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GOVERNMENT LIABILITY FOR ECONOMIC LOSSES: THE CASE OF REGULATORY FAILURE

David Cohen*

I. INTRODUCTION

Compensation claims against provincial and federal governments are largely a product of the second half of the 20th century. The initial surge of cases after the enactment of the federal Crown Liability Act¹ in 1953 — mirrored also in developments at the provincial level — were typically “private” tort claims. Indeed a significant percentage of claims against the federal government continue to be nothing more than automobile accident, occupier liability claims and lawsuits arising out of similar relatively minor bureaucratic errors.²

Recently, however, as a result of both the imagination of litigators and the growth of the regulatory state, claims against governments have extended to claims for recovery of economic losses related to the negligent enforcement of building regulations,³ the negligent failure to resolve labour disputes in the federal civil service,⁴ the negligent regulation of financial institutions,⁵ and the failure to enact regulations establishing oil and gas royalties payable to Indian bands.⁶

This flurry of litigation has led some to claim that the courts are

* Associate Professor, Faculty of Law, University of British Columbia. This is the revised version of a paper presented at the Economic Negligence Symposium, sponsored by the Canadian Business Law Journal and held at the Faculty of Law of the University of Toronto, on April 19, 1991. I would like to note the assistance of Paul Fairweather in the preparation of this paper.

¹ S.C. 1952-53, c. 30 — now R.S.C. 1985, c. C-50.

² See D. Cohen, “Regulating Regulators: The Legal Environment of the State” (1990), 40 U.T.L.J. 213, at pp. 247-50.

³ See *Kamloops (City) v. Nielson* (1984), 10 D.L.R. (4th) 641, [1984] 2 S.C.R. 2.

⁴ See *Canadian Pacific Airlines, Ltd. v. Canada* (1976), 71 D.L.R. (3d) 421, [1977] 1 F.C. 715, affd 87 D.L.R. (3d) 511, [1979] 1 F.C. 39.

⁵ See *Baird v. Canada* (1983), 148 D.L.R. (3d) 1, 48 N.R. 276 (F.C.A.).

⁶ See *Alexander Indian Band No. 134 (Council) v. Canada (Minister of Indian Affairs & Northern Development)*, [1991] 2 F.C. 3, 39 F.T.R. 142.

becoming more active in their willingness to review regulatory activities of government agencies. Between 1984 and 1990, the popular literature and case reports were replete with suggestions that the courts order governments to address losses associated with public vaccination programmes,⁷ to compensate tobacco farmers for losses associated with increases in levels of taxation representing government policy to reduce smoking,⁸ to compensate haemophiliacs who have tested HIV positive,⁹ to address the claims of persons who suffered birth defects after their mothers ingested thalidomide,¹⁰ and to provide compensation to a woman who, as one of a number of patients, received repeated electroshock therapy at a Montreal psychiatric institute as part of a federally funded programme.¹¹

Both the popular and legal rhetoric suggest an image of governments under attack in the courts. However, closer examination of the facts of litigation, at least against the federal government, suggests that perhaps here, as nowhere else in tort law, "the lines have held".¹² The 1990 *Public Accounts of Canada* lists all governmental expenditures by department for the fiscal year ending on March 31, 1990. In that year, the expenditures of the federal government totalled \$131,945,022,000.¹³ Excluding legal expenses

⁷ See *Rothwell v. Raes* (1990), 76 D.L.R. (4th) 280, 2 O.R. (3d) 332 (C.A.), affg 54 D.L.R. (4th) 193, 66 O.R. (2d) 449, and supp. reasons at 59 D.L.R. (4th) 319, 69 O.R. (2d) 62 (action against manufacturer, distributor and Crown dismissed for failure to demonstrate sufficient causal connection between vaccine and injuries): see also, "Medical groups urge program to compensate vaccine victims", *The Globe and Mail*, January 2, 1987, at p. A14; "Taking on Ottawa: Action Groups Wait, Wonder", *The Toronto Star*, October 18, 1990, at p. 11.

⁸ See "Former tobacco farmers taking government to court", *The Globe and Mail, Report on Business*, May 11, 1990, at p. B5.

⁹ "Taking on Ottawa: Action Groups Wait, Wonder", *supra*, footnote 7 at p. 11. The claim, which is being pursued by the Canadian Haemophilia Society, alleges that Canada's blood-screening system was not in place until 12 months after New Zealand's and nine months after that of the United States.

¹⁰ *Ibid.*, at p. 11. The Thalidomide Victims Association of Canada is claiming \$10 million on behalf of the victims, alleging that the federal government shares liability with the manufacturer because it licensed the use of the product in Canada.

¹¹ "Woman stripped of memory seeks redress", *The Globe and Mail*, March 6, 1990.

¹² Jeremy Rabkin argues that, in the United States, claims against the federal government rose much more slowly in the period from 1975-1986 than did general product liability litigation. As well, his data suggests that "The federal government . . . continues to prevail in the overwhelming majority of tort claims filed against it.": see J. Rabkin, "Where the Lines Have Held: Tort Claims against the Federal Government", in *New Directions in Liability Law* (1988), 37(1) Proc. Acad. Pol. Sc., at pp. 112-25, Walter Olsen, ed.

¹³ This excludes some \$487,263,000 in federal government loans, investments and

as a cost element,¹⁴ the total amount of money paid out by the government in respect of what might loosely be called “damage claims” during the 1990 fiscal year totalled only \$16,423,000; this represented only .0001244 of the total budgetary expenditures. This \$16 million figure consists of settlements and damage claims (\$14,524,350); *ex gratia* payments (\$921,000);¹⁵ Federal Court awards (\$732,749);¹⁶ and nugatory payments (\$246,000).¹⁷ In other words, about 1/10,000th of the federal budget in 1990 was paid out in compensation claims. This 1/10,000th of the federal budgetary expenditures represented *all* settlements and payments, including contract, property, traditional tort claims and so on. Only a small proportion represented “economic loss” claims — hardly a crisis by any standards.¹⁸

What then has spawned the perception that governments are being subjected to intolerable levels of legal liability? One explanation for the recent reports of litigation, as well as for many of the cases decided in recent years, was the decision of the Supreme Court of Canada in *Kamloops (City) v. Nielson*,¹⁹ which began the

advances: see Table 2, “General Summary Non-budgetary”, Vol. II, *Public Accounts of Canada*, 1989-90, Part I, Details of Expenditures and Revenues, at 1.8-1.9.

¹⁴ Legal expenses are reported by Department in Section 5 of the *Public Accounts*, as Professional and Special Services: see Vol. II, *Public Accounts of Canada*, 1989-90, Part II, Additional Information and Analyses. In the 1989-90 fiscal year, departmental expenditures for legal services totalled \$42,249,666: see Vol. II, *Public Accounts of Canada*, 1989-90, Part II, Additional Information and Analyses, at 5.3. However, there is no information as to whether this represents actual expenditures for legal services from firms outside government, or an internal accounting technique representing an intergovernmental accounting of services to departments provided by the Department of Justice. More importantly, there is no information as to what percentage of this figure represents litigation expenses, as compared to expenses incurred in policy development and the provision of general legal advice.

¹⁵ This figure excludes a payment of \$21,000 per person to individuals claiming compensation under the Japanese Redress Program (P.C. 1988-89/2552) from the Ministry of State (Multiculturalism and Citizenship) totalling \$263,970,283: see Vol. II, *Public Accounts of Canada*, 1989-1990, Part II, at 9.18-9.114.

¹⁶ This includes \$150,000 in Federal Court awards awarded on income tax appeals: see Vol. II, *Public Accounts of Canada*, 1989-90, Part II, Additional Information and Analyses, at 9.117-9.118.

¹⁷ Formally, nugatory payments are awarded in respect of claims in which “no value or service has been received, but for which a liability is recognized”: see Vol. II, *Public Accounts of Canada*, 1989-90, Part II, at 9.119.

¹⁸ One point which should be noted is that the damage claim figure excludes situations where legislative programmes have been developed to respond to compensation claims which might otherwise have been subject to litigation: see, for example, “Medical groups urge program to compensate vaccine victims”, *supra*, footnote 7; “Compensation Pushed for Kids Harmed by Shots,” *The Vancouver Sun*, November 21, 1986; “Canada Eyes Compensation Plan for Vaccine Injuries”, *The Medical Post*, December 9, 1986.

