchaser for value that at the date thereof the building complied with the requirements of the Act and ordinances."

Since the plaintiffs had not applied for such a certificate, and had not made any enquiry of the Council concerning the condition of the house, they had no basis for arguing specific reliance. Mason J. also observed that:

"the respondents did not by evidence or argument at any stage of the proceedings advance a case of general reliance or dependence stemming from the existence of the legislative regime of control . . . No doubt this approach reflected a recognition of the obstacles which such a case would encounter. An intending purchaser of a building can apply for a certificate under s.317A and make inquiries of a council for information concerning the erection of a building and the inspection of it which the council has made. He can if he wishes, retain an expert to inspect the building and check its foundations – a task which I assume to be within the competence of an appropriate expert. These considerations would complicate the presentation by a person in the position of the respondents of a case based on general reliance or dependence.[239]

[236] Ibid.

[237] This is the type of reliance that must be established when the defendant's negligent misstatement has caused pure economic loss to the plaintiff.

[238] Id. 580.

[239] Id. 583.

Several objections can be made to this approach. To begin with, that "inspection generally results in the issue of a certificate" is irrelevant to the requirement that the plaintiff demonstrate specific reliance. While it is true that cases which established liability for negligent mis-statement involved the production of pieces of paper, this was not the reason why liability depended on the plaintiff showing reasonable reliance. Cases such as *Hedley Byrne & Co. Ltd* v. *Heller & Partners Ltd*,[240] *Mutual Life and Citizens Assurance Co. Ltd* v. *Evatt*,[241] and *L. Shaddock & Associates Pty Ltd* v. *Parramatta City Council*,[242] all concerned plaintiffs who took positive action as a result of information provided by the defendant, and suffered loss. Reliance was a necessary part of the causal chain; the statements in question were incapable of causing harm unless the plaintiffs acted in reliance on them. In contrast, the negligent approval of building plans or negligent inspection of foundations, by permitting a defective structure to be erected, can be a cause in fact of loss to a subsequent purchaser of the house who has never heard of the local authority, much less relied on it.

In *Anns's* case, Salmon J. stated:

> "It was also contended on behalf of the council that the plaintiffs do not even allege that they relied on the inspection of the foundations by the council. Nor they did, and I dare say they never even knew about it. This, however, is irrelevant . . . In the present case . . . the loss is caused not by any *reliance* placed by the plaintiffs on the council or the building inspector but by the fact that if the inspection had been carefully made, the defects in the foundations would have been rectified before the erection of the building was begun . . . reliance is not even remotely relevant."[243]

The Court of Appeal deciding *Dutton* v. *Bognor Regis Urban District Council*[244] were unanimous in rejecting the defendant's argument that the plaintiff had not established reliance. As Stamp L.J. observed, the requirement that the plaintiff demonstrate reliance outside the *Hedley Byrne* situation produces unacceptable anomalies.[245] One undesirable result would be the exclusion from the ambit of a public body's duty of care of those plaintiffs who are ignorant of its function. This would tend to discriminate against those with little access to information, as a result of poor education or lack of fluency in English, a group whom one might imagine public bodies have a particular responsibility to protect.

One might also ask what would happen if the house had collapsed, injuring a passer-by? It is hard to see how such a plaintiff could demonstrate specific reliance, especially if he happened to be a baby in a pram, or why he should

[240] [1964] A.C. 485 (H.L.).
[241] (1968) 122 C.L.R. 566 (H.C.).
[242] (1981) 150 C.L.R. 225 (H.C.).
[243] *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 768–9. This passage was quoted with approval by Gibbs C.J. in *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 570.
[244] [1972] 1 Q.B. 373, 395 *per* Lord Denning M.R., 399 *per* Sachs L.J., 413 *per* Stamp L.J.
[245] Id. 410–3 for an illustration.

be required to do so. It is possible that Mason J. would regard the passer-by as entitled to succeed by establishing general reliance only. However, it is hard to see how in practice this would differ from simply holding that the fact that the Council possessed powers which were intended to be exercised for the good of the community, and which had been exercised in the past, imposed on it a duty of care.

The position of a purchaser, unable to demonstrate special reliance, who is injured when his house collapses, in unclear. Mason J. doubted that the plaintiffs in *Heyman's* case could succeed on the basis of general reliance because they had alternative means available to them of discovering the condition of the house. This would seem to suggest that the defendant owed the plaintiffs no duty at all in the absence of specific reliance, regardless of the type of injury they suffered. It would appear to follow that if a house collapsed, injuring all the occupants, everyone but the owners could succeed against the Council.

