POLICING PUBLIC AUTHORITIES: THE USE OF TORT AND HUMAN RIGHTS AS A MEANS OF REQUIRING STATE ACTION

by

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This thesis concentrates on the acceptability of judicial involvement in the decision making processes of democratically appointed representatives and the administrators who carry out the work of government. While I devote considerable space to the general question of the judicial role in reviewing administrative discretion, I use as my particular focus an issue which has been a matter of particular academic and wider general public interest since 1998: the right of the courts to review the conduct of the police in their role in the investigation and suppression of crime.

Recent times have seen an increased recognition that it may be necessary to impose positive obligations on governmental and administrative bodies in order to properly protect fundamental civil and human rights. The argument between those who believe that the courts are justified in reviewing the administrative inaction of government and those who do not is one that has profound implications for the balance of governmental and democratic power in a modern society. The thesis seeks to identify the important issues in ascertaining the propriety of judicial involvement in the decision-making processes of government and its administration. In doing so, I have sought to place the various legal, political and social arguments in context in order to permit the conduct of an objective and coherent analysis.

The continued development of civil and human rights codes as one of the foundations of a modern democratic society means that the questions I seek to answer in this thesis are of fundamental importance. I seek to analyze the approaches of the Canadian and European Courts in order to try to ascertain the proper scope of the rights enshrined in the European Convention of Human Rights and the Canadian Charter of Rights and Freedoms. My conclusion is that in certain circumstances, the proper protection of human rights can only be provided where positive obligations on the part of the state are inferred. The European Court has been more willing to consider positive obligations as necessary to the proper protection of human rights, although there are positive signs that members of the Supreme Court of Canada are moving in a similar direction.
I also seek to explore the proper limits of the common law of negligence as regards the right of the individual to challenge decisions of government, an issue which has attracted a great deal of comment in the past 30 years. I consider the development of relatively recent English and Canadian jurisprudence on this issue and conclude that the Canadian courts have been much more willing than their English counterparts to hold governmental actors responsible in tort for failures to discharge statutory duties with due care. However, questions are raised about the methods used by the Canadian courts to reach conclusions on this issue. It is argued in this thesis that a more context-sensitive approach is preferable to the artificial distinctions sometimes drawn between courts in attempting to distinguish between matters of policy and matters of operation.

Primarily, I seek to establish whether the types of decision which governmental bodies are called upon to make are of a nature which should exempt them from judicial scrutiny and whether the protection of human rights demands that the courts do become involved so as to require governmental (and in particular police) action. It is my overall conclusion that arguments hitherto advanced in favour of insulating governmental bodies from legal liability are seriously flawed and are counterbalanced by strong arguments in favour of exposing governmental conduct to more strict judicial scrutiny.
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1. INTRODUCTION

There is scarcely an area of life which is not affected by state regulation or supervision. A founding concept of a democratic society is that the people elect representatives in order to make decisions regarding legal order and the allocation of state resources. We all pay our taxes in the knowledge that government will redistribute these funds in line with the priorities which formed the basis of their political mandate. Indeed, elections are won and lost on the basis of such priorities. On this view, it may be argued that, at root, the question of whether or not a public authority strikes the correct balance in dedicating resources to one class of recipients rather than another is a matter better adjudicated at the ballot box rather than in the courts.

Members of the public are, however, entitled to integrity and responsibility on the part of those in public office, as well as transparency and efficiency in the mechanisms which scrutinize their conduct. Basic constitutional theory dictates that government should be conducted according to law. As long ago as 1885, Dicey wrote that "the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants, thus the constitution is the result of the ordinary law of the land."¹ Thus, the right of the individual to liberty was secured by the ordinary remedies of private law against those who interfered with that liberty, be they private citizens or officials. In a constitutional democracy based on an entrenched bill of rights, similar principles are at work, with government being unable to act so as to infringe the guaranteed rights of the individual.

The Supreme Court of Canada has stated, "democracy in any real sense of the word cannot exist without the rule of law."² The principle of the rule of law requires that the organs of government operate through law and are subject to effective sanctions if they fail to do so. The health of a democracy can often be reflected in the willingness of the courts to scrutinize executive conduct. For example, the unwillingness of the United

States Supreme Court to accept claims of presidential privilege in the Watergate affair\(^3\) can be sharply contrasted with the questionable actions of the same Court in the aftermath of the 2000 Presidential election.\(^4\)

In many ways, the right of the individual to challenge government conduct turns on one’s notion of democracy itself. For example, those who subscribe to a “majority rule” philosophy would argue that decisions made by a democratically elected legislature should not, except where the proper processes have not been followed or in cases of corruption, be reviewable by the courts. On the contrary, those whose idea of democracy is based on the decision making process being open to all on something approaching an equal basis would argue that the right of those who hold elected positions to make decisions is a means towards the end of democracy, not an end in itself\(^5\).

In modern commonwealth systems based on the Westminster model, the public has the right to challenge Governmental decisions based on the legality and fairness of the processes used to make such decisions in order to ensure that executive decisions are taken in accordance with legal requirements. Public law has also established rules with regard to the reasonableness of such decisions, the general test being one of rationality. In a much quoted judgment, Lord Greene M. R. stated the test of legality as being “so unreasonable that no reasonable

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3 United States v. Nixon 418 U. S. 683 (1974). In A. W. Bradley and K. D. Ewing, Constitutional and Administrative Law, 13\(^{th}\) ed. (London: Longman, 2003), the authors state (at p. 97) that “[w]hen presidential privilege was claimed for the tapes, the U. S. Supreme Court held that this claim had to be considered ‘in light of our historic commitment to the rule of law’. The court rejected the claim and ordered the tapes to be produced, since ‘the generalised assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.’”

4 See M. Moore, Stupid White Men (New York: Penguin Books Ltd. 2001). Moore seeks to demonstrate that the decision of the Supreme Court in instructing that the recount of votes in the pivotal state of Florida be stopped was politically motivated. Justices Thomas and Scalia had close family links to the Bush administration and other Justices had clear reasons to assist the election of a conservative administration. See also Thomas and Isikoff, “The Truth Behind the Pillars”, Newsweek, December 25, 2000 and Zuckman, “Justice Scalia’s Son a Lawyer in Firm Representing Bush Before Top Court”, Chicago Tribune, November 29, 2000.

5 See text accompanying notes 332 and 333 below.
authority could ever have come to it." More recently, Lord Cooke of Thorndon has restated this test as being simply whether the decision under review "was one which a reasonable authority could reach."

While "the use of judicial review has expanded dramatically," the remedies available to private claimants in such cases are restricted to having administrative decisions struck down, rather than providing any remedy in damages for loss. It is perhaps not surprising, therefore, that individuals have sought to utilize the private law of negligence to attack decisions of public bodies where they believe that such decisions have been made in breach of a duty of care and have caused them damage. On one hand, such actions appear justified, in that (as we have seen) government should be subject to the law just as private individuals are, and therefore negligent acts or omissions which cause loss should be actionable against public bodies, just as they are against private individuals. On the other hand, however, as will be discussed below, public bodies have many distinctive characteristics which call into question the role of private law in determining the propriety of substantive choices made to discharge statutory duties or exercise statutory powers.

There are many arguments for and against subjecting public authorities to judicial review of choices made in respect of both the nature and scope of legislation, as well as the choices made in terms of the means used to discharge public duties and exercise statutory powers. This debate is of fundamental importance to society, in that judicial interference in governmental and legislative choices has a profound effect on the balance of democratic power among the branches of government, and also in that extensive public authority liability may have a significant effect on the levels of resources available to public authorities to fulfil their obligations to society. One thing which cannot be doubted however, is that the increase in the number of actions in which

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6 Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K. B. 223 (per Lord Greene at p. 230)
8 Bradley and Ewing, supra note 3 at p. 762
the state is the defendant has become a "readily observable phenomenon"9. In many such cases the public authority may not be the most "blameworthy" of potential defendants, but plaintiffs are nevertheless attracted by the "deep pockets" of the State and the practical ease with which actions against governments can be pursued, when compared to defendants from the private sector who may be insolvent or may no longer exist10. Another factor in the marked increase in actions against government, at least in Canada, has been the relatively recent requirement that the courts subject legislative and administrative governmental choices to constitutional scrutiny to ensure compliance with fundamental human rights. As will be discussed below in the context of the Canadian Charter of Rights and Freedoms11 and the European Convention on Human Rights12, plaintiffs are consistently seeking to increase the scope of governmental liability in this field by characterizing an ever-wider range of state activity or inactivity as a violation of rights. In light of these trends, it is critical that the courts establish and enforce appropriate and robust principles, capable of consistent application, when dealing with actions against public sector defendants.

The aim of this thesis is firstly to review the recent jurisprudence of the European Court of Human Rights with regard to the interpretation of certain rights as imposing positive obligations on states to provide certain services or confer certain benefits on citizens. In particular I will analyze the recent groundbreaking willingness of the Court with regard to subjecting administrative omissions to scrutiny in the light of the Convention’s requirement that the member states secure the rights of individuals in national law.

10 ibid at p. 36
11 Part I of the Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982, (and hereinafter referred to as the "Charter").
12 The formal name of the Treaty is "The Convention for the Protection of Human Rights and Fundamental Freedoms", hereinafter referred to as "the Convention". The Convention was opened for ratification in November 1950 and entered into force in September 1953. The Convention is currently in force in 41 European states (and is hereinafter referred to as the "Convention").
Given the semantic similarity between many of the rights contained in the Convention and the Charter, I propose to conduct a comparison between the development of the concept of positive obligations under the two instruments. While I shall concentrate initially on the general arguments used most often to restrict the application of civil rights instruments to a fairly narrow scope based on traditional libertarian principles, I shall use as my particular focus the application of such arguments to a particular branch of administrative government, the police. Since police omissions with regard to their role in the investigation and suppression of crime is an issue which has been considered at length under the Convention, I will consider the constitutional liability under Canadian law of law enforcement bodies with regard to omissions which result in physical and/or psychological harm to members of the public. I have chosen this as my focus primarily because the courts have traditionally (in the United Kingdom at least), with certain limited exceptions, adopted for policy reasons a “hands-off” approach to the police with regard to scrutiny of their investigative procedures. I also consider the police to be an interesting focus, since much has been written about the “cop culture” which affects the approach taken by the police to their fundamentally important role in society, and which is in itself affected by the willingness of the courts to subject police procedures to extensive judicial scrutiny.

In order to gauge the practical utility of such novel constitutional actions under the Charter, I also propose to consider the common law of both England and Canada with regard to the right of citizens to sue state bodies in negligence for omissions. It will be considered whether it is appropriate to use tort law at all to review administrative governmental decisions, in particular decisions not to act in a particular way. Following this general discussion, the focus will again be on the legal liability of law enforcement bodies for failures to act, alluding both to the traditional approach of the English courts and to the contrasting approach of the Supreme Court of Canada with regard to the tort law liability of public bodies. I shall seek to establish common threads in the approach

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of the courts to rights issues and tort issues, and establish the principles lying beneath the application of these areas of the law which make them different.

While, as we shall see, the policy factors used by the courts in analyzing, on one hand the existence of a private law duty of care by a public authority and on the other hand a violation of fundamental rights and freedoms may be similar, it must be remembered that the nature and purpose of the two branches of law may often be seen to vary. Human Rights law is concerned with the protection of the liberty of the citizen against arbitrary or unjustified state conduct, while the law of negligence is concerned with providing a means of redress for harm caused to persons by those who owe them a duty to take care.

As Dicey stated, the common law developed in many ways to protect the liberty of citizens, not only against unjustified intrusion by other members of society, but also from public authorities\textsuperscript{14}. Thus, in many ways, the common law attempted to protect the rights which were protected by constitutional entrenchment in constitutional democracies. The theme of protecting liberty is one which runs through Lord Atkin's classic exposition of the founding principles of negligence in \textit{Donoghue v. Stevenson}\textsuperscript{15}, the idea being that individuals should be entitled to interact and pursue their goals in the knowledge that (a) others in a relationship of proximity with them were under an obligation to take reasonable care in their actions, and (b) that the law provided a system of redress were that person to fall below the standard required of them.

When one conceives of tort as being mainly about the protection of interests, the results of the comparison with human rights law are interesting. While tort may often be perceived to be concerned with wrongdoing and loss-adjustment, it must be remembered that the law of torts primarily protects fundamental human interests. No

\textsuperscript{14} For Dicey, there was no need for any statement of fundamental principles operating as a kind of higher law, because freedom was adequately protected by the common law and an independent Parliament acting as watchdog against any excess of zeal by the executive. For an expression of this view, see \textit{Wheeler v. Leicester City Council} [1985] A. C. 1054 at p. 1065 per Browne-Wilkinson L. J.

\textsuperscript{15} [1932] A. C. 562
matter how bad the wrongdoing of the defendant, the law of torts only “concerns those situations where one person’s conduct causes or threatens to cause harm to the interests of others.”

The role of common law as protector of liberty can, however, be questioned on a number of levels. First, and perhaps most obviously, in a system of Parliamentary supremacy, it is always open to Parliament to pass laws which restrict liberty, with the citizen having no recourse to an entrenched bill of rights to challenge such a law. Also, the basis for Dicey’s theory that liberty would be protected by the Parliamentary watchdog is flawed, due to the political reality that in a modern democratic state, the political colour of the executive and the vast majority of parliamentarians is usually the same.

While there is a threshold question in civil rights claims with regard to the identity of person breaching a particular right, the focus of such a claim is based on the extent of the guarantee afforded by the right in question. In contrast, the focus of a claim in negligence is primarily on issues of proximity between the parties and foreseeability of harm. Despite these variances in scope, however, the courts have sought to balance the right of government to be given ample scope to govern with the right of the individual to protection of his or her liberty. Perhaps as a reflection of the differences between the two areas of law highlighted above, the methods which have been used by the courts vary. Where the balance is to be struck, however, remains a matter of considerable academic and judicial debate, and I would suggest that the differences which can be seen in the approaches to this question by various courts may be due to the constitutional heritage of a particular state, as well as the political and constitutional philosophy most favoured by the judges.

It is perhaps an unassailable statement to say that the public is entitled to responsible government and should have effective and efficient recourse to methods of redress where this does not happen. But as a threshold question, it must be asked, when can an

16 Brazier and Murphy, Street on Torts, 10th ed. (London: Butterworths, 1998) at p. 4 (emphasis added)
individual require that the government act on his behalf? Is it when his fundamental rights are at stake if the state does not come to his assistance? Is it when the state is aware of his or her plight and the likelihood that he or she will suffer loss or damage if they do not act? Should the state be entitled to claim that it does not have enough money to please all of the people all of the time and should be given discretion to strike the right balance, notwithstanding the fact that people will win and some will undeniably lose? Should the rights of some be given primacy over the rights of others? These are all fundamentally important questions, not just on an academic level, but also on a practical level for us as a society. To an extent our faith in the democratic system is dependant on the transparency and accessibility of that system. In order to answer some of these questions, I will, in this thesis, seek to explore the different ways in which individuals can seek to challenge governmental failures, as well as examine the tensions that exist between the three branches of government when it comes to the courts’ willingness to examine the shortcomings of governmental conduct.

In this thesis I seek to analyze areas of law which have attracted a variety of approaches in different jurisdictions. In doing so, I have sought primarily to conduct a comparative analysis, considering differing legal approaches and philosophies to particular factual situations in order to identify the reasons for particular types of development, but also to identify the core issues in each case. In undertaking such analysis, it is important, if one is to understand the reasons for a particular pattern of development, to place the approach of each legal system in its proper social and historical context. The subject matter of this thesis is as much concerned with the development of political theory as well as legal theory. The position of politicians and administrators in our society has changed markedly in the last century and it is perhaps inevitable that this will have an effect on the legal approach to the rights of individuals to challenge the decision making processes of government. The task is made somewhat easier by the fact that my main study groups follow the western democratic tradition, but despite the fact that legal systems being studied may be similar, it is nevertheless essential to bear in mind the differences that do exist in the social and political culture of the study groups.
This thesis is not, however, intended to be a purely comparative analysis. I also seek to establish the effect of different political and legal philosophies in order to ascertain why the law has developed the way it has. One example is that, while examining the development of civil and human rights in Europe and Canada, I consider the extent to which strict libertarian ideals have been adhered to. To the extent that such principles have not been strictly applied, I seek to establish why this has happened.

The two main areas of legal study in this thesis are the common law of negligence and civil and human rights. With regard to the former, the development of the common law of negligence in Canada and England are considered. The law of negligence in these two jurisdictions have a common base, but have diverged in some respects, one example being the liability in tort of government administrators. The process of comparison is eased by the similarity in general legal philosophy and language in the two jurisdictions. However, it must be remembered that there are differences in the political landscape of the two states. For example, in conducting any comparison between the two legal systems which is affected by political matters, the federal system of government (and the resultant split between federal and provincial courts) has no parallel in the English system.

With regard to civil and human rights, the main study groups are Canada and Europe. In making this comparison it must be borne in mind that the European Convention on Human Rights is a supra national instrument, which has a profound effect on the philosophy and interpretative methods utilised by the European Court. Concepts such as the “margin of appreciation”, which will be discussed in Chapter 2 in many ways reflect the wish of the European Court to protect core human rights values without unjustifiably restricting the right of governments to effectively govern in their jurisdictions. However, I seek to consider whether similar concepts are pervasive in all systems of human rights protection, since the Supreme Court of Canada has (primarily through Section 1 of the Charter), depending on the circumstances, sought to provide government with a measure of discretion with regard to the way in which particular rights are protected.
2. POSITIVE OBLIGATIONS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

2.1 Context and Purpose of the Convention

The Council of Europe is "an intergovernmental organization founded upon the principles of pluralist democracy, respect for human rights, and the rule of law." In the aftermath of World War II and in a time when the Cold War was escalating, the Council of Europe was a vehicle which sought "to bring western liberal democracies closer together to strengthen shared values and to protect the spread of totalitarianism and further violations of human rights." The Convention was opened for ratification in 1950 and its preamble affirms the Council of Europe's aim of achieving greater unity between states through 'the maintenance and further realization of human rights and fundamental freedoms'.

In general, the Convention seeks to secure for those within its purview a framework for the unremitting protection of fundamental rights and freedoms. The obligation on states under Article 1 of the Convention is to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention", and while the primary aim of the Convention is to protect the civil and political rights of the individual from arbitrary or unjustified state interference, the European Court has in recent years actively considered the scope of states' obligations under Article 1.

The Convention rights and freedoms are set out in fairly general form, leaving it up to the European Court to give content to these rights in light of the established principles of Convention interpretation. In general, the rights are set out in negative form, but the language of some of the Convention rights expressly requires positive state action. However, even from early decisions of the European Court of Human Rights, it can be

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18 ibid. at p. 57
19 Section 1 contains Articles 1 – 18, which confer the substantive Convention rights and freedoms.
20 For example Articles 3 – 5 and Article 7 proceed on the basis of the words “No-one shall be...”
21 Article 2 requires that “Everyone’s right to life shall be protected by law” and Article 6 requires that “Everyone charged with a criminal offence has... [the right] to be given [legal assistance] free when the interests of justice so require.”
seen that the existence of a positive obligation does not depend upon the semantic form in which a guarantee is expressed, but rather on whether it is necessary to construe a particular right as entailing a positive obligation in order to confer on individuals the full benefit of the Convention’s protection.

One of the fundamental underpinnings of the imposition of positive obligations on states under the Convention has been the need to interpret rights so as to make them practical and effective rather than theoretical or illusory. This principle, when combined with the requirement of Section 1 that states secure Convention rights and freedoms in domestic law, has led to the willingness of the European Court to assess whether a state would be required to take positive steps in order to meet their obligations under the Convention.

The European Court has considered the need for the imposition of positive obligations in a number of circumstances, and in doing so will generally “have regard to the fair balance that has to be struck between the general interest of the community and the competing private interests of the individual, or individuals, concerned.” Not only may the Convention require that the state take positive legislative or executive action with regard to its relationship with individuals, it may also be require the state to amend the law between private individuals, so as to ensure the effective protection of the Convention’s rights and freedoms. Examples of this range from the finding of a violation of Article 11 (Freedom of Association) on the basis of a domestic failure to protect employees against dismissal on grounds that they had failed to join a trade union, to the finding of a violation of Article 8 (Right to Respect for Private and Family Life) on the basis of court procedures in child custody cases.

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22 For the classic statement of this principle, see Airey v. Ireland (1979) A 32 at para. 24.
23 McGinley and Egan v. United Kingdom 1998-III 1334, para. 98
24 For example the need to take measures to ensure a fair criminal prosecution (Kaya v. Turkey 1998 - I 297, para. 93) or the need to amend the substance of the criminal law (Dudgeon v. United Kingdom (1981) A 44, para. 49)
25 The Court stated in X and Y v. Netherlands (1985) A 91 at para. 93 that Article 8 may require “the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”
26 Young, James and Webster v. United Kingdom (1981) A 44, para. 49
What can readily be ascertained from the cases concerning positive obligations which have come before the European Court, particularly in more recent times, is the willingness of the court to attempt to establish the *substance* rather than the *form* of alleged violations. The point is, that it is often qualitatively indifferent to the individual whether the restriction on rights is caused directly by state organs or by third parties where the restriction is possible due to the *failure* of the state to appropriately safeguard the rights of the individual in domestic law. However, it may be argued that by forcing the state to ensure compliance with the requirements of the Convention in domestic law, the European Court is dictating to member states the prioritization of domestic legislation. It may also be argued that such a stance ignores the fact that the state is necessarily limited in its capabilities by finite resources. So therefore a balancing mechanism requires to be employed which recognizes that any *prima facie* violation of rights requires to be fully justified if the state is to escape censure, but also recognizes that the state is often legitimately justified in restricting the rights of the individual in the broader public interest.

It has long been recognized in Convention jurisprudence that the nature of the right in question will have a significant impact on where the balance between the right of the individual and the right of the executive or legislature to a "*discretionary area of judgment*" will be struck. In an early case under the *Human Rights Act 1998*, Lord Hope of Craighead made this point, stating that in "*some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention... It will be easier for such an area of judgment to be recognized, where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognized where the issues involve"

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questions of social or economic policy, much less so where the courts are especially well placed to assess the need for protection."

Lord Hope’s views were cited with approval by Lord Rodger of Earlsferry in A. v. The Scottish Ministers, where he stated along similar lines that “What we must therefore decide is whether, even though the members were conscious of the need to have regard to the human rights of the patients, the Parliament nonetheless failed to maintain the necessary fair balance by giving too much weight to the perceived danger to members of the public... In determining that issue, as the authorities show, it is right that the court should give due deference to the assessment which the democratically elected legislature has made of the policy issues involved.”

A review of the jurisprudence of the European Court leads to the conclusion that states will be given a wider discretion to restrict the rights of individuals which may be classed as economic or social rather than civil rights related to security of the person. Indeed, this is borne out by the wording of the Convention itself. Articles 8 through 11 in general protect the rights to respect for private and family life, the right to freedom of thought, conscience and religion, the right to freedom of expression and the right to freedom of association. In each case, the state is generally entitled to curtail these rights where “prescribed by law” and “necessary in a democratic society”. In contrast, Articles which protect personal liberty or security of the person tend to be absolute in their terms, making *prima facie* violations of these rights more difficult to justify.

The outcome of cases involving Articles 8 through 11 regularly hinge on whether states have shown that a particular interference is “necessary in a democratic society”. This

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30 2001 S. C. 1
31 ibid at p. 21
32 This is often emphasized by the language of the European Court, which, for example, has described Articles 2 and 3 of the Convention as calling for particularly strict scrutiny of state conduct (see, for example Soering v. United Kingdom (1989) A 161, at para. 88 (hereinafter “Soering”). It should be noted that under Article 15(2) of the Convention, no derogation from Articles 2 and 3 can be made, even during time of war or other national emergency.
phrase has been held to require the demonstration of a "pressing social need" for the interference, rather than a mere indication that it is "desirable" or "reasonable". The strictness of the application of this test will very much depend on the circumstances. For example, state interferences with political speech integral to the democratic process will prove much more difficult to justify than interferences with commercial speech where there is little public interest in the open debate of the matter at issue or the purpose of the speech is purely commercial.

The balancing process inherent in Articles 8 – 11 also involves consideration of the "margin of appreciation" which is to be afforded to states with regard to the Convention's requirements. "In accordance with the principle of subsidiarity, the European Court of Human Rights exercises a degree of restraint in determining whether the judgment made by national authorities (including national courts) is compatible with the state's obligations under the Convention. That restraint is exercised by means of the margin of appreciation. The concept of the margin of appreciation is thus one of the principal means by which the European Court of Human Rights recognizes its subsidiary role in protecting human rights, and the right of free societies, within limits, to choose for themselves the human rights policies that suit them best."

Due to their "direct and continuous contact with the vital forces of their countries", individual states are, within certain limits, in a better position than the European Court to assess the outcome of the balancing of interests required by the Convention. However, the European Court has been keen to emphasize that this is not an abdication of its responsibilities to the national authorities, stating that the margin is limited in its

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33 Dudgeon v. United Kingdom (1983) A 45 at paras. 51 and 53
34 Handyside v. United Kingdom (1976) A 24 at para. 48
35 ibid at para. 48
36 See Castells v. Spain (1992) A 236, where the European Court stated at para. 42 "While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court."
37 See Open Door Counselling and Dublin Well Woman v. Ireland (1992) A 246
39 Handyside, supra note 34 at para. 48
scope and repeating that it is the Court which has the final say in assessing the compatibility of state interferences with the requirements of the Convention\(^{40}\).

The extent to which the European Court will recognize a margin of appreciation depends largely on the context. States will be given a larger measure of discretion with regard to situations where it is appropriate for an international court to defer to the judgment of state authorities, for example in matters relating to moral issues\(^{41}\), economic issues\(^{42}\) or matters of social policy on which there is no discernable European consensus. The reason for this was well stated by the European Court in *James v. United Kingdom*, a case concerning the reform of laws relating to landlord and tenant in the United Kingdom: "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest."\(^{43}\)

The margin of appreciation is, however, more limited in situations where the nature of the right in question demands a high level of scrutiny by the Court. Examples include the need to protect individuals from interference with the more intimate aspects of private life\(^{44}\) and the need to ensure freedom of political debate\(^{45}\). In relation to the rights relating to physical liberty and security of the person, the European Court has often refused to recognize any right on the part of states to a margin of appreciation at all\(^{46}\). The case for a margin of appreciation weakens where there is a broadly ascertainable European standard, as one of the main justifications for allowing states a

\(^{40}\) See for example *Klass and Ors. v. Germany* (1978) A 28, para. 49. In *Open Door and Dublin Well Woman v. Ireland*, supra note 37, the European Court acknowledged that in the field of domestic protection of morals, a state is to be given a wide margin of appreciation, but in this case held that the sweeping terms of the restrictions imposed on the complainants were "over-broad and disproportionate" (at para. 74).

\(^{41}\) *Wingrove v. United Kingdom* 1996-V, 1937

\(^{42}\) *James v. United Kingdom* (1986) A 98, para. 46

\(^{43}\) ibid at para. 46

\(^{44}\) *Smith and Grady v. United Kingdom* (27 September 1999)

\(^{45}\) *Bowman v. United Kingdom* 1998-1, 175

\(^{46}\) See in relation to Article 3, *Soering*, supra note 32
margin of appreciation is their ability to more accurately ascertain where the balance between individual rights and community interests should be struck\(^{47}\).

2.2 Positive Obligations Under Articles 8 – 11 of the Convention

Notwithstanding the measure of discretion which the European Court has afforded to member states, the fundamental Convention principle of ensuring that the protection of rights is practical and effective has led the Court on a number of occasions to consider whether Articles 8 – 11 require the imposition of positive obligations on the state. The Court has, however, remained mindful of the fact that effective human rights protection can take a variety of forms and has therefore allowed states a certain latitude with regard to the methods chosen to safeguard Convention rights.

The European Court has made it clear that states will be obliged to intervene where the individual is not guaranteed effective enjoyment of the Article 8 right to respect for private and family life, even where this involves state intervention in relations between private individuals. As early as 1985, the Court stated in \(X\) and \(Y\) v. The Netherlands\(^{48}\) that "The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."

\(^{49}\) In that case, a failure in the Dutch legal system to allow a complaint of sexual assault to be made on behalf of mentally handicapped persons over the age of 16 constituted a violation of Article 8. Generally applicable rules of private law which fail to ensure respect for protected Article 8 rights, such as a failure to protect individuals from surveillance without appropriate legal safeguards\(^{50}\)

\(^{47}\) See, for example Rasmussen v. Denmark (1984) A 87, paras. 40 - 41
\(^{48}\) (1985) A 91
\(^{49}\) ibid at para. 24
\(^{50}\) Verliere v. Switzerland (28 June 2001)
may constitute a violation of Article 8. Indeed, the requirement that Article 8 rights be “practical and effective” may entail an obligation on the state to provide an individual with legal representation in order that his or her rights can be adequately protected or enforced.\(^{51}\)

However, having given the Convention such a broad scope of application, it is fundamentally important that the imposition of positive obligations should only occur where there would be a clear infringement with the right if the required state action were not performed. For example, the right to respect for private life covers the right to respect for personal and physical autonomy, as well as the right to engage in relationships with others, and thus may require the imposition of positive obligations.\(^{52}\) It does not protect “interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link”\(^{53}\) between “private life” within the meaning of Article 8 and the measures sought by the applicant.

While the primary role of the Convention is to protect the individual from arbitrary or unjustified state interference, the European Court has noted that it is essential for the effective protection of rights that states be under an obligation to provide an environment in which such rights can be fully enjoyed. In a practical sense, the labelling of obligations as positive or negative may be of little importance, as the Court is primarily concerned whether the freedom to enjoy or exercise Convention rights has been unjustifiably restricted by the state’s legal infrastructure. Whether such a restriction arises as a result of direct state action or by a failure on the part of the state to adequately protect rights is qualitatively irrelevant to the individual concerned. That said, where the applicant seeks to impose a positive obligation, the positive nature of the required action is nevertheless an important factