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BUNGLED POLICE EMERGENCY CALLS AND THE PROBLEMS WITH UNIQUE DUTIES OF CARE

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1. Introduction

In *Michael v Constable of South Wales* the Supreme Court of the United Kingdom ('UKSC') upheld the striking out of a negligence action brought by the estate of a murdered victim of domestic violence.[1] Ms. Michael's ex-partner, Williams, discovered her in bed with another man. Williams hit her, left to take the other man into town, and told her he would return to kill her. Michael made an emergency telephone call to the police. Her call was misrouted to the neighbouring county and answered by a police operator, Ms. Mason. Michael described the attack and told Mason that Williams was going to kill her. Mason told Michael she would notify the police force in Michael's area. She logged the call as "Grade 1," which meant a response within 5 minutes was required. However, when Mason contacted Gould, the police operator in Michael's area, she neglected to mention that Michael was in fear for her life. Gould therefore logged the call as "Grade 2," which meant a response within an hour. Michael called a second time about 15 minutes after her first call. There were screams on the line and then the call ended. The event was then upgraded to "Grade 1." The police arrived at Michael's home 22 minutes after her first call and discovered that Williams had brutally stabbed Michael to death. Had the police not bungled her first call, it seems likely that the claimants could have established that the police would have been able to save Michael's life. Williams pleaded guilty to murder and was sentenced to life imprisonment. Mason and Gould faced disciplinary action. The Independent Police Complaints Commission issued a report strongly criticizing Mason for breaching internal policy by failing to obtain critical information from Michael. The police force in Michael's area was criticized for failing to respond immediately upon receiving the report from Mason, given that so much critical information was missing.[2] Nevertheless, in a 5-2 decision the UKSC dismissed an action in negligence, brought on behalf of Michael's parents and children, seeking damages against the Chief Constables of both counties.

The majority in *Michael* displayed little interest in Ms. Michael's experience. Instead, it focussed on affirming a fundamental principle of UK law: that

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[1] *Michael v The Chief Constable of South Wales Police*, [2015] UKSC 2, [2015] AC 1732 [*Michael*].

[2] United Kingdom, Independent Police Complaints Commission, *Independent Investigation into Police Contact with Joanna Michael prior to her death*, online: <https://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/joanna_michael_final_report.pdf> at 3–4.

a common law duty of care in negligence can never be founded on a statutory duty or power alone. *Michael* holds that the courts should not recognize unique public duties of care. A unique public duty is one that is imposed on governments or other public defendants where no such duty would be imposed on a private party in the same or an analogous situation.[3] Instead, the liability of public defendants must be based on the application of ordinary private law principles. McBride calls this the Diceyan principle.[4] Public actors should be "under the *same* (emphasis added) law that applies to private citizens," a principle Dicey called the "idea of equality."[5]

Like the *Michael* decision, this article does not deal primarily with the social problem of domestic violence. It does shed some light on the question of police responsibilities to potential victims of crime who reach them on emergency hotlines. However, the primary focus is on unique duties of care, with *Michael* serving as a provocative background against which to evaluate the arguments. I believe that Ms. Michael's family was entitled to a remedy in tort. I do not believe it would be necessary in Canada to create a unique public duty to provide one.

Public defendants owe the same duties of care as do private citizens.[6] In Section 2, I will review the basic law of negligence pertaining to the failure of one private party to confer a benefit on another.[7] The general rule is that one private party

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[3] *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129 [*Hill*] is an example of a duty of care that may only be owed by the police, but is nevertheless analogous to private party duties. The court recognized a duty of care owed by an investigating police officer to a suspect in a criminal investigation. The relationship between the parties is analogous to other special relationships of control and vulnerability between private parties where exceptional affirmative duties of care have been recognized. See 175–177, below.

[4] Nicholas McBride, "Michael v Chief Constable of South Wales Police [2015] UKSC 2" (2015) University of Cambridge Legal Paper Research Series, Paper No. 21/2015 at 5, online: <ssrn.com/abstract=2565068> [McBride, "Michael Comment"]. See also Nicholas McBride, "Michael and the future of tort law" (2016) 32 J of Professional Negligence 14 at 15, n 12 (WL) where the author has now renamed it the "uniform approach" [McBride, "Professional Negligence"].

[5] Peter Hogg, Patrick Monahan & Wade Wright, *Liability of The Crown*, 4th ed (Toronto: Carswell, 2011) at 218–19 citing Albert Venn Dicey, *The Law of the Constitution*, 10th ed (London: McMillan, 1959) at 193.

[6] However, the Canadian public defendant may enjoy an immunity from liability if the allegation of negligence concerns core government policy. See *Just v British Columbia*, [1989] 2 SCR 1228, 64 DLR (4th) 689 [*Just*] and *R v Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*]. Immunity is different than an objection to a unique public duty. See 172, below. It can be argued that immunizing public defendants from ordinary negligence liability is as objectionable as subjecting them to unique duties. See Bruce Feldthusen, "Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified" (2014) 92 Can Bar Rev 211.

[7] The defendant does not perform an act that causes harm. Rather the defendant fails to prevent harm or fails to provide other benefits. This is described variously; e.g. as potential liability for nonfeasance, for omissions, or for a failure to take positive action. See *Childs v Desormeaux*, 2006 SCC 18 at paras 31–32, [2006] 1 SCR 643 [*Childs*]. Examples include duties to rescue, duties to warn, duties to protect, and duties to control. See also 195, below.

does not owe an affirmative duty to confer a benefit upon another.[8] There are numerous exceptions to this "no duty" rule. Canadian courts probably recognize a broader range of exceptions, and apply them less strictly than do courts in the UK.

Section 3 suggests that *Michael* would have been decided differently in Canada,[9] and possibly should have been decided differently in the UK, based on basic private party negligence law. The *Michael* claim ought to have been allowed to proceed to trial. There is a sound case that the claimants could have established that the police assumed responsibility to Ms. Michael. If necessary, they might also have been able to establish that she relied on the police to her detriment. This is an important conclusion because it demonstrates that basic negligence law is not as impotent in the face of domestic abuse as *Michael* suggests it is in the UK. It also shows that basic negligence law can take into account unique aspects of government conduct without creating unique public duties of care.[10]

Sections 4 and 5 consider the alternative argument: assuming that the facts will not support a duty in private party negligence law, when, if ever, ought the law to recognize unique public duties.[11] Section 4 considers arguments in favour of unique duties that are grounded in what McBride calls the "policy approach" derived from the *Anns* case.[12] Characteristic of this approach is a presumption that government owes a duty to provide benefits to its citizens at a standard of reasonable care unless there are good reasons to deny or limit the duty.[13] McBride notes that the

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[8] The classic authority is *Osterlind v Hill,* 263 Mass 73 (1928), 160 NE 301. The defendant rented a canoe to an intoxicated customer. He then ignored the customer's cries for help when the canoe tipped. The court held that he did not owe a duty to rescue the plaintiff. This case would probably be decided differently today in Canada, based on a special relationship exception. See *Childs, ibid* at paras 38–40.

[9] A Canadian case somewhat similar to *Michael* is *Mooney v British Columbia (AG),* 2001 BCSC 419, [2001] BCLWD 913, aff'd 2004 BCCA 402, 31 BCLR (4th) 61, leave to appeal to SCC refused, *Mooney v Canada (AG)* (3 March 2005), No 30546 [*Mooney*]. Mooney formally reported to the police credible threats of violence by her ex-partner. The police did nothing. Forty-seven days later he broke into her house, killing her friend and injuring her daughter. At trial a duty of care was recognized on the part of police to protect Mooney. On appeal the case was dismissed on the issue of causation. The question of unique duties of care was not discussed explicitly. See Margaret I Hall, "Duty, Causation, and Third-Party Perpetrators: The Bonnie Mooney Case" (2005) 50 McGill LJ 597; Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC press, 2013) at ch. 2; Elizabeth Sheehy, "Causation, Common Sense and the Common Law: Replacing Unexamined Assumptions with What We Know About Male Violence Against Women or From Jane Doe to Bonnie Mooney" (2005) 17 CJWL 97; Erika Chamberlain, "Tort Claims for Failure to Protect: Reasons for (Cautious) Optimism since *Mooney* " (2012) 75 Sask L Rev 245 [Chamberlain, "Optimism"]; and Julia Tolmie, "Police Negligence in Domestic Violence Cases and the Canadian Case of Mooney: What Should Have Happened, and Could It Happen in New Zealand?" 2006 NZLR 243.

[10] See 178–181 and 196–200 below.

[11] See text accompanying note 3.

[12] McBride, "Michael Comment", *supra* note 4 at 6 discussing *Anns v Merton London Borough Council,* [1978] AC 728, [1977] UKHL 4 [*Anns*].

[13] See 189–195, below, where this "Good Public Samaritan" approach is criticized.

policy approach often has resulted in the same outcome – no unique public duty – as the Diceyan approach.[14] The sympathetic facts in *Michael* are useful to illustrate the issues. Section 5 considers the possibility of unique public duties of care in narrowly defined specific circumstances.

Although *Anns* has been overruled in the UK,[15] Canada continues to follow robustly the *Anns* policy approach to duty of care.[16] Not surprisingly, therefore, the Supreme Court of Canada ('the Supreme Court') has recognized at least 5 unique public duties of care.[17] The Supreme Court also purports to follow the same rule as the UKSC, that a common law duty of care cannot be imposed on public authorities based on the words of the enabling statutes alone.[18] Yet it is difficult to explain the recognized unique public duties otherwise. Rarely has the court acknowledged that is creating a unique public duty of care and never has it discussed explicitly and fully whether it is appropriate to do so, as did the court in *Michael*. There may exist a principled justification for imposing unique public duties, but it has never been put forth as such. Instead, I will suggest that the unique duties that Canada does recognize have emerged on an *ad hoc* basis, in the process damaging the critical structure of common law adjudication.

Issues surrounding unique public duties are sometimes confused with issues surrounding government immunity for high level policy decisions.[19] This is probably because both are concerned with respecting the separation of powers between the legislative bodies and the courts. However, there is a fundamental difference. A case for immunity only arises when the public defendant would otherwise be liable for breaching a recognized duty of care.[20] Immunity is a concept employed to *reduce* government responsibility for otherwise negligent conduct below the level of

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[14] McBride, "Michael Comment", *supra* note 4 at 6.

[15] The two-step duty framework was rejected in *Caparo Industries plc v Dickman*, [1990] 2 AC 605, [1990] 1 All ER 568. Liability for defective structures was rejected in *Murphy v Brentwood District Council*, [1991] 1 AC 398, [1991] UKHL 2.

[16] This is true especially after the decision in *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537 [*Cooper*].

[17] The following unique duties have been identified by Bruce Feldthusen, "Unique Public Duties of Care: Judicial Activism in the Supreme Court of Canada" (2016) 53 Alberta L Rev 955: *Schacht v O'Rourke,* [1976] 1 SCR 53, 55 DLR (3d) 96 [*Schacht*]; *Kamloops (City) v Nielsen*, [1984] 2 SCR 2, 10 DLR (4th) 641 [*Kamloops*]; *Just*, *supra* note 6; *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 (the negligence holding against the Chief of Police) [*Odhavji*]; and *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5, [2010] 1 SCR 132 [*Fullowka*].