¹⁹ *Supra*, footnote 3. Some aspects of the now famous “two-stage” approach to determining

modern era of tort litigation against governments in Canada. The recent cases before the Supreme Court have confirmed that employment of the *Anns* doctrine continues to be the court's preferred approach to government liability claims.²⁰ Indeed, notwithstanding the criticism of the Supreme Court of Canada's decision in *Just v. British Columbia*,²¹ I would argue that the Supreme Court has simply continued the approach it took in 1984.

Kamloops v. Nielson did, however, dramatically transform the approach which the judiciary would take from then on in addressing government liability claims. First, it represented an explicit confirmation of the two-stage *Anns* approach to determinations as to the existence of a legal duty of care. The first stage of the test — foreseeability of risk of injury — would almost always be met in government liability claims, given the planned and complicated institutional character of much of modern government activity.

Thus, the analysis of government liability claims has, from 1984 onwards, invariably involved the application of the second stage of the *Anns* formula. This second stage requires explicit judicial assessment of the policy considerations relevant to a decision to expose the government to, or insulate it from, legal responsibility. *Kamloops* has undoubtedly transformed the traditional judicial search for abstract, highly conceptual "legal duties of care" into a much more pragmatic assessment of the role of the judiciary in relation to the exercise of bureaucratic power, and of the implications of imposing liability on regulatory programmes and on private markets.

liability as expressed in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), had earlier been adopted in several lower court rulings and in at least one Supreme Court of Canada decision.

However, these decisions dealt with activities which had obvious private counterparts and did not, at least in the same way as *Kamloops*, raise the spectre of governmental liability for economic losses associated with regulatory failure: see *Welbridge Holdings Ltd. v. Greater Winnipeg (Metropolitan Corp.)* (1971), 22 D.L.R. (3d) 470, [1971] S.C.R. 957 (no liability for failure at the legislative or quasi-judicial level to take reasonable care in following procedures for enacting by-law); *Barratt v. North Vancouver (District)* (1980), 114 D.L.R. (3d) 577, [1980] 2 S.C.R. 418 (no liability for policy decisions relating to road inspection); *Malat v. Bjornson* (1980), 114 D.L.R. (3d) 612, [1981] 2 W.W.R. 67 (B.C.C.A.), leave to appeal to S.C.C. refused D.L.R. *loc. cit.* (liability for negligent operational decision involving failure to construct median barrier after a decision to do so had been made).

²⁰ The approach of the Supreme Court in its 1989 decision in *Rothfield v. Manolagos* (1989), 63 D.L.R. (4th) 449, [1989] 2 S.C.R. 1259, is virtually indistinguishable from that in *Kamloops v. Nielson*, *supra*, footnote 3.

²¹ (1989), 64 D.L.R. (4th) 689, [1989] 2 S.C.R. 1228.

Second, *Kamloops* has been interpreted as permitting recovery for “pure” economic losses. Since much of what government does is to redistribute wealth either purposefully, contingently or inadvertently, the case represented an opportunity for rapid judicial expansion of recovery for government-induced losses. This recognition of legal responsibility for economic risks associated with government action was coupled with the application of common law tort principles to a clear instance of “regulatory failure”, in contrast to the more common use of tort law to regulate bureaucrats by holding them liable for behaviour which would be tortious if done by a private individual. Given that governments are often engaged in regulatory activities which have no obvious private analogue, *Kamloops* should be, and indeed was, seen as the vehicle through which the courts could mediate claims for a range of losses generated by less than competent bureaucrats engaged in the myriad of activities designed to create and distribute economic entitlements directly, and to regulate the creation and distribution of wealth by private actors.²²

Third, *Kamloops* was one of the first cases in Canada in which the Supreme Court was explicit in stating the source of the common law duty of care; the kinds of interests protected by the courts through the application of the duty of care in tort; and the class of persons who were entitled to claim compensation for their losses as a result of the breach of that duty: these factors were all to be identified through a close analysis of the legislative and regulatory framework within which the bureaucracy was operating. It is true that the court has rejected the concept of “breach of statutory duty”, and reaffirmed its commitment to the idea that the tort liability of public authorities would continue to be founded in a common law private duty of care. None the less, reading *Kamloops* and virtually every case since 1984 confirms that the legislative responsibility of the regulatory authority holds the key to the existence and definition of its legal liability.

²² In this article, I focus my attention on tort claims which arise from regulatory failure in an effort to capture the distinctive character of government action and the way in which it affects the economic interests of private firms. Thus, I do not analyze recent cases involving non-regulatory activity in which governments have been sued, as these cases are invariably indistinguishable from private tort law cases: see *Stuart v. Canada*, [1989] 2 F.C. 3, [1988] 6 W.W.R. 211 (application of Alberta Occupiers’ Liability Act, R.S.A. 1980, c. O-3, s. 5, to the federal government in respect of a claim for compensation for personal injuries incurred as a result of a fall in a parking lot); *Rasmussen v. Canada (Ministry of Fisheries & Oceans)* [1989] 2 F.C. 651, 24 F.T.R. 86 (claim for value of fish unlawfully seized and sold by the federal government to a Crown corporation).

Finally, *Kamloops*, like *Anns*, purported to collapse the historical distinction between acts of commission and omission and, at least for the purposes of governmental liability, assimilated bureaucratic failure to act and active wrongdoing. As I argue later, this distinction is required in the case of governments once one accepts that the source of legal responsibility is the regulatory programme which the bureaucracy is entrusted to implement. Liability for failing to act, when applied to private individuals carries with its enormous implications in terms of ideas about causation and of liberal ideas of personal obligation — leaving aside the pragmatic difficulty of defining the boundaries of legal responsibility. Conversely, liability for failing to act, when applied to public bureaucracies requires only that we identify the positive social obligation articulated in the relevant legislative authority pursuant to which the bureaucracy was operating.

Since *Kamloops*, the Supreme Court of Canada has had several opportunities to reconsider this approach to government liability with results which have not changed the judicial terrain to any significant degree. In *Just*,²³ Cory J., speaking for the court, clearly rejected recent Commonwealth decisions which themselves had retreated from *Anns*, and reaffirmed that the Supreme Court would continue to employ the two-stage formula which it had adopted from *Anns* some six years earlier in the *Kamloops* case. While some might argue with Cory J. about where we should draw the line between policy and operational decisions, and while there is some language in the judgment which suggests that even policy decisions might incorporate an element of judicial review for reasonableness, virtually all of the judgment reflects precisely the ideas which the Supreme Court earlier expressed in *Kamloops*.²⁴

²³ *Supra*, footnote 21.

²⁴ What is very interesting is the resulting ambivalence of lower courts faced with the two very different approaches — the so-called liberal or expansive approach taken in the Supreme Court and the much more conservative and restrictive doctrine in the Commonwealth cases. The result is a series of very confusing judgments at the trial and appellate levels, which will certainly lead to future Supreme Court of Canada decisions seeking to clarify the issue: see, for example, *Longchamps v. Farm Credit Corp.*, [1990] 6 W.W.R. 536, 108 A.R. 115 (Q.B.) (government agency not liable for negligence in assessing loan application); *Akhtar v. MacGillivray & Co.*, [1991] 2 W.W.R. 489, 112 A.R. 242 (Q.B.) (no liability in Securities Commission for alleged negligent assessment of corporate information). In both these cases, the courts seem to collapse the two lines of authority — notwithstanding their apparent contradictory approaches. As I argue later, however, I am not certain that much of this matters.

II. TWO VIEWS OF THE RELATIONSHIP OF COURTS TO GOVERNMENTS

From 1984 until today, we have witnessed both academic and judicial consternation, if not admitted confusion, about how to respond to claims in tort for recovery of economic losses associated with maladministration, bureaucratic negligence and regulatory failure. One important reason for this confusion is the tension between two very different views which the courts seem to have of their relationship with the modern bureaucratic state. These contradictory views — at least at the Supreme Court of Canada level — can best be illustrated by considering the following two quotations from recent Supreme Court decisions. In both, the court attempted to defend its thinking about governmental liability.

The first quotation is from a case considering special procedural privileges which the federal government attempted to confer on federal bureaucracies. In that case the Supreme Court of Canada said that:²⁵

... the Crown cannot be equated with an individual. The Crown represents the State. It constitutes the means by which the federal aspect of our Canadian society functions. It must represent the interests of all members of Canadian society in court claims brought against the Crown in right of Canada. The interests and obligations of the Crown are vastly different from those of private litigants making claims against the federal government.

At virtually the same time, the court in *Just v. British Columbia*,²⁶ through Mr. Justice Cory, writing for the majority, ruled that in

²⁵ See *Rudolph Wolff & Co. Ltd. v. Canada*, [1990] 1 S.C.R. 695, 43 Admin. L.R. 1, at p. 8. In that case, the plaintiffs claimed that the federal government had breached fiduciary obligations, had breached contracts and was liable in tort in respect of negotiations involving the International Tin Council. The Crown brought a motion to have the action dismissed from the Supreme Court of Ontario and was successful. The Supreme Court of Canada held that s. 17(1) and (2) of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), now R.S.C. 1985, c. F-7, and s. 7(1) of the Crown Liability Act, R.S.C. 1970, c. C-38, now R.S.C. 1985, c. C-50, s. 15(1), which vested exclusive jurisdiction to consider damage claims against the federal government, did not violate s. 15 of the Charter of Rights and Freedoms.

²⁶ *Supra*, footnote 21. This view was also adopted by a minority of the Supreme Court in *Tock v. St. John's Metropolitan Area Board* (1989), 64 D.L.R. (4th) 620, [1990] 2 S.C.R. 1181, where La Forest J., writing for himself and Chief Justice Dickson, would have radically limited the ability of governmental bodies to exculpate themselves from liability in nuisance, by treating the liability of the governmental agency as indistinguishable from that of private individuals, and by dramatically limiting the defence of statutory authority.

general the duty of care in tort owed by a government agency is the same as that owed by one private person to another. These two contradictory ideas, I think, explain the tension between two realities which the court — and most of us, it is fair to say — simply cannot reconcile.

The first historical reality is that courts and judges embody the institutional and human dimensions of the rule of law. Dicey said, almost a century ago, that all public authorities should be suable in common law courts and should be liable through the application of the same common law principles as would a private individual.²⁷ Abstractions from social context, combined with an overriding fear of bureaucratic power, have left us with a powerful and often unstated judicial reluctance to recognize the government, public bureaucrats or public institutions in general in the law of torts; and an equally pervasive paranoia about developing a “public tort law” which would operate according to a different set of ideas and values than does private tort law.

That is the philosophy underlying *Just*, and it is not an unexpected outcome of Diceyan notions of the rule of law that the current model of judicial “tort” review consists largely of the application of modified private tort law concepts to governments. This approach reflects either the rudimentary development of public law — focusing as it has on process review — or perhaps a simplistic allegiance to Diceyan notions of the rule of law. It is generally accepted that Dicey was the strongest advocate of personal bureaucratic liability administered by common law courts and of the non-recognition of the “state” in the common law legal system. These two concepts lie at the heart of this component of the current model of government liability in tort.

The second reality which the judges must, and certainly do, accept is that the government and public bureaucrats do not respond to liability risks in the same fashion as do private firms; that the allocation of legal liability to “the government” in fact represents risk spreading to taxpayers; that public bureaucrats, as individuals, participate in the delivery of public services and benefits which have no private analogues; that government action

²⁷ See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London, MacMillan & Co. Ltd., 1959). I make this point in more detail in D. Cohen, “Thinking about the State: Law Reform and the Crown in Canada” (1986), 24 *Osgoode Hall L.J.* 379, at pp. 388-92.

may, to varying degrees and in complicated ways, represent the expression of the democratic will to which the judiciary should defer; that government responsibilities are established and defined through a complex of legislative and regulatory enactments which charge public bureaucrats with responsibilities in ways which private individuals and firms simply do not experience; that governments may represent monopolistic deliverers of services, imposing risks to which the public has no alternative but to submit; and so on.

These two realities simply cannot be reconciled. Formal notions of the rule of law embodied in our legal heritage tell us to treat governments and similar public authorities as if they were private firms. Almost everything else we know about modern bureaucratic governments — what they are empowered to do, how they operate, their position in the modern state relative to courts and judges — tells us that to do so is both foolish and indefensible given what most of us are trying to achieve in tort law. Until we choose to reject attempts to assimilate the government to the position of private firms we will continue to read judgments which cannot be understood as anything but manifestations of this judicial schizophrenia. It is my view that recovery of economic losses for regulatory failures must continue to be adjudicated — if they remain in the court system at all — according to principles which necessarily differ from those applied to resolve disputes between private actors.

III. THE SPECIAL TREATMENT OF CLAIMS AGAINST GOVERNMENTS

Since *Kamloops*, we have seen literally hundreds of cases struggle with a doctrine which asks that 19th century ideas about the role of the state in England be applied at the end of the 20th century in Canada. If one accepts the approach in *Kamloops*, the policy/operational distinction becomes the doctrinal tool which is employed to draw the line between claims which are compensable and those that are not. I have written about the variables which I see operating under the umbrella of that doctrine, and little would be gained by repeating them here.²⁸ Recently, however, the Supreme Court of Canada has had the opportunity to reconsider

²⁸ See D. Cohen "The Public and Private Law Dimensions of the UFFI Problem: Part II" (1983-84), 8 C.B.L.J. 410, at pp. 420-30.

its position on *Kamloops*. While the judgments are confusing, it is my sense that these cases reaffirm what is obviously a frustrated and ultimately fruitless commitment to treat the government as if it were a private firm and *simultaneously* to recognize the unique political character, fiscal environment and social responsibility of the modern Canadian state.

What is clear, then, is that the analysis of the liability of central governments as well as of their subsidiary agencies will continue necessarily to involve several issues which have no counterpart in the analysis of the tort liability of private firms and individuals. The courts will continue to focus on the legislative and regulatory framework within which the bureaucracy operates to determine several issues fundamental to a determination of legal liability; they will continue to have to recognize the adjudicative responsibilities of many administrative agencies; the courts will have to continue to struggle with the complex issues associated with the identity of the bureaucrat/agency/government which is subject to liability; and, finally, the courts will continue to be sensitive to the very persuasive reasons for judicial deference to authorized bureaucratic activity. Recent cases confirm that the Supreme Court's half-hearted direction to equate the liability of public authorities with that of private firms is being and, I believe, will always be, distorted in a substantial majority of cases.

The first issue which is unique to tort litigation involving governments is the necessity for the court to investigate closely the regulatory environment in which the relevant bureaucrats operate in order to determine the kinds of interests which will be recognized in litigation, as well as the class of persons who will be able to pursue compensation if those interests are not respected. Government liability tort cases necessarily involve an assessment of the regulatory programme pursuant to which bureaucrats operate; where it is clear that the programme is designed to protect the economic interests of private citizens, economic loss is recoverable without serious debate.²⁹ There is obviously no private situation which generates this legislatively focused inquiry.

²⁹ This is the point made by Madame Justice Wilson in *Kamloops*, where she addresses the "floodgates" risk by arguing that economic loss is only recoverable if it was within the purview of the statute as an interest which was protected by the relevant regulatory programme: see *Kamloops (City) v. Nielson*, *supra*, footnote 3, at pp. 679-80 D.L.R. See also, Bruce Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1991), 17 C.B.L.J. 356, at p. 362.

Several recent decisions make this point unambiguously. In *Brewer Bros. v. Canada (Attorney General)*,³⁰ several farmers had extended credit to a grain elevator operator licensed by the Canadian Grain Commission under the Canada Grain Act.³¹ The licensee went bankrupt and the farmers sued for, and successfully recovered, \$420,000 from the federal government to compensate them for the economic losses incurred on the bankruptcy of the elevator operator. The court held that its decision as to whether a private law duty of care was owed by the government to the farmers “required an analysis of the statutory underpinnings which create the public duty” of the regulatory authority.³² The court justified its conclusion that a duty of care existed on the ground that the “primary purpose of the Canada Grain Act . . . was to protect the economic interests of the grain producers”.³³

The same approach, with a radically different outcome, was taken in *Wirth v. Vancouver (City)*.³⁴ That case involved a claim in negligence brought by the plaintiff against the city for incorrectly calculating the square footage of a building to be constructed on property adjoining that of the plaintiff. A building was constructed which would not have been permitted by the applicable zoning by-laws, and which allegedly reduced the value of the plaintiff's property. The court interpreted the relevant zoning legislation as not being directed at protecting the economic interests of neighbouring owners of zoned property and clearly rejected recovery of pure economic loss on the basis of mere foreseeability of risk of injury.³⁵

³⁰ (1990), 66 D.L.R. (4th) 71, 31 F.T.R. 191 (T.D.), var'd 80 D.L.R. (4th) 321 (C.A.).

³¹ S.C. 1970-71-72, c. 7, s. 35, now R.S.C. 1985, c. G-10, s. 45(1). A statutory condition of licensing established under s. 36(1)(c), now s. 46(1)(c), was that the commission was satisfied that the licensee was financially able to carry on the elevator operation, and had given security sufficient to ensure that all of its contractual obligations to farmers could be met. Section 38 of the Act empowered the commission to obtain additional security where it had reason to believe and was of the opinion that the current security of the licensee was insufficient.

³² *Brewer v. Canada*, *supra*, footnote 30, at p. 91 D.L.R.

³³ *Ibid.*, at pp. 96 and 98 D.L.R. An almost identical approach and result was adopted in a New Zealand case, *Steiller v. Porirua City Council*, [1986] 1 N.Z.L.R. 84, in which the court interpreted the applicable legislation as providing protection to home buyers in respect of substandard construction materials. In that case, the court awarded damages to a homeowner who had purchased a home which had been constructed with substandard materials that had not been discovered on an inspection by the city.

³⁴ (1990), 71 D.L.R. (4th) 745, [1990] 6 W.W.R. 225 (B.C.C.A.).

³⁵ Similarly, in *Akhtar v. MacGillivray*, *supra*, footnote 24, a case involving a claim against the Alberta Securities Commission, the court held (at p. 543 W.W.R.) that the “powers

In *McGauley v. British Columbia*,³⁶ Huddart J. was faced with a claim by a large group of investors who had lost their savings when a co-operative, which had been unlawfully acting as a financial institution, went bankrupt. The plaintiffs claimed that the Superintendent of Co-operatives had been negligent in carrying out his regulatory responsibilities under the provincial Cooperative Association Act.³⁷ The court denied that the government had any duty of care to the depositors. After a close examination of the relevant legislation, the court held that the purpose of the legislation was to further the co-operative activities of licensed co-operatives, and not to protect the economic interests of members of a co-operative who mistakenly assumed that their directors' actions were authorized by their corporate constitution.³⁸

Finally, in *Yuen Kun Yeu v. Attorney-General of Hong Kong*,³⁹ the plaintiff suffered substantial financial losses after depositing funds in a registered institution which was subsequently liquidated. The Privy Council held that the legislation under which the company was registered was^{39a}

...designed to give added protection to the public against unscrupulous or improvident managers of deposit-taking companies, but it cannot reasonably be regarded . . . as having instituted such a far-reaching and stringent system of supervision as to warrant an assumption that all deposit-taking companies were sound and fully credit-worthy.

... in the regulators to allow for the protection of the public at large, [were] not intended to allow for a complementary, common law duty of care”.

In a recent decision involving a claim against the Toronto police force arising out of the alleged negligence of the police in failing to warn the plaintiff of the activities of a rapist, the Ontario Court of Appeal similarly rejected foreseeability as sufficient to trigger a duty of care, but only after the court closely analyzed sections of the Police Act to reach the conclusion that the police *were* under a duty of care to preserve the peace, prevent crime and apprehend offenders. In *Doe v. Metropolitan Toronto (Municipality) Board of Commissioners of Police* (1989), 58 D.L.R. (4th) 396 at pp. 426-7, 48 C.C.L.T. 105, the court indicated that the police might owe a duty of care to a victim of a rapist given the circumstances which indicated that the police knew the rapist was active in a confined geographical area and was choosing victims with physical characteristics similar to those of the plaintiff. On appeal (1990), 72 D.L.R. (4th) 580, 74 O.R. (2d) 225 (C.A.), the same view was taken.

³⁶ (1990), 44 B.C.L.R. (2d) 217 (S.C.), appeal allowed pending further argument 56 B.C.L.R. (2d) 1 (C.A.).

³⁷ R.S.B.C. 1979, c. 66.

³⁸ See also *Kripps v. Touche Ross & Co.* (1990), 52 B.C.L.R. (2d) 291 (S.C.) This decision employs the same analytical technique to deny governmental liability for economic losses arising out of the failure of the relevant government agencies to adequately review corporate prospectuses.

³⁹ [1988] A.C. 175, [1987] 2 All E.R. 705.

^{39a} *Ibid.*, at p. 197 A.C.

As there was no scheme (according to the interpretation of the judges) to protect against financial loss, no duty of care was found.

The recent English decisions which have overruled *Anns* will not significantly alter this aspect of the development of the legal liability of governmental institutions. These decisions, taken as a whole, emphatically reject the imposition of legal liability for failure to implement positive regulatory responsibilities based on mere foreseeability of risk of injury. On one view, this will confront legal decision-makers with some serious conceptual problems when faced with claims that public bureaucrats failed in some way to deliver regulatory benefits which the public, or a particular individual member of the public, expected to receive. In all of the recent cases discussed above, the courts respond to this issue by focusing their attention on the legislative and regulatory framework within which the bureaucracy operates to determine the kind of interests which ought to be recognized and the class of persons intended to be protected. As the cases indicate, in virtually all situations, an individual is claiming that the public bureaucrat failed to deliver some service or benefit for which he or she was responsible; and, in virtually all cases, the entitlement or regulatory activity or both has no private analogue.⁴⁰ Claims against governments almost invariably introduce issues of non-feasance. In *Kamloops*, for all of its critics, the Supreme Court recognized that where bureaucrats are sued for failing to deliver regulatory benefits, the distinction between non-feasance and misfeasance, whatever its merits in resolving and defining private conflicts and relations, should have little applicability.⁴¹

It is not at all clear that the recent English cases will change this approach by very much. Judges, even if they adopt the recent English decisions and reject the two-stage *Kamloops* test, cannot avoid dealing with the intractable policy questions raised by government liability claims. If they were to accept the approach in these recent English cases, Canadian courts would be required to

⁴⁰ Thus, in *Funk v. Clapp* (1986), 68 D.L.R. (4th) 229, 35 B.C.L.R. (2d) 222 (C.A.), the court was asked to determine whether the police owed a duty of care to a man who committed suicide in a jail cell after he had been jailed without being deprived of his belt. The court held that the police were under a duty of care to ensure that people in custody were not able to injure themselves.

⁴¹ In Scotland, the issue of non-feasance and the liability of public authorities in light of *Anns* was explicitly recognized in the case of vaccination liability claims in *Bantrone v. Secretary of State for Scotland*, [1987] S.L.T. 34.

determine whether a public authority is liable on the basis of a vague "close proximity" standard or an even more abstruse "fair and reasonable" test.⁴² The House of Lords, in *Yuen Kun Yeu v. Attorney-General of Hong Kong*,⁴³ explicitly restated the first stage of *Anns* as encompassing not only foreseeability, but also notions of a "necessary relationship", and went on to say that the analysis of the policy reasons for not imposing liability would be considered "only in a limited category of cases". Most recently, in *Murphy v. Brentwood District Council*,⁴⁴ the House of Lords in several judgments acknowledged that it would not in the future use the *Anns* approach. Instead, the courts will either require that the imposition of a legal duty of care be "fair or reasonable", or alternatively recognize a legal duty of care when there is a sufficiently close and proximate relationship between an individual plaintiff and the regulator.

I am not sure that the change matters very much, either in terms of the outcome of the cases or in the arguments to which the courts will be sensitive. One concern might be that, by collapsing the *Kamloops/Anns* standard into one principle, we will no longer see the explicit articulation and argument of the policy reasons for either imposing or not imposing liability which has become the hallmark of decisions involving government defendants during the past decade. I do not share this concern. A reading of the cases which purport to follow the recent English decisions demonstrates virtually no change from the *Kamloops* approach. For example, in deciding whether a duty of care existed in *Murphy*, the House of Lords itself was forced to inquire into the objectives of the legislation to determine whether there was anything in the terms of the legislation which would support the view that "the purpose of the statute was to protect owners of buildings from economic loss".⁴⁵

⁴² Thus, in *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*, [1984] 3 All E.R. 529, the House of Lords rejected the approach in *Anns* and held that a municipal authority did not owe a duty of care to safeguard developers against economic losses associated with negligent approval of construction plans, on the basis that it was not "just and reasonable" that a duty of care exist. This approach has been adopted in Canada in several decisions. In *Longchamps v. Farm Credit Corp.*, *supra*, footnote 24, McDonald J. was faced with a claim that a firm suffered financial losses when its loan application was improperly assessed by the defendant government agency. He denied liability, holding that it would not be "just and reasonable" to impose a legal duty upon a lender to use reasonable care in assessing the financial affairs of a loan applicant.

⁴³ *Supra*, footnote 39.

⁴⁴ [1990] 3 W.L.R. 414. See also, *Department of Environment v. T. Bates & Son Ltd.*, [1990] 3 W.L.R. 457.

⁴⁵ *Murphy v. Brentwood District Council*, *ibid.*, at p. 449. As I have discussed earlier, the

Tort claims against governmental authorities will also be characterized by concerns that tort law is being used as a vehicle to achieve judicial review of adjudicative decisions. A significant number of government liability cases will continue to address the potential liability of public authorities exercising judicial and quasi-judicial functions which traditionally, and for a number of very persuasive reasons, have been immunized from liability.⁴⁶ While one thinks that this immunity applies only to classic judicial activities, one gets a clear sense from reading the cases that a significant segment of regulatory activity involves the exercise of discretion in order to trigger judicial deference in subsequent tort claims.

An example of the pervasiveness of this immunity is *Yuen Kun Yeu v. Attorney-General of Hong Kong* itself.⁴⁷ That case involved a group of depositors who attempted to recover money lost when the financial institution in which their funds were invested failed. The plaintiffs alleged that they relied on the government's registration of the bank as an indication that it was credit-worthy and that the regulator responsible for such matters in Hong Kong knew, or should have known, that the directors of the bank were acting fraudulently. Lord Keith rejected the appellants' claim, emphasizing that there was not a sufficient degree of proximity in the relationship between the Commissioner and the appellant. In so doing, he implicitly accepted the policy operational distinction

Supreme Court of Canada has recently reaffirmed its allegiance to the two-stage approach it had adopted in *Kamloops*. However, there are some Canadian cases which have clearly taken the English approach, notwithstanding the Supreme Court's direction. Nevertheless, these cases still require an analysis of the legislative framework in which the bureaucracy operates in order to determine the class of person which might benefit from a private right of action, as well as to articulate the kinds of interests protected as a result of the institution of the regulatory program: see *Wirth v. Vancouver (City)*, *supra*, footnote 34, at pp. 748-9 D.L.R. (foreseeability risk of economic loss is not sufficient to found a duty of care).

⁴⁶ For example, in *French v. Law Society of Upper Canada* (1975), 61 D.L.R. (3d) 28, 9 O.R. (2d) 473, the Ontario Court of Appeal held that the investigative functions of the defendant were quasi-judicial in nature and thus did not give rise to liability in tort absent malice. The Supreme Court of Canada was faced with this issue in *Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609, [1989] 2 S.C.R. 170, in which the court held that prosecutorial immunity for malicious prosecutorial decisions was contrary to the Canadian Charter of Rights and Freedoms. However, there are remarks in the judgment which suggest that historical immunities for "professional negligence" and related "errors of judgment" by parties exercising judicial and quasi-judicial functions may still be respected by the court: *ibid.*, at p. 644, *per* Lamer J. See also, *Birchard v. Alberta (Securities Commission)* (1988), 42 D.L.R. (4th) 300 at pp. 310-11, [1987] 6 W.W.R. 536.

⁴⁷ *Supra*, footnote 39.

by alluding to the quasi-judicial nature of the Commissioner's decisions: "it might be a very delicate choice whether the best course was to deregister a company forthwith or to allow it to continue in business with some hope that . . . its financial position would improve".⁴⁸

The third aspect of government liability claims which has no private analogue is the intractable problem concerning the identity of the institutions and individuals who are the appropriate subjects of litigation. The problem has several sources. The first is the continued requirement, present in most Crown liability legislation, that the plaintiff demonstrate that an individual bureaucrat has committed a common law tort which has caused the losses sustained by the plaintiff — only then can the government be held vicariously liable under the relevant legislation.⁴⁹ The issue is complicated by the fact that many government agencies are not legal entities suable in tort, meaning that only the individual bureaucrat is subject to legal liability for which the Crown is vicariously liable.⁵⁰ As well, it is becoming increasingly common to find that the relevant legislation insulates individual public employees from liability — either absolutely, or if they are acting in good faith.⁵¹ Courts have addressed, and will continue to address, both the constitutionality of such statutory immunities and, more problematically, will have to consider whether personal immunity will necessarily result in institutional immunity for the government itself.⁵²

⁴⁸ *Ibid.*, at p. 195 A.C.

⁴⁹ See, for example, the Crown Liability Act, R.S.C. 1985, c. C-50, s. 3(a).

⁵⁰ Both these situations were presented in *Air India Flight 182 Disaster Claimants v. Air India* (1987), 44 D.L.R. (4th) 317, 62 O.R. (2d) 130, in which Holland J. dismissed claims against the federal Solicitor-General and Minister of Transport since the court could not recognize claims against persons in so far as they were being sued in their capacity as government officers. Similarly, the court dismissed claims against the Department of Transport and the Canadian Security Intelligence Service since they were not suable entities.

⁵¹ See, for example, the Criminal Code, R.S.C. 1985, c. C-46, s. 25, which exempts police officers from liability if they act on "reasonable grounds"; and the Elevator and Fixed Conveyances Act, R.S.A. 1980, c. E-7, s. 9, which provides that inspectors are not liable for injury, loss or damage when acting pursuant to the Act.

⁵² In *G. (A.) v. British Columbia (Superintendent of Family & Child Service)* (1989), 61 D.L.R. (4th) 136, [1990] 1 W.W.R. 61, supp. reasons at 63 D.L.R. (4th) 606n, the British Columbia Court of Appeal recognized the difficulty of applying s. 23 of the Family and Child Service Act, S.B.C. 1980, c. 11, which immunized individual social workers from liability for decisions taken in good faith, both in terms of its constitutionality and in respect of the implications for the vicarious liability of the government: *ibid.*, at p. 153.

Finally, and most importantly, courts may be expected to continue, whether or not the Supreme Court shifts from its position in *Just* and *Kamloops*, to recognize the broad range of justifications for judicial deference to bureaucratic discretion. A substantial majority of very significant regulatory decisions are motivated by economic, social, and political factors. They represent public choices which mediate and reflect the conflicting interests and claims of large numbers of the public who stand to benefit or lose as a result of the exercise of regulatory power. For a variety of reasons — including institutional competence, respect for the exercise of democratic power, the acknowledgement of internal bureaucratic and external political accountability mechanisms,⁵³ and the unavailability of standards against which to assess bureaucratic decisions — government liability claims will necessarily generate decisions which deny legal liability for reasons unique to government.

Again, I do not believe that the recent English decisions, were they to be adopted in Canada, would generate any substantial modification in the approach which Canadian courts will take in responding to these issues. Any discussion of “proximity” or “the justness and reasonableness of imposing duties of care” — if judges do anything more than state their conclusions on the existence of a duty of care — requires courts to explain their concern with judicial deference to bureaucratic expertise, resource allocation decisions, and similar “policy” factors.⁵⁴ In *Longchamps v. Farm Credit Corp.*,⁵⁵ McDonald J. purported to apply the recent English decisions, holding that it was not just and

Similarly, in *Gutek v. Sunshine Village Corp.* (1990), 65 D.L.R. (4th) 406, 103 A.R. 195, the court was faced with a section of the provincial statute regulating elevator operations which immunized individual bureaucrats from liability, and a section of the Alberta Proceedings Against the Crown Act, R.S.A. 1980, c. P-18, s. 5(c), which provides that any immunity that applies to employees also applies to the Crown.

⁵³ See D. Cohen, *supra*, footnote 28.

⁵⁴ Perhaps the best example of this is in *Hill Estate v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238, a case involving an unsuccessful claim of negligence against the defendant police force for failing to apprehend Peter Sutcliffe — the Yorkshire “Ripper” — before he killed Suzanne Hill. The House of Lords held that the police did not owe a duty of care to the victim and that foreseeability of risk of harm was not enough to trigger legal responsibility. The court went on at length to describe its views regarding the ability of the courts to assess police practices, their concern with distorting police investigative discretion, the diversion of police resources to the defence of legal suits and away from law enforcement activities, and so on.

⁵⁵ *Supra*, footnote 24.

reasonable that a government agency would be responsible for losses suffered by a firm whose loan application was improperly assessed. His reasons, however, are indistinguishable from those which one might find in a decision applying *Kamloops*, one which focuses on the impact on the lender's cost of lending, on the impact on insurance requirements if the lender would be held liable, on the impact of liability on other borrowers and the tax-paying public and so on.⁵⁶ In fact, he states explicitly that "it would be desirable to articulate the grounds upon which, as a matter of policy, it is or is not 'just and reasonable' to develop a new category [of negligence]".⁵⁷

Of course, the Supreme Court of Canada has not yet rejected the approach it developed in *Kamloops*. And as these recent cases suggest, even if it decided to reject *Anns*, I do not believe that much will change. For all of the reasons developed above, the courts will continue to address government liability claims using concepts and principles which have no counterpart in claims against private citizens and firms.

IV. THE FUTURE OF GOVERNMENT LIABILITY — MORE OF THE PAST?

Given these cases, and the Supreme Court's recent reaffirmation of its position in *Kamloops*, it seems to me that governments will continue to enjoy a broad immunity in respect of the vast majority of regulatory decisions which produce and allocate economic risks in the private sector. There are several reasons for the original reluctance of the courts to extend liability to governmental bodies in respect of regulatory action which generates economic risks, and for the continuation of this position in the recent cases discussed above.

⁵⁶ Another decision which purports to adopt the *Kamloops* two-stage approach, but in fact seems to integrate it with the more restrictive approach in *Yuen* and related cases, is a recent decision of the Alberta Supreme Court: *Akhtar v. MacGillivray*, [1991] 2 W.W.R. 489, 112 A.R. 242 (Q.B.). In that case, the court held that mere foreseeability of risk of injury to the investing public was insufficient to trigger a legal duty of care, and that a "close and direct" relationship between the regulator and individual plaintiff would be required. Here, as in *Longchamps*, the explanation for the decision was, as it must always be, expressed in policy terms, in particular, the concerns of the regulators with the investments of other individuals, and the degree and extent of control exercised by the regulator under the Alberta Securities Act, R.S.A. 1980, c. S-6, repealed and replaced by s. 199, Securities Act, 1981, S.A. 1981, c. S-6.1.

⁵⁷ *Longchamps v. Farm Credit Corp.*, [1990] 6 W.W.R. 536 at p. 549, 108 A.R. 115 (Q.B.).

First, for the past 30 years, the one overriding concern has been, and continues to be, the issue of whether the plaintiff was in an “individualized” relationship with some particular bureaucrat. This question has concerned the court both in assessing whether a particular bureaucratic decision is a “policy or operational decision” and in deciding whether, to use the doctrine enunciated in the recent English decisions, there is a relationship of sufficient proximity that it would be “just and reasonable” to impose a duty of care.

This requirement of an individualized relationship first appears in *Cleveland-Cliffs Steamships Co. v. The Queen*,⁵⁸ decided soon after the enactment of the federal Crown Liability Act;⁵⁹ it was certainly present in *Kamloops* itself;⁶⁰ and it reappears in cases like *Yuen Kun Yeu v. Attorney-General of Hong Kong*,⁶¹ where the court explicitly rejected the plaintiff’s claim, which was based on “institutional” rather than individualized reliance.⁶² We see it as well in cases like *Birchard v. Alberta (Securities Commission)*,⁶³ where the court is explicit in its reluctance to impose liability on regulatory agencies absent evidence of a particular decision or representation directed at a particular plaintiff who subsequently suffers a loss.

“Institutional reliance” as the basis for imposing liability has been emphatically rejected by every court which has been asked to adopt it.⁶⁴ Instead, the courts seem to require actual reliance by

⁵⁸ (1957), 10 D.L.R. (2d) 673 at pp. 679-80, [1957] S.C.R. 810.

⁵⁹ Most of the provincial Crown liability legislation, like s. 3 of the federal Act, reinforce this approach by limiting governmental liability to vicarious liability for the common law torts of individual bureaucrats. Thus, in most cases, the necessary focus of litigation is not on institutional action and bureaucratic programmes, but rather on individual action and common law tort liability of individuals.

⁶⁰ The absence of this individualized relationship is perhaps what has caused much of the discussion around the *Just* decision. What is apparent, however, in cases like *Just*, is that this individualization of responsibility, which is most often found in judicial consideration of regulatory activity generating economic risks, will not be a prerequisite to liability in cases which involve risks of personal injury. That distinction is an extremely important one, which appears to have been ignored in most analyses of government liability in Canada.

⁶¹ [1988] A.C. 175, [1987] 2 All E.R. 705 (P.C.).

⁶² *Ibid.*, at p. 189 A.C. In that case it was clear that the House of Lords was rejecting any argument that depositors’ generalized reliance on the existence of regulatory functions exercised by the Colony’s Commissioner of Deposit-taking Companies would justify the imposition of a duty of care in tort.

⁶³ *Supra*, at footnote 46. In that case, the court held that neither the Alberta Securities Commission nor the Law Society of Alberta owed a duty of care to individual creditors of a defunct company, on the ground that the plaintiff did not actually rely on any particular representation of fiscal status by either party.

⁶⁴ In *McGauley v. British Columbia* (1990), 44 B.C.L.R. (2d) 217 at p. 234 (S.C.), Huddart

the plaintiff on the specific low-level bureaucratic decision or activity,⁶⁵ or at least knowledge of the identity of the potential plaintiff as a member of a limited, defined class of potential victims.⁶⁶

J. held that reliance on statutory duties of auditors would not give rise to liability absent a demonstration of actual reliance by the investors. In *Kripps v. Touche Ross & Co.* (1990), 52 B.C.L.R. (2d) 291 at p. 307 (S.C.), Boyd J. rejected a claim of liability based on "indirect reliance or reliance on the regulatory process or reliance upon the statutory duties set out in the securities legislation".

Another example of this approach is the decision of the Nova Scotia Court of Appeal in *Nova Scotia (Attorney-General) v. Aza Avramovitch Associates Ltd.* (1985), 11 D.L.R. (4th) 588, 62 N.S.R. (2d) 181. In that case, an architect sued the province in negligence for the Department of Health's inspection and approval of the location and design of a defective sewage system. At trial, 58 N.S.R. (2d) 267 *sub nom. Nova Scotia Home for Coloured Children v. Aza Avramovitch Associates Ltd.*, the architect succeeded against the province on the ground that the Board of Health "knew or ought to have known [the approval] would be relied upon by people . . .": quoted, *ibid.*, at p. 596 D.L.R. An appeal by the province was allowed as the judge found that the architect did not rely on either the permit or the officials' opinion. In fact, there was evidence that the architect knew nothing about the board's activities. The court went on to say, however, that "if [one] had relied on that certificate . . . the inspectors would have been clearly liable for negligence under the well-known doctrine of *Hedley Byrne* . . .": *ibid.*, at p. 607 D.L.R.

⁶⁵ Thus, the negligent zoning in *Wirth v. Vancouver (City)*, *supra*, footnote 34, was held not to give rise to liability since there was no reliance by the plaintiff on the inaccurate calculation of the square footage of a building on property adjoining that of the plaintiff. And in *Brewer Bros. v. Canada (Attorney General)* (1990), 66 D.L.R. (4th) 71, 31 F.T.R. 191 (T.D.), *var*d 80 D.L.R. (4th) 321 (C.A.), the court, while it found a duty of care on the basis of its interpretation of the purpose of the Canada Grain Act, also found actual reliance by the farmers. In the court's opinion the farmers were protected in part, because the Grain Commission had issued a license which indicated that a sufficient bond had been posted by the company, and in part because the court believed that "the plaintiffs' relied on the bond to protect them in the case of . . . default": *ibid.*, at p. 99 D.L.R.

Similarly, in *Hendrick v. DeMarsh* (1984), 6 D.L.R. (4th) 713, 45 O.R. (2d) 463 (H.C.J.), *affd* 26 D.L.R. (4th) 130, 54 O.R. (2d) 185 (C.A.), a plaintiff (hostel owner) sued the Ontario Ministry of Correctional Services for not informing them of a prisoner-guest's inclination to set fires. The action was unsuccessful because of an expired limitation period, but the judge went on to write that, if this had not been the case, the plaintiff could succeed against the ministry: "[the parole officer's] affirmative answer to the question whether DeMarsh was reliable implied that there was no peculiar risk involved in accepting DeMarsh": *ibid.*, at p. 732 D.L.R. Outside of the statutory bar the ministry would have been liable for the probation officer's negligent misrepresentation to the plaintiff.

⁶⁶ See *Doe v. Metropolitan Toronto (Municipality) Board of Commissioners*, *supra*, footnote 35, at pp. 426-7 D.L.R. On appeal, (1990), 72 D.L.R. (4th) 580 at p. 584, 74 O.R. (2d) 225 (C.A.), the court held that foreseeability of risk of harm would be insufficient to trigger liability, but continued that the plaintiff's claim could proceed assuming that she was part of a known and distinct group of potential victims. Similarly, in *Air India Flight 182 Disaster Claimants v. Air India*, *supra*, footnote 50, the court suggested that, while the federal government, through the Department of Transport and the Canadian Security Intelligence Service, did not owe a duty of care to the entire flying

A second and perhaps more important explanation for judicial conservatism in addressing economic negligence is the realization that in a significant subset of cases, in particular in cases of governmental licensing and inspection activities, the imposition of liability on the government might distort otherwise efficient private-market mechanisms which are available to deal with the relevant risk. That is, private tort liability risks represent an economic signal to private firms; such risks provide an incentive to make cost-justified investments in accident reduction, and would otherwise be represented in pricing decisions in private market transactions. The incentive effects of tort law, and the reduced demand in the relevant market due to the risk-induced increase in price, would be seriously attenuated if regulatory authorities were to bear fiscal responsibility for losses associated with inadequate market goods or services.⁶⁷ It is this concern which logically explains the decisions in cases like *Yuen*⁶⁸ and *Murphy*⁶⁹ and *Governors of Peabody Donation Fund*.⁷⁰ To find a regulator liable in cases where the regulatory activity involves inspection and

public, they might owe a duty of care to those identified persons flying on a particular flight.

⁶⁷ Thus, for example, in the case of potential liability for losses associated with adverse reactions to vaccines, there is evidence in the United States that in 1987 at least one company raised the per dose cost of diphtheria-pertussis-tetanus vaccine from \$4.29 (U.S.) to \$11.40 (U.S.) as a result of the establishment of a self-insurance mechanism to respond to product liability risks associated with the vaccine. Similarly, Connaught Laboratories announced an increase of \$3 per dose to cover the cost of self-insurance: see "Medical groups urge program to compensate vaccine victims", *supra*, footnote 7. To the extent that product liability risks are shifted from the private sector to public revenues, the incentive effects of legal liability risks and the impact of price increases on demand will be attenuated.

Of course, the issue is more complicated than that presented above. If the delivery of the good or service is mandated by legislation, then the decrease in demand associated with price increases will be substantially less than would be the case if the market were operating more freely. As well, it is possible for the government, which faces contingent liability risks, to shift those risks to the relevant firms through a licensing system, thus replicating the market impact of direct firm liability. Whether we do this or not depends not only on our interest in incentive effects, but also on our sense of equal treatment and access to the relevant service or good.

⁶⁸ *Supra*, footnote 61.

⁶⁹ *Supra*, footnote 44. In that decision, Lord Mackay as well as Lord Bridge noted the obvious link between the imposition of legal liability on regulatory authorities and the tort liability of private enterprise: *ibid.*, at pp. 430 and 439.

⁷⁰ [1984] 3 All E.R. 529. The Privy Council in that case noted explicitly both their concern that governmental liability might "safeguard building developers against economic loss resulting from their failure to comply with approved plans", and the equally relevant concern that governmental liability might insulate homeowners who failed to comply with regulatory requirements: *ibid.*, at pp. 534-5.

licensing of private firms and market activities would immunize such firms from at least some substantial portion of the economic losses which their private action generates.

Perhaps the clearest example of this concern is a recent decision of the Alberta Supreme Court, *Guttek v. Sunshine Village Corp.*⁷¹ That case was initiated by a plaintiff who sued SVC for recovery of personal injury damages suffered when she fell from a chair lift. SVC joined the Alberta government, alleging that it was negligent in its failure to inspect the lift facilities, and in its subsequent licensing of SVC to operate the ski lift. The court held that the relevant legislation might impose on the government a duty of care to members of the public in respect of personal safety risks. However, the court held that no duty of care was owed by the government to Sunshine and that the purpose of the legislation was "not to hold safe from liability the designer, manufacturer, installer or owner of ski lifts".⁷²

A third explanation for the acceptance of a substantial sphere of immunity around government action is that judges are becoming increasingly sensitive to the unique environment in which public bureaucrats operate — sensitive, that is, to the bureaucratic incentives which are not commonly found in the case of private firms. One finds judges finally acknowledging that public bureaucracies and public bureaucrats are unlikely to be deterred by the economic risks represented by potentially adverse legal decisions.⁷³ Public bureaucracies are not constrained by the kinds of markets in which private corporations must survive. And one finds increasing evidence that public institutions will formally or informally insulate their civil servants from personal responsibility for civil wrongs committed in the course of fulfilling their regulatory responsibilities.⁷⁴ Simultaneously, judges are acknowl-

⁷¹ *Supra*, footnote 52.

⁷² What the court apparently ignores is that the distortion of private markets will occur both where the government implicitly insures the "supplier" of a particular good or service directly by sharing liability to an injured consumer, and where the government implicitly insures the supplier through the imposition of direct tort liability to the consumer. In both cases, the supplier's expected accident exposure is reduced in precisely the same amount.

⁷³ Thus, in *Hill Estate v. Chief Constable*, *supra*, footnote 54, the House of Lords argued that imposing liability on the police would not appreciably reinforce the general sense of public duty which motivates police forces: see D. Cohen, *supra*, footnote 2.

⁷⁴ There are innumerable examples of legislative immunities applicable to specific bureaucracies or bureaucrats. There is no evidence that the courts are interpreting these provisions narrowly: see *G. (A.) v. British Columbia (Superintendent of Child & Family*

edging that bureaucrats are likely to respond to the expectations generated in and by the internal “bureaucratic culture” of which they are an integral part, and may be over-deterred by threats of legal liability.⁷⁵ For both these reasons, legal liability risks simply cannot be expected to generate the same kind of deterrent or regulatory responses that are assumed to occur in private firms.

Fourth, judges are increasingly recognizing the loss-spreading and insurance implications of extending liability in tort for economic risks against public institutions. The conclusion that judges seem to be reaching is that members of the tax-paying public would *not* be willing to pay an implicit insurance premium (hidden in their taxes) for protection against many of the economic risks for which individual plaintiffs are seeking recovery.⁷⁶ In *Longchamps v. Farm Credit Corp.*,⁷⁷ liability for economic losses was denied because of judicial concerns about the impact of legal liability risks on the lender’s cost of lending, the impact on insurance requirements if the lender were held liable, and the impact of liability on the tax-paying public.

These views should be contrasted with the remarks of La Forest J. in *Rothfield v. Manolakos*,⁷⁸ a case that involved municipal liability and defective construction. La Forest J. first acknowledged that the inspection and supervision of construction sites increases expenses for everyone involved in the enterprise; he then noted that, in his view, most of us would justify the increased expense as an investment, given that faulty construction creates health and safety risks. These divergent views on public attitudes towards various kinds of risk cannot be answered except by empirical studies which, not surprisingly, are absent from both judgments.

Service), *supra*, footnote 52 (good faith immunity under the Family Child and Service Act required only that the social worker honestly believe that a child was in danger).

⁷⁵ See *Yuen Kun Yeu v. Attorney-General*, *supra*, footnote 39, at p. 198 A.C., where the Privy Council suggested that the regulators’ judgement might be seriously inhibited by the prospect of legal liability risks, and that bureaucratic effectiveness might be adversely affected by defensive strategies adopted by regulators in an effort to avoid or reduce contingent liability in tort.

⁷⁶ Thus, in the trial decision in *Wirth v. Vancouver (City)*, (1990), 71 D.L.R. (4th) 745 at p. 748, [1990] 6 W.W.R. 225 (B.C.C.A.), the judge refused to impose liability for economic losses associated with negligent zoning approval in part on the ground that “owners and tenants would have to pay if such a duty of care exists . . . and I do not see why residents should pay for the kind of economic loss which occurred here”.

⁷⁷ *Supra*, footnote 57.

⁷⁸ (1989), 63 D.L.R. (4th) 449, [1989] 2 S.C.R. 1259.

Finally, even as they say that they will not review “policy” decisions and will treat the government like a private firm when it acts “operationally”, the courts are clearly doing something quite different. In the case of “operational” decisions, they are acknowledging that the statutory framework in which the bureaucracy operates,⁷⁹ budgetary issues, and the conflicting demands placed on public resources and personnel will significantly affect the standard of care expected of public agencies and public bureaucrats.⁸⁰ As well, at least some courts are recognizing that the pressing public need to permit bureaucrats to act quickly and without fear of liability will, in particular situations — for example in the case of child apprehension legislation — justify judicial deference to bureaucratic choices which might not be the case if a private firm, motivated by profit, were the defendant.⁸¹

V. CONCLUSION

Regulatory failure and the consequent liability of public officials to claims pursued through the avenue of private tort law has attracted a great deal of interest and much comment and debate about the rhetoric of judicial intervention. The quantity and the level of discussion in this country regarding the perceived benefits of adopting or ignoring the recent decision of the House of Lords in *Murphy* (and, thereby, either completely rejecting or once again affirming the *Anns/Kamloops* approach) is astonishing given the substantive outcomes of the decisions in these cases. It

⁷⁹ See *Fletcher v. Manitoba Public Insurance Co.* (1991), 74 D.L.R. (4th) 636 at pp. 655-6, [1990] 3 S.C.R. 191, where, in assessing the liability in negligence of a provincial automobile insurance company established by statute, the Supreme Court of Canada said that the standard of care expected of the public insurer would be different and lower than that of a private insurer in light of the institutional setting in which the public insurer’s agents operated, and in view of a statutory exemption from a licensing requirement.

⁸⁰ In *Just v. British Columbia* (1989), 64 D.L.R. (4th) 689, [1989] 2 S.C.R. 1228, Cory J. said that the standard of care expected of the provincial rock scaling crews engaged in “operational” inspections would have to be assessed in light of the fiscal constraints faced by the Department and of competing demands for public resources.

⁸¹ For example, in *G. (A.) v. British Columbia (Superintendent of Family & Child Service)*, *supra*, footnote 52, the B.C. Court of Appeal took a very relaxed view of the standard of care expected of social agency workers who apprehended a child they believed to be in danger of sexual abuse by a family member. In a companion case, involving the failure to apprehend a child who was a victim of sexual abuse, the court refused to review a trial decision which found that the social worker was not negligent even though she failed to abide by the policy set down by the Superintendent of Family and Child Service: see *M. (M.) v. K. (K.)* (1989), 61 D.L.R. (4th) 392 at p. 405, 38 B.C.L.R. (2d) 273.

would not, in fact, be unreasonable to characterize the entire issue as something of a “tempest in a teapot”. The “teapot” metaphor is particularly apt given the foregoing discussion of the irrelevant nature of the results of the debate as to whether *Kamloops* or *Murphy* ought to be applied; the results will remain the same in either event. Even those commentators arguing in favour of the retention of the *Kamloops* doctrine have recognized the essential similarity in result regardless of the test applied. The concern is not with the articulation of the rule as much as it is with the reactionary rhetoric in the cases.⁸²

Given such a state of affairs, and if tort law is the appropriate vehicle to use in addressing regulatory failure, it is clear that the major difficulty to be faced in this area of the law does not arise from a debate about the precise linguistic formulation of the rule to be applied. The real problem is inherent in the lack of the judicial will to establish a clearly defined model through which to address the responsibility of the modern state towards those citizens injured through the mismanagement of its regulatory activities. The current doctrinal debate over the primacy of “proximity” or “foreseeability” as the formal test of the existence of a duty of care is only relevant to the extent that it recognizes that the legal liability of governments cannot be formulated on the same basis as that of a private firm or individual.

Close examination of the judgments on government liability invariably indicates that the state’s duty stems from the legislative or regulatory scheme which imparts both the proximity and the foreseeability which finally becomes the issue in the *Kamloops* versus *Murphy* debate. This is a completely different argument than the test of “who in law is my neighbour?” as framed by Lord Atkin in *M’Alister (or Donoghue) v. Stevenson*.⁸³ The modern

⁸² Earl A. Cherniak and Kirk F. Stevens argue in “Two Steps Forward or One Step Back? *Anns* at the Crossroads in Canada” *supra*, p. 165, that *Anns/Kamloops* should remain the test of choice in Canada. They do this, in part, by demonstrating that the result in *Caparo Industries Plc v. Dickman*, [1990] 1 All E.R. 568, which was decided some six months prior to *Murphy* but clearly heralded the demise of *Anns* by determining that “proximity” would be the touchstone of liability in England, would have been the same had *Anns* been applied. They are concerned, as is Feldthusen, that some of the language in *Murphy* is “reactionary to the point [that it threatens] to overturn or retard many modern developments in products liability and public authority law”: see Feldthusen, *supra*, footnote 29, at p. 369.

⁸³ [1932] A.C. 562 at p. 580. On one view, Lord Atkin was attempting to ensure that such a duty might be found where the parties “created” a relationship by their actions in relation to one another. The duty of care under which the state might be said to labour is created, at least in part, by bureaucratic policy, regulation and legislation.

Canadian state is, after all, far more the unique functionary defined by the Supreme Court in *Rudolph Wolff & Co., Ltd. v. Canada*,⁸⁴ than it is in any way analogous to one's next-door neighbour or to a commercial enterprise, regardless of size and scope.

There are two further points which must be made in conclusion. The first, which I made at the outset, is that, notwithstanding the tremendous amount of energy expended in debating and commenting upon this particular area of law, the reality seems to be that at least some governments are minimally affected by its application. As mentioned earlier, both the legal and popular rhetoric suggest an image of governments under attack in the courts. The data we have on the legal liability of the federal government suggests precisely the opposite.

The second point is that the entire argument might be better framed in a completely different way. The latter half of the 20th century brought with it a dramatic expansion of the role of the modern welfare/regulatory state in Canada. The expansion took place both in tort law (product liability and medical malpractice being the best-known examples), and in government (for example, in the expansion of Crown corporations involved directly in market activities, and in the development of a range of licensing and public insurance regimes to monitor, control and spread private market risks). The expansion of the Canadian state reflected two things. One was that the public good might not always be achieved through traditional market vehicles; market failure should be addressed, first, by shifting losses through tort law and, more dramatically, by regulating the activity through centralized licensing and monitoring mechanisms. The second was that the growth of the modern Canadian state acknowledged the value of social insurance for a broad range of individual risks which, while they might be insured privately, could be more efficiently and equitably spread through loss-shifting mechanisms triggered by contingent tort liability or by public regulatory and insurance regimes.

As we reach the end of the century, this naive vision and aspiration for a better world, through more and more regulatory action by an increasingly centralized government, with an expanded private tort law serving as the ultimate arbiter of

⁸⁴ [1990] 1 S.C.R. 695, 43 Admin. L.R. 1.

fairness and competence, has few supporters. Like market failure, "government failure" has become all too common. Yet it is not clear what we should do once we admit this. To ask that we return to the "pure" market is to aspire to the economic, social and political conditions of the 19th century. It also begs the question: is tort law a fitting response to governmental failure under these or any circumstances? I would argue that it is not.

One response to government failure is private tort law. As we have seen since the middle of this century, tort law is perhaps an appropriate vehicle to respond to the same kinds of accident-generating activities which first justified its application to private actors and institutions. However, we have also seen that tort law has not, and likely cannot, be effectively employed by the judiciary to respond to government failure at anything more than the most "micro" level of bureaucratic action. And yet, all of the decisions which reflect judicial defence to public institutions, regardless of the policy and doctrinal grounds for governmental immunity, present serious problems to anyone concerned with creating institutions which foster effective and accountable government. If government fails, and the legal system does not respond, what will?⁸⁵

The picture I have painted of the ways in which the legal system has and, in my view, will continue to respond to economic negligence should be understood as an admission that an enormous range of regulatory activity currently occurs without effective compensatory or deterrent mechanisms in place to respond to maladministration. To say that the legal system is an inappropriate vehicle to address these claims is not to say that they should be ignored. And yet, at the end of the day, that is precisely what tort law does. I leave for another time any suggestions as to other, more appropriate mechanisms with which society might respond.

⁸⁵ To say that the traditional electoral process is the vehicle through which to address governmental failure is facile. We are talking not about free trade, sales tax legislation, constitution-making, or national defence initiatives in foreign countries. Rather we are dealing with serious losses generated by maladministration across the bureaucracy in ways which are invisible except to the particular victims of bureaucratic incompetence.