Finally, Mason J.'s reasons for doubting that a duty of care could be founded on general reliance in this case are not entirely convincing. Gibbs C.J. stated that "section 317A is not directed to the questions whether the Council owes a duty of care in exercising its statutory functions and if so to whom and in what circumstances".[246] His Honour concluded: "the main effect of the section appears to be to protect a bona fide purchaser for value who has obtained a certificate from an action which a local authority might otherwise take in respect of events that occurred prior to the issue of the certificate".[247] In the Court of Appeal Hope J.A. expressed the same idea more tersely, saying, "these certificates are intended to protect owners in respect of infringement of the Act and not to protect councils against claims for negligence".[248]

Mason J. assumed, in the absence of evidence, that a competent expert could have discovered the defective foundations in a pre-purchase inspection. However, this may be contrasted with statements by Lord Denning M.R.,[249] Lord Wilberforce, Lord Salmon,[250] and Deane J.[251] that such an inspection would not be capable of examining the foundations.

The judgment of Deane J. was dependent on the characterisation of the case as one involving failure to prevent pure economic loss being caused to the plaintiffs. The common law recognises liability in negligence for pure economic loss only in limited circumstances.[252] The classification as physical or economic of damage caused to the fabric of a house by inadequate

[246] *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 567.
[247] Ibid. Brennan J. and Deane J. agreed with Mason J.'s view of s.317A. Id. 593, 600.
[248] *Sutherland Shire Council* v. *Heyman* [1982] 2 N.S.W.L.R. 618, 628.
[249] *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373, 396.
[250] *Anns* v. *Merton London District Council* [1978] A.C. 728, 759, 763.
[251] *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 600.
[252] The rule that such loss cannot be recovered, discussed in *Spartan Steel and Alloys Ltd* v. *Martin* [1973] Q.B. 27 (C.A.) has been modified by cases including *Caltex Oil Australia Ltd* v. *The Dredge "Willemstadt"* (1976) 136 C.L.R. 529 (H.C.), *Junior Books Ltd* v. *Veitchi Ltd* [1983] 1 A.C. 520 (H.L.) and the negligent mis-statement cases.

foundations is conceptually a difficult question.[253] Such damage was defined as physical by Lord Denning M.R., who stated that to hold otherwise would leave the council liable if the house collapsed and injured a person, but not if the owner discovered and repaired the defect in time, a distinction he described as "impossible".[254] Lord Wilberforce, in *Anns's* case, also classified damage to the fabric of the house as "material physical damage".[255]

In *Heyman's* case, Gibbs C.J. classified the damage as physical.[256] Wilson, Brennan and Mason JJ. expressed reservations about this view, but did not decide the point.[257] Deane J. rejected Lord Wilberforce's classification on the basis that the building never existed other than with its foundations in an inadequate state.[258] The essence of the plaintiff's complaint was that they paid more for the building than its intrinsic worth.

In the view of Deane J., while there is a duty of care to refrain from positive acts which it is reasonably foreseeable may cause physical harm to others, a plaintiff whose claim is based on failure to avert harm, or who claims damages for pure economic loss, must show a relationship of "proximity" with the defendant, not established by the mere reasonable foreseeability of harm.[259] A relationship of proximity in this sense could result from physical proximity between the plaintiff and defendant (the basis of occupier's liability), from the relationship between professional and client, from the directness of the relationship between act and injury, or from an assumption of responsibility by one party towards another (the principle of the negligent misstatement cases).[260] It might also arise as the result of "reliance by one party upon care being taken by the other in the discharge of performance of statutory powers, duties or functions".[261] Deane J. concluded, for similar reasons to those given by Mason J., that the plaintiffs had neither established reliance on the council nor any other factor giving rise to a relationship of proximity.

His Honour evidently regarded the result of the case as satisfactory from a policy point of view. The purposes of the legislation included "protection of health and the prevention of injury to the person or property of those within the area", but not "protecting an owner of premises from mere economic loss". Nor was there any "readily discernable reason in principle, policy or justice why the general body of ratepayers within an area should bear the economic loss sustained by such an owner of land".[262]

The respective merits of "proximity" in the sense used by Deane J. and reasonable foreseeability of harm as criteria for imposing a duty of care, and the extent of liability for pure economic loss, are large questions which

[253] This issue is discussed by J.A. Smillie, "Liability of Builders, Manufacturers and Vendors for Negligence" (1978) 8 *N.Z.U.L. Rev.* 109.
[254] *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373, 396.
[255] *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 759.
[256] *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 572-3.
[257] Id. 583, 590-1, 581.
[258] Id. 598.
[259] Id. 596.
[260] Id. 597.
[261] Ibid.
[262] Id. 600-1.

cannot be addressed here.[263] However, at least as far as actions against statutory authorities are concerned, the characterisation of loss as physical or economic simpliciter seems a less satisfactory determinant of liability than whether the loss incurred was of a type which the legislation in question was intended to prevent. If the *Local Government Act* 1919 was intended to protect the health and safety of owners and occupiers of buildings, damage of a kind which results in a house being rendered unsafe or unhealthy should be recoverable. In Mason J.'s words:

> "To deny the existence of a duty of care solely by reason of the legal characterisation of the respondent's loss as economic – because the structure was flawed before they acquired property in it – is to ignore the significance of other circumstances in which the loss was sustained, circumstances which the appellant could readily foresee. One of the circumstances is that the respondents' loss reflects expenditure which averts personal injury to those who occupy the building."[264]

The effect of *Heyman's* case on the law concerning failure to make effective use of statutory powers is extremely difficult to sum up, since the five justices had four incompatible sets of reasons for their decision. For Deane J., but not for the other members of the court, the distinction between economic and physical loss was decisive. Gibbs C.J. and Wilson J. held that a plaintiff could only succeed by showing that the act or omission complained of, even at the operational level, was outside a bona fide exercise of discretion. Mason and Deane JJ. rejected the ultra vires doctrine, but conferred a blanket immunity on all decisions made on policy grounds. Mason J. accepted that general reliance might found a duty of care, although it did not in *Heyman's* case; when Deane and Brennan JJ. refer to a duty of care founded on reliance, they appear to mean specific reliance only. While neither Gibbs C.J. nor Deane J. equated "proximity" with reasonable foreseeability of harm, Gibbs C.J. held that the council's possession of statutory powers to control building created a relationship of proximity, while Deane J. did not. If the High Court decided to hear the Sutherland Shire Council's appeal in the hope of clarifying this area of the law, they cannot be said to have succeeded.[265]

CONCLUSION

It has been argued above that both the ultra vires doctrine and Mason J.'s reliance-based approach are inconsistent with earlier case law, fail to achieve

[263] For a vigorous attack on the "proximity" limitation see *Lee and Sullivan Ltd* v. *Aliakmon Ltd* [1985] Q.B. 350, 395–6 *per* Robert Goff L.J. However, a majority of the High Court accepted the concept of "proximity" as a limitation on the test of reasonable foreseeability of harm in *San Sebastian Pty Ltd* v. *Minister for Administering the Environmental Planning and Assessment Act 1979* (1987) 68 A.L.R. 161, 169. Brennan J. rejected this approach at 178–9.

[264] *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 581.

[265] *Heyman's* case was applied in *Jeffrey* v. *Weeding* (1986) *Aust. Torts Report* 80-032 (S.C. Tas.) Green C.J. adopted Brennan J.'s judgment, but seems to have used it to limit the extent of the defendant council's duty to inspect, rather than to deny the existence of a duty of care at all.

their stated policy objectives, and produce anomalous and unsatisfactory results in some cases.

On the other hand, it could be argued that the courts should disregard the defendant's status as a public body and return to the stark distinction in the *East Suffolk* case between affirmatively causing harm and failing to avert it.

Alternatively, like Mason J., one may accept that statutory powers:

> "are powers conferred for the purpose of attaining the statutory objects, sometimes generating a public expectation having regard to the purpose for which they are granted that they will be exercised. There is, accordingly, no reason why a public authority should not be subject to a common law duty of care in appropriate circumstances in relation to performing, or failing to perform, its functions ... "[266]

In the view of the author, the general rule should be that when a public body is entrusted with statutory powers, for the purpose of protecting members of the community from harm, it should be subject to a common law duty to take reasonable care to make effective use of those powers in order to achieve the statutory purpose.[267]

Several policy arguments may be advanced in favour of this approach. First, the public body is normally in a far stronger position than the plaintiff to avert the harm, being equipped with statutory powers and public funds for the purpose. For this reason, it seems fairer to require the public body to bear the loss.

This argument may be more compelling in theory than in practice, since the public body will normally pass the cost on to the community or a section of it, either through insurance or directly through rates and taxes. However, the spreading of the loss which results is in itself desirable, especially where the plaintiff has suffered physical injury. There is also a strong argument to be made in favour of loss spreading in a case such as *Heyman*; for most Australians, the family home is the sole significant asset, fundamental to financial security; and furthermore, the damage which occurred cannot be insured against. The argument may be less compelling where the loss occurs in a commercial context or when insurance is available.[268]

That a public body performs a statutory function may retard the development of private alternatives; Bowman and Bailey suggest that if local councils did not supervise the construction of buildings, lending institutions might have instituted a system of inspection.[269] Finally, it may be argued that if public bodies are liable in negligence, they will tend to take more care in the exercise of their statutory powers.[270]

[266] *Council of the Shire of Sutherland* v. *Heyman* (1985) 59 A.L.J.R. 564, 577–8.

[267] It must be admitted that the purpose of statutory provisions is not always self-evident. Compare the purpose attributed to the provisions for the inspection of buildings in *Acrecrest Ltd* v. *W.S. Hattrell and Partners* [1983] 1 All E.R. 17 with that in *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson and Co. Ltd* [1985] 3 A.C. 210.

[268] This argument was suggested by Mr Ronald Sackville.

[269] Bowman and Bailey, [1984] *Pub. L.* 277, 295.

[270] *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373, 398 *per* Lord Denning M.R.

If the view that statutory bodies should be subject to such a duty of care is accepted, it is necessary to ask what, if any, mechanisms are necessary to limit their liability. It is often argued that "policy" decisions should be immune from actions in negligence. This position is justified on several grounds. First, decisions made by elected bodies or their delegates on social, political or economic grounds should not be evaluated by an unelected judiciary. Secondly, the training and skills of the judiciary and the type of evidence available in a civil action make a civil court an inappropriate forum for such judgments. Thirdly, the risk of litigation may discourage initiative by public bodies and promote conservatism.[271]

Regardless of the extent to which one accepts the political perspective of the first reason, it must be acknowledged that courts constantly evaluate policy decisions made by public bodies in their capacity as employers or providers of education, health services or transport. A decision by a local council to buy cheap word processing equipment dumped on the Australian market because it did not conform to U.S. safety standards, in order to use the resulting savings to open a child care centre, would clearly involve social and economic considerations; but who would doubt that the council's motivation would, and should, be irrelevant to an action in negligence by an employee? Futhermore, the court is not being asked to determine if the public body made the best decision, but only if it made a negligent decision.

A similar point can be made in relation to the second reason. Most of the cases discussed in this article have involved questions fairly similar to those routinely raised in cases against private defendants: was an inspection careless? Was a system of record-keeping adequate? Was the use of the seatbelt reel justified? Was this child adequately supervised?

The third reason did not impress Lord Reid; in the *Dorset Yacht Co.* case, he stated that "my experience leads me to believe that Her Majesty's servants are made of sterner stuff".[272] More prosaically, one suspects, from the volume of American case law on the "discretionary function" immunity, that the immunity has not prevented litigation; it has merely shifted its subject from the existence of negligence to the applicability of the immunity.

This is not to deny that there are some decisions made by public bodies which should not give rise to an action in negligence regardless of their outcome. One example, given by Peter Hogg, is the decision to establish a public hospital in one suburb rather than another.[273] While such a decision will invariably prejudice the residents of the suburb not chosen, it should not be adjudicated in a negligence action. Hogg states that to do so would be to "pass judgment on the merits of a decision which had been made by an elected authority".[274] It has been argued above that this is not in itself a reason for excluding a duty of care. Rather, the decision in question involves the balancing of a variety of interests at such a level of generality and for

[271] Aronson and Whitmore, 35–6, 42.
[272] *Home Office* v. *Dorset Yacht Co. Ltd* [1970] A.C. 1004, 1033.
[273] Peter W. Hogg, *Liability of the Crown (Sydney, Law Book Co., 1971)* 85–6.
[274] Id. 86.

reasons so plainly political rather than technical that the decision-maker should not be said to owe a duty of care to any individual person.

This is not to say that any decision involving allocation of resources should be immune, but only those made at a high level of generality, where the interests of different groups are balanced in a way that is very difficult to characterise as negligent, although the decision may be regarded as wrong or even foolish. To illustrate, a disabled child injured while attending a normal school should not be able to attack the policy of integrated education for disabled children, but should be able to assert that the school or Education Department owed him a duty of care to provide adequate supervision or facilities for his protection. The issue of adequacy of resources is better dealt with in relation to standard of care than by holding that no duty of care exists.

In the opinion of the writer, where a public body has directly caused harm to the plaintiff, or where there is a special relationship of a type which would justify the imposition of an affirmative duty on a private person, the public body, like a private defendant, should not be able to argue that it could not afford to take reasonable precautions to prevent the harm, providing that the cost of doing so was not disproportionate to the risk of injury. However, as Bowman and Bailey suggest, where there is no connection between the public body and the plaintiff, other than the existence of the statutory power, there is a strong case for holding that whether the public body acted reasonably should be determined in relation to the resources available to it.[275]

Further protection for public bodies is provided by the requirement that the plaintiff demonstrate that the defendant's negligence caused him harm. Where a decision has been deliberately made, a plaintiff will have considerable difficulty in establishing this, since he will have to show not only that the decision was arrived at negligently, but that without negligence, the defendant would have decided otherwise.

These safeguards have the potential to provide a more satisfactory means of balancing the interests of the individual who has suffered injury against the need to preserve a legitimate sphere of freedom of action for public bodies than the ultra vires doctrine or the alternatives to it set out in *Heyman's* case.

[275] Compare *Selfe* v. *Ilford and District Hospital Management Committee* (1970) 114 S.J. 935, where the hospital authority was found liable for inadequately supervising a suicidal patient despite evidence of staffing difficulties.