[18] *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205, 143 DLR (3d) 9 [*Saskatchewan Wheat Pool*]; *Odhavji Estate, ibid.* Admittedly, these decisions are difficult to reconcile with others. See e.g. *Cooper*, *supra* note 16 at para 43.

[19] See also McBride, "Professional Negligence", *supra* note 4 at 17 and 20.

[20] The decision in *Imperial Tobacco*, *supra* note 6 provides an excellent example. The defendant Canada was held to owe a recognized *prima facie* duty regarding misrepresentations that caused detrimental reliance loss at Step 1 of the *Anns* framework. However, at Step 2 Canada was granted immunity for its alleged breach of duty because the court held that the representation was made as an exercise of high level policy.

responsibility owed to others by private citizens. In contrast, unique public duties arise by definition only when the conduct at issue is not governed by ordinary private party negligence law. Whereas a claim of immunity seeks special exculpatory treatment, a unique public duty is an *additional* duty owed only by the public defendant. The objection to a unique public duty is that it violates Dicey's equality principle.[21] There is no other duty from which immunity could be sought.[22]

Although "duty of care" is a classic common law negligence question, unique public duties of care raise important questions about the separation of powers in constitutional law. When courts create unique public duties of care, I will argue that they appropriate unilaterally powers that previously and properly belonged to the legislative branch.[23] I will argue that the law of negligence ought not to recognize unique public duties of care unless a principled justification that does not prove to be over-broad can be identified. No doubt there are compelling counter-arguments.[24] Canadian law would benefit if these came forth explicitly.

2. The Duty to Confer Benefits in Private Party Negligence Law

To evaluate the case for unique public duties of care it is necessary to identify the principles that govern duties to provide benefits between private parties.[25] The general rule in negligence is that one private party does not owe an affirmative duty to confer benefits upon another. I will refer to this as the "no duty" rule. There are

[21] Logically, the objection to unique public duties should be extended to policy immunity. They both entail treating governments differently from private parties.

[22] Prior to *Imperial Tobacco*, *supra* note 6, *Just* was the leading authority on policy immunity. *Just* created a unique public duty of care. Cory J was possibly careless in using immunity language to refer to the process of creating a unique duty. I think not. Several passages in *Just* suggest that Cory J did not support unique public duties and did not realize that he was creating one. See *Just*, *supra* note 6 at 1239 and 1244. The finding of proximity in *Just* is out of line with basic private party negligence law and with proximity decisions in most other public authority cases. See *Taylor v Canada (AG)*, 2012 ONCA 479 at para 80, 111 OR (3d) 161. The erroneous assumption that he was dealing with a pre-existing common law duty principle is what best explains Cory J's discussion about immunity.

[23] This is a different and narrower argument than a rights-based argument that would preclude any and all judicial policy making. See 192, below.

[24] I would find it more difficult to adhere to this position if I were not confident that basic Canadian negligence law would support a duty of care on the part of the police in a case such as *Michael*.

[25] I rely on the excellent article by Peter Benson to explain the significance of this distinction in private law. At the risk of over-simplification, he says ". . . misfeasance restricts the fundamental imperative in private law to a prohibition against conduct, whether act or *omission*, that injures or interferes with a definite but limited kind of protected interest; namely, another's ownership right" (person or property). Nonfeasance does not interfere with the plaintiff's right to exclude others from her personal or proprietary interests; it fails to benefit her. See Peter Benson, "Misfeasance as an Organizing Normative Idea in Private Law" (2010) 60 UTLJ 731 at 733 and generally at 731–737. See also *Childs*, *supra* note 7 at paras 31–32; and Donal Nolan, "The Liability of Public Authorities for Failing to Confer Benefits (2011) 127 LQR 260.

numerous exceptions. Some are unclear or contentious. Many overlap. Authors and courts classify the exceptions differently.

A. Defendant by his Fault Creates a Situation of Peril

When a defendant *by his fault* creates a situation of peril, the defendant comes under a duty to protect the person so-imperilled.[26] Strictly speaking, this is not an exception to the "no duty" rule. The "no duty" rule does not apply to misfeasance that causes physical harm. However, the creation of the new peril frequently occurs in the course of providing a benefit to another. In *Hampshire*, for example, a fire department was held liable based on its decision during its intervention to turn off the sprinkler system. Turning off the sprinklers made the fire damage more extensive than it would have been had they done nothing. The department was held liable for the additional damage. [27] In *Zelenko v Gimbel Brothers* the defendant removed the ill plaintiff to a place where no one else could help him. The fresh harm was the defendant's denying the plaintiff other aid.[28] There is no reason to distinguish making someone worse off by denying other aid from any other manner of inflicting harm.

B. Duty to Warn

There is no general duty to warn another about dangers of which one is aware.[29] However, product manufacturers and distributors owe a duty to warn of inherently dangerous products or dangerous uses of safe products. The duty arises when the defendant acquires actual knowledge of the danger, including those it discovers after sale.[30] Significantly, it arises even when the defect was not caused by any fault on the part of the defendant. This exception only applies to a defendant who has created the peril. It is also relevant that the product manufacturer exception is limited to

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[26] *Videan v British Transport Commission*, [1963] 2 QB 650 at 699, [1963] 2 All ER 860, quoted with approval in *Horsley v McLaren*, [1972] SCR 441 at 444, 22 DLR (3d) 545 [*Horsley*]. *Dorset Yacht Co Ltd v Home Office*, [1970] AC 1004, [1972] All ER 294 [*Dorset Yacht*] discussed below, may also be explained this way. *Horsley* also establishes that if the defendant's breach of the original duty foreseeably induces a new rescue attempt, a further duty may be owed to protect the new rescuer. The defendant's breach of the original duty constitutes a fresh peril to the foreseeable rescuer.

[27] *Capital & Counties plc v Hampshire County Council*, [1997] QB 1004, [1997] 2 All ER 865 (CA), discussed in *Michael*, *supra* note 1 at para 71.

[28] *Zelenko v Gimbel Brothers*, 287 NYS 134 at 135, aff'd 287 NYS 136 (1936).

[29] See Margaret I Hall, "Duty to Protect, Duty to Control and the Duty to Warn" (2003) 82 Can Bar Rev 645 at 673–79.

[30] *Rivtow Marine v Washington Iron Works*, [1974] SCR 1189, 40 DLR (3d) 530; *Lambert v Lastoplex Chemicals*, [1972] SCR 569, 25 DLR (3d) 121; *Hollis v Dow Corning*, [1995] 4 SCR 634, 266 DLR (4th) 257.

commercial defendants who create the risk.[31] It is doubtful, but possible, that a duty to warn might be extended to non-commercial defendants such as motorists who create a peril by being involved in an automobile accident without any fault on their part.[32]

C. Special Relationships of Control:[33]

There exists a number of status-based "special relationships" where the more powerful party owes affirmative duties to the more vulnerable party. The term "special relationship" is not a technical term so much as a convenient label for an open-ended list of such relationships. Some are formal, ongoing status relationships like "parent-child" or "doctor-patient." Others, like "commercial alcohol provider-customer," are situational.[34] The underlying principle is that a defendant in a position of control over a vulnerable plaintiff owes certain affirmative obligations to the plaintiff. These are true exceptions to the "no duty" rule.

Vulnerability alone cannot justify an exception to the "no duty" rule. If it did there would nothing left of the rule.[35] Having control simply makes an intervention easier or more likely to be effective. This is irrelevant to the "no duty" rule. Control and vulnerability must work together. Perhaps the answer lies in the plaintiff's exclusive right to control over her own body or property. When a defendant assumes or obtains, and retains, some of what was originally the plaintiff's exclusive right of control, the defendant is no longer a mere bystander. The relationship has become "special" because of the transfer of control. At that point, the defendant has been entrusted with some of the core rights of the plaintiff. It has also been argued that a government police force effectively monopolizes and controls a citizen's right to protect herself from crime and that this entails special affirmative obligations.[36]

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[31] See *Childs*, *supra* note 7 at para 35.

[32] See *Ziemer v Wheeler*, 2014 BCSC 2049, [2015] BCWLD 232. See also *Oke v Weide Transport* (1963), 41 DLR (2d) 53, 43 WWR 2 (Man CA) per Freedman JA dissenting.

[33] See Hall, *supra* note 29; Nicholas McBride & Roderick Bagshaw, *Tort Law*, 5th ed (Harlow England: Pearson Education, 2015) at 245–253.

[34] See Hall, *supra* note 29 at 653.

[35] See Allan Beever, "The Basis of the *Hedley Byrne* Action" in Kitt Barker, Ross Grantham & Warren Swain, *The Law of Misstatements* (Oxford and Portland Oregon: Hart Publishing, 2015) 83 at 97. Beever suggests that had the passenger who fell overboard in *Horsley* swum nearby to another boat the vulnerability and dependency would be the same as it was when he stayed near his own boat. But those on the other boat would not owe any special duty to rescue him. See *contra* Andrew Robertson & Julia Wang, "The Assumption of Responsibility" in Barker, Grantham & Swain 49 at 70 who say dependency is the key.

[36] This is an important idea offered in support of a unique public duty of care by Stelios Tofaris & Sandy Steel, *Police Liability in Negligence for Failure to Prevent Crime: Time to Rethink* (University of

There are numerous examples of recognized special relationships of control: "employer-employee"[37]; "pleasure boat captain – passenger"[38]; "occupier of land-entrants"[39]; and "landlord-tenant."[40] Some of these special relationships involve public defendants including "police officer-suspect"[41]; "police officer-informant"[42]; "police force-potential victims of crime"[43] and "warden-prisoner."[44]

Doctors and other health care providers owe a unique obligation to perform the professional service with the reasonable care expected of similarly situated professionals.[45] A doctor who voluntarily intervenes to treat an accident victim must exercise reasonable care to improve the patient's condition, not merely to avoid making it worse.[46] There are several possible explanations for this rule, none universally accepted as dominant. It is certainly relevant that medical intervention puts the patient's health, possibly life, at risk.[47] This special obligation may also be explained as a requirement derived from the professional status. This may be part of our understanding of what it means to render "professional" services. Even by contract, medical doctors are not permitted to provide bargain-basement, lower skill professional services. They must meet the standard of the profession. Or, this affirmative obligation may derive from one of two possible meanings of "assumption of responsibility" in basic private party negligence. The first refers to a duty not to induce detrimental reliance loss. However, the second, an "equivalent to contract" approach to assumption of responsibility, requires the defendant to provide a positive

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Cambridge Legal Studies Research Paper Series, Paper No 39/2014) at 5 [Tofaris & Steel, "Police Liability"], online: <https://ssrn.com/abstract=2469532>, and quoted in dissent by Lady Hale in *Michael*, *supra* note 1 at para 189; and Stelios Tofaris & Sandy Steel, "Negligence Liability for Omissions and the Police" (2016) 75 Cambridge LJ 128. [Tofaris & Steel, "Omissions"]. It is expressed in their fourth condition for proximity, quoted at 198, below.

[37] *Hunt v Sutton Group Incentive Reality*, 60 OR (3d) 665, 215 DLR (4th) 193; *Jordan House v Menow*, [1974] SCR 239, 38 DLR (3d) 105 per Laskin J [*Jordan House*].

[38] *Horsley*, *supra* note 26.

[39] *Depue v Flateau*, 111 NW 1 (Minn SC 1907) discussed in Beever, *supra* note 35 at 96.

[40] *Q v Minto Management* (1985), 49 OR (2d) 531, 15 DLR 4th 581 (SC).

[41] *Hill*, *supra* note 3.

[42] Robertson & Wang, *supra* note 35 at 78–9.

[43] *Jane Doe v Toronto (Metropolitan) Commissioners of Police*, 39 OR (3d) 487, 72 DLR (4th) 580 (Ct J (Gen Div)).

[44] *Dorset Yacht*, *supra* note 26.

[45] The same may be true of other professionals such as lawyers who voluntarily provide professional services. *Michael*, *supra* note 1 at para 178 quoting *Lanphier v Phipos* (1838), 8 C & P 475, 479; Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 12.

[46] Nolan, *supra* note 25 at 282.

[47] See *Criminal Code of Canada*, RSC 1985, c C-46 at s 217.

benefit if that was the responsibility assumed. These two possibilities are discussed below.[48]

There are also numerous examples of "special relationships of control" that entail the dual duties to control the vulnerable party and to protect third parties from being injured by the vulnerable party.[49] Liability to the third party will depend on the nature of both relationships, defendant-perpetrator and defendant-third party plaintiff.[50] Doctors may be required to protect others from their patients.[51] Parents are required to protect their child and also required to control the child so that the child does not harm others. Commercial alcohol providers owe a duty to protect their patrons,[52] and also a duty to control their patrons so they do not injure others.[53] Jailers owe a duty to protect their prisoners, and also a duty to control them so they do not escape and injure others.[54] These duties to the third party are not pure exceptions to the no duty rule. They are all but specific examples of the broader principle discussed above that a defendant who creates a situation of peril by his fault owes a duty to protect persons so imperilled.

D. Assumption of Responsibility

Recall, the general rule is that one party is under no duty to confer a benefit on another. In *Michael*, the majority considered two recognized exceptions to the "no duty" rule, eventually holding that neither applied to the facts. The first was when one party owed a duty to control another, and thereby came under a duty to protect a third party.[55] The second was when the defendant assumed responsibility to benefit the plaintiff under the *Hedley Byrne* principle.[56]

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[48] See 178, below.

[49] See generally Hall, *supra* note 29. This is one of two exceptions to the "no duty" rule identified in *Michael*, *supra* note 1 at para 99.

[50] Hall, *ibid* at 646; *Michael*, *supra* note 1 at para 99.

[51] See *Wenden v Trikha*, 1 Alta LR (3d) 283, 124 AR 1 aff'd 135 AR 382, 14 CCLT (2d) 225 (CA), leave to appeal to the SCC refused 149 AR 160, 17 CCLT (2d) 285. See also Douglas Smith, "Wenden v Trikha and Third Party Liability of Doctors and Hospitals: What's Been Happening to Tarasoff" (1995-96), 4 Health L Rev 12.

[52] *Jordan House*, *supra* note 37 at 248.

[53] *Stewart v Pettie*, [1995] 1 SCR 131 at 143, 25 Alta LR (3d) 297.

[54] *Dorest Yacht*, *supra* note 26 was so explained in *Michael*, *supra* note 1 at paras 58, 89, 142.

[55] *Michael*, *supra* note 1 at para 135.

[56] *Ibid* at para 136.

The court in *Michael* stated the *Hedley Byrne* principle in two significantly different ways. First, commenting on what (little) Lord Goff had said about it in *Spring*, the court said:[57]

> The underlying principle rested on an assumption of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due skill and care. The principle that a duty of care could arise in that way was not limited to a case concerned with the giving of information and advice (*Hedley Byrne*) but could include the performance of other services.

Under this view, the defendant assumes responsibility to exercise due skill and care, the familiar standard of care in negligence law, but not unknown in contract.[58] What precisely "assumes responsibility" means is contentious in UK law.[59] *Michael* seems to adopt the view that responsibility is actively assumed by the defendant rather than imposed by law.[60] Detrimental reliance is presumably required.[61] This explanation of *Hedley Byrne* is a variant, albeit a significant variation,[62] of the "create the peril" situation.[63] This is also a principle that antedates *Hedley Byrne*, applies to acts as well as to statements, and applies to physical harm as well as to economic loss.[64]

Later, Lord Toulson explained the *Hedley Byrne* principle differently:[65]

> The principle established by *Hedley Byrne* is that a careless misrepresentation may give rise to a relationship akin to contract under which there is a positive duty to act. Lord Devlin spoke of "an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract" and he said that "wherever there is a relationship equivalent to contract, there is a duty of care" (pp 529-530).

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[57] *Ibid* at para 67.

[58] See e.g. *Esso Petroleum v Mardon*, [1976] QB 801, [1976] 2 All ER 5 (CA) per L Denning.

[59] See generally Beever, *supra* note 35; Robertson & Wang, *supra* note 35; and Christian Witting, "What Are We Doing Here? The Relationship Between Negligence in General and Misstatements in English Law" in Barker, Grantham, & Swain, *supra* note 35.

[60] Michael, *supra* note 1 at para 67

[61] *Ibid* at para 138.

[62] The plaintiff injures herself by relying on the defendant. There must be an adequate explanation of why she should be able to hold the defendant responsible for this. See Stephen R Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 UTLJ 247 at 285.

[63] See Nolan, *supra* note 25 at 278.

[64] *Mercer v SE&C Ry*, [1922] 2 KB 549.

[65] *Michael*, *supra* note 1 at para 135.

The "equivalent to contract" approach has several possible implications. Presumably it would require privity, thereby limiting the ambit of responsibility. The basis of liability would not be the failure to confer the benefit, but the breach of the undertaking.[66] The defendant could assume responsibility to provide the plaintiff with a positive benefit, not merely for taking due care to prevent a detrimental reliance loss.[67] The court would be looking for an intention to be bound to a promise confer a benefit, not merely an intention that the plaintiff rely. The issue would go beyond whether responsibility was assumed to *what* responsibility was assumed.

The equivalent to contract approach enjoys powerful academic support.[68] The cases said to support it are not definitive.[69] Later, Lord Toulson seems to reject the broader approach without discussing it, and to require detrimental reliance. Despite the absence of clear authority, the case for a duty to provide positive benefits independent of detrimental reliance is a compelling one that is likely to be pursued in future. The court in *Michael* missed an excellent opportunity to consider it.

3. *Michael* falls within the Assumption of Responsibility Exception to the "No Duty" Rule

Although there was great vulnerability to the police on the part of Ms. Michael, the police did not exercise any control over her such as would have entailed a duty to protect her. They did not create the original danger that Williams posed to Michael. Nor were they in a traditional special relationship of control with the murderer Williams based on custody. Later, I will suggest that an expanded duty to control might apply had the police been aware of the risk to Michael, but she had been unaware of it. In the actual *Michael* situation, the most promising avenue for establishing a duty of care under basic negligence law was to establish an assumption of responsibility on the part of one or both of the police emergency operators. The claimants must have been devastated to discover that the majority only found it necessary to devote a single paragraph to this crucial line of argument, and to dismiss it summarily. The key paragraph reads as follows:[70]

> Mr Bowen submitted that what was said by the Gwent call handler who received Ms. Michael's 999 call was arguably sufficient to give rise to an assumption of responsibility on the *Hedley Byrne* principle as amplified in

[66] See Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) at 222.

[67] See Beever, *supra* note 35 at 98–99.

[68] See *ibid* at 83, 104–105; Stevens, *supra* note 45 at 14; Nolan, *supra* note 25 at 282–83.

[69] These are primarily the health care professional cases some of which may be explained otherwise. See 176–177, above. But see especially *Barrett v Ministry of Defence*, [1995] 3 All ER 87, [1995] 1 WLR 1217. See also McBride & Bagshaw, *supra* note 33 at 230.

[70] *Michael*, *supra* note 1 at para 138.

> *Spring v Guardian Assurance Plc*. I agree with the Court of Appeal that the argument is not tenable. The only assurance which the call handler gave to Ms. Michael was that she would pass on the call to the South Wales Police. She gave no promise how quickly they would respond. She told Ms. Michael that they would want to call her back and asked her to keep her phone free, but this did not amount to advising or instructing her to remain in her house, as was suggested. Ms. Michael's call was made on her mobile phone. Nor did the call handler's inquiry whether Ms. Michael could lock the house amount to advising or instructing her to remain there. The case is very different from *Kent v Griffiths* where the call handler gave misleading assurances that an ambulance would be arriving shortly.

This is virtually all the court had to say about the application of private party negligence law to what actually happened to Ms. Michael. The court's lengthy and detailed discussion of the (arguably) grander principles of unique public duties, and the rights versus policy debate, overwhelmed discussion of the outrageous circumstances of the murder.[71] But there is nothing inconsistent with supporting the Diceyan approach or the rights-based approach on the one hand, and giving proper consideration to the question of what responsibilities in ordinary private party negligence, if any, a police emergency operator assumes to a citizen who calls in distress on the other. The conclusion may well be "none." However, this paragraph offers scant and superficial justification for that conclusion.

The Supreme Court of Canada no longer follows *Hedley Byrne* in negligent misrepresentation cases. Today, a plaintiff need only establish that the defendant ought to have reasonably foreseen that the plaintiff would rely on the information or advice to their detriment, and that reliance in the particular case was reasonable. The Supreme Court restricted the scope of the duty by adopting a transaction-specific "end and aim" test to control indeterminate liability.[72] Possibly, the reliance approach in *Hercules* has replaced the assumption of responsibility approach across the board.[73] Either way, the claimants in *Michael* have a strong case. It is obvious

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[71] Lord Toulson's reasons constitute a dream come true for supporters of the Diceyan approach, and supporters of the rights-based approach to negligence law. One hundred and thirty-nine paragraphs of *obiter dicta* would have been less compelling. Even McBride's usually sharp style of criticism appears somewhat muted by his undisguised joy at the triumph of the Diceyan and rights-based approaches. In "Michael Comment", *supra* note 4 at 9–10 he says with uncharacteristic understatement:

> But the UKSC was taking a bit of a chance by making these findings without the benefit of a full hearing. Perhaps the need to lay down a strong line in *Michael* on the future of liabilities of public bodies in omissions cases justified doing this, but I do feel some unease at this aspect of the decision, particularly as there was evidence that Joanna's neighbours could hear what was going on, and were concerned enough that they called the police themselves (though their calls were mis-routed to the Gwent police as well).

[72] *Hercules Managements v Ernst & Young*, [1997] 2 SCR 165 at 200, 146 DLR (4th) 577. This is developed by Bruce Feldthusen, "*Hedley Byrne*: Misused, then Exiled by the Supreme Court of Canada" in Barker, Grantham & Swain, *supra* note 35, ch 11.

[73] That said, there is ample support for the assumption of responsibility principle that has never been overruled or even criticized. See e.g. *Welbridge Holdings Ltd v Greater Winnipeg*, [1971] SCR 957, 22 DLR (3d) 470; *J Nunes Diamonds Ltd v Dominion Electric Protection Co*, [1972] SCR 769, 26 DLR (3d)

that someone in the position of Ms. Mason, the first call operator, knows that emergency callers are relying on her. The claim is transaction-specific. The very nature of the service is to intend, induce and invite specific reliance. Citizens call the emergency line expecting a proper response to the emergency. Relying on the police to provide one is entirely reasonable.

The claim in *Michael* was struck out on a different basis. The majority held that Ms. Mason made no relevant statements or promises whatsoever. The majority conceded that if Mason told Michael that help would arrive shortly, there might have been a duty, and liability if reliance on that statement had caused additional harm.[74] True, Mason only gave assurance that she would pass on the call to the proper police department. But it is doubtful the claim would have been dismissed had Mason simply called Gould, told him there was a call for him and passed on Michael's number. Surely Ms. Michael was entitled to believe at a minimum that Mason undertook to convey the full and relevant details of her call according to established police procedure. This Mason failed to do.

When Mason asked Michael whether she was able to lock the house, it would have been reasonable for Michael, beaten, terrified, alone, and as vulnerable to Mason as she can possibly be, to assume that she was being advised to stay in the house and lock up. The problem is a line of UK authority that requires in police cases that only an unambiguous explicit promise can constitute an assumption of responsibility.[75] Lord Kerr effectively criticized this rule in dissent.[76] Employing it in *Michael* is the ultimate irony. The entire majority judgment is devoted to championing the Diceyan approach. Yet, when it came to the actual claim the majority retained a rule that protects the police from the ordinary rules of negligence with a unique and strictly limited public duty.

Many, if not most, of the significant facts referred to immediately above are uniquely associated with the police response to an emergency call. However, the duty that I argue should result is not a unique public duty. The principle that liability will be imposed based on an assumption of responsibility is a principle of basic negligence law. The very nature of the public emergency service is to intend, induce and invite specific reliance, the touchstones of an assumption of responsibility. In this way, the common law may take into account factual matrixes that are unique to

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699 per Spence J (dissenting), citing John Fleming, *The Law of Torts*, 4th ed (Sydney: Law Book Co, 1971) at 564; *Hodgins v Nepean (Township) Hydro-Electric Commission*, [1976] 2 SCR 501, 60 DLR (3d) 1; *Carman Construction Ltd v Canadian Pacific Railway Co*, [1982] 1 SCR 958, 136 DLR (3d) 193; *Central Trust Co v Rafuse*, [1986] 2 SCR 147, 31 DLR (4th) 481.

[74] *Michael*, *supra* note 1 at para 138; this was the case in *Kent v Griffiths* (2000), [2001] QB 36, [2000] 2 All ER 474 (CA).

[75] See *Michael*, *supra* note 1 at para 164. This rule is consistent with the "contract without consideration" approach to *Hedley Byrne* discussed immediately below.

[76] See *supra* note 1, especially at paras 165–68.

government activity and address the understandable view that there are situations where we might expect more from the government than from a private citizen. This is how the argument above is constructed.[77] The important thing is that the principle of law is the same. In contrast, to impose liability on the police in the absence of an assumption of responsibility would require a unique principle of public liability.

The next question is whether the claimants are required to prove that the failure to communicate the emergency properly, or the advice to stay in the house, or any other assumptions of responsibility that might have been revealed at trial, put Ms. Michael in a worse position than she would have been in had she not called the police. There is strong academic support for a "contract without consideration" approach to assumption of responsibility. Under that approach, it is the breach of an undertaking, not the infliction of detrimental reliance loss, which constitutes the actionable wrong with assumptions of responsibility.[78] A party may be held liable for failing to deliver a benefit based on an undertaking to do exactly that. Arguably, the undertaking to forward the full and relevant details of Michael's original call to the proper police station was an undertaking to provide a benefit. The police promised to help her and their failure to do so allowed Williams to murder her. This is an argument that ought to have been considered by the court, and the claimants ought to have been allowed to develop an evidentiary foundation for it at trial.

Recall also that a doctor's duty to use reasonable care to improve the patient's situation may be based on the risk to health and life with medical interventions.[79] If so, an analogy might be drawn to the case of emergency responders who begin a professional interaction with a person who is in the midst of a life-threatening emergency. This would be consistent with the third requirement for an exception to the "no duty" rule favoured by Tofaris and Steel, "A's status creates an obligation to protect B from that danger."[80]

Finally, assuming the court had considered and rejected these two arguments and insisted that detrimental reliance loss was an essential element of the claim, it is arguable that there was such detrimental reliance. There were concerned neighbours in the near vicinity to whom Michael might have turned had she not reasonably understood that she had been advised to stay in the house.[81] The claimants should have been allowed to develop this argument at trial.

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[77] The same is true of the decision in *Hill*, *supra* note 3 at para 27.

[78] Detrimental reliance probably must be foreseeable for the duty to arise, but that is different than requiring actual detrimental reliance as a condition of duty. See Nolan, *supra* note 25 at 285–86.

[79] *Supra* note 45.

[80] See Tofaris & Steel, "Police Liability", *supra* note 36 at 5; and Tofaris & Steel, "Omissions", *supra* note 36 at 128. See also *Michael*, *supra* note 1 at para 197 per Lady Hale, and at paras 178–181 per Lord Kerr dissenting.

[81] McBride, "Michael Comment", *supra* note 4 at 9–10.

The reasons for judgment in *Michael* constitute an impressive review of the authorities, an overwhelming endorsement of the Diceyan approach, and a rejection of the policy approach to establishing new duties of care. They also constitute an inexplicably dismissive application of the law to the facts. What is needed to resolve this claim is evidence produced by the parties, tested under oath and woven into submissions by trained advocates. The claim ought to have been allowed to proceed to trial. It is unlikely that a Canadian court would have stopped this claim on a preliminary motion,[82] and surprising that the UKSC did so. There is good reason to be uneasy about the result.

4. The Difficulties with Unique Public Duties

A. Introduction

I assume that a Canadian court would have held for the claimants in *Michael* under ordinary negligence law. If not, the question would arise whether the court should instead impose a unique public duty. This question may seem odd given how little attention the courts have paid to unique public duties in recent times. Subsection B below begins by pointing out that although unique public duties do exist in Canadian negligence law today, at one time Canadian courts refused to recognize them. Most legislative bodies and the courts defined the distinction between the political and the judicial realm according to the Diceyan principle that governments should be governed by the same rules of negligence law as private parties.

Subsection C considers the general objections to unique duties of care. It suggests that the distribution of government largess should be, subject to citizens' rights-based claims, a purely political function. It takes no position on the broader question that arises in rights-based negligence discourse about whether courts should seek to effect distributive justice between citizens themselves. It identifies the "Good Public Samaritan" principle as the apparent justification for the unique public duties currently recognized in Canada. This principle states that once a public defendant decides to confer a benefit, it then comes under a duty of care to render the benefit with reasonable care. It appears that this principle, suspect in its own right, is applied on an *ad hoc* basis. Were it applied to all "like cases," as it should be with a common law commitment to *stare decisis*, the shift in power from the legislatures to the courts, effected by the unconstrained courts themselves, would constitute a dramatic change to our constitutional democracy.

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[82] See *Mooney*, *supra* note 9. See also Sunny Dhillon, "Woman sues Surrey RCMP officer for failure to act on reported assault," *The Globe & Mail*, (14 March 2016), online: <www.theglobeandmail.com/news/british-columbia/woman-sues-rcmp-officer-for-failure-to-act-on-reported-assault/article29241402/> where the plaintiff's lawyer proposes to rely on *Mooney* as a precedent. See also *Fullowka*, *supra* note 17 and *Heaslip Estate v Ontario*, 2009 ONCA 594, 310 DLR (4th) 506.

Subsection D explores whether much more limited principles might be identified to allow for unique public duties in exceptional cases. I remain open to such a possibility, but conclude that attempts to justify principled exceptions that are not over-broad remain a work in progress.

B. Unique Public Duties in Canada: Then and Now

Historically, the rule in Canada was the same as the majority decision in *Michael* – the courts should not recognize unique public duties of care. Today there are at least five Supreme Court of Canada precedents for unique public duties,[83] including two imposed on the police.[84] This transition to unique public duties has never been openly justified as such by the Supreme Court, let alone considered in depth as it was in *Michael.* Canadian negligence law and Canadian constitutional law would benefit from fresh consideration of unique public duties of care.

The point is debatable, but I would suggest that most Canadians do not conceive of their constitution as consisting of one set of rules for private citizens and another set for public officials. True, it is often appealing to prefer that a loss be shifted to a deeper pocket, especially when an avoidable loss is suffered by a vulnerable plaintiff. *Michael* is a sympathetic case. But the temptation to create unique public duties must be measured against the fact that a society that normalizes unique obligations will also normalize unique public immunities and privileges. A special UK rule limiting police liability was invoked to defeat Ms. Michael's claim.[85] I am even more confident that Canadians do not generally approve of unique excuses for government negligence.[86] The question must be considered as a broader one than that of unique *liabilities*. We are really talking about conceptualizing government and private parties as separate and distinct in private law. This has not been our tradition. Our tradition has been that public actors should be "under the *same*

[83] *Supra* note 17.

[84] See *Schacht* and *Odhavji*, *supra* note 17.

[85] *Michael*, *supra* note 1 at para 164, see also text accompanying note 75.

[86] One example is core government policy immunity, *supra* note 6. Many public authorities are shielded by legislation requiring proof of gross negligence or bad faith. See e.g. *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28. See also *Jacobs v Ottawa (Police Service)*, 2016 ONCA 345 at para 12, 400 DLR (4th) 148 where the court affirmed that a police disciplinary offence had to be proven on a special and higher standard of proof than the established civil standard of a balance of probabilities. Dissappointed plaintiff's lawyer Lawrence Greenspon was quoted as saying "we've got one law for the police, and another law for everyone else" in "Supreme Court dismisses Ottawa police appeal to lower standard of proof for officers," *Ottawa Citizen* (13 January 2017) online: <ottawacitizen.com/news/local-news/supreme-court-dismisses-ottawa-police-appeal-to-lower-standard-of-proof-for-officers>.
Significantly, the legal press called the decision "troubling." See "Ruling sets special standard of proof for police," *Law Times* (30 May 2016).

(emphasis added) law that applies to private citizens."[87] This is a fundamental *political* principle.[88]

Crown Liability legislation by which the Crown surrendered its historical immunity from liability in tort evidences Canada's historical commitment to the Diceyan principle. The federal Crown, and the Crown in 8 of the 9 common law provinces, consented only to being held vicariously liable for torts committed by their servants or agents.[89] They did not accept to be held liable for "peculiarly governmental activity" where there exists "no clear private analogue."[90] British Columbia also consented to "direct" liability, which might be interpreted to include unique public duties.[91] In *Swinamer*, the Supreme Court collapsed the distinction between direct and vicarious liability without considering explicitly a challenge to unique public duties.[92] The dissenting judgment in *Schacht v O'Rourke* was the closest the Supreme Court has ever come to considering whether Crown Liability legislation precludes unique duties of care.[93] The majority did not address the issue. Arguments based on the Crown liability statutes are seldom raised and seldom successful today.[94] The legislatures have apparently acquiesced.[95] It is highly

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[87] Hogg, Monahan and Wade, *supra* note 5 at 218–19.

[88] This is a principle of formal equality. As such it is vulnerable to the criticism that employing it to defeat a claim such as *Michael* allows form to triumph over substance. In part, the answer is that a unique public duty is not necessary to allow *Michael* claimants to succeed. In part, the answer is that formal divisions of constitutional power are core principles of how we are governed. They are not "mere" formalities and toying with them is very likely to produce substantial social change. As such, the question of whether the courts ought to create unique public duties is deserving of transparent debate, something that has not happened in the Canadian courts.

[89] *Crown Liability and Proceedings Act*, SC 1990, c 8, s 20; amended SC 2001, c 4, s 3(b)(1); *Proceedings Against the Crown Act*, RSA 2000, c P-25, s 5(1)(a); *Proceedings Against the Crown Act*, CCSM, c P140, s 4(1)(a) (excluding liability for economic loss); *Proceedings Against the Crown Act*, RSNL 1990, c P-26; *Proceedings Against the Crown Act*, RSNS 1989, c 360, s 5(1)(a); *Crown Proceedings Act*, RSPEI 1988, c C-32, s 4(1)(a); *Proceedings Against the Crown Act*, RSS 1978, c P-27, s 5(1)(a); and *Proceedings Against the Crown Act*, RSO 1990, c P27, s 5(1)(a). Canada and all the common law provinces except BC also have a provision substantially identical to s 10 of the federal Act which reads as follows:

> **10.** No proceedings lie against the Crown . . . in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

This historical immunity was constitutional, based on separation of powers, not on tort doctrine.

[90] Hogg, Monohan & Wade, *supra* note 5 at 261 use these terms and support this proposition. See also Norman Siebrasse, "Liability of Public Authorities and Duties of Affirmative Action" (2007) 57 UNBLJ 84; and Lewis Klar, "Tort Liability of the Crown: Back to Canada: Saskatchewan Wheat Pool" (2006-2007) 32 Advocates Q 293 at 294.

[91] *Crown Proceeding Act*, RSBC 1996, c 89, s 2(c).

[92] *Swinamer v Nova Scotia (AG)*, [1994] 1 SCR 445 at 462–3, 129 NSR (2d) 321.

[93] *Schacht*, *supra* note 17.

doubtful an argument that unique public duties are precluded by the Crown Liability legislation would succeed today. My point is simply that the idea of limiting government liability to the same rules that govern private parties is not foreign to Canadian constitutional law.

Moreover, until at least 1989, the Supreme Court also acknowledged a common law rule precluding recognition of unique public duties in municipal government cases where the Crown Liability statutes do not apply. The famous decision *Welbridge Holdings v Winnipeg* applied the rule to deny liability.[96] *Kamloops v Nielsen* recognized the same rule but did not apply it.[97] Justice Cory also appeared to favour the Diceyan approach in *Just*.[98] This common law prohibition against unique public duties has never been explicitly overruled, or even criticized. It simply disappeared. It too can no longer be considered a viable legal argument. The most one can say is that concerns about unique public duties are neither novel in Canadian law, nor radical. At one time this was how courts themselves defined the division of power between courts and legislative bodies.

Today there are numerous Supreme Court precedents for the recognition of unique public duties. This in itself legitimizes an attempt to establish a unique police duty to govern the *Michael* situation. However, none of these precedents are directly on point. A quick summary below of the unique police duty cases suggests that any unique public duty created to govern the *Michael* situation would be a "novel" duty requiring a full *Anns/Cooper* analysis.[99]

The first unique public duty of care in Canada was established in a police case, *Schacht v O'Rourke*.[100] A police officer attended at a traffic accident and then

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[94] No one pays any attention to the distinction today. See Hogg, Monahan & Wade *supra* note 5 at 182–3; *Williams v Canada (AG)*, 76 OR (3d) 763, 257 DLR (4th) 704, varied on other grounds; and *Davidson v Canada*, 2015 ONSC 8008, 262 ACWS (3d) 648.

[95] It is difficult to feel any sympathy for governments who could have, and presumably still could, put an end to unique public duties by legislation. This article is not premised on the need to protect the government. It is premised on the need to distinguish properly *governance* from common law *adjudication* in the interests of all citizens. A proper distinction benefits both the legislatures and the courts.

[96] *Welbridge Holdings v Winnipeg*, *supra* note 73. *Welbridge* has never been overruled and may be undergoing a modern revival. See, e.g. *118143 Ontario Inc v Mississauga (City)*, 2016 ONCA 620, 405 DLR (4th) 338.

[97] Justice Wilson expressed concern about creating unique public duties pertaining to pure economic loss in *Kamloops*, *supra* note 17 at 27. She did not raise that concern on the basic by-law enforcement issue. One possible explanation may be that liability in *Kamloops* was premised on improper government conduct, not simple negligence. See *infra* note 131.

[98] *Just*, *supra* note 6.

[99] *Anns*, *supra* note 12. In fact, the SCC regards every case involving a public defendant as a "novel" case. See Jost Blom, "Do We Really Need the *Anns* Test for Duty of Care in Negligence?" (2016) 53 Alta L R 895 at 905.

[100] *Schacht*, *supra* note 17.

left the scene without notifying the proper authorities about the remaining dangers at the scene. The court recognized a new common law duty based on a statutory duty to maintain a "traffic patrol." The majority held that this included a duty to notify possible road users of any foreseeable dangers arising from the original accident. The decision in *Schacht* was clearly statute-specific and thus not a direct precedent for the *Michael* scenario.[101] Moreover, *Schacht* might not be decided the same way today. The Supreme Court has subsequently held that it is impermissible to create a new common law duty of care based on the words of the statute alone, as it did in *Schacht.*[102]

In the most recent unique police duty case, *Ohavji*, a deceased criminal suspect's family was allowed to proceed with an action for psychiatric damage against the Chief of Police. The action was based on the Chief's failure to compel his officers to assist with an SIU investigation into the suspect's death at the hands of the police.[103] The basis of decision on the negligence point was unclear, highly unusual, and of no direct relevance to a case like *Michael*.

The recognition of a novel duty of care owed by investigating police officers to criminal suspects recognized in *Hill v Hamilton* is not a unique public duty. That duty is entirely consistent with the principle in private party negligence law that imposes affirmative obligations in special relationships of control.[104]

Jane Doe v Toronto[105] is a lower court decision. It is otherwise the most useful precedent for a unique police duty in a *Michael* situation, and as I will argue later, more broadly.[106] The action was brought by a woman who had been raped by an intruder whom the police suspected to be a serial rapist with an established *modis operandi* based on entry via lower floor climbable apartment balconies within a small geographical area. The court held that the police owed a unique public duty to a limited class of potential rape victims to investigate crime with due care, and specifically owed a duty to warn the plaintiffs so they could protect themselves. There was an additional finding of liability based on a breach of the plaintiff's *Charter* right to gender equality resulting in an identical award of damages. Adherence to rape myths as well as sexist stereotypical reasoning about

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[101] The majority suggested that there was common law authority for a unique public duty in such a case. *Ibid* at 86. The cases cited show only that a police officer has special public duties, but are not authorities for unique public tort duties.

[102] See, e.g. *Saskatchewan Wheat Pool*, *supra* note 18.

[103] *Odhavji*, *supra* note 17 at para 4. This decision is better known for its elaboration on the intentional tort of misfeasance in public office. No criticism is intended to the holding on that point, which is not relevant to the unique negligence duty.

[104] See 175–177, above.

[105] *Jane Doe*, *supra* note 43.

[106] See *infra* note 167.

rape, about women, and about women who are raped motivated and informed the failure to warn. Women were treated differently because some members of the force adhered to sexist notions that, if warned, women would panic and scare off the attacker. The negligence analysis was also infused with concern about the discriminatory treatment. It is unclear whether the negligence claim would have been decided the same way absent the gender discrimination.[107]

Police failures to respond effectively to domestic violence complaints have often been studied through the lens of systemic gender discrimination.[108] If supporting evidence of unlawful discrimination is available, it would certainly help advance the effort to establish a unique police duty in a case like *Michael*. Moreover, the *Charter* breach aspect would remove any constitutional objection to the recognition of the unique duty. Courts have every right to address *Charter* breaches. The only remaining question would be whether a negligence duty is necessary, or whether the *Charter* remedy is sufficient.

C. The General Challenges with Unique Duties of Care

The basic question with unique public duties concerns the relationship between the government and its citizens. Relational matters are properly dealt with as questions of proximity. The distinction between inflicting harm and failing to prevent it is a fundamental distinction in our law.[109] The proximity test is different for nonfeasance than for misfeasance. Proximity is a challenging concept to define succinctly. McLachlin CJC put it this way in *Childs v Desormeaux*:[110]

> The law of negligence not only considers the plaintiff's loss, but explains why it is just and fair to impose the cost of that loss on the particular defendant before the court. The proximity requirement captures this two-sided face of negligence.

As explained in the earlier review of private party negligence law, the general rule is that one party does not owe a duty to convey a benefit to another. This is so even when the parties are in as close a relationship to one another as they were in *Michael*. The plaintiff must establish a special relationship of control or an assumption of responsibility to succeed. The failure to have done so is what would drive the plaintiff to seek to establish a unique public duty. The argument for a unique public

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[107] But see *Mooney*, *supra* note 9. At trial a police officer was held to owe a duty of care to investigate and prevent crime, but the claim failed on causation on appeal with little discussion of the duty itself.

[108] *Mooney*, *supra* note 9.

[109] *Supra* note 25 and *Childs*, *supra* note 7.

[110] *Childs*, *supra* note 7 at para 25. *Childs* involved a claim against a social host brought by a victim of an auto accident caused by an impaired guest. The claim was dismissed on proximity grounds, not step two *Anns* grounds. The proximity grounds were rooted in the distinction between causing harm and failing to provide a benefit. See also *Cooper*, *supra* note 16 at paras 34–35.

duty must depend on arguments that distinguish public from private defendants. The plaintiff may not rely solely on statutory public duties to draw that distinction.[111]

The generally accepted rationales for the "no duty" rule are respect for individual autonomy,[112] concerns about potentially indeterminate liability, and the difficulty of singling out one defendant among many who might have conferred the benefit.[113] None of these rationales apply to public defendants who fail to protect citizens from physical harm. This clears the deck for an argument in favour of unique duties relating to public benefits. It does not, however, make that case.

A number of arguments for unique public duties of general application have been advanced.[114] In my opinion, none are compelling in substance. Even if they were, imagine the outcome if these general principles were applied across the board to all public benefits, as they ought to be according to the principle of *stare decisis.* In such a scenario, it is difficult to identify what would remain of the distinction between a judicial function and a legislative one.

One argument in favour of unique public duties generally is that public benefits are not purely gratuitous. Citizens pay tax to support public benefits. However, taxes are not paid in exchange for a specific public benefit, or for a particular quality of a specific public benefit, as would be the case, for example, in a contract. Paying tax does not convey a right to receive a particular benefit. While governments may not deserve the praise that might be accorded to a Good Private Samaritan, from the recipients' point of view a government benefit is still a gratuitous benefit.

A similar argument based on "general reliance" is sometimes raised in support of unique public duties. General reliance usually means only that citizens expect public authorities to conduct their operations without negligence.[115] Assuming

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[111] See e.g. *Saskatchewan Wheat Pool*, *supra* note 18.

[112] Of the three, autonomy is paramount. In *Michael*, *supra* note 1 at para 177, Lord Kerr dissenting said "whereas it is arguable that a private individual's freedom has an intrinsic value in its contribution to an autonomous life, the value of the state's freedom is instrumental and lies in the contribution that it makes to the fulfilment of its proper functions."

[113] McBride, "Michael Comment", *supra* note 4 at 9, summarizing Tofaris & Steel, "Police Liability", *supra* note 36. See also Tofaris & Steel, "Omissions", *supra* note 36 at 129–133; McBride & Bagshaw, *supra* note 33 at 216–219; and Siebrasse, *supra* note 90 at 87.

[114] By general arguments I mean those that apply across the board to any situation to which the relevant principle applies. For example, the duty to avoid causing foreseeable physical damage to a foreseeable plaintiff applies generally to almost every potential defendant and plaintiff. It is not limited to product manufactures and consumers, the situation from which it was derived. Duties based on assumptions of responsibly apply generally to almost every potential defendant and plaintiff, not only to bankers or professional persons. See, e.g. *Mutual Life and Citizen's Assurance Co* v *Evatt*, [1971] AC 793 (PC). The principle takes into account the factual differences between professional advisors and others.

that were true, as the Chief Justice reminded us, it remains to justify imposing the cost of their disappointments on the defendant.[116] General reliance is not situation-specific reliance between parties in a closely proximate relationship based on an assumption of responsibility that produces detrimental reliance.

Most of the recognized unique public duties in Canada are based on the general principle that once a public defendant begins to exercise a discretionary power, it then comes under a duty to exercise the power with reasonable care. I call this the Good *Public* Samaritan liability principle.[117] A clear example is the recognized unique public duty imposed on municipalities that decide to exercise their discretionary statutory power to operate a residential home inspection program. Once the municipality implements the program, the Canadian courts require that the inspections be performed with reasonable care. This is a unique public duty. The idea that a Good *Private* Samaritan should incur legal responsibilities simply by beginning to offer a benefit, while one who does nothing would not, has never been established in private party negligence law,[118] except in the case of professionals like doctors and lawyers.[119]

There are problems with this Good Public Samaritan liability principle. It became prominent after a simple, unsupported conclusion drawn by Lord Wilberforce in *Anns*.[120] Neither he, nor the many Canadian judges who have

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[115] *Invercargill City Council v Hamilton*, [1994] 3 NZLR 513 (CA); aff'd [1996] 2 WLR 367 (PC). Although general reliance typically arises in public authority negligence actions, it is discussed in both the private and public sectors in *Childs*, *supra* note 7 at para 40.

[116] This is similar to the argument that while it might be reasonable to rely on financial reports prepared by a national accounting firm as having been prepared with due care, that does not justify liability unless the firm did something to intend or induce the reliance. See Perry, *supra* note 62 at 285.

[117] So far, the Supreme Court has only applied this principle where there is a safety rationale. See 194–196, below.

[118] See especially *Horsely v MacLaren*, [1970] 2 OR 487, 11 DLR (3d) 277 (CA) per Jessup J. See also *HR Moch v Rensselaer Water*, 159 NE 896 (1928) (NYCA). Whenever the Good Samaritan liability principle it is mentioned in private party negligence law it usually turns out that the decision was based on a sounder principle. See e.g. *Zelenko v Gimbel Brothers*, *supra* note 28. If it were established in the UK, presumably the unique public duty discussion in *Michael* would have been unnecessary. If the Good Samaritan liability rule were adopted generally as opposed to exceptionally in private law, I believe it would then be necessary to argue that the rule not apply to public defendants because it would be over-broad in application to governments who are constantly delivering public benefits. It is not necessary to deal with this complication here.

[119] Later I will suggest that a good case could be made for extending this line of authority to the police. See 198, below.

[120] "Passing then to the duty as regards inspection, if made. On principle there must surely be a duty to exercise reasonable care." *Anns*, *supra* note 12 at 755. This conclusion would also seem to violate the rule now followed in England and Canada that a common law duty cannot be based on a statutory public duty alone. See *supra* note 18. The Good Public Samaritan rule has since been adopted regularly by the Supreme Court of Canada with no further justification or explanation. See e.g. *Kamloops*, *supra* note at 17; *Just*, *supra* note 6 at 1242–3; *Rothfield v Manolakos*, [1989] 2 SCR 1259 at 1266, 41 BCLR (2d) 374; *Ingles v Tutkaluk Construction*, 2000 SCC 12 at para 17, [2001] 1 SCR 298. There are many pre-Michael

followed him, have ever offered any justification, doctrinal or otherwise, for such a rule. *Anns* itself has since been overruled in the UK.[121] There is no apparent reason why the defendant's voluntary provision of a gratuitous benefit, standing alone, should confer a right on an unharmed plaintiff to receive the benefit. Nor is it sound policy to discourage Good Samaritans.[122] It is better to allow the public to obtain some public benefits, albeit imperfect, than none.[123] That said, it is not my purpose to suggest that the housing inspection or similar highway maintenance lines of authority should be overruled. I do not foresee this happening.[124] Rather, I want to use the Good Public Samaritan liability principle to illustrate a more fundamental constitutional problem with unique public duties of care.

Governments are in the business of providing public benefits: health, safety, education, transportation, housing, culture, recreation, and so on. Governments have limited budgets. Allocating a limited budget among competing claims for public benefits is a political task. Judicial supervision exists quite properly to ensure that the government respects the recognized legal rights of its citizens. These include the right not to be discriminated against on prohibited grounds, the right to be governed honestly and in good faith, the right to receive mandatory entitlements, and the right to enjoy the same protections from government as from private citizens in basic tort law. Imposing a standard of "reasonable care" on the provision of discretionary benefits absent an interference with such rights is different.

What does it mean to provide a reasonable public benefit? This does not pose much difficulty in a case like *Michael*. Recognized public service providers like police or firefighters develop professional standards for basic services. What it means to perform a discretionary municipal house inspection, or highway inspection, with reasonable care is a different question. There is no professional standard, contract or representation to set the standard. Later, I will suggest that professional status may help found a principled distinction within the ordinary common law between public rescue providers and others.[125] For now, I will concentrate on the inspection-type cases.

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applications of the Good Public Samaritan rule in the UK. See generally McBride, "Michael Comment", *supra* note 4.

[121] *Supra* note 15.

[122] Rights theorists abhor such instrumentalist arguments. See e.g. Donal Nolan, "Revisiting the Liability of Public Authorities for Omissions" (2014) 130 LQR 21 at 24. However, it is pointless to ignore economic reality. A public authority who failed to include potential liability in predicting the cost of a discretionary program or action would be negligent.

[123] See McBride, "Michael Comment", *supra* note 4 at 10.

[124] It is more realistic to suggest that the Good Public Samaritan liability principle will not readily be further extended. See e.g. *Vlanich v Typhair*, 2016 ONCA 517, 131 OR (3d) 353 [*Vlanich*].

[125] See 199, below. As to the importance of there being a recognized standard of behaviour to justify judicial intervention, see David Cohen, "The Public and Private Law Dimensions of the UFFI Problem" (1984) 8 Can Bus LJ 410 at 421.

For the sake of argument assume accepted standards exist within the for-profit house inspection industry and that the courts could adopt those as a definition of "reasonable." But why should the government be required to meet a private market standard? Why, as an exercise in governance, should the government not be permitted to adopt instead a lesser standard of inspection, call it a "modest" standard.[126] The government could combine this with modest benefits to tennis players who use public courts and modest benefits to library users, and so on. Or the combination could include modest benefits to home buyers and generous benefits to tennis players, and no benefits to library users. A great many different combinations are possible given the number of benefits being distributed.

When a court decides that new home owners are entitled to "industry-standard" or otherwise defined "reasonable" inspections, not the modest programs preferred by the legislature, additional costs will be imposed on the municipalities. These costs are not related to the infringements of recognized rights. These costs might encourage the defendant to stop providing the discretionary benefit altogether. They might encourage "better" inspection practices and better outcomes for some fortunate home buyers. If so, some other claimants, library users perhaps, will receive fewer benefits than the municipality would have given them otherwise. Or the municipality might raise taxes. Are these outcomes more "reasonable" than the benefit combination decided upon by the municipality? What is a reasonable benefit allocation? Surely these are political questions, not justiciable questions.

A more deferential approach might be for the courts to take the "modest" benefit program as a given, but require the government to deliver that program with reasonable care. This is how some would define actionable "operational" negligence.[127] The policy-operational continuum was introduced to Canadian law via *Anns* as a vehicle with which to determine whether the government ought to be immune from tort law in particular cases. The continuum approach has since been abandoned in the UK,[128] and the quest to identify operational negligence has been abandoned in Canada.[129] Liability for unreasonable program implementation is no different than liability for unreasonable program definition.[130] They both amount to

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[126] There are different ways in which an inspection program might fall below industry standard. For example, there could be fewer inspections, less extensive inspections, or a less adequately supervised programs with a higher error rate than in the private sector.

[127] This was introduced by McLachlin J as she then was at trial in *Just v BC*, [1985] 5 WWR 570 at 576, 64 BCLR 34 (SC).

[128] As pointed out in *R v Imperial Tobacco Canada Ltd*, *supra* note 6 at para 78, the House of Lords declared the "policy/operational distinction unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence: *Stovin v Wise*, [1996] AC 923 (HL), per Lord Hoffmann."

[129] See e.g. *Imperial Tobacco*, *supra* note 6 at para 78..

[130] *Anns* itself was equivocal about whether policy implementation should be assessed on a standard of reasonable care (hence based on a unique public duty) or a standard of good faith (an entirely appropriate condition precedent for the legitimate exercise of government power). See *Anns*, *supra* note 12 at 755. *Kamloops* carried this equivocation into Canadian law. See *Kamloops*, *supra* note 17 at 24–25. The actual decision in *Kamloops* was based on improper conduct by the municipality, not negligence. See *Kamloops*,

the court requiring the government to redefine its public benefit package, abandoning some programs, allocating more money to some and less to others. They both require the public defendant to deliver a certain standard of gratuitous service to an unharmed citizen. [131]

Courts lack the institutional competence to allocate public benefits amongst competing claims.[132] Two-party litigation is an inadequate vantage point from which to take all relevant considerations into account.[133] But the more fundamental reason why courts should decline to become involved in allocative policy that does not infringe the rights of citizens is constitutional. Allocative policy with respect to public benefits, good or bad, is the essence of governance. Governments should be entitled to select whom to benefit and how. That is politics. Courts should make sure governments respect the public law and private law rights of citizens when governments define and deliver the benefits. That is the judicial function.

Although the argument against unique public duties derives support from rights-based torts scholars, it is a different argument that can stand by itself. Rights-based scholars object to the courts attempting to achieve distributive justice by pursuing policy goals. They believe that the function of negligence law is corrective justice. Citizens enjoy a primary right to security of the person and property. A negligent defendant who interferes with these rights should be required to restore the *status quo ante* by paying restitutionary damages.[134] The case against unique public duties, in contrast, must take as given all established private party tort duties including those based on distributive policy goals to which the rights-based scholarships would object. For example, if the common law were to recognize generally a legal duty based on a moral obligation to rescue another from injury or death, under the Diceyan approach that duty should also apply to public

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supra note 17 at 24. The dissent in *Kamloops* did not believe the evidence supported a finding of impropriety and therefore declined to recognize a unique public duty. Since then, Canadian courts have varied in the degree to which bad faith is stressed over negligence. On the bad faith side see e.g. *Froese v Hik*, 78 BCLR (2d) 389, [1993] BCWLD 1405 per Huddart J as she then was, approved in *Foley v Shamess*, 2008 ONCA 588, 297 DLR (4th) 287. See also *City of Toronto v Polai*, [1970] 1 OR 483, 8 DLR (3d) 689, upheld in [1973] SCR 38, 28 DLR (3d) 638. On the simple negligence side see e.g. *Oosthoek v Corporation of the City of Thunder Bay*, 30 OR (3d) 323, 139 DLR (4th) 611(CA), leave to appeal to the Supreme Court of Canada dismissed September 26, 1997; and *Rausch v Pickering (City)*, 2013 ONCA 740, 369 DLR (4th) 691.

[131] In contrast, with an assumption of responsibility approach based on induced actual reliance the defendant may undertake to perform its services according to its accepted practices.

[132] David Cohen & JC Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64 Can Bar Rev 1 at 10–11, and sources cited therein at n 73.

[133] *Ibid* at 8.

[134] See e.g. Beever, *supra* note 66 at 211; Benson, *supra* note 25; Ernest J Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995).

defendants.[135] The case against judicial policy-making in private party negligence is a different case that must be made separately. It need not be made at all for the purposes of this article.

We can look at this another way. When a court imposes negligence liability on policy grounds it will affect the distribution of wealth. It is understandable that some people believe that courts and legislatures should each have a role to play in effecting distributive justice generally. Unique public duties, however, affect the distribution of wealth in a particular way, by affecting the distribution of *government* benefits. Government benefits, by definition, are created and delivered by the government. Citizens enjoy substantial rights against their governments. The courts' job is to enforce those rights, not to supervise discretionary benefits beyond this.

The principled objection to unique public duties is grounded in Dicey's equality principle. There are also policy concerns. Courts do continue to employ the Good Public Samarian principle in new situations when it suits them.[136] There might come a tipping point at some stage. However, I do not base my concerns about unique public duties on any expectation that they will cause an imminent constitutional or financial crisis. The courts are usually very cautious about extending the Good Public Samaritan liability principle as far as formal logic would otherwise take it. This necessary judicial deference leads to the definition and distribution of public benefits on an apparently *ad hoc* basis. In so doing the courts undermine their own credibility.

The doctrine of *stare decisis* requires courts to treat like cases alike.[137] There are literally thousands of public benefits regularly conveyed to citizens by their governments. Many are distinguishable from the inspection situation. Many are not. Strictly speaking, the courts ought to extend the Good Public Samaritan liability principle across the board to any situation in which the government operates a public benefit program that is in principle similar to the inspection benefit. Thanks to the good sense of most judges, this has not happened. If it did, many, perhaps most government benefits would have to achieve a court-defined standard of reasonable care. Public administration would become overwhelmingly judicialized. The existing division of powers between the courts and the legislatures would not merely shift, it would be entirely redefined.

Voluntary judicial restraint in employing the Good Public Samaritan principle across the board is necessary and commendable, but it comes with a cost. It

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[135] Tofaris and Steel make this argument to support a unique duty of care. See "Omissions", *supra* note 36 at 142–145. Later I will suggest the same outcome can be accomplished via basic common law negligence.

[136] See e.g. *Fullowka*, *supra* note 17; *Rausch*, *supra* note 130.

[137] True, this is an uncertain and fungible exercise. Some would argue *stare decisis* is more an exercise in justification than in logic. Regardless, there are limits to the fungibility. For example, I suggest these limits were exceeded in *Vlanich*, *supra* note 124.

is difficult, perhaps impossible, to predict or justify when the Good Public Samaritan principle will be invoked and when it will not.[138] For example, the Supreme Court has recognized unique public duties in the areas of highway safety,[139] workplace safety,[140] and building construction.[141] There seems to be a "safety" theme. However, Health Canada does not owe a duty to consumers when it approves for sale defective medical devices such as jaw or breast implants.[142] Why is there proximity between the police or highway maintenance crews and ordinary road users, even in the absence of specific reliance, but not between consumers of medical devices who did specifically rely on the defendants' product approval posted on their website? Why are highway accidents, where insurance cover is prevalent, or structural building defects that are easily discovered by consumers hiring a private inspector, more worthy of exceptional intervention than other cases like the medical device cases? No principled answers to these questions appear in the reasons for judgment. The Canadian exceptions appear to be purely *ad hoc*.[143] This is damaging to the structure of the common law.[144]

5. Difficulties with Unique Public Duties in Exceptional Circumstances

Suppose that one accepts the aversion to unique rules of general application for public defendants. Should there be exceptions in exceptional cases? The substantive case against unique public duties is based on a particular view about the distinction between the legislative function and the judicial function. I cannot identify an exceptional case that would not violate this distinction. Therefore, I would prefer a

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[138] Unfairness among potential beneficiaries is a problem. See McBride and Bagshaw, *supra* note 33 at 218.

[139] *Schacht*, *supra* note 17*; Just*, *supra* note 6.

[140] *Fullowka*, *supra* note 17

[141] *Kamloops*, *supra* note 17.

[142] *Drady v Canada*, 2008 ONCA 659 at para 52, 300 DLR (4th) 443, leave to appeal refused [2008] SCCA No 492; and *Attis v Canada*, 2008 ONCA 660 at para 77, 93 OR (3d) 35, leave to appeal refused [2008] SCCA No 491.

[143] See Erika Chamberlain "To Serve and Protect Whom? Proximity in Cases of Police Failure to Protect" (2016) 53 Alta L Rev 977 [Chamberlain, "Serve and Protect"] where the author exposes several poorly reasoned lower court decisions about police duties to protect victims of crime.

[144] Consider the dilemma the court faced in *Vlanich*, *supra* note 124. The plaintiff relied on the unique inspection cases and the underlying Good Public Samaritan liability principle to argue that the defendant owed it a duty to enforce its bylaws with reasonable care. The Court of Appeal felt compelled to "distinguish" the inspection cases by stating that the inspection authorities had "invited the injured party to rely on an inspection, and it has assumed responsibility for avoiding the risk." See para 32. Of course, the inspection duties were not based on either induced transaction-specific reliance or an assumption of responsibility. Suggesting otherwise was probably the only way in which the Court of Appeal could reconcile the lack of proximity with the doctrine of *stare decisis.*

clean and clear across-the-board prohibition against unique public duties.[145] However, others will prefer to draw the line differently in exceptional cases based on the quest for "good" judicial interventions into what otherwise would be the legislative sphere. I suggest that acceptable exceptions must 1) distinguish meaningfully those cases where an exception is justified; and 2) keep the exception sufficiently narrow that the existing division of powers between the legislative and judicial branch is not radically altered.[146] It may be possible to meet these conditions, but I have only seen one, a proposal by Tofaris and Steel, that has done so.[147] It justifies the exception based on important differences between the status of the police and that of ordinary citizens. Ironically, their proposal is unnecessary. I conclude this section by suggesting that any plaintiff who can satisfy the Tofaris and Steel conditions for a unique public duty would succeed, probably more easily, under basic Canadian private party negligence law.

The Canadian unique public duty cases tend to be safety-based, intended to reduce personal injury and death. The Canadian *Charter of Rights and Freedoms* provides a strong precedent for prioritizing personal security over property rights. General negligence law recognizes fundamental distinctions between physical damage and pure economic loss based on both principle and policy.[148] There seems to be little judicial appetite for expanding recovery for pure economic loss beyond its relatively limited scope today.[149] All unique public duties effectively create a limited taxpayer-funded insurance scheme.[150] The arguments for having to insure someone in Ms. Michael's position are compelling. The arguments for insuring someone's interest in receiving a gratuitous financial benefit are less so, especially if they are effectively able to obtain such protection themselves.[151] Refusing to recognize novel unique public duties concerning public benefits relating to property or purely economic interests would be a step in the right direction.[152]

Recall that governments will routinely be held liable for misfeasance that interferes with the right to personal security. Unique public duties would be directed

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[145] I would also prefer to employ this approach instead of the immunity approach.

[146] These are limits I would propose for unilateral action by the courts. The legislature is free, subject to claims of right, to select which constituencies it wishes to benefit and which not.

[147] Tofaris & Steel, "Police Liability", *supra* note 36; and Tofaris & Steel, "Omissions", *supra* note 36.

[148] See e.g. Benson, *supra* note 25 at 865; Beever, *supra* note 66 at 214; *Canadian National Railway Co v Norsk Pacific Steamship Co*, [1992] 1 SCR 1021, 91 DLR (4th) 289 per La Forest J dissenting, eventually adopted by the court in *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210, 153 DLR (4th) 385.

[149] Recovery for one type of pure economic loss, dangerously defective housing construction, is well-entrenched in the inspection cases. This would have to be carved off somehow.

[150] See e.g. *Cooper*, *supra* note 16 at para 55.

[151] There is a significant difference in being able to purchase a standard home inspection and being able to replace police emergency services on the private market.

[152] See *Vlanich*, *supra* note 124 at para 31.

to the failure to take reasonable steps to protect citizens from such interferences in advance. The problem is that governments are deeply involved in benefit programs with a safety rationale. In order to avoid judicializing an enormous range of government power, we cannot accept a general health and safety justification, or even a safety justification alone, for unique duties of care. We have to further narrow the justification. It is, however, difficult in a common law system to distinguish in principle an imminent risk from a long term risk, or a safety rationale from a health rationale. The home inspection duty allows recovery of pure economic loss on a safety rationale. Based on *stare decisis* this could be extended. It remains to be seen whether some safety-based benefits can be distinguished in principle from others.

One possibility is to attempt to draw a distinction between "targeted" public duties and duties that exist for the benefit of the general public. This distinction was adopted by the Supreme Court of Canada in *Cooper v Hobart*[153] and is frequently invoked by the courts. It may be a principled distinction, but it is totally conclusory. Every duty derived from a statute has a general public aspect, and, like in *Cooper*, a class of persons who are more directly affected than members of the general public. Is the purpose of the emergency service in *Michael* targeted towards potential victims of crime, or towards crime prevention generally?[154] Does that question really help to distinguish *Cooper* from *Michael*? If the legislature intends to confer private benefits on targeted individuals, it should create statutory torts to that effect. The search for targeted duties adds nothing to the discussion.[155]

A proposal by Tofaris and Steel to adopt a particular duty of care owed by the police to protect citizens from the criminal acts of others has received favorable attention in the UK.[156] In 2014 the authors stated their proposition as follows:[157]

> . . . a finding of proximity should arise where the following factors are satisfied:
> (i) *The claimant is at a special risk of personal harm*, i.e., a greater risk than the general public. The circumstances in which the risk will be special must be left to the courts to develop on a case-by-case basis. Guidance on this can be found in the New Zealand case *Couch v Attorney-General*, where the majority held that "the necessary risk must be… special in the sense that the plaintiff's individual circumstances, or her membership of the necessary class rendered her particularly vulnerable to suffering harm

[153] *Cooper*, *supra* note 16 at para 38.

[154] Tofaris and Steel claim it is the former. See "Omissions", *supra* note 36 at 154–155. I suggest there is no possible way to answer the question definitively.

[155] See also Nolan, *supra* note 122.

[156] The recommendations made in Tofaris & Steel, "Police Liability", *supra* note 36 at 5 were quoted in dissent by Lady Hale in *Michael*, *supra* note 1 at para 189. See also at para 197 per Lady Hale, and at paras 178–181 per Lord Kerr dissenting.

[157] Tofaris & Steel, "Police Liability", *supra* note 36 at 5.

> of the relevant kind" from the third party. In any case, there is no doubt that a person facing a specific threat to her physical safety from a specific individual is at a special risk.
> (ii) *The police are aware or should have reasonably been aware* that the claimant is at a special risk of personal harm.
> (iii) *The police are given special powers by law to protect the class of persons to which the claimant belongs*, i.e., members of the public at a special risk of physical harm.
> (iv) *The claimant is dependent upon the police as regards protection against the risk* on the basis of the legal and civic duties imposed on her to inform the police about the incident and to refrain from taking measures beyond reasonable self-protection *and/or* her vulnerability in the sense that she cannot be reasonably expected to protect herself adequately against that risk.

Inexplicably, the 2016 version of their proposal omits the following requirement: "*and/or* her vulnerability in the sense that she cannot be reasonably expected to protect herself adequately against that risk."[158]

This is a "good" proposal, excellent according to my untrained eye. It deals only with special risks of personal harm, a type of risk with more moral and legal significance than property damage or economic loss. Restricting the duty to police, and to a limited class in a limited set of circumstances, certainly minimizes the scope of the judicial intrusion into the legislative realm. But my objection to unique public duties is not based on whether or not they are "good" duties. Some are, some are not, and usually it is difficult to tell.

One may quibble with the proposal. The more specific we are in defining the exception, the more likely that we will exclude other situations that are not distinguishable in principle. Lords Toulson's and Kerr's sparring over several options in *Michael* illustrates this. Why are dangers posed by a third party different from other risks to life and limb? Why police, but not other emergency responders like firefighters? Does an imminent safety risk warrant different treatment from an imminent health risk, for example, or even a long term risk of industrial disease? One may still ask why, unless the police were in some way specifically responsible for the risk of criminal attacks by others, ought there to be a unique public duty? How confident are we that the proposed rules will actually increase the degree of protection the police currently offer to potential victims of criminal attacks?[159]

Despite these quibbles, I find it difficult to argue strenuously against liability under the Tofaris and Steel conditions. The more interesting question is whether this specific and narrowly crafted unique public duty is necessary, at least in Canada. I suggest not. Basic common law negligence should be able to accomplish the same goals.

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[158] Tofaris & Steel, "Omissions", *supra* note 36 at 151.

[159] For a fascinating take on this problem see Margaret Hall, "Theorizing the Institutional Tortfeasor" (2016) 53 Alta L Rev 995.

Tofaris and Steel propose their novel police duty against the background of botched emergency responses such as those in *Michael*. As previously discussed, that particular situation can be effectively resolved by the basic rules of Canadian negligence law governing an assumption of responsibility. Canadian courts already require a special relationship of proximity between the citizen and the public defendant that is closer than the relationship between the defendant and the general public or even from other members of the class most directly affected by the public benefit at issue.[160] Near privity is required in a negligent misrepresentation action. The most the plaintiff should have to establish is that the defendant intended, induced or invited her to rely on the defendant; that she reasonably and foreseeably did so; and possibly that she suffered foreseeable detrimental reliance loss as a consequence. The Tofaris and Steel conditions would be more demanding of claimants.

It is difficult to imagine that a party who reaches a police emergency line and sets out a request for police protection from imminent physical harm or death could fail to meet the first two Tofaris and Steel conditions. The authors believe their proposal goes further than the common law because it would apply in the case where the emergency operator was listening to music and simply did not answer the call. I would argue that situation could also culminate in a duty of care under basic Canadian negligence law. By providing the service the force is assuming responsibility by intending and inducing a limited and vulnerable class of persons whose personal safety is at risk to rely on the service being provided with reasonable care. Listening to music instead of answering emergency calls breaches that duty. Refusing to answer emergency calls without relevant justification should also be actionable as "bad faith."[161]

It is a further question whether the plaintiff's recovery should be limited to detrimental reliance loss, or extended to the full loss of the benefit. By analogy to the exceptional professional duties of affirmative action one could argue it is a standing promise to provide to provide the benefit, open to being accepted to create a "contract without consideration" unless and until it is withdrawn. As noted in *Michael*:

> Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of care and skill.[162]

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[160] *Cooper*, *supra* note 16 is the leading example. There is an expansive summary of the law on point in *Taylor v Canada*, *supra* note 22 at paras 75–91. The exceptions are the unique public duty cases identified *supra* note 17.

[161] See *Anns*, *supra* note 12 at 102.

[162] *Michael*, *supra* note 1 at para 178 quoting Tindal CJ in *Lanphier v Phipos* (1838) 8 C & P 475, 479.

This principle has been extended to lawyers, doctors, other health care providers[163] and ambulance service providers.[164] It has not been extended to police or firefighters, but it could be. As noted above, with recognized rescue professionals such as the police there should be no difficulty in determining what a reasonable police officer ought to have done.[165]

The Tofaris and Steel proposal covers more ground than assumption of responsibility where the plaintiff is unaware of the special danger, but the police department is. The alleged negligence would be the failure to warn the plaintiff, or to control the potential assailant. General Canadian common law recognizes numerous exceptions to the "no duty" rule based on special relationships of control.[166] I suspect a good personal injury lawyer, especially one working in a "no unique public duty" jurisdiction, would be happy to bring a case against the police seeking to expand this line of authority beyond a duty to control a person already in custody.[167]

Tofaris and Steel's proposal is specific to the police, and they emphasize that the "special status" of the police is what justifies their proposed unique police duty.[168] My preferred approach is to work with basic common law negligence and to allow the flexibility of the common law to take into account special facts relevant to the status of the public defendant when applying the general principles. I believe that what drives Tofaris and Steel to the preference for a unique public duty is the need to circumvent a narrow definition of assumption of responsibility specific to the police in the UK.[169] There are no police-specific definitions of assumption of responsibility in Canada. This makes our ordinary common law more adaptable to the special arguments in favour of police liability in the types of circumstances envisaged by Tofaras and Steel. Neither Tofaris and Steel's proposal nor basic private party

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[163] *Michael*, *supra* note 1 at para 112.

[164] *Ibid at* para 81.

[165] See 190–191, above.

[166] See 175, above. A case like *Jane Doe*, *supra* note 43, absent the *Charter* element, might also be explained along these lines.

[167] This is discussed in McBride & Bagshaw, *supra* note 33 at 245 where the authors also refer to John Goldberg & Benjamin Zipursky "Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling" (2009) 44 Wake Forest L Rev 1211 at 1240, n 121 in support of an expanded notion of control beyond custody. Chamberlain, "Serve and Protect", *supra* note 143 cites several lower court decisions that take a very expansive view along these lines. We should also keep in mind that there has long existed in common law support for a "Bad Samaritan" liability rule that would impose liability for the failure to perform an easy rescue from a situation threatening life or serious bodily harm to another. Such provisions do exist in many civil law jurisdictions. See, e.g. Allen Linden, "Toward Tort Liability for Bad Samaritans" (2016) 53 Alta L Rev 837.

[168] Tofaris & Steel, "Omissions", *supra* note 36 at 129.

[169] *Ibid* at 150. Tofaris and Steel also discuss their preference for unique duty over assumption of responsibility at Tofaris & Steel, "Police Liability", *supra* note 36 at 23–4 based on the debate about whether a responsibility is truly assumed or imposed by law in the UK.

Canadian negligence law explain or justify the decisions in the classic unique public duty cases decided by the Supreme Court of Canada.[170]

6. Conclusions

Unique public duties pose more problems than they solve. They allow the courts on their own initiative to shift classic governance functions to the courts. They damage the structure of the common law. Most importantly, where they appear to be most needed, in *Michael* for example, they are unnecessary. Private party negligence can address the issues, and do so in a way that takes into account the unique aspects of the government's role in perpetrating the alleged wrong. There are also other options. Perhaps a better answer lies in public law?[171] If unique responses to police failure to address domestic violence are necessary, the legislature should provide them. There is no constitutional objection to the legislature creating a statutory cause of action to deal with a duty to prevent crime generally, or a duty to prevent domestic violence particularly. The complaint under the *Human Rights Act, 1998* for breach of the defendants' duties as public authorities to protect Ms. Michael's right to life under article 2 of the European Convention on Human Rights was allowed to proceed.[172] A Canadian plaintiff might succeed in an action for damages under the *Charter*.[173] The police misconduct in *Michael* was the subject of a damning public inquiry, discipline and in one case dismissal.[174] We should resist the temptation to resolve Ms. Michael's case with a unique public duty. Hard cases make bad law.

I do not purport to have offered the definitive word on unique duties of care. Nor do I believe that Canadian judges have yet developed principled guidelines for creating unique duties of care. A full and open discussion would be welcome.

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[170] *Supra* note 17.

[171] Nolan, *supra* note 25 at 291 quoting Beever, "Rediscovering", *supra* note 66 at 340. See also *Paradis Honey v Canada*, 2015 FCA 89 at paras 119–146, 382 DLR (4th) 720.

[172] The implications of this are considered in McBride, "Michael Comment", *supra* note 4.

[173] See e.g. *Jane Doe*, *supra* note 43 and *Dudley v British Columbia*, 2013 BCSC 1005, 49 BCLR (5th) 382 [Dudley]. This may be a better way to attack systemic wrongdoing.

[174] This was not the case in *Dudley*, *ibid*, nor in *Mooney*, *supra* note 9. See Chamberlain, "Optimism", *supra* note 9 at para 33. Police accountability is one of the reasons Tofaris & Steel, "Omissions", *supra* note 36 offer in support of a unique police duty of care. It is possible to do this otherwise.