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PUBLIC AUTHORITY NEGLIGENCE REVISITED

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I. Introduction

The question of the extent to which public authorities should be held liable in negligence continues to generate both academic and judicial controversy in England and in Commonwealth jurisdictions.[1] This is not surprising, given the combination of a number of factors. First, the potential of the tort of negligence to provide a remedy for a loss that has been suffered seems increasingly to be recognised by the lawyers to whom the victims turn for advice. Secondly, the substantive scope of the tort of negligence has itself been developed, with the recognition, for example, that it may apply in the case of purely economic loss[2] and apply to a wider range of situations in the case of psychiatric damage.[3] Thirdly, public authorities as defendants have the advantage of always being there[4] and of having access, at least in

* University of Nottingham. We wish to thank Horton Rogers for his comments on a draft of this article. An early version was presented at the SPTL Public Law Section Conference at the University of Birmingham in 1997, and we are also grateful for comments made then. Sections II and IV are primarily the work of the first named author, and Sections III and V of the second-named author, but each accepts responsibility for the whole article.

[1] The literature on the topic is voluminous. See the references cited by Lord Nicholls of Birkenhead in *Stovin* v. *Wise* [1996] A.C. 923, 934–935. Subsequent books and articles include S. Todd, *The Law of Torts in New Zealand* (2nd ed., Wellington 1997), pp 342–362, W.V.H. Rogers, *Winfield and Jolowicz on the Law of Tort* (15th ed., London 1998, pp. 143–153), D. Brodie, "Public authorities—negligence actions—control devices" (1998) 18 L.S.1; A. Bartlett Q.C. and J. Waite, "Searching for Duties of Care: the Fire Brigade Cases" (1998) 14 Const. L.J. 20. It is beyond the scope of this paper to consider the increasingly important dimension provided by liability for damages for non-implementation of directives under EU Law.

[2] *E.g.* under the principle of *Hedley Byrne & Co. Ltd.* v. *Heller and Partners Ltd.* [1964] A.C. 465, as explained by the House of Lords in *Henderson* v. *Merrett Syndicates* [1995] 2 A.C. 145. See also *White* v. *Jones* [1995] 2 A.C. 207. This point remains important notwithstanding the judicial retreat from the even broader approach to liability for pure economic loss enshrined in the decision in *Junior Books Ltd.* v. *Veitchi Co. Ltd.* [1983] 1 A.C. 520: see especially *Murphy* v. *Brentwood District Council* [1991] 1 A.C. 398.

[3] The existence of a cause of action in respect of negligently inflicted psychiatric damage was recognised by the House of Lords in *Bourhill* v. *Young* [1943] A.C. 92. The scope of liability was extended by the House in *McLoughlin* v. *O'Brien* [1983] 1 A.C. 410 (distressing sight of P's husband and children at hospital after accident regarded as within the "immediate aftermath" of the accident) and *Page* v. *Smith* [1996] A.C. 155 (special rules limiting liability for psychiatric damage not applicable where P is the "primary victim"). These cases provide the background to claims based on alleged negligence in the performance of statutory functions causing psychiatric damage, in situations where there is no physical accident involving personal injury or property damage (as in *X (Minors)* v. *Bedfordshire County Council* below).

[4] The position of the Crown as an effective defendant was regularised by the Crown Proceedings Act 1947. No claims by or against the Crown are to abate or be affected by the demise of the

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the eyes of potential plaintiffs, to significant financial resources.[5] Insolvency is not an option for defendant authorities. Fourthly, under the current rules on joint and several liability, a plaintiff is entitled to recover in full from any defendant liable for the loss, irrespective of the latter's share in responsibility. The defendant's right to recover contribution from another, possibly more culpable, defendant may turn out to be worthless in practice.[6] Fifthly, the tort of negligence is itself subject to much uncertainty. The principles of negligence have always been set at a high level of generality, leaving much room for argument as to their application. As the scope of the tort has been extended beyond the core situation of a negligent *act* causing *personal injury* or *property damage*, so the principles have become less clear, and, indeed more likely to shift according to the prevailing fashion of judicial opinion. Finally, it is interesting to note that the European Court of Human Rights has recently had occasion to consider the operation in the UK of negligence claims against public authority defendants, and has expressed the view that too ready an acceptance of blanket immunity for the protection of such defendants might, in appropriate circumstances, constitute a denial of the claimant's rights to a fair trial.[7]

A recurrent issue in the debate over public authority liability in negligence has been the extent to which the ordinary principles of negligence are sufficient to enable the courts to balance the legitimate interests of plaintiffs against those of defendant public authorities. Some take the view that private law principles alone are insufficient and that the law needs to build in additional protection for public authorities to take proper account of their constitutional position, particularly as regards allegations of negligence in the exercise or non-exercise of statutory functions. In two articles in the 1980s the present authors argued that private law principles were fully sufficient to protect the legitimate interests of defendant authorities, once it was recognised that the imposition of a duty of care in respect of a negligent failure to confer a benefit on the

Crown (1947 Act, s. 32). Local authorities, as the creatures of statute, may be (and with increasing frequency have been) abolished. However, provision is almost invariably made for the transfer of rights and liabilities to a successor authority or residuary body. In *Anns* v. *Merton London Borough Council* [1978] A.C. 728 the council was held liable as successor to Mitcham Borough Council.

[5] Public authorities are commonly (but not invariably) large organisations with large budgets. They may carry liability insurance or be so large as to be self-insurers. They may be able to raise extra money by additional taxation, although the ability of local authorities to do so has been curtailed by legislation. See Chapter V of the Local Government Finance Act 1992, which enables the Secretary of State to designate an authority for the "capping" of its Council tax or precept.

[6] This point is developed by Jane Stapleton in "Duty of care: peripheral parties and alternative opportunities for deterrence" (1995) 111 L.Q.R. 301.

[7] *Osman* v. *United Kingdom*, Judgment of 28 October, 1998, (1998) 1 L.G.L.R. 431.

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plaintiff was justified only in exceptional circumstances, and that the ordinary principles covering the duty of care and breach of duty were sufficiently flexible to ensure that findings of liability were not reached too easily regardless of context.[8] We were accordingly critical of the decision in *Anns* v. *Merton London Borough Council*,[9] where the House of Lords, in holding that a local authority owed a duty of care to the purchaser of a house in respect of the exercise or non-exercise of its powers to control building work, both failed to perceive that the situation was essentially one of a failure to confer a benefit rather than infliction of a loss and heralded the development of a new distinction between policy and operational matters, it being much more difficult to contend for a duty of care in respect of the former than the latter. Since then there has been a plethora of case law concerning both the general approach that should be taken by the courts in determining whether a duty of care should be owed and the particular problems of public authority liability. *Anns* v. *Merton London Borough Council*[10] has itself been overruled by the House of Lords in *Murphy* v. *Brentwood District Council*.[11] However, it should be noted that the ground for overruling focused on yet another defect in the *Anns* reasoning, which was the failure to see that the nature of the loss suffered by the purchaser of a house that turned out to be defective was essentially purely economic. The question of the extent of a public authority's liability for a failure to confer a benefit, and of the existence of any special "immunity" in respect of policy decisions were left for subsequent consideration.

Although the policy-operational dichotomy appeared to have been relatively well-established by the *Anns* case, from the late 1980s it seemed to play a rather diminished role. A succession of important cases was decided without particular reference to it.[12] It was occasionally applied in a rather grudging fashion,[13] but was elsewhere held to be artificial and unworkable[14] or indeed to be no longer relevant.[15] A key development as regards the latter

[8] M.J. Bowman and S.H. Bailey, "Negligence in the Realms of Public Law—A Positive Obligation to Rescue" [1984] P.L. 277; S.H. Bailey and M.J. Bowman, "The Policy/Operational Dichotomy—A Cuckoo in the Nest" [1986] C.L.J. 430.

[9] [1978] A.C. 728.

[10] *Ibid.*

[11] [1991] 1 A.C. 398.

[12] *Calveley* v. *Chief Constable of the Merseyside Police* [1989] A.C. 1228; *Jones* v. *Department of Employment* [1989] Q.B. 1; *Yuen Kun Yeu* v. *Attorney General of Hong Kong* [1988] A.C. 175; *Hill* v. *Chief Constable of West Yorkshire* [1989] A.C. 53; *Curran* v. *Northern Ireland Co-ownership Housing Association Ltd* [1987] A.C. 718.

[13] *Lavis* v. *Kent County Council* (1992) 90 L.G.R. 416.

[14] *Osman* v. *Ferguson* [1993] 4 All E.R. 344, *per* McCowan L.J. at p. 353: "I consider such a dividing line to be utterly artificial and impossible to draw in the present case."

[15] *Lonrho* v. *Tebbit* [1992] 4 All E.R. 280, *per* Dillon L.J. at p. 287; referring to the opinion of Lord Keith in *Rowling* v. *Takaro Properties* [1988] A.C. 473, 501.

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conclusion was the decision of the Privy Council in *Rowling* v. *Takaro Properties Ltd*[16] where Lord Keith of Kinkel stated[17] that their Lordships

> incline to the opinion ... that [the policy-operational] distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution of risks: see especially the discussion in *Craig on Administrative Law* (1983), pp. 534–538. If this is right, classification of the relevant decision as a policy or planning decision in this sense may exclude liability; but a conclusion that it does not fall within that category does not, in their Lordships' opinion, mean that a duty of care will necessarily exist.

Further consideration has now been given to these issues by the House of Lords in *X (Minors)* v. *Bedfordshire County Council*[18] and *Stovin* v. *Wise*.[19] However, as we shall see, matters can hardly be said to have been concluded by these decisions. Indeed, in certain respects they conflict with each other. This is particularly remarkable given the close proximity in time of the two decisions to each other.[20] The House of Lords has recently returned to these matters in *Barrett* v. *Enfield London Borough Council*.[21]

In this article we analyse these cases in turn. In the light of these and other recent cases on the policy considerations relevant to public authority negligence we return to our proposition that orthodox private law principles are sufficient for justice to be done in this area to see whether it still holds good.

II. *X (minors)* v. *Bedfordshire County Council* and Other Cases[22]

A. Overview

The House of Lords heard together five appeals which raised related issues as to public authority liability in tort. All concerned the question whether causes of action should be struck out. Two (*X*

[16] [1988] A.C. 473.
[17] At p. 501.
[18] [1995] 2 A.C. 633.
[19] [1996] A.C. 923.
[20] Only Lord Jauncey of Tullichettle was party to both decisions.
[21] [1999] 3 W.L.R. 79.
[22] [1995] 2 A.C. 633, H.L. See P. Cane, (1996) 112 L.Q.R. 13.

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(Minors) v. *Bedfordshire County Council* and *M (a minor)* v. *Newham London Borough Council)* concerned alleged negligence in the exercise or non-exercise of powers under the Child Care Act 1980 and subsequently the Children Act 1989 to protect children from abuse. In the *Bedfordshire* case, the child plaintiffs claimed damages for personal injuries, alleging that the council had negligently failed to act on reports that they were being abused. In the *Newham* case, it was alleged that a consultant psychiatrist employed by the area health authority and a social worker employed by the council had negligently identified the cohabitee of M's mother as M's abuser, leading to M's placement in foster care. Both M and her mother claimed damages for psychiatric injury. The other three cases (*E (a minor)* v. *Dorset County Council*, *Christmas* v. *Hampshire County Council* and *Keating* v. *Bromley London Borough Council*) arose out of alleged failures to diagnose special learning disorders in children or to deal appropriately with the children's special educational needs once they had been identified. In the *Dorset* and *Bromley* cases it was also alleged that the parents had been wrongly advised by psychologists and other staff employed by the council. The House of Lords struck out all the causes of action in negligence save those based on allegations of the negligent giving of advice by officers and employees.[23] Causes of action for breach of statutory duty were also struck out. The leading speech was given by Lord Browne-Wilkinson, with whom all the other members of the House of Lords[24] agreed, save Lord Nolan on one point.[25]

Lord Browne-Wilkinson partakes of the school of thought that holds that special principles must be applied to public authority defendants in negligence cases lest the authorities be held liable too easily or inappropriately.[26] In his speech, he set out in detail the approach that should be adopted by the courts in dealing with negligence actions against public authorities. In doing so he cleared away some of the misconceptions that had in the past hindered a proper analysis of the issues. Unfortunately, taken as a whole, his preferred approach would introduce new and unnecessary complexities into the law.

B. The General Approach

At the start of his speech, Lord Browne-Wilkinson helpfully distinguished four possible private law causes of action in respect of the performance or non-performance of statutory functions:

[23] *I.e.* cases falling within the *Hedley Byrne* principle.
[24] Lords Jauncey of Tullichettle, Lane, Ackner and Nolan.
[25] [1995] 2 A.C. 633, 771–772.
[26] See *e.g.* his judgment in *Lonrho plc* v. *Tebbitt* [1991] 4 All E.R. 973.

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> (A) actions for breach of statutory duty simpliciter (i.e. irrespective of carelessness); (B) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; (C) actions based on a common law duty of care arising either from the imposition of a statutory duty or from the performance of it; and (D) misfeasance in public office, i.e. the failure to exercise, or the exercise of statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful.[27]

Category (D) did not arise here.[28] As to category (A), his Lordship concluded that neither the duties under the child care legislation nor those in respect of the identification of and support for special educational needs gave rise to such an action. As to category (B), his Lordship concluded that in truth it did not exist.[29] The reasoning here is, with respect, wholly convincing. The well known dictum of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir,*[30] construed properly in its context, was no authority to the contrary, merely establishing that "the careless exercise of a statutory power or duty cannot provide a defence to a claim based on a free-standing common law cause of action, whether in trespass, nuisance or breach of a common law duty of care."[31]

As to category (C), a common law duty might be owed by the authority itself or by its officer or employee (the authority being held liable vicariously).[32] However, where the alleged negligence related to an exercise of a statutory discretion, it was not sufficient simply to apply the orthodox private law principles governing duty and breach.

C. Special Principles in Respect of Statutory Discretion

According to Lord Browne-Wilkinson, it was necessary in these cases to ask a series of questions. The first is whether the act or omission of which complaint is made relates to the manner in which the authority (a) exercises a statutory discretion or (b)

[27] [1995] 2 A.C. 633, 730–731. The reference to "statutory duty" in (B) and (C) presumably means "statutory function" embracing both powers and duties.

[28] A full analysis of the ingredients of the misfeasance tort is given by the Court of Appeal in *Three Rivers District Council* v. *Bank of England* (No. 4) (1998) 1 L.G.L.R. 645.

[29] [1995] 2 A.C. 633, 732.

[30] (1878) 3 App. Cas. 430, 455–456.

[31] [1995] 2 A.C. 633, 733. It was not clear whether the *Geddis* cause of action lay in nuisance (including *Rylands* v. *Fletcher*) or negligence.

[32] In the case of a direct duty of care owed by the authority, the act of an officer or employee might constitute a breach of that duty. A duty owed by the officer or employee could be a duty owed as a professional, irrespective of whether a direct duty was owed by the authority. (See [1995] 2 A.C. 633, 739–740.) Alternatively, the officer or employee might owe the same duty as the authority, as where powers were delegated (*e.g.* under the Local Government Act 1972, s. 101).

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implements a statutory duty in practice. An example of (a) would be a decision whether to close a school; an example of (b) would be "the actual running of a school pursuant to the statutory duties", illustrated by the common law duty to take reasonable care for the safety of pupils.[33] Secondly, if the case does concern the exercise of a statutory discretion, it is then necessary to ask if the decision complained of is so unreasonable that it falls outside the ambit of that discretion. If it is not, then no action will lie as the authority "cannot be liable in damages for doing that which Parliament has authorised."[34] Thirdly, in considering whether a decision is unreasonable in this sense, a further distinction arises between (a) policy matters and (b) non-policy matters which the authority has taken into account. This is because "it is established that the courts cannot enter upon the assessment of such 'policy' matters" and therefore "cannot reach the conclusion that the decision was outside the ambit of the statutory discretion".[35] Examples of "policy matters" include "social policy, the allocation of finite financial resources between the different calls made upon them or (as in the *Dorset Yacht* case) the balance between pursuing desirable social aims as against the risk to the public inherent in so doing."[36]

Accordingly, a duty of care may only arise by the application of ordinary principles

(1) in respect of negligence in the implementation of a statutory duty with no element of statutory discretion; or
(2) in respect of exercises of statutory discretion not involving policy matters that can be held to fall outside the "ambit of the discretion".

Once the court comes to apply these ordinary principles, it will, so far as the duty of care is concerned, have to consider the familiar (if largely unhelpful) questions whether damage to the plaintiff was "reasonably foreseeable", whether the relationship between plaintiff and defendant was "sufficiently proximate", and whether imposition of a duty would be "just and reasonable."[37] However, the question of the existence and nature of any duty of care must be profoundly influenced by the statutory framework; a common law duty of care could not be imposed that would be

[33] [1995] 2 A.C. 633, 735.
[34] [1995] 2 A.C. 633, 736.
[35] *Ibid.*, at pp. 737, 738. This view was based on a passage in Lord Keith's opinion in *Rowling* v. *Takaro Properties Ltd.* [1988] A.C. 473, 501, cited above, note 17.
[36] *Ibid.*, at p. 737.
[37] [1995] 2 A.C. 633, 739, applying *Caparo Industries plc* v. *Dickman* [1990] 2 A.C. 605, 617–618.

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"inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties."[38]

Pausing there, the approach adopted by Lord Browne-Wilkinson appears to necessitate the drawing of two distinctions, neither of which is straightforward. First there is the distinction between cases that involve the exercise of statutory discretion and those that do not. The examples given by Lord Browne-Wilkinson[39] illustrate the difficulty that this is ultimately a distinction of degree rather than kind. While the first example (a decision to close a school) can be seen to involve the exercise of an expressly conferred, specific, statutory power, the latter (taking reasonable care for the safety of pupils) is traceable to the exercise of the implied or incidental powers of management of school premises. A particular level of safety provision may, indeed, be traced to a decision involving exercise of discretion as to the allocation of resources between one project and another. The same criticism may also be made of the attempt to distinguish "policy" and other matters as factors taken into account in exercising the discretion. The examples given of "policy" matters[40] are either vague and self-referential ("social policy") or simply involve an exercise in the balancing of factors indistinguishable from the balancing that can take place within the standard formula for determining breach of duty.[41] We have elaborated elsewhere the practical difficulties of distinguishing between "policy" and "operational" matters.[42] Lord Browne-Wilkinson's approach would give us two difficult distinctions in place of one.

The adoption of such a complex approach might be justified either if required by clear and binding authority or if it contributed to the speedy resolution of litigation by facilitating the striking-out of hopeless cases. Neither of these can, however, be demonstrated. There are statements in the speeches of Lords Reid, Morris and Diplock in *Home Office* v. *Dorset Yacht*[43] that might be construed as offering some support. However, as Lord Hutton points out in *Barrett* v. *London Borough of Enfield*,[44] these are *obiter* as on the facts of the case the essence of the negligence was a disobedience to orders by the borstal officers rather than an exercise of discretion.

[38] [1995] 2 A.C. 633, 739.
[39] See note 33 above.
[40] See note 36 above.
[41] Under which the magnitude of the risk is weighed against the object to be achieved (? social policy) and the cost and practicability of precautions (? finite financial resources) : see W.V.H. Rogers, *Winfield and Jolowicz on Tort* (15th ed., 1998, pp. 179–183).
[42] [1986] C.L.J. 430. See further below, Section III B1.
[43] [1970] A.C. 1004, 1031. Here the House of Lords held that the Home Office owed a duty of care in respect of the escape of Borstal trainess from a work camp on Brownsea Island, which led to damage to the plaintiffs' yacht.
[44] [1999] 3 W.L.R. 79, 103–104.

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Furthermore, Lord Reid's real point is that there will be no *breach* of duty by an authority in exercising a statutory discretion unless the decision was reached so carelessly that there was no real exercise of discretion.[45] Lord Wilberforce's remarks in *Anns*[46] describing the policy-operational distinction as "convenient" and "illuminating" although "probably a distinction of degree" were more cautious than those of Lord Browne-Wilkinson. The remarks in *Rowling* v. *Takaro Properties*[47] were similarly tentative.

As to the possible facilitation of striking-out, it is noteworthy that none of the cases was in fact struck out by reference to these distinctions.

D. Application of the Special Principles

When it came to applying the special principles to the circumstances of the child abuse cases, Lord Browne-Wilkinson found that none enabled the claims to be struck out. In *X* v. *Bedfordshire*, the plaintiff alleged that the council owed "a duty to children in respect of whom they receive reports of neglect or ill-treatment to take reasonable care to protect such children."[48] Lord Browne-Wilkinson considered the special principles in turn. First, would determination by the courts of the question whether there had been a breach of that duty involve unjusticiable policy questions? The answer was that it might as regards allegations, for example, that the county council failed to provide a level of service appropriate to the plaintiffs' needs. On the other hand, allegations of a failure to take reasonable practicable steps, for example to remove the children, to allocate a suitable social worker or to make proper investigations would not require the court to consider non-justiciable policy matters.[49]

This is difficult to accept. What if the decision not to remove a child was based on a departmental view (? policy) that it was normally in the best interests of children to keep the family together? What if a "suitable" social worker was not available, or was unable to devote sufficient time because of budget cuts? Or if

[45] [1970] A.C. 1004, 1031; *cf.* Lord Morris at p. 1037. Indeed, in *X* v. *Bedfordshire* itself Lord Browne-Wilkinson stated at one point that if a decision in the exercise of a discretion was not outside the ambit of the discretion, the authority "cannot itself be *in breach of any duty of care* [our emphasis] owed to the plaintiff": [1995] A.C. 633, 737.

[46] [1978] A.C. 728, 754.

[47] [1988] A.C. 473, 501, *per* Lord Keith (see note 17 above). Their Lordships subsequently noted that the decision of the minister under attack here was "capable of being described as having been of a policy rather than an operational character"; however, the allegation of negligence here was "not ... of itself of such a character as to render the case unsuitable for judicial decision": *ibid.*

[48] [1995] 2 A.C. 633, 748. The *Newham* case was based solely on a claim that the defendants were vicariously liable for the negligence of their employees.

[49] *Ibid.*, at pp. 748–749.

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"proper investigations" were constrained by departmental priorities that laid greater stress on other classes of work? In any event, the conclusion here was that as some allegations would be justiciable the claims should not be struck out on that ground.

The second question was whether the allegations of breach of duty "in the operational field" all related to decisions within the ambit of the local authority's statutory discretion. The conclusion here was that the case should not be struck out because it was possible that the plaintiff might be able to demonstrate at trial that the decisions were so unreasonable that no reasonable authority could have reached them.[50] Similar reasoning was used in refusing to strike out by reference to these principles claims in the education cases that the defendant councils owed a direct duty of care.[51] It is not surprising that these unconvincing distinctions did not provide a sufficient basis for striking out.[52] The claims based on direct duties of care were, however, ultimately struck out by reference to the ordinary principles of the duty of care in negligence, and it is to these that we now turn.

E. Application of Ordinary Duty of Care Principles

The local authority in *X* v. *Bedfordshire* accepted both that it could foresee damage to the plaintiff if it was negligent in carrying out its statutory duties and that the relationship between it and the plaintiff was sufficiently proximate. The claims were, however, struck out on the ground that it was not "just and reasonable" to impose a duty of care. His Lordship agreed with Sir Thomas Bingham M.R. in the Court of Appeal[53] that the "public policy which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter-considerations are required to override that policy."[54] However, unlike Sir Thomas, he was of the view that there were sufficient such considerations. The reasons given were these.

First, a "common law duty of care would cut across the whole statutory system set up for the protection of children at risk."[55] The

[50] *Ibid.*, at p. 748. His Lordship regarded the essence of the case here as being a complaint of the negligent exercise of a statutory discretion, and so presumably allegations about the "failure to take reasonable practical steps" concerned discretionary but non policy-based decisions.

[51] *Ibid.*, at pp. 760–761.

[52] Cf. *Holmes* v. *Devon County Council* (unreported, 24 April, 1998), where P's claim against the council arising out of abuse of him, while in care, by another resident at a home run by the council was struck out by the County Court judge on the basis that the administration of the home was a "discretionary matter". However, the claim was reinstated by the Court of Appeal on the ground that, after amendment, it was now reasonably arguable that the case fell, if only just, on the operational side. This further illustrates the futility of this exercise.

[53] [1995] 2 A.C. 633, 663.

[54] *Ibid.*, at p. 749.

[55] *Ibid.*

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system was inter-disciplinary, involving the police, educational bodies, doctors and others as well as social workers. To impose liability on one body alone would be unfair. To impose it upon all "would lead to almost impossible problems of disentangling as between the respective bodies the liability, both primary and by way of contribution, of each for reaching a decision found to be negligent."[56]

This is, with respect, unconvincing. If all those involved at a case conference were agreed on the decision reached, all would in principle share equally in liability. If they were not, and the constituent bodies wished to spend money squabbling over their respective shares in responsibility, so be it. It is difficult to see in principle why a plaintiff should suffer because the actions of a number of people were to combine or coincide so as to inflict loss on him in such a way that their respective shares subsequently became difficult to disentangle. Indeed, the rules on joint and several liability are specifically designed to prevent this being the plaintiff's problem.

The second reason was that "the task of the local authority and its dealing with children at risk is extraordinarily delicate."[57] There is indeed a notoriously difficult line between taking action too soon and not taking it soon enough. However, whether it justifies a holding that there is no duty of care at all is more debateable. Certainly, the more difficult a decision is the less likely it will be that a plaintiff will be able to establish breach. The task of balancing the risk to the public against the rehabilitation of offenders might also be thought to be delicate and yet the House of Lords in the *Dorset Yacht* case suggests that a duty would be owed.[58]

Thirdly, there was the speculation that local authorities might adopt a more cautious and defensive approach to their duties.[59] Thus if there was to be liability for a negligent decision to remove a child, there would be a "substantial temptation" to postpone a decision until further inquiries had been made. This would leave the child at risk of further abuse and take up time in further investigations. This argument is also unconvincing. A decision to remove a child that has to be taken swiftly, albeit on incomplete evidence, on the grounds that there is perceived to be a very serious immediate risk to the child, is most unlikely to be held to be in breach of duty. Defendants who have to act swiftly in an

[56] *Ibid.*, at p. 750.
[57] *Ibid.*
[58] Cf. *Marti* v. *Smith* (unreported, 22 May, 1981, Q.B.D.) where it was argued (unsuccessfully) that it was negligent to place a particular individual in an "open" institution.
[59] [1995] 2 A.C. 633, 750.

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emergency tend to be given some leeway under ordinary principles. Indeed, this flexibility of approach may extend to protect cautious decisions as well as interventionist ones. If decisions were to be delayed to allow for further investigation, then this could be justified by the consideration that there would be fewer children harmed by premature (and, as it turned out, unnecessary) removal.

The fourth argument was that the relationship between social worker and parent was frequently one of conflict, and that this was "fertile ground in which to breed ill-feeling and litigation, often hopeless",[60] the cost of which in terms of money and human resources would come from finite social service budgets. There are a number of difficulties here. It is presumably no argument in itself that the area is one that breeds ill-feeling. Litigation is presumably designed to provide a mechanism whereby a dispute that generates such feelings can be settled without violence. It has never been confined to the settlement of disputed points between friends. The point that many hopeless cases might be initiated cuts both ways. It may conceal the fact that there would be only a few good claims, in which case the financial consequences in terms of awards of damages ought not to be too severe. Other mechanisms are available for controlling hopeless cases.[61] Given that a claim against a local authority in this context would in any event only succeed where (a) the authority's action or inaction led to personal injury or psychiatric damage[62] (which is equivalent to personal injury) *and* (b) that conduct was very clearly unreasonable, it becomes difficult to see why a duty of care should not be recognised.

The next argument was that there were alternative remedies in the form of the statutory complaints procedures or an investigation by a local government ombudsman. However, as Lord Browne-Wilkinson himself pointed out, the former would not lead to an award of compensation (the latter might do so, but only on an ex gratia basis). These remedies might lead to the substitution of a good decision for a bad one, thus avoiding the further prolongation of the period during which harm would be suffered, but they provide nothing for the harm actually incurred. Accordingly the relevance of their availability is limited.

Finally, the absence of the recognition of a duty in any analogous case was a pointer against recognition of a duty here, in

[60] *Ibid.*

[61] These might include the refusal of legal aid (if available) and the refusal of support on a contingent fee basis and procedures for obtaining summary judgment.

[62] Recognition of a claim based solely on psychiatric damage would depend on the courts deciding that such damage was actionable in the absence of a specific shocking event: this point was mentioned in the context of the education cases but not reached for decision: *ibid.*, at pp. 766–767, 771.

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accordance with the current preference for developing the law of negligence incrementally.[63] Indeed the "nearest analogies" were cases where it had been sought to impose a duty of care on the police in respect of the protection of vulnerable members of society from wrongs done by others[64] or in respect of the statutory regulation of financial dealings seeking to protect investors from dishonesty.[65] In neither situation had a duty been recognised. Accordingly, "... the courts should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoing of others."[66]

However, the analogies here are imperfect. The proximity between the plaintiff and the local authority in the present case was much closer than that between Miss Hill (simply a member of the female general public at risk from the Yorkshire Ripper) and the police. Furthermore, the authority had much greater powers of detailed control over the situation than the defendant Commissioner in *Yuen Kun-yeu*. Ultimately, the preference for incrementalism reflects a desire to have cases decided by reference to a very specific analysis of the context, including the relevant policy arguments, rather than by reference to broad general principles (particularly where such principles would lead to the imposition of liability).[67] Provided that full attention is given to the relevant matters, the absence of analogies should only be regarded as a weak pointer against the imposition of liability.

Overall, then, the policy arguments given against recognition of a duty of care seem, with respect, to be unconvincing.[68] This view is reinforced by the thought that most, if not all, of the arguments advanced could be used to deny a duty of care in respect of straightforward medical negligence.[69] Is that step (by analogy with *X* v. *Bedfordshire*) now to be taken?

There is one line of argument against a duty of care that could have been but was not developed. That is that the conduct complained of in *X* v. *Bedfordshire* amounted to an *omission* to protect the plaintiff from harm caused by a third party. As shall be considered further below, there are good reasons why the law of

[63] *Caparo Industries plc* v. *Dickman* [1990] 2 A.C. 605, 618, *per* Lord Bridge.
[64] *Hill* v. *Chief Constable of West Yorkshire* [1989] A.C. 53.
[65] *Yuen Kun-yeu* v. *Att.-Gen.of Hong Kong* [1988] A.C. 175.
[66] [1995] 2 A.C. 633, 751.
[67] Cf. *Osman* v. *United Kingdom*, note 206 below.
[68] Similar arguments were used to deny a duty of care in the education cases as regards the performance of duties under the legislation: [1995] 2 A.C. 633, 761–762. However, it was arguable that a direct duty of care was owed in respect of the provision, by an authority, of a psychology service and the advice given by it (pp. 762–763), see further, note 205 below.
[69] See Stuart-Smith L.J. in *Capital & Counties plc* v. *Hampshire County Council* [1997] Q.B. 1004, 1044.

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negligence does not normally impose a duty of care in respect of a failure to confer a benefit on the plaintiff as distinct from the infliction of loss. At the same time, such duties are exceptionally imposed and the *Bedfordshire* case might be held to fall within the established exceptions.[70] A further point is that in the *Bedfordshire* situation, where the defendant's choice is between an act (removing the child) or an omission (not removing the child), *each* of which carries the risk of harm to the plaintiff, to impose liability for the act but not the omission (in accordance with normal principles) would distort the decision-making of the defendant by placing a premium on inaction. Accordingly, in the present context liability should be imposed in respect of both or neither. The House of Lords in *Bedfordshire* chose the latter. The preferable approach is that liability should be recognised as possible in respect of both.

F. Vicarious Liability

By contrast with the position as regards direct duties, the House of Lords was prepared in principle to recognise duties of care owed by an authority's officers or employees as professionals. Thus in the *Newham* case it was argued that the social worker (employed by the local authority) and the psychiatrist (employed by the health authority), who interviewed the child suspected to be at risk and made other inquiries, owed to both the child and the mother duties to exercise reasonable professional skills. It was accepted that the same argument could be made in *X* v. *Bedfordshire* (even though not expressly pleaded). Lord Browne-Wilkinson conceded that normally such duties would be owed. However, this was not the case here as the social workers and the psychiatrists were retained by the local authority to advise the local authority, not the plaintiff. Even though the retainer required the social worker and psychiatrist to interview the child, that could not alter the extent of the duty owed by them under the retainer.[71]

The position was similar to that of the doctor instructed by an insurance company to examine an applicant for life insurance; such a doctor does not come under a "general duty of medical care" to the applicant, but only a duty not to damage him in the course of the examination.[72] It was to be distinguished from that of the building society surveyor, who does owe a duty of care to the

[70] See further, note 187 below.
[71] [1995] 2 A.C. 633, 752.
[72] The Court of Appeal has subsequently held that a doctor engaged by an employer to assess medical questionnaires completed by job applicants owes no duty to the applicants: *Kapfunde* v. *Abbey National plc* [1999] I.C.R.1, disapproving on this point the decision of Robert M. Owen Q.C. in *Baker* v. *Kaye* [1997] I.R.L.R. 219.

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purchaser[73] on the ground that he or she knows (or should know) that the purchaser would act in reliance on the report. Here, neither child nor parent would act in reliance on the report by the social worker and psychiatrist. The position was also to be distinguished from that of the managing agent who owes a duty of care to an indirect Name notwithstanding that he is acting under the terms of a contract with a members' agent.[74] The explanation here was that the duty of care fell within the terms of the retainer contained in the contract; the Names were not seeking to impose on the managing agents any obligation beyond those terms.[75] In this situation, the social worker and psychiatrist were retained to advise the local authority "but not to advise or treat the plaintiffs."[76]

It is submitted that the distinctions drawn are at best fine and ultimately unsustainable. First, the decision in *Henderson* v. *Merrett Syndicates* suggests that a plaintiff may be regarded as "relying" on a defendant notwithstanding that he or she performs no act in response to advice from or other acts of the defendant.[77] Secondly, the fact that the social worker and psychiatrist are not employed to advise the child or parent is irrelevant as it is not performance of or failure to perform any such act that is the subject of complaint; it is, indeed, the negligent performance (or non-performance) of the very act which they are retained to perform that causes the harm through its impact on the conduct of the defendant authority. It is a commonplace that the negligent performance of an act that the defendant has contracted with A to perform may give rise to liability to B. These arguments thus provide no basis for excluding a duty of care. Lord Browne-Wilkinson went on to say that the policy arguments against a direct duty of care also applied to the professional defendants.[78] These have already been considered.

The final argument relied on by Lord Browne-Wilkinson does, however, arguably provide a solid basis for the conclusion that the psychiatrist[79] did not owe a duty of care. This is that investigations with a view to determining whether protection proceedings should

[73] *Smith* v. *Eric S. Bush* [1990] 1 A.C. 831.
[74] *Henderson* v. *Merrett Syndicates Ltd.* [1995] 2 A.C. 145.
[75] [1995] 2 A.C. 633, 753.
[76] *Ibid.*
[77] See [1995] 2 A.C. 145, 180, *per* Lord Goff. *cf.* Lord Browne-Wilkinson in *White* v. *Jones* [1995] 2 A.C. 207, 271–272 in the context of fiduciary relationships.
[78] [1995] 2 A.C. 633, 754.
[79] The same would presumably apply to the social worker but the argument was deployed in respect of the psychiatrist by the defendant health authority.

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follow gave rise to witness immunity in respect of findings that might be used in evidence[80] in such proceedings.

In the education cases, by contrast, claims based on direct or vicarious liability for professional negligence were not struck out. The relevant defendants included educational psychologists (*Dorset*), a headmaster and the county educational advisory services (*Hampshire*) and (it was inferred) unidentified professionals or other officials (*Bromley*). It was stressed that there was no potential conflict of duty between the professional's duties to the plaintiff and to the education authority. If, however, any conflict between the former and the discharge by the authority of its statutory duties emerged at trial, the trial judge would have to limit or exclude any duty of care.[81] These cases accordingly proceeded, although some of the difficulties the plaintiff would encounter at trial were noted. These included establishing that harm had been incurred of a kind recognised by law;[82] and that there had been a breach of duty by reference to the *Bolam* test[83] judged in the light of the then current views as to the nature of dyslexia.[84]

G. To Summarise

(1) *X* v. *Bedfordshire* is very helpful in clarifying the different kinds of claim that may arise where the defendant is performing statutory functions and in confirming that the negligent performance of a statutory function does not give rise to liability in the absence of a common law duty of care.

[80] *Evans* v. *London Hospital Medical College* [1981] 1 W.L.R. 184 (immunity applied to communication of result of postmortem to DPP which D had been instructed to make for the purpose of possible criminal proceedings). See further the decision of the House of Lords in *Taylor* v. *Serious Fraud Office* [1998] 3 W.L.R. 1040.

[81] [1995] 2 A.C. 633, 764.

[82] In *Dorset*, the plaintiffs claimed the cost of providing alternative fee-paying education: [1995] 2 A.C. 633, 764; in *Hampshire* it was claimed that the failure to treat dyslexia caused psychological damage sufficiently serious to constitute an identifiable mental illness: *ibid.*, at p. 766; in *Bromley* it was claimed that the plaintiff's personal and intellectual development had been impaired: *ibid.*, at p. 771. Whether these were recoverable in principle was expressly left open. See now *Phelps* v. *Hillingdon London Borough Council* [1999] 1 W.L.R. 500 (note 187), where the Court of Appeal has ruled that *Hedley Byrne* liability does not in fact arise in respect of the failure of an educational psychology service to diagnose dyslexia without a specific assumption of responsibility.

[83] [1995] 2 A.C. 633, 763, referring to *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582.

[84] The claim in *Christmas* v. *Hampshire County Council* was subsequently dismissed on the ground that no breach of duty was established: [1998] E.L.R.1. Two cases have been taken to the European Court of Human Rights. The Commission concluded in *TP and KM* v. *UK* (App. No. 28945/95), which arose out of *M* v. *Newham London Borough Council*, that the UK was in breach of Articles 8 (right to respect for private life), Article 6 (right to a fair hearing as regards the child applicant); and Article 13 (right to an effective remedy as regards the child's mother); it concluded in *Z and others* v. *UK*, App. No. 29392/95, which arose out of *X* v. *Bedfordshire*, that the UK was in breach of Article 3 (prohibition of inhuman or degrading treatment) and Article 6 (no separate issues arising under Articles 8 and 13). The cases have been referred to the Court.

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(2) It is unhelpful in endorsing an approach to the liability for the negligent exercise of statutory functions that requires the court to consider, for the purposes of determining the existence of a duty of care, distinctions (1) between discretionary and non-discretionary decisions, and (2) between non-justiciable policy matters and other matters.

(3) It is surprising that no attention was paid to the acts/omissions distinction.

(4) The policy reasons given for excluding a duty of care altogether in respect of the exercise or non-exercise of statutory discretions under the child care and special educational needs legislation are unconvincing.

(5) The reasons given for excluding *Hedley Byrne* liability in respect of the psychiatrist in the *Newham* case are also unconvincing, save for that based on witness immunity.

(6) The case correctly allowed proceedings based on the *Hedley Byrne* principle to proceed, although at least one action (*Hampshire*) was subsequently dismissed and the Court of Appeal (in *Phelps*) has held that liability does not in fact arise in these circumstances.

An interesting contrast is provided by the later decision of the House of Lords in *Stovin* v. *Wise*, to which we now turn.

III. *Stovin* v. *Wise (Norfolk County Council, Third Party)*[85]

A. Overview

The case concerned a traffic accident at a road junction. The junction was particularly dangerous in the sense that vehicles turning right from the side road, Cemetery Lane, had to make a turn through some 150° to get on to the main road, Station Road. Furthermore, visibility was extremely limited, the view to the right being obstructed by a bank of earth topped by a fence. Late one night in December 1988 the plaintiff, Mr. Stovin, was riding his motorcycle along Station Road when a car driven by the defendant, Mrs. Wise, emerged from the side road into his path. Mr. Stovin was seriously injured in the ensuing collision. The judge held Mrs. Wise 70% to blame for the accident, and attributed the other 30% of responsibility to Norfolk County Council, which she had joined as co-defendant.

The council, as local highway authority, had power under section 79(1) of the Highways Act 1980 to direct the owner of land

[85] [1996] A.C. 923. See M.C. Harris, (1997) 113 L.Q.R. 398; J. Convery, (1997) 60 M.L.R. 559.

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at a road junction to alter or remove any wall or bank which constituted an obstruction to the view of road users. The landowner could reclaim the cost of complying with the notice from the authority. This provision was of obvious relevance to the case in hand. The junction was not a particularly busy one, but previous accidents had occurred there in 1976 and 1982.[86] Furthermore, in January 1988, following an approach by the local safety committee, the owners of the land upon which the bank was situated, British Rail, had contacted the council to suggest a rearrangement of the road markings at the junction. Following a site visit, the highway authority's traffic movement expert, Mr. Deller, accepted that there was a visibility problem at the junction but concluded that alteration of the road markings would not provide an adequate solution. The divisional surveyor favoured the removal of part of the bank, and wrote to British Rail to suggest that, subject to their agreement, the authority would carry out the work itself at its own expense, which was estimated to amount to no more than £1,000. Despite another on-site meeting between the parties in February, British Rail never responded to that letter. A further accident, involving a police car, occurred in March 1988, though the council officials directly involved in the discussions with British Rail were apparently not informed of this. Mr. Deller was then transferred to other duties and the matter was forgotten. No further action had been taken by the time of Mr. Stovin's accident. Although certain claims based upon breach of statutory duty were rejected, both the trial judge and the Court of Appeal held the authority liable in negligence for their failure to take steps to make the junction safer.[87] The Council's appeal on this point was the sole issue for consideration by the House of Lords.

The House was ultimately divided as to the outcome, the decision being reached on the basis of 3–2 majority. Two speeches were delivered—that of Lord Hoffmann, with whom Lord Goff and Lord Jauncey concurred, and that of Lord Nicholls, with whose dissenting speech Lord Slynn expressed his agreement. It may therefore be appropriate to identify first those areas of principle in respect of which the Law Lords were in agreement, before moving on to consider those aspects of the case in which a divergence of view was manifest.

[86] See the speech of Lord Nicholls, [1996] A.C. 923, 929.
[87] Judge Crawford Q.C., sitting as a judge of the Queen's Bench Division: Unreported, 27 July, 1992; [1994] 1 W.L.R. 1124, C.A.

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B. Issues upon which the Majority and Minority were in Agreement

1. A special approach for all cases involving public authorities?

Lord Nicholls and Lord Hoffmann[88] were in broad agreement as to the general approach to establishing a duty of care in negligence, noting that there was little if any substantive difference between the two stage test propounded in *Anns* v. *Merton London Borough Council*[89] and the tripartite test articulated in *Caparo Industries* v. *Dickman*.[90] However, as indicated above, since the decision in *Anns*, and arguably even earlier,[91] it has been a matter of some controversy whether the general test for establishing a duty of care in negligence requires to be modified or supplemented in cases where the defendant is a public authority of some description. The crucial issue can in fact be subdivided into two related questions, namely (i) is there any need for a special approach to govern such cases and (ii), if so, in accordance with what principles should such an approach be formulated? In particular, is it possible to identify a "no-go area"[92] of non-justiciable cases based upon Lord Wilberforce's notion of the "policy/operational" dichotomy, or perhaps upon some similar principle such as that advanced by Craig[93] and offered tentative endorsement by the Privy Council in *Rowling* v. *Takaro Properties Ltd.*,[94] to the effect that discretionary decisions concerning the allocation of risks or resources are unsuitable for judicial resolution.

As to the first, more general, question our own view has been that cases of this kind are perfectly capable of satisfactory resolution on the basis of ordinary negligence principles alone.[95] All that is required is that due regard be paid to the special position of public authorities in the application of those principles. It is, however, important to stress in this context that the "ordinary principles" in question plainly embrace those concerning *both* the duty of care *and* the question of breach.[96]

In *Stovin* v. *Wise*,[97] the entire approach of the minority appears to involve a rejection of the idea that any special principles are

[88] [1996] A.C. 923, 931–932, 949.
[89] [1978] A.C. 728.
[90] [1990] 2 A.C. 605.
[91] See Lord Diplock's speech in *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] A.C. 1004.
[92] To use Lord Nicholls' expression, [1996] A.C. 923, 938.
[93] P.P. Craig, *Administrative Law* (London 1983), pp. 534–538. See now the 4th ed. at pp. 860–867.
[94] [1988] A.C. 473, 501, note 17 above.
[95] See note 8 above.
[96] See Bowman and Bailey, [1984] P.L. 277, esp. at p. 307. Breach of duty principles are especially apposite to deal with those particular considerations which the policy/operational dichotomy was designed to address. Other crucial considerations, such as the nature of the loss, availability of alternative remedies etc, must continue to be dealt with by traditional principles governing the existence of the duty of care.
[97] [1996] A.C. 923.

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required for the resolution of negligence claims against public authority defendants. Throughout his speech, Lord Nicholls seems to be applying the familiar, traditional principles of private law, albeit with due regard to the statutory framework in accordance with which the authority must act, and to the legitimate interests of public authority defendants generally. The majority, by contrast, do appear to recognise the need for special principles to govern certain cases falling within this category, but it is clear that these are rather different from those advocated by Lord Wilberforce in *Anns*, or by those academic writers who have been broadly supportive of his approach.[98] In particular, it seems that they are envisaged to be very much more limited in their scope. It will be necessary to return to this new formulation of principle shortly, once the other areas of concordance between the majority and minority have been identified.

In that regard, all the members of the House were plainly united in their rejection both of the "policy/operational" dichotomy, and of the closely related approach which regards decisions concerning the allocation of risks and resources as inherently unjusticiable. Indeed, these two were treated as being essentially alternative semantic expressions of the same basic idea. Lord Hoffmann was particularly severe in his criticism of the policy-operational dichotomy, suggesting that it was now clear that it was "an inadequate tool" for determining whether it was appropriate to impose a duty of care or not. There were, he suggested, at least two reasons why it had proved unsatisfactory as a test. The first was that the dividing line between the two limbs of the dichotomy was extremely elusive. Later in his speech he employed examples from the Canadian case-law[99] to demonstrate this point, arguing that it had produced distinctions which were "hardly visible to the naked eye".[100] The second reason for its inadequacy was that even where the conduct in question could successfully be categorised as operational, there were many other factors to be borne in mind before a duty of care could be held to exist. These observations echo those previously made in the *Rowling* case.[101] Lord Nicholls, while observing that adoption of the policy/operational approach would not usually lead to the wrong conclusion, essentially endorsed these criticisms.[102] Given that it was perceived as

[98] See especially Craig, *loc. cit.* note 93; C. Lewis, *Judicial Remedies in Public Law* (London 1992), at pp. 381–388.

[99] *Barratt* v. *District of North Vancouver* (1980) 114 D.L.R. (3rd) 577; *Just* v. *British Columbia* (1989) 64 D.L.R. (4th) 689; *Brown* v. *British Columbia (Minister of Transportation and Highways)* (1994) 112 D.L.R. (4th) 1.

[100] [1996] A.C. 928, 955–956.

[101] *Rowling* v. *Takaro Properties Ltd* [1988] A.C. 473, 500–501, *per* Lord Keith of Kinkel.

[102] [1996] A.C. 923, 938.

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essentially the same concept in a different guise, the "risks and resources" approach was inevitably regarded as suffering from precisely the same deficiencies. Lord Hoffmann demonstrated its unworkability as a practical test by pointing out that virtually every decision concerning the provision of public benefits, no matter how trivial, affects the budget of the authority in some way.[103]

Lord Nicholls added that the establishment of "excluded zones" or "areas of blanket immunity" was in any event both undesirable and unnecessary, because

> no statutory power is inherently immune from judicial review. This has not given rise to any insuperable difficulties in public law. Nor should it with claims in tort if, very exceptionally, a concurrent common law duty were held to exist in an area of broad policy. Courts are well able to recognise that reasonable people can reach widely different conclusions when making decisions on social, political or economic grounds ... Similarly with competing demands for money. Indeed, the courts have recognised that sometimes it may be necessary in private law to look into competing demands for available money.[104]

It therefore appeared that there were good grounds for hoping that the policy/operational cuckoo had at last been decisively ejected from the nest.

2. *The distinction between acts and omissions*

Having cleared the intellectual ground of unnecessary distractions, the House was able to give consideration to the essential points at issue with a degree of clarity and conviction which has not always been evident in the previous case-law in this area. In particular, earlier decisions have frequently overlooked the need to analyse the nature of the conduct of the authority in question in order to determine whether it should properly be regarded as an act or an omission,[105] or, to state the matter in what might be regarded as a more helpful and illuminating form, whether the essence of the complaint against the authority is that it has inflicted a loss upon the plaintiff or merely failed to confer a benefit upon him/her.[106]

Here, both the majority and minority speeches laid heavy emphasis upon the crucial significance of this distinction. Lord Nicholls suggested[107] that, although the distinction was not always

[103] *Ibid.*, at p. 951.
[104] *Ibid.*, at pp. 938–939.
[105] *E.g.* in *Anns* v. *Merton London Borough Council* [1978] A.C. 728; and, indeed, *X* v. *Bedfordshire*.
[106] See discussion by Bowman and Bailey, [1984] P.L. 277, 282–285.
[107] [1996] A.C. 923, 930.

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easy to draw, it was nevertheless fundamentally sound because "compulsory altruism needs more justification than an obligation not to create dangers to others when acting for one's own purposes." Lord Hoffmann was of a similar view,[108] arguing that the distinction could be defended in political, moral and economic terms. Thus any plaintiff would be certain to have a more difficult task when seeking damages from a defendant who had merely omitted to confer a benefit upon him. This was obviously central to the issue in the instant case, since there was little room for doubt that the complaint against the council fell into this category.[109]

That being so, there was a manifest need to identify compelling reasons for imposing a duty of affirmative action upon the council in this case. Here again, there was agreement that the task faced by a plaintiff seeking to establish such a duty, though difficult, was by no means impossible. Indeed, there were a number of well-established situations in private law where defendants had long been recognised to owe such duties, of which the ownership and occupation of land was a conspicuous example. In this context, duties of affirmative action unquestionably existed for the benefit both of those who came on to the land and of neighbours. Lord Hoffmann pointed out that in the latter context[110] the imposition of the duty upon the landowner was to some extent mitigated by the fact that the standard of care expected of him "should be judged by reference to the resources he actually had at his disposal and not by some general or objective standard." Lord Nicholls appeared to regard this more subjective enquiry as the appropriate approach in all cases where the law compelled a person to act "when left to himself he might do nothing,"[111] a position which has much to commend it.[112]

Where public authorities were concerned, it was also recognised that some of the difficulties normally inherent in the imposition of liability for mere omissions were absent or of limited relevance. Lord Nicholls observed[113] that a public authority, unlike an individual, was not a mere indifferent onlooker. Public authorities were charged with responsibilities for the public good, and their powers were intended to be exercised in appropriate cases. Compelling a public authority to act did not represent an intrusion into private affairs in the same way as when a private individual

[108] *Ibid.*, at p. 945.
[109] As Lord Nicholls observed *ibid.*, at p. 930: "The council did not bring about the dangerous configuration and poor visibility at the road junction. The question is whether it was in breach of common law duty by carelessly failing to remove this source of danger."
[110] *Ibid.*, at p. 944.
[111] *Ibid.*, at p. 933.
[112] See Bowman and Bailey, [1984] P.L. 277, 301–306.
[113] [1996] A.C. 923, 935.

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was compelled to act. He added that the imposition of a common law duty of affirmative action would often require nothing more of the authority than was already implicit in its public obligations. Lord Hoffmann agreed that the very purpose of the existence of the highway authority was to spend its resources on making the roads convenient and safe, and that there was therefore no room for the "why pick on me?" argument which represented an impediment to the imposition of positive obligations upon private individuals.[114]

It was also common ground that the question of reliance required careful examination in this context, since it had a potentially crucial significance to the incidence of liability. Both speeches recognised that the term "reliance" might be used in two distinct senses, and that the presence of either form might prove decisive for the establishment of a duty of care in appropriate cases. In its more traditional sense, exemplified in the context of liability for negligent misstatement,[115] it involved a situation where the defendant should reasonably have foreseen that the plaintiff would reasonably rely on him acting in a particular way, and where the plaintiff did so rely by acting to his detriment. As Lord Hoffmann pointed out,[116] such liability did not depend upon the public nature of the authority's powers and was unproblematic. It was not relevant in the present case, however. But there was also a second form of reliance—known as "general" or "community" reliance—which might generate a duty of care in appropriate cases. Here, the particular plaintiff did not need to have relied on the expectation that the power would be used, or even have known that the power existed. Rather, it needed to be shown that there was a general expectation or widespread assumption within the community, which the plaintiff individually may or may not have shared, that the power would be exercised in appropriate circumstances.[117] Plainly, this is a slightly more elusive concept, and Lord Nicholls observed that it was not enough that people were in a general sense entitled to expect that an authority would behave reasonably and in accordance with its public law obligations; otherwise a duty of care might arise in almost every case.[118] Lord Hoffmann was of the view that this form of reliance could only arise where the benefit or service provided pursuant to the statutory

[114] *Ibid.*, at p. 946. See also Bowman and Bailey, [1984] P.L. 277, 287.
[115] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465.
[116] [1996] A.C. 923, 953.
[117] See Mason J. in *Sutherland Shire Council* v. *Heyman* (1985) 157 C.L.R. 424, cited by Lord Nicholls at [1996] A.C. 923, 937–938 and by Lord Hoffmann at p. 953; *Pyrenees Shire Council* v. *Day* [1997] 1 V.R. 218; B.V. Slutsky (1973) 36 M.L.R. 656, 661; Bowman and Bailey, [1984] P.L. 277, 281–282, 287–289. Note also, however, the views of Stuart-Smith L.J. in *Capital & Counties plc* v. *Hampshire County Council* [1997] Q.B. 1004, 1027–1028.
[118] [1996] A.C. 923, 938.

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powers in question was of a uniform or routine nature, so that it would be irrational to provide it in one case and arbitrarily withhold it in another. But that alone would not be enough—it would in addition be necessary to discern a policy which confers a right to financial compensation if the power were not exercised.[119] It is at this point that indications of the divergence between the majority and minority speeches begin to become detectable, and it is to this question that we must shortly turn. For present purposes, it is necessary to point out by way of conclusion that the question of community reliance was not thought to be germane to the case in hand, because it did not concern "the provision of a uniform identifiable benefit or service."[120]

C. Areas of Divergence Between the Majority and Minority Approaches

1. Intuitive responses to the question of liability

However intensively judicial determinations may be rationalised, there is a school of thought which suggests that the essentials of the adjudicative process in fact occur in the heart, the gut, the bones, the water or even more obscure corners of the judicial anatomy. Some judges appear more willing to acknowledge this possibility than others.[121] Interestingly, Lord Nicholls appears to have aligned himself with the tendency which would bring such considerations out of the closet. Having already commended[122] the decision in *Anns*[123] for liberating the law from the "unacceptable yoke" imposed by *East Suffolk Catchment Board* v. *Kent*,[124] he added[125] that it reflected a growing unease over the inability of public law, on occasions, to afford a remedy matching the wrong. Instances where individuals suffered loss through the carelessness of public bodies in carrying out their statutory functions sometimes invoked an intuitive response that the authority ought to make

[119] *Ibid.*, at p. 954.
[120] *Ibid.*, at p. 957.
[121] "In my judgment such an attempt to analyse the authorities is always valuable in focusing the minds of courts on the considerations they need to take into account, but at the end of the day it is the gut feeling of the court .... which is likely to prevail": *per* Brooke L.J. in *Daly* v. *Sharples* 20 November 1996, C.A., Lexis. Sometimes reference is made instead to judicial "instinct": see, *e.g.* Stephenson L.J. in *McLoughlin* v. *O'Brian* [1981] 1 Q.B. 599, 614; Watkins L.J. in *Lamb* v. *Camden London Borough Council* [1981] 1 Q.B. 625, 647; and Lord Reid, as reported in A. Paterson, *The Law Lords* (London 1982) at p. 194. Note also the view of Lord Goff that "the judicial function can ... be epitomised as an educated reflex to facts ...": *Smith* v. *Littlewoods Ltd.* [1987] 1 A.C. 241, 280. See generally J. Bell, *Policy Arguments in Judicial Decisions* (Oxford 1983).
[122] [1996] A.C. 923, 931.
[123] [1978] A.C. 728.
[124] [1941] A.C. 74.
[125] [1996] A.C. 923, 933.

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good that loss. Leaving the loss to lie where it fell was not always an acceptable outcome.

Lord Hoffmann's intuitions, insofar as they were revealed, appeared to lead him in a different direction entirely, namely towards the protection of the public purse. He suggested[126] that it was one thing to provide a service at the public expense but quite another to require the public to pay compensation when a failure to provide the service resulted in loss. Other than in cases of reliance, the same loss would have been suffered if the service had not been provided in the first place. As one might have expected, these intuitions were supported by plausible reasoning. The denial of a duty of care on the part of the authority would certainly not leave the road user unprotected. The primary responsibility for the safety of road users lay with vehicle drivers themselves, and, if they failed to take due care, compulsory insurance was available to provide compensation to the victims.[127] Lord Hoffmann had previously laid the foundations for this argument by means of certain observations concerning the position of fire authorities,[128] conscious perhaps of the number of cases which have recently arisen in that area.[129] He noted that protection against the risk of fire was available through insurance. It was not obvious that there should be a right to compensation from a negligent fire authority, since that would normally enure by way of subrogation to an insurance company. Compensating such companies out of public funds was not, he considered, the best means of providing a general deterrent against inefficiency.

Yet these remarks, while certainly not without force, do not provide a complete answer to the case favouring the recognition of a duty. As Lord Nicholls rightly pointed out,[130] the contest in the road accident situation would not always be fought between an injured and an *insured* road user. Perhaps he had in mind the possibility that the entity emerging from the side road might have been a pedal cyclist, a horse-rider or a pedestrian, or even that no other road user was involved, the dangerous configuration of the junction being the sole cause of the accident. Equally, the putative duty of care of the fire brigade might be required to cover personal injuries suffered in a fire, in respect of which insurance would be less likely to be available and subrogation in any event inapplicable.

[126] [1996] A.C. 923, 952.
[127] *Ibid.*, at p. 958.
[128] *Ibid.*, at p. 955.
[129] See the discussion in Section IV, below.
[130] [1996] A.C. 923, 941.

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2. The relevance of the statutory background

This divergence in initial perception regarding the underlying merits of the claim leads on to further differences regarding the precise relevance of the statutory background out of which the authority's powers and functions arose. For Lord Nicholls, although the "will of the legislature is paramount in this field", the practical consequence of this consideration was that[131] the common law should not impose a duty *inconsistent* with the performance by the authority of its statutory duties and powers in the manner intended by Parliament, or contrary in any other way to the presumed legislative intention. Thus, the question of the existence of a common law duty would be determined on the basis of the interaction between the statutory framework and other considerations, and a duty should only be found to exist where there were special circumstances rendering it fair and reasonable that the authority should be liable in damages and where this would not be subversive of legislative intent. This approach seems wholly appropriate.

For Lord Hoffmann, however, the emphasis was somewhat different, and indeed he appeared to regard it as necessary that there be positive indications that the policy of the statute was to create a right to compensation.[132] This requirement was first mentioned in the context of discussion of claims for breach of statutory duty,[133] where it seems entirely appropriate, but was subsequently carried over into a consideration of the possibility of common law duties existing alongside statutory duties, and then into the area of common law duties superimposed upon statutory powers: "... the fact that Parliament has conferred a discretion must be some indication that *the policy of the Act conferring the power was not to create a right to compensation*."[134]

Lord Hoffmann himself appeared to recognise that there were some difficulties with this approach: "Whether [the policy of the statute] can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision."[135]

It is, however, one thing to deny a duty of care on the basis that it is inconsistent with the clear policy of Parliament, and quite

[131] *Ibid.*, at p. 935 (emphasis added).
[132] *Ibid.*, at p. 953.
[133] *Ibid.*, at pp. 952–953.
[134] *Ibid.*, at p. 953 (emphasis added).
[135] *Ibid.*, at p. 952.

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another only to affirm one where there is positive evidence that that is what Parliament intended. As is well known, it is almost impossible in many cases to discern a clear Parliamentary intent with respect to the question of civil liability for statutory duties specifically created by the legislature.[136] How much more difficult will it be to determine their intent with respect to *common law* duties in the tort of negligence, which in all probability were never in their minds at all? The significance of this point can be illustrated by a number of considerations. First, statutory functions, whether powers or duties, are commonly stated in very broad and general terms. It is therefore entirely appropriate that considerable caution should be exercised before allowing a claim based upon the statute simply for failure to fulfil the function in question. A common law duty, however, might stand in almost any relation to the statutory function, and in particular, might often be significantly more limited in scope. For example, in the Court of Appeal, Kennedy L.J. emphasised the fact that the highway authority had actually decided to take action to improve safety at the junction.[137] Although his particular analysis was criticised as unconvincing by Lord Hoffmann,[138] it is mentioned here only to demonstrate that it would have been *possible* at common law to recognise a duty only in circumstances where the highway authority had resolved to act and then subsequently failed to do so.[139] It would surely have been meaningless to consider Parliamentary intention with respect to the recognition of such a duty, given that this particular, highly specialised, fact situation will never have been in anyone's mind at the time the legislation was adopted. Equally, there have been cases where common law duties have been recognised which are *more* onerous in substance than their

[136] See W.V.H Rogers, *Winfield and Jolowicz on Tort* (15th ed., 1998), pp. 259–260; K.M. Stanton, *The Modern Law of Tort* (London 1994), pp. 54–56.

[137] [1994] 1 W.L.R. 1124, 1138.

[138] [1996] A.C. 923, 945.

[139] One problem with this approach is that it might be thought contrary to principle to impose liability for failure to confer a benefit solely on the grounds that the defendant has resolved to confer the benefit in question, or embarked upon doing so: see Bowman and Bailey, [1984] P.L. 277, 285–286. While this must certainly be true with respect to private sector defendants, it is less clearly the case with public authority defendants exercising statutory powers. In this context, some of the basic arguments *against* imposing liability for omissions—such as the "Why me?" argument—are plainly inapplicable: see notes 113–114 and accompanying text above. Indeed, "the very fact that the body in question and the functions it exercises have been established ... by statute is a pointer in favour of imposing a duty, since it is an indication that the community, through its elected representatives, is entrusting its well-being to that agency in a particular context": Bowman and Bailey, *ibid.*, at p. 287. Although it is conceded that this pointer is not a particularly strong one, its relevance in this context is that the defendant's decision or attempt to confer the benefit is not the *sole* reason for imposing liability. Rather, the relevance of this fact is that it could be used to counter certain other arguments *against* imposing liability, e.g. through its effect in limiting the number of potential claims against the defendant authority and the consequent financial burden and disruption of its activities.

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statutory counterparts, but which apply in a narrower range of factual situations.[140]

Secondly, it is material to recall that statutory duties are commonly couched in absolute terms, whereas common law duties in the tort of negligence are only ever obligations of reasonable care. The fact that Parliament may have wished to avoid the creation of the former kind of duty at all (by establishing only a power) or may have been unwilling to countenance the imposition of civil liability for breach of an absolute duty, tells us nothing at all about the acceptability of the courts creating a parallel duty to exhibit reasonable care in the performance of statutory functions.

Finally, it is to be remembered that Lord Hoffmann himself accepted in principle that there were situations where duties of care might arise at common law on the basis of "community reliance" upon the exercise of statutory powers. He pointed out that this phenomenon necessitated an inquiry into "the role of a given statutory power in the behaviour of members of the general public" and into "general patterns of socio-economic behaviour".[141] It seems evident that such behaviour patterns could only establish themselves over the course of time, and that whereas a duty of care might not be found to exist upon this basis on the very day the statute came into force, a wholly different view might be taken several years later, when the appropriate patterns of socio-economic response had had time to manifest themselves. Since the principal engine for the creation of the duty is not the statute as such but the *public response to it*, the logic of examining the statute itself for indications of a policy to create a civil remedy is not easy to discern. For all these reasons, it is submitted that Lord Nicholls' view of the role and significance of the statutory background is strongly to be preferred.

3. A new principle for cases involving public authority defendants

Lord Hoffmann's views on the significance of the statutory background led him to formulate a new principle applicable to cases involving public authority defendants:[142]

> In summary, therefore, I think that the minimum pre-conditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have

[140] See *e.g. Bux* v. *Slough Metals* [1973] 1 W.L.R. 1358. Compliance with the duty under regulations to *provide* suitable goggles for employees working with molten metal was not sufficient to discharge the common law duty of care, which, in the particular circumstances of the case, extended to taking reasonable steps to *secure their use*.

[141] [1996] A.C. 923, 954.

[142] *Ibid.*, at p. 953.

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> exercised the power, so that there was in effect a public law duty to act, and, secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.

It is first necessary to advert to the context in which this new principle is intended to operate. First, it is clear from Lord Hoffman's speech that it is limited to cases involving failures to confer benefits.[143] Next, it is fair to point out that this new principle does not seem to be subject to the pervasive conceptual and practical deficiencies that were exhibited by the policy/operational dichotomy and closely related concepts, which were decisively rejected in Lord Hoffmann's speech as unhelpful and, indeed, unworkable. At the same time, the new principle is itself not beyond criticism. As indicated above, the heavy emphasis upon the policy of the statute in the context of the enquiry as to whether a duty of care should be recognised at common law is not easy to defend, and the dissenting speech of Lord Nicholls is much to be preferred on this point. Thus the second limb of Lord Hoffmann's principle could, it is respectfully submitted, profitably be reformulated in such a way as to provide that a duty of care should not be found to exist where the clear policy of the statute was to exclude that possibility.

As regards the first requirement, namely that the plaintiff must demonstrate that it would, in the circumstances, have been irrational not to exercise the power, it is relevant to point out that this too derives its inspiration from Lord Hoffmann's perception of the precise relevance of the statutory framework within which the authority in question has acted. As such, it equally rests upon an analytical base which does not appear wholly convincing. It might nevertheless be possible to argue for the incorporation of this requirement independently of the particular argumentational foundations offered by Lord Hoffmann, as a means of providing a satisfactory resolution between the public and private law responsibilities of public authorities in relation to the conferral of benefits, but it is legitimate to ask whether such a principle is actually necessary or desirable for that purpose. What of substance is added by the introduction of such a principle, given that the plaintiff will in any event have to establish both that the authority was in breach of duty and that the harm suffered would not have occurred but for the breach in question? These are by no means

[143] Compare his remarks on the position in infliction of loss cases: *ibid.*, at pp. 946–947. See also [1986] C.L.J. 430, 456.

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easy matters to establish in such cases. Although it may appear at first sight that the "irrationality" test, *i.e. Wednesbury* unreasonableness, is a substantially more difficult hurdle to overcome than proving a breach of duty in private law, closer examination reveals that the two issues are in fact extremely similar in cases where the deliberate, discretionary decisions of public authorities are concerned.[144] Indeed, this point was brought out emphatically in the speech of Lord Nicholls, who asserted that the private and public law obligations of the council could be shown to "march hand in hand".[145] The reason was that the authority could in either case only be shown to have violated the obligation if it had "acted in a way no reasonable authority would have done" or, to put it another way, exercised its statutory discretion "in a way no sensible authority with a proper appreciation of its responsibilities would act."[146] It is also to be remembered that Lord Nicholls had already suggested that the standard of reasonableness in cases where the law required one person to act for the benefit of another would be measured by reference to that person's individual circumstances and resources,[147] which represents a further easing of the burden potentially to be imposed on hard-pressed public authorities. It is therefore difficult to see that this new requirement adds much of substance to what is already implicit in private law principles.

One point to note is that Lord Hoffmann's approach to the "irrationality" test will be applied at a different stage of the inquiry, specifically in the context of determining whether a duty of care exists. This might have the advantage of facilitating the disposal of unmeritorious cases before a full trial by the determination of a preliminary question of law.[148] Such advantages are, however, notoriously difficult to achieve in practice.[149] It is also analytically unattractive that the duty of care is only shown to exist once the circumstances demonstrating its breach have been established.[150]

[144] See [1984] P.L. 277, 306–307, which suggests that there is little difference in terms of the standards of conduct envisaged by the two texts. On the other hand, there may be a distinction in terms of causation where the decision relates to the conferral of a benefit, because in public law it will generally be "open to a public body to decide not to act in any given instance": J. Convery (1997) 60 M.L.R. 559, at p. 569. For discussion of this point see the following paragraphs.

[145] [1996] A.C. 923, 936. In light of Convery's argument it may be that Lord Nicholls too readily accepted this particular point, though it was only advanced as one of a number of factors pointing towards a finding of liability.

[146] [1996] A.C. 923, 936.

[147] *Ibid.*, at p. 933.

[148] See [1986] C.L.J. 430, at p. 447.

[149] *Ibid.* See the criticism of this procedure expressed by Lord Wilberforce in *Allen* v. *Gulf Oil Refining Ltd.* [1981] A.C. 1001 at p. 1010, quoted with approval by Lord Bridge in *Lonrho* v. *Fayed* [1992] 1 A.C. 448, at p. 470, and by Hirst L.J. in *Three Rivers District Council* v. *Bank of England* (No. 4) (1998) 1 L.G.L.R. 645, 718–720.

[150] [1986] C.L.J. 430 at p. 440.

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Finally, and most importantly, Lord Hoffmann's approach offers an opportunity for public authority defendants to escape liability by advancing contrived, hypothetical justifications for their failure to confer the benefit. If the irrationality test is treated as a precondition of the existence of a duty of care, it will be considered as an aspect of a question of law. Even though the failure to confer the benefit in fact resulted from pure oversight, the defendant authority will be able to raise alternative, hypothetical reasons as to why, even absent such oversight, it might ultimately have declined to confer that benefit. Unless these alternative scenarios are wholly fanciful, or themselves indicate unlawfulness on the authority's part, the plaintiff's action will fail. If, by contrast, the matter had been considered in the context of breach of duty and causation, it would have been treated as a question of *fact*, and the plaintiff's claim would succeed upon proof that, but for the oversight, the benefit *would, on the balance of probabilities, have been conferred.*[151] This is a difficult enough task in itself, and it is by no means clear why plaintiffs should be faced with the additional obstacles implicit in Lord Hoffmann's approach. It is submitted that his approach might be appropriate in the context of public law proceedings, where any person with a sufficient interest may challenge the legality of a decision (and indeed explains why the most a successful applicant can normally obtain is the quashing of that decision, with the authority able or required to look at the matter afresh[152]). It is not appropriate in the context of private law proceedings, where the plaintiff is seeking compensation and must demonstrate that he or she has suffered harm that constitutes a violation of his or her private law interests.

If, then, it is argued that even the limited additional principle advanced by Lord Hoffmann for dealing with cases concerning the failure of public authorities to confer benefits appears to be unattractive, how should such cases properly be approached? Is it simply a matter of trusting to the vagaries and vagueness of foreseeability, proximity and fairness and reasonableness? Or is an extended scrutiny of previously decided cases necessary in order to determine whether analogous instances of liability can be found? It is submitted that the proper approach lies between these two extremes. It has been elaborated in academic writings[153] and is elucidated in the speech of Lord Nicholls in *Stovin* v. *Wise*[154] itself. On the basis of decided cases, it is possible to identify a checklist

[151] *Bolitho* v. *City and Hackney Health Authority* [1998] A.C. 232.
[152] See de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed., London 1995), at p. 248.
[153] See, *e.g.* S. Todd, *The Law of Torts in New Zealand* (2nd ed., 1997) at pp. 342–362.
[154] [1996] A.C. 923, 939–941.

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of considerations which almost inevitably have a bearing upon the fairness and reasonableness of imposing a duty of care upon any defendant, whether a public authority or not. Some additional factors may be appropriate in the public authority context. These considerations include the nature of the loss;[155] whether the defendant actually inflicted that loss or merely failed to prevent it;[156] the nature and extent of the control exercised by the defendant over the activities out of which the loss arose;[157] the extent, if any, to which the plaintiff reasonably relied upon the defendant or to which "community reliance" can be established;[158] the availability of alternative remedies, whether public law or other;[159] the precise nature and purpose of the functions exercised by the defendant and the range of persons for whose benefit they were created;[160] the extent to which it was open to the plaintiff to protect himself, whether by insurance or otherwise;[161] and the practical consequences of imposing a duty of care, in terms of inhibiting or undermining the proper exercise of the defendant's legitimate functions.[162] As Lord Nicholls pointed out, it is scarcely possible to provide a definitive or exhaustive list, but the factors mentioned should provide adequate guidance in most cases.

Having itemised these general considerations, it should then be possible to employ them to highlight the particular factors which affect the question of liability in the case in hand. Again, Lord Nicholls demonstrated how this might be done. The factors which appeared to him to be significant in confirming the existence of a duty of care in this case were as follows:

(1) the loss in question was physical injury, potentially of a serious or even fatal kind;
(2) the authority was actually aware of the danger—he specifically reserved his view on the outcome in a situation where the authority merely ought to have known of the danger;[163]
(3) had the authority complied with its public law obligations the accident would not have occurred;[164]

[155] *Jones* v. *Wright* [1992] 1 A.C. 310; *Murphy* v. *Brentwood District Council* [1991] 1 A.C. 398.
[156] *Stovin* v. *Wise* [1996] A.C. 923; *Hill* v. *Chief Constable of South Yorkshire Police* [1989] A.C. 53.
[157] *Yuen Kun-yeu* v. *A.G. of Hong Kong* [1988] A.C. 175; *Curran* v. *Northern Ireland Co-Ownership Housing Association* [1987] A.C. 718.
[158] *Sutherland Shire Council* v. *Heyman* (1985) 157 C.L.R. 424.
[159] *Jones* v. *Department of Employment* [1989] Q.B. 1.
[160] *Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210.
[161] *P. Perl (Exporters) Ltd.* v. *Camden London Borough Council* [1984] Q.B. 342.
[162] *Rowling* v. *Takaro Properties* [1988] A.C. 473; *Hill* v. *Chief Constable of South Yorkshire Police* [1989] A.C. 53; *X* v. *Bedfordshire*.
[163] [1996] A.C. 923, 941.
[164] *Ibid.* But see note 168 below.

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(4) this was an area where Parliament had already recognised that public authorities might be liable for mere omissions;[165]
(5) the very purpose of the statutory powers was to enable the highway authority to remove sources of danger, but public law remedies were inadequate to protect an injured road user;
(6) recognition of a common law duty would not represent an incursion into a wholly novel field—the position of the authority bore some similarity to that of an occupier of land;[166]
(7) it was preferable that the authority should bear the loss, because the injured party would not necessarily have a remedy against an insured road user;
(8) it was not realistic to suppose that highway authorities would indulge in artifice or defensive practices in the event of recognition of a duty of care—it was more likely that the consequence would be a tightening of administrative procedures for the avoidance of needless tragedies, which would serve the public interest.

It is unnecessary to accept the detail of all these observations to discern their collective force. It is unnecessary even to agree with the outcome of their application in order to perceive the wisdom of this general approach to the determination of a duty of care. No additional, special principles are required—merely the consideration of a series of factors of the kind which would be relevant in almost any negligence action where a novel form of duty was asserted. Since the essence of this approach involves a balancing process, and the consideration of individual factors may indeed shift that balance in different directions, no simple answers can be expected. The outcome will necessarily depend upon an appraisal of the respective weight of numerous considerations, none of which is in itself either necessary or sufficient for liability. Some may find this unsatisfying, but they should perhaps console themselves with the thought that the quest for One Big Idea, by reference to which all questions can be answered, is likely in this as in so many other contexts to prove a fool's errand.

4. The question of fault

The issue of breach of duty on the facts unfortunately did not receive as thorough an analysis as would have been desirable. This

[165] *I.e.* in respect of a failure to take reasonable care to keep the highway safe: see the Highways Act 1980, s. 58. But note the views of Lord Hoffmann on this point: [1996] A.C. 923, 952, 957–958.

[166] Both to those who came into his property, under the Occupier's Liability Acts 1957 and 1984, and to neighbours at common law, under the principle of *Goldman* v. *Hargrave* [1967] 1 A.C. 645.

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is because the council in the House of Lords accepted the trial judge's decision (upheld by the Court of Appeal) that if there was a duty the council had been in breach of it. This position was accepted by Lord Nicholls for the minority.[167] However, Lord Hoffmann, in addressing the question whether the council's decision had been "irrational" (as a prerequisite for finding a duty of care), had to consider more or less the same matters as would have arisen had breach of duty technically been a live issue.[168] His Lordship found that a decision by the council not to undertake the work could not be characterised as irrational. On his analysis of the evidence there had not in fact been a clear decision by the relevant officers that the necessary work should be done according to any particular time scale, and no definitive assessment of the cost. The trial judge and Court of Appeal had accordingly attached too much weight to the "decision" to act that supposedly had been made. Lord Hoffmann's conclusion on this point seems unassailable. What the proper conclusion would have been if Lord Hoffmann's "irrationality" prerequisite did not form part of the law and a duty of care had been found to exist is more difficult to assess. It is possible that the concession that there had been a breach of duty was in fact unwise, given the special way in which breach issues become intertwined with issues of causation in omissions cases.[169] It is on the other hand at least arguable that, but for the council's oversight, they would, on the balance of probabilities, have taken action to prevent the accident. However, it is impossible to come to a concluded view as only some of the relevant evidence is revealed in the reports of the case.[170]

D. To Summarise

There is a great deal to commend in the decision in *Stovin* v. *Wise*, in particular the rejection of any attempt to identify "no go" areas; the recognition of the important distinction between the infliction of loss and failure to confer a benefit; and the careful consideration of the policy arguments for and against the imposition of a duty of care. The aspect of the reasoning most likely to cause difficulty is Lord Hoffmann's attempt to tie liability for failure to confer a benefit at common law too closely with the notoriously uncertain principles governing liability for breach of statutory duty. It is also surprising that their Lordships chose not to comment expressly on the fact that they had diverged from Lord Browne-Wilkinson's

[167] [1996] A.C. 923, 929, 936.
[168] *Ibid.*, at pp. 956–957.
[169] *Ibid.*, at p. 957. See note 151 above.
[170] See especially Kennedy L.J. in the Court of Appeal: [1994] 1 W.L.R. 1124, 1131 and Lord Hoffmann, [1996] A.C. 923, 926–927.

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approach in *X* v. *Bedfordshire* to the question of "no-go" areas. Bearing that in mind, we move on to consider, in the following section of this article, how the guidance provided by the House of Lords in these circumstances has been treated in subsequent cases.

IV. Recent Cases

The principles set out in *X* v. *Bedfordshire* and *Stovin* v. *Wise* have subsequently been considered in a number of cases below the level of the House of Lords. The (partial) divergence between them has not as yet had fully to be addressed.

In terms of outcomes, there has been a marked reluctance on the part of the courts to hold that public authorities are under a duty of care in respect of the exercise or non-exercise of a statutory power, outside established situations. Examples are legion and include cases arising in the context of the powers of local authorities concerning children,[171] the grant or refusal of planning permission,[172] the institution of proceedings for statutory nuisance,[173] the control of building work,[174] the discharge of responsibilities under the homelessness legislation,[175] the service of notice of purchase price on a tenant wishing to exercise the right to buy[176] and the control of unruly tenants or persons misusing the highway;[177] cases concerning public officials whose functions include protection of the public, such as the police,[178] the fire service,[179] coastguards,[180] the Department of Transport,[181] and the Health and Safety Executive;[182] cases concerning the alleged failure of a health

[171] *H* v. *Norfolk County Council* [1997] 1 F.L.R. 384, refusing leave to appeal (no liability in respect of abuse by a foster parent of a child in the council's care); *cf. Barrett* v. *Enfield London Borough Council* [1999] 3 W.L.R. 79 (possible liability in respect of the authority's decisions as to the upbringing of a child in care) (see below, Section V).

[172] *Lam* v. *Brennan and Torbay Borough Council* [1997] P.I.Q.R. P488.

[173] *Ibid.*

[174] *Tesco Stores Ltd.* v. *Wards Construction (Investment) Ltd.* (1995) 76 B.L.R. 94 (no duty of care in exercising building control powers to avoid causing loss of or damage to property).

[175] *R.* v. *Ealing London Borough Council, ex p. Parkinson* (1995) 29 H.L.R. 179.

[176] *Blake* v. *London Borough of Barking and Dagenham* (1996) 30 H.L.R. 963; *Payne* v. *Barnet London Borough Council* (1997) 30 H.L.R. 295.

[177] *Hussain* v. *Lancaster City Council* [1999] 2 W.L.R. 1142, C.A. (pet. dis. [1999] 1 W.L.R. 1359, H.L.).

[178] *Daly* v. *Sharples (sued as the Chief Constable of the Merseyside Police)* (unreported, 20 November 1996) (no duty of care owed in respect of the conduct of an identification parade); *Kinsella* v. *Chief Constable of Nottinghamshire, The Times*, 25 August 1999 (no duty of care owed in respect of alleged negligence causing damage to claimant's property during a search; it is submitted that this takes the immunity recognised in *Hill* v. *Chief Constable of West Yorkshire* [1989] 1 A.C. 53 into new territory and was wrongly decided.)

[179] *Capital & Counties plc* v. *Hampshire County Council* [1997] Q.B. 1004; but *cf. Kent* v. *Griffiths, The Times*, 10 February 2000 (note 188).

[180] *Skinner* v. *Secretary of State for Transport, The Times*, 3 January 1995; *OLL Ltd.* v. *Secretary of State for Transport* [1997] 3 All E.R. 897.

[181] *Reeman* v. *Department of Transport* [1997] 2 Lloyd's Rep. 648.

[182] *Harris* v. *Evans* [1998] 1 W.L.R. 1285.

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authority to protect members of the public from harm caused by an outpatient;[183] and cases concerning prosecutors.[184]

Many of these cases have concerned failures to protect the plaintiff from harm caused by third parties,[185] but some have involved infliction of losses through the authority's own actions.[186] Liability has been recognised in situations clearly covered by authority[187] but very rarely in novel situations.[188]

In terms of *reasoning*, the picture is more confused. The courts have been unable to discern a coherent framework of principles from the House of Lords authorities. Instead, there is a tendency to range through the speeches in *Bedfordshire* and *Stovin* and to select sufficient elements of the reasoning to dispose of the case in hand, almost invariably infavour of the defendant authority. A case against a public authority might be resolved in its favour (1) because it concerns a non-justiciable policy matter; (2) because it involves the exercise or non-exercise of a statutory discretion that cannot be characterised as irrational; (3) because imposition of a duty of care would be inconsistent with the statutory framework; (4) because the case involves a failure to exercise a statutory power to confer a benefit and no duty of care is recognised according to the approach of the majority of the House of Lords in *Stovin* v. *Wise*; (5) because there is no sufficiently proximate relationship between the parties; (6) because it is not fair, just and reasonable for a duty of care to be owed; (7) because there is no negligence on the facts; (8) because there is no causal link between any negligence on the part of the authority and the plaintiff's loss; and (9) because

[183] *Palmer* v. *Tees Health Authority*, *The Times*, 6 July 1999. Or to prevent the plaintiff patient from causing harm: *Clunis* v. *Camden & Islington Health Authority* [1998] Q.B. 978.

[184] *Elguzouli-Daf* v. *Commissioners of Police of the Metropolis* [1995] Q.B. 335; *cf. W* v. *Home Office*, *The Times*, 14 March 1997 (no duty of care owed by immigration officer in deciding whether immigrant should be detained).

[185] *E.g. Skinner*, *Lam*, the fire service cases, *Hussain*, *Palmer*.

[186] *E.g. Barrett*, *Lam*, *Harris*, *Reeman*, *Kinsella*. It is difficult to see why the misdirection by the coastguard of persons outside the coastguard service seeking to rescue people in danger at sea does not involve the infliction of a loss: *contra*, *OLL Ltd.* v. *Secretary of State for the Home Department* [1997] 3 All E.R. 897.

[187] *E.g.* cases falling within the scope of the *Hedley Byrne* principle: the causes of action not struck out in *X* v. *Bedfordshire*; *Welton* v. *North Cornwall District Council* [1997] 1 W.L.R. 570 (negligent requirement of unnecessary work by environmental health officer); *Lambert* v. *West Devon District Council* [1997] J.P.L. 735. But see *Phelps* v. *Hillingdon London Borough Council* [1999] 1 W.L.R. 500, where the Court of Appeal held that *Hedley Byrne* liability would only arise where a professional officer voluntarily assumed personal responsibility, otherwise the policy grounds against holding the authority directly liable would be subverted.

[188] The liability of the fire service in respect of actions that increase the risk of fire: *Capital & Counties plc* v. *Hampshire County Council* [1997] Q.B. 1004; the liability of the ambulance service even for an omission once it had accepted a 999 call in respect of a named individual at a specified address: *Kent* v. *Griffiths*, *The Times*, 10 February 2000: the *possible* liability of a local authority where a sex offender was placed with foster parents contrary to their expressed wishes and without informing them of his background: *W* v. *Essex County Council* [1999] Fam. 90; the *possible* liability of a local authority to a child in care in respect of decisions as to its upbringing: *Barrett* v. *Enfield London Borough Council* [1999] 3 W.L.R. 79.

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the plaintiff's loss falls outside the scope of the tort of negligence. By far the commonest grounds of decision in the recent cases have been (3)[189] and (6),[190] although each of the other arguments rates one or more appearance in the cases after *X* v. *Bedfordshire*.[191] Counsel for a defendant authority plainly has a wide choice of weapons to deploy.

In one sense it is reassuring that the key areas over which the battle is fought in practice tend to involve a close examination of the statutory context and of the policy arguments for and against a duty of care, rather than the artificial questions whether the case concerns an exercise of discretion or a non-justiciable policy matter. However, it is alarming that by being too ready to accept at face

[189] *Tesco Stores* (note 174): no duty of care in respect of loss or damage to property where statute was designed to protect the health, safety and welfare of persons; *Payne* (note 176): no wider obligations imposed through the tort of negligence than through statute (which required the disclosure of structural defects known to the council); *Reeman* (note 181): no duty of care in respect of issue of certificates of seaworthiness of fishing vessel leading to economic loss to plaintiffs; statutory framework designed to promote safety at sea.

[190] *Tesco Stores* (note 174): even if the purpose of the statute had extended to property damage, it would still not have been fair, just and reasonable to impose a duty of care; *Hussain* v. *Lancaster City Council* (note 177): not fair, just and reasonable to hold council liable for failing to take reasonable steps to prevent racial harassment by council tenants and others using the highway by use of statutory powers; *Palmer* v. *Tees Health Authority*, *The Times*, 6 July 1999: not fair, just and reasonable to impose duty of care on health authority in respect of alleged failure to diagnose that an outpatient posed a serious risk to the public; *W* v. *Home Office*, *The Times*, 14 March 1997: not fair or reasonable to impose liability on immigration officer performing his public duty; *R* v. *Ealing London Borough Council, ex p. Parkinson* (1995) 29 H.L.R. 179; *Reeman* v. *Department of Transport* [1997] 2 Lloyd's Rep. 648; *H* v. *Norfolk County Council* [1997] 1 F.L.R. 384; *Skinner* v. *Secretary of State for Transport*, *The Times*, 3 January 1995; *Harris* v. *Evans* [1998] 1 W.L.R. 1285. cf. the non-acceptance of the public policy arguments in *Welton* (note 187); *Capital & Counties plc* v. *Hampshire County Council* (note 188) (as regards liability for increasing the risk of fire); *Perrett* v. *Collins* [1998] 2 Lloyd's Rep. 255 (as regards liability of certification officer for personal injuries caused to passenger in defective light aircraft) (see note 241 below); *Barrett* v. *Enfield London Borough Council* [1999] 3 W.L.R. 79, below, Section V.

[191] (1), (2) (decision falls within ambit of discretion); *R* v. *Ealing London Borough Council, ex p. Parkinson* (1995) 29 H.L.R. 179 (if wrong on that, not fair, just and reasonable to impose duty of care); *W* v. *Home Office*, *The Times*, 14 March 1997. (4) (criteria in *Stovin* v. *Wise* not satisfied): *Hussain* v. *Lancaster City Council* (note 177); *Clunis* v. *Camden & Islington Health Authority* [1998] Q.B. 978: "We find it difficult to suppose that Parliament intended to create such an extensive and wide-ranging liability for breaches of responsibility under section 117 [of the Mental Health Act 1983 (duty of health authority and social services authority to provide, in co-operation with voluntary agencies, after care services to person who cease to be detained under the Act)] which would of its nature apply alike to those engaged as professionals as well as those in voluntary services in many disciplines" (*per* Beldam L.J. at p. 992). (5) (no sufficiently proximate relationship): *Palmer* v. *Tees Health Authority*, *The Times*, 6 July 1999 (as between health authority and member of the public living in the area injured by outpatient; child murdered, child's mother suffered psychiatric injury); *Capital & Counties plc* v. *Hampshire County Council* [1997] Q.B. 1004 (as between fire authority and owner of premises on fire attended by fire brigade); *Reeman* v. *Department of Transport* [1997] 2 Lloyd's Rep. 179 (as between DoT as issuer of certificate of seaworthiness of fishing vessel and subsequent purchaser of vessel who suffered financial disaster when certificate was withdrawn). (7) (no breach of duty) *Phelps* v. *Hillingdon London Borough Council* [1999] 1 W.L.R. 500; *Swinney* v. *Chief Constable of Northumbria Police (No 2)*, *The Times*, 25 May 1999. (8) (no causal link) *Skinner* v. *Secretary of State for Transport*, *The Times*, 3 January 1995 (P on the facts not likely to have been found sooner if coastguard had given alert earlier). (9) (loss outside scope of tort of negligence): *Phelps* v. *Hillingdon London Borough Council* [1999] 1 W.L.R. 500 (dyslexia and failure to mitigate dyslexia not an injury, but might give rise to claim for economic loss).

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value policy arguments against the existence of a duty of care, the courts have been steadily building an immunity from suit for the benefit of public authorities that politicians would not have dared propose for incorporation in a statute.

It is becoming increasingly difficult to find a principled basis for the line between liability and non-liability. A possible theory is that a public authority is open to liability on ordinary principles where it undertakes activities that are also undertaken by private sector institutions. This would explain, for example, why there may be liability for professional negligence in designing or surveying houses[192] or providing expert psychological advice to children[193] or negligence in the physical care of children,[194] and (possibly) the cases on the liability of a custodian towards a person in custody.[195] However, this is clearly wholly inadequate as a "touchstone of liability" given the absence of any accepted definition of *functions* that are, and are only properly, to be discharged by the public sector and the increasing difficulty in drawing the line between public sector and private sector institutions.[196]

V. Coda: *Barrett* v. *Enfield London Borough Council*

Most recently, the House of Lords has had occasion to return to the question of public authority liability in the case of *Barrett* v. *Enfield London Borough Council*.[197] At the age of 10 months, the plaintiff had been made the subject of a care order in favour of the defendant council, and had remained in their care up to the age of 17. He now claimed to be suffering from various deep-seated psychological problems resulting from the council's failure properly to safeguard his welfare, including an alcohol problem and a propensity to harm himself. He attributed this condition to numerous breaches of a common law duty of care owed to him,[198] arising out of certain placements with foster parents and his subsequent transfer to a series of residential homes, and from the

[192] *Targett* v. *Torfaen District Council* [1992] 3 All E.R. 27; *Smith* v. *Eric S. Bush*; *Harris* v. *Wyre Forest District Council* [1990] 1 A.C. 831, H.L.

[193] Lord Browne-Wilkinson in *X* v. *Bedfordshire* [1995] 2 A.C. 633, 761–762, 764 (notes 68, 82 above); but see now the *Phelps* case, note 187.

[194] *Carmarthenshire County Council* v. *Lewis* [1955] A.C. 549; *Surtees* v. *Kingston-upon-Thames Royal Borough Council* [1991] 2 F.L.R. 559.

[195] *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] A.C. 1004; *Porterfield* v. *Home Office*, *The Independent*, 9 March 1988; *Knight* v. *Home Office* [1990] 3 All E.R. 237; *Kirkham* v. *Chief Constable of the Greater Manchester Police* [1990] 2 Q.B. 283; *Reeves* v. *Commissioner of Police of the Metroplis* [1999] 3 W.L.R. 363.

[196] See *e.g.* the morass of case law on the scope of the application for judicial review and the failure of the courts to develop a clear test for identifying a public function: de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed., 1995), Chap. 3.

[197] [1999] 3 W.L.R. 79.

[198] A claim for breach of statutory duty had originally been made but was rejected by Judge Brandt and not pursued in the Court of Appeal: see Lord Slynn, *ibid.*, at pp. 87, 88.

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failure to make arrangements for his adoption or for re-uniting him with his natural mother, or to provide him with appropriate psychiatric advice or social work care. The district judge had refused to strike out the action, but his view had not been shared by Judge Brandt or by the Court of Appeal. The plaintiff obtained leave to appeal to the House against the striking out of his action. The appeal was allowed.

For a number of reasons, the *Barrett* case probably can not be considered as an authority possessing the same level of formal significance as either *X* v. *Bedfordshire* or *Stovin* v. *Wise*. First, it in no sense represents a final determination of liability, the outcome being merely a refusal to strike out the action.[199] Secondly, and as a consequence, it was not necessary to establish the relevant general principles of law with the degree of finality which would otherwise have been required.[200] Indeed, there is some difficulty in determining the precise ratio of the case. Three speeches were delivered, by Lords Browne-Wilkinson, Slynn and Hutton. The remaining members of the House, Lords Nolan and Steyn, declared their support for the reasoning of all three, even though there are differences of emphasis, if not actual inconsistencies, amongst them. Finally, their Lordships did not for the most part purport to be breaking new ground, but simply to be following the dictates of previous decisions. Nevertheless, the case is valuable as an illustration of the pervasive contradictions and confusion exhibited by those earlier authorities and of the impossibility of detecting a coherent pattern of principle. Furthermore, it is just conceivable that it may open the way for the development of a more satisfactory regime in the future.

A. The Striking Out of Claims

Given the nature of the proceedings, it was inevitable that the House would give some consideration to the principles governing the striking-out of claims: indeed Lord Browne-Wilkinson devoted virtually the whole of his speech to this point. His Lordship began by reiterating the point he had made in *X* v. *Bedfordshire* that, unless it was possible to state with certainty that the claim had no prospect of success, the case was inappropriate for striking-out.[201] Furthermore, the use of such powers by the courts was usually likely to be inappropriate in relation to "confused and developing" areas of the law, such as the circumstances in which a person might

[199] In *X* v. *Bedfordshire*, by contrast, several of the claims were struck out, while in *Stovin* the plaintiff's claim was ultimately rejected on appeal.

[200] Lord Hutton expressly described certain of his conclusions on the law in this area as "provisional": [1993] 3 W.L.R. 79, 108.

[201] *Ibid.*, at p. 196.

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be held liable in negligence for the exercise of a statutory duty or power. The Court of Appeal had further judged it unlikely that any breaches of duty which might be proved could be shown to have caused the loss, but Lord Browne-Wilkinson observed that these were quintessentially matters of fact and best left to full exploration at the trial. These statements are very welcome, though it is pertinent to question why, some 30 years after *Dorset Yacht*, the law in this area should still be "uncertain and developing" when the House of Lords and the Privy Council have had so many opportunities to provide the necessary clarification. Lords Slynn and Hutton agreed that the claim was inappropriate for striking out, largely on the basis of possible distinctions which could be shown to exist between it and *X* v. *Bedfordshire*.[202]

However substantial these distinctions might be, it is difficult to escape the conclusion that Lord Browne-Wilkinson had been given cause for further reflection since *X* v. *Bedfordshire*. Indeed, he seemed chastened by two developments in particular to which he made reference in his speech.[203] The first had arisen directly out of a suggestion he had made himself in *X* v. *Bedfordshire*,[204] to the effect that where a local authority provided a psychology service it might be liable for a failure of that service to diagnose dyslexia. This dictum, shown by the Court of Appeal in the *Phelps* case to have been based upon erroneous factual assumptions regarding the way in which such services operate,[205] had apparently given rise to a "proliferation of claims" against local authorities on the part of those suffering from reading disabilities, a no doubt unwelcome side-effect of a judgment which was designed to keep the floodgates firmly closed. This experience was taken to underline the importance of deciding cases on actual facts, rather than "mistaken hypotheticals".

The second, and more significant, development was the decision of the European Court of Human Rights in the case of *Osman* v. *UK*,[206] which Lord Browne-Wilkinson professed to find extremely difficult to understand. The cause of his perplexity arose from the Court's application of Article 6(1), which provides, insofar as is relevant, "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing....". In his Lordship's view this provision presupposed the existence of a

[202] Both also agreed that the issues regarding breach of duty and causation required a full exploration of the facts and were not appropriate for striking out: see Lord Slynn, *ibid.*, at pp. 213–214 and Lord Hutton at p. 229.
[203] *Ibid.*, at pp. 197–200.
[204] [1995] 2 A.C. 633, 673.
[205] The assumption was that the psychology service would be a service open to the public along the lines of a hospital.
[206] Judgment of 28 October 1998, (1998) 1 L.G.L.R. 431.

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primary right (right A), probably contractual or tortious in origin and potentially enforceable in the local courts, such as the right not to be negligently injured. Article 6(1) then accorded a secondary right (right B) of access to the courts to assert the primary right, which he regarded as separate and free-standing. He questioned whether the rejection by the English courts of the plaintiff's claim in *Osman* could properly have amounted to a breach of Article 6. The claim was in respect of personal injuries allegedly attributable to a negligent failure by the police to afford him adequate protection and was struck out on the basis of the exclusionary rule deriving from the case of *Hill* v. *Chief Constable of West Yorkshire*.[207] In his Lordship's view, presumably, such restrictions as were imposed by English law related to the primary, rather than the secondary, right.[208]

It is far beyond the scope of an already long article to embark upon a detailed analysis of the *Osman* case. Suffice it to say that the degree of separation envisaged by Lord Browne-Wilkinson between the primary and secondary rights to which he refers appears artificial and unconvincing. It seems clear that there is, in a general sense, a civil right not to be subjected to personal injuries in consequence of another's negligence. Article 6(1) guarantees a right of access to the courts for a formal judicial determination of the existence or extent of such a right, and of any violation of it, in specific circumstances. In any situation where claims against particular categories of defendant are routinely rejected on the basis of a ritual invocation of a blanket immunity, without regard to the individual merits, there is a clear risk, to say the least, that a denial of justice will be found to have occurred.[209] This is precisely the risk that the English law of negligence has been courting since the development by the courts of arbitrary and unsustainable exclusionary rules for the protection of public authorities. It is disappointing that it should have required a decision of the European Court of Human Rights to bring home this obvious point, though this does give rise to the hope that the inadequacies of English law might now at least be squarely addressed. It remains for us to consider whether the *Barrett* case itself indicates that this process has begun in earnest.

B. A Special Approach for Public Authority Negligence Cases?

Lord Browne-Wilkinson in fact showed little inclination to re-enter

[207] [1989] A.C. 53.

[208] These views essentially reflect the arguments raised by the UK Government in *Osman* but rejected by the Court: see paras. 133–140 of the judgment.

[209] For a possible example, see *Kinsella* v. *Chief Constable of Nottinghamshire*, *The Times*, 25 August 1999.

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the fray on this particular issue. He did make passing reference to the "policy-operational" dichotomy,[210] though largely because that had formed part of the basis upon which the Master of the Rolls had approached the striking-out question in the Court of Appeal. He observed only that it was far from clear what the expressions "policy" and "operational" connoted, and that they did not afford a convincing basis for striking out: a proposition with which it would be difficult to disagree.

The principal attempts to explain and apply the substantive law governing the liability of public authorities occurred in the speeches of Lords Slynn and Hutton. The former appeared to regard the key question as being whether the instant case was concluded by the principles established in *X* v. *Bedfordshire*,[211] and to that end he referred repeatedly to Lord Browne-Wilkinson's two preliminary hurdles which the plaintiff had to surmount, prior to consideration of the normal three-stage Caparo test, where the defendant was a public authority. That is, the case should be rejected if (i) it required the investigation of policy matters or (ii) the allegations of breach of duty were all in respect of decisions within the ambit of the authority's statutory discretion. This is in itself a little surprising, since in *Stovin* v. *Wise* Lord Slynn had expressed his endorsement of the approach of Lord Nicholls,[212] who favoured the abandonment of any such additional tests. A partial explanation of this apparent anomaly may lie in the fact that Lord Slynn seemed ultimately to favour a modification in the function to be performed by these two factors, so that they should no longer be regarded as absolute in their effects. Rather, the ultimate question was whether the particular issue was justiciable, and these two factors should henceforth be regarded simply as "guides" in the determination of that question:[213] "The greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justiciable so that no action in negligence can be brought."

Lord Hutton agreed that the essential question in this context was whether the issue before the court was justiciable,[214] but rejected both the "policy" and "discretion" tests as suitable criteria for the determination of that question.[215] He went to some lengths to argue that, read in their contexts and properly interpreted,

[210] [1999] 3 W.L.R. 79, 82–83.
[211] See *ibid.*, at pp. 90, 91, 99.
[212] [1996] A.C. 923, 928.
[213] [1999] 3 W.L.R. 79, 97.
[214] This point is made repeatedly in the passage in his speech headed "The negligent exercise of a statutory discretion": *ibid.*, at pp. 102–111.
[215] See especially, p. 108.

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neither *Dorset Yacht* nor *X* v. *Bedfordshire* required the application of those tests.[216] In rejecting the policy/operational dichotomy specifically, he relied heavily upon the criticisms of it expressed by Lord Keith in *Rowling* v. *Takaro Properties* and Lords Hoffmann and Nicholls in *Stovin* v. *Wise*.[217] The courts should not be regarded as precluded from evaluating questions of policy *per se*, but only such questions of policy as they were "ill-equipped and ill-suited to assess".[218] Unfortunately, in seeking to formulate a test for the identification of such issues, he opted to fall back upon the "throw-away" remark of Lord Keith in *Rowling* to the effect that "discretionary decisions on the allocation of risks and resources" constituted this elusive non-justiciable category. The problem with this approach is, of course, that it too was exposed as fatally flawed in *Stovin* v. *Wise*.[219] Virtually every decision of a public authority can be presented in such a way as to involve an allocation of risks or resources in some respect. It is submitted, furthermore, that this test is not merely unworkable in a practical sense, but also based upon a false premise, namely that to allow the action to proceed would lead to a situation where the courts might "substitute their views" for those of the relevant authority upon questions which they were "ill-suited" to assess.[220] As has been pointed out before,[221] it is no part of the function of the court in a negligence action to substitute its own views for those of the defendant. The question for the court is not, for example, "how much money should be spent on social services in a particular locality?" but rather, "was the decision to spend £x within the range of reasonable decisions which the authority could legitimately have reached?", since it is only if the latter test is not satisfied that the authority in question will be held to have been negligent.[222] While it is right to entertain doubts as to the capacity of the courts to arrive at the first kind of decision we may take comfort from the fact that it is only the second kind that can legitimately arise in a negligence claim. It is essential to recall in this context that the

[216] See pp. 109–111.
[217] See pp. 106–108. He laid particular emphasis on the point made in *Rowling* that neither the policy nor the operational aspects of the test could be regarded as conclusive indicators of the existence/non-existence of a duty of care.
[218] At p. 105.
[219] See the discussion of that case in Section III B 1 above.
[220] At p. 105.
[221] Bowman and Bailey, [1984] P.L. 277, 306–307.
[222] Ironically, this point was actually recognised by both Lords Slynn and Hutton elsewhere in their speeches: see Section V D below. The only situation in which it might loosely be said that the courts were substituting their own view for that of the defendant is where they conclude that there was only one decision which could reasonably have been reached. Such decisions are certain to be rare, however, and are in any event occasionally encountered in proceedings for judicial review: for a recent example, see *R* v. *Lord Saville, ex p. A* (1999) 149 N.L.J. 1201.

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concept of justiciability is one which can only meaningfully be considered in relation to specific questions of the kind that may properly arise for determination during the course of particular kinds of legal proceeding. It is pointless and self-defeating to seek to apply it to any question that cannot so arise.

There are two final points to note under this heading. The first is that both Lords Slynn and Hutton endorsed the view of Lord Browne-Wilkinson in *X* v. *Bedfordshire* that Lord Diplock's attempt in *Dorset Yacht* to introduce the public law concept of ultra vires as the test of legality in the tort of negligence was to be deprecated,[223] though there is the glimmer of a recognition in the speech of the former that the substantive principles of that tort might in any event not differ significantly from *Wednesbury* unreasonableness. The second relates to the question of the relevance of the statutory background to the recognition of the existence of a common law duty of care. Lord Hutton quoted with approval[224] passages from both the Court of Appeal in *Fisher* v. *Ruislip-Northwood Urban District Council*[225] and the High Court of Australia in *Sutherland Shire Council* v. *Heyman*[226] to the effect that a public authority exercising statutory powers might place itself in such a relationship with the public that a duty of care might be imported, *subject to the manifestation of a contrary intention in the statute*. Although the divergence of view was not expressly adverted to, this formulation appears to display a preference for the approach of Lord Nicholls in *Stovin* v. *Wise* over that of Lord Hoffmann,[227] which is very much to be welcomed.

C. Application of Private Law Principles

As has so often proved to be the case, it was the traditional private law principles, embodied in the *Caparo* three-stage test of foreseeability, proximity and the fairness and reasonableness of imposing a duty of care, that ultimately proved more significant to the outcome of the appeal. The first two elements were plainly satisfied, and the House was primarily concerned to consider the various policy factors affecting the third limb of the test which had been applied by Lord Browne Wilkinson in *X* v. *Bedfordshire*. Although the *Barrett* case was concerned with the same general area of public authority activity, namely the care and welfare of children, the House was much less ready than the Court of Appeal had been to accept that those policy considerations impinged upon

[223] See Lord Slynn [1999] 3 W.L.R. 79 at p. 97 and Lord Hutton at p. 111.
[224] *Ibid.*, at pp. 102–103.
[225] [1945] K.B. 584, 595.
[226] (1985) 157 C.L.R. 424, 459.
[227] For discussion of this point, see Section III C 2 above.

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the two cases in the same way. Of the various factors itemised in *X* v. *Bedfordshire*, the contention that no analogous duty had been recognised previously was treated simply as a reason for approaching the claim in a circumspect fashion, rather than dismissing it *in limine*.[228] As regards the multi-disciplinary nature of the decision to take a child into care, that could be distinguished from those decisions which fell to be taken once the once the child was actually in care, which were essentially the sole responsibility of the social services, and did not require significant input from elsewhere. Similarly, the decisions in question were less delicate and highly charged than those in *X* v. *Bedfordshire*.[229] Although there was no overt attempt to cast doubt upon the actual outcome in the *X* v. *Bedfordshire* case, the speeches in *Barrett* do display a markedly diminished willingness to accept that the "public policy consideration which has first claim on the loyalty of the law",[230] namely that wrongs should be remedied, should be overborne by other factors. Indeed, some of Lord Browne-Wilkinson's policy considerations received particularly short shrift;[231] the availability of alternative remedies was not a convincing argument for excluding a claim because they were unlikely to be as efficacious as those offered by the tort of negligence, the contribution of which to the maintenance of standards should not be underestimated.[232] Equally, the fact that negligence claims might be time-consuming and costly to defend, or might lead to over-caution, was summarily dismissed as a factor of any real weight.[233]

One proposition that had weighed heavily with the Court of Appeal in *Barrett* was based upon the fact that the local authority in such cases was acting in loco parentis; given that parents should not be liable in respect of decisions with regard to their children's future, then the authority should be similarly immune. The House of Lords, however, was much less impressed by this argument.[234] The local authority's position was not strictly comparable to that of a parent in any practical sense because it employed trained staff to advise it and to make the necessary decisions in pursuance of its

[228] See Lord Slynn, [1999] 3 W.L.R. 79, 94. Lord Hutton, at p. 114, did not agree that the instant case constituted a novel category of negligence claim.

[229] These points were made in the form of simple assertions: see Lords Slynn at pp. 93–94 and Hutton at pp. 113–114.

[230] This had been Lord Browne-Wilkinson's formulation in *X* v. *Bedfordshire*: see [1995] 2 A.C. 633, 649.

[231] Possibly because they had been viewed unsympathetically by the European Court of Human Rights in the *Osman* case: see in particular paragraphs 141–154 of the Court's judgment.

[232] Lord Slynn cited with approval the dissenting judgment of Lord Bingham M.R. in the Court of Appeal in the *X* v. *Bedfordshire* case.

[233] On this point, both their Lordships cited with approval the comments of Evans L.J. in the Court of Appeal in the instant case.

[234] See Lords Slynn at pp. 94–95, 98–99 and Hutton at pp. 111–113.

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statutory functions. Furthermore, many of those decisions—for example, whether the child should be adopted or placed with foster parents—would plainly never arise when a child was living in a normal family relationship. In any event, it was not the case that parents could *never* be liable to their children. In short, none of the policy considerations which militated against recognition of a duty of care was so telling that the plaintiff's claim should be regarded as doomed from the outset.[235]

D. Breach of Duty

In some ways the most interesting aspects of the *Barrett* case lie in the brief consideration given by the House to the often neglected question of breach of duty. Both Lords Slynn and Hutton made a point of stressing that many of the considerations which were relevant to the question of justiciability would also resurface for consideration in the context of breach.[236] Lord Hutton's comments are worthy of citation in full. He stated:

> The standard of care in negligence must be related to the nature of the duty to be performed and to the circumstances in which the defendant has to carry it out. Therefore the standard of care to be required of the defendant ... will have to be determined against the background that it is given discretions to be exercised by statute in a sphere involving difficult decisions in relation to the welfare of children. Accordingly when the decisions taken by a local authority in respect of a child in its care are alleged to constitute negligence at common law, the trial judge, *bearing in mind* the room for differences of opinion as to the best course to adopt in a difficult field[237] and *that the discretion is to be exercised by the authority and its social workers and not by the court*, must be satisfied that the conduct complained of went beyond mere errors of judgment in the exercise of a discretion and constituted conduct which can be regarded as negligent.

This passage is valuable for two reasons. First, it provides clear testimony to the flexibility and sophistication of the breach of duty mechanism, and its capacity to cater for all the considerations which the policy/operational dichotomy and similar principles seek to address, thereby rendering them superfluous. Secondly, the

[235] That is not to deny, of course, that the plaintiff would face an exceptionally difficult task at the trial. *Barrett* was followed by the Court of Appeal in another striking-out case: *Gower* v. *London Borough of Bromley*, *The Times*, 28 October 1999.

[236] See Lords Slynn at pp. 98–99 and Hutton at pp. 115–116.

[237] Lord Slynn expressly noted that the defendants would have the benefit of the principle articulated in *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582 (ed.).

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italicised section exposes the flaw in Lord Hutton's own reasoning as to the supposed necessity for a justiciability principle, by confirming that it is no part of the court's task in a negligence claim to substitute its own view for that of the defendant. All that is now required is for the courts to travel the extra mile by recognising the logic of this position and formally abandoning the notion that any additional principle is required, over and above ordinary private law principles, in cases involving public authority defendants.

If it be claimed that there remains a need for a preliminary filter to eliminate unmeritorious cases, the answer must be that the rag-bag of "justiciability" principles advocated by various academic writers and explored by the courts over the last 30 years have proved a costly and comprehensive failure. It would be preferable to rely for this purpose upon the utilisation of ordinary private law principles in the course of the striking-out process, so that claims might be rejected, for example, if the claim disclosed no interest which the tort of negligence was designed to protect, or if there was no realistic prospect of the plaintiff establishing breach of duty or causation at the trial. The *Barrett* case demonstrates that the latter finding is one rarely likely to be reached, but it remains at least a possibility for genuinely hopeless cases. Such an approach also seems more likely to pass muster with the European Court of Human Rights, since it closely reflects that embodied in the admissibility procedures under the European Convention itself, whereby claims may be rejected as "manifestly ill-founded".

VI. Conclusions

It is submitted that the existing principles of the common law of negligence, intelligently applied, contain all that is needed for sensible outcomes. Thus, public authorities should not *per se* be treated as different from other kinds of defendant. In determining whether a duty of care is owed, the court will no doubt follow the current convention of considering the elements of foreseeability, proximity, and fairness, justice and reasonableness. In practice, however, the key part of the exercise will increasingly be seen as involving an intense scrutiny of the policy arguments for and against imposition of a duty of care in these circumstances. In considering policy, careful attention will need to be paid to such matters as the exact nature of the loss, the closeness of the relationship between the parties and the nature of the defendant's contribution (ie whether the defendant actively brought about the harm or merely failed to prevent its occurrence) and the likely

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practical consequences of the existence (or non-existence) of a duty of care. There are signs that the courts are increasingly effective in analysing and addressing the issues arising from the nature of the loss[238] and whether the situation is one of infliction of loss or failure to confer a benefit.[239] However, the courts have been least convincing in their handling of the argument that imposition of a duty of care would impose undue burdens on a public authority. The kinds of arguments accepted in *X* v. *Bedfordshire*[240] have been adopted uncritically in a variety of contexts in the absence, so far as can be told, of a detailed analysis based on expert evidence.[241]

Finally, it is now clear that the difficulties in this area are not to be resolved by the creation or recognition of any wide ranging immunity from suit for the benefit of public authorities. That appears from, first, the rejection of the concept of an immunity for policy decisions by all the members of the House of Lords in *Stovin* v. *Wise*;[242] and secondly, from the decision of the European Court of Human Rights in *Osman* v. *UK*.

The latter decision of itself is valuable both for rejecting any "blanket" public policy immunity for public authorities, and for its healthy scepticism as to some of the particular arguments commonly deployed on their behalf. It will confirm the trend already apparent from other cases involving public authorities for the arguments both ways to be put into the balance,[243] a process apparently affirmed by the decision in *Barrett* v. *Enfield London Borough Council*.[244]

Accordingly, the ingredients are available for the courts to bring some order into an area that has threatened to descend into chaos.

[238] See *e.g. Murphy* v. *Brentwood District Council* [1991] 1 A.C. 398; the discussion by the Court of Appeal of the different balance of policy factors according to whether loss is personal injury, property damage or economic loss in *Perrett* v. *Collins* [1998] 2 Lloyd's Rep. 255.

[239] See *e.g.* the discussion in *Stovin* v. *Wise* [1996] A.C. 923; *Capital & Counties plc* v. *Hampshire County Council* [1997] Q.B. 1004. This is not to say that the line between liability and non-liability in the case of failure to confer a benefit is satisfactorily clarified: compare the *Capital & Counties* case with *Kent* v. *Griffiths*, *The Times*, 10 February 2000 (note 188).

[240] Above, Section II.

[241] As noted by Buxton L.J. in *Perrett* v. *Collins* [1998] 2 Lloyd's Rep. 255, 277.

[242] But note the views expressed by Lords Slynn and Hutton in *Barrett* discussed in Section V B.

[243] See *e.g. Swinney* v. *Chief Constable of the Northumbria Police* [1997] Q.B. 464, 484 (Hirst L.J.), 486 (Peter Gibson L.J.) (arguable that there was a special relationship between police and informant to keep information supplied secure so as to maintain secrecy of informant's identity; necessary to consider all public policy arguments in the round); *ibid.* (No. 2), *The Times*, 25 May 1999 (trial judge found that a duty of care was owed but there was no breach); *Leach* v. *Chief Constable of Gloucestershire Constabulary* [1999] 1 W.L.R. 1421 (alleged failure to provide counselling for volunteer who sat in as "appropriate adult" on police interviews with Frederick West).

[244] [1999] 3 W.L.R. 79.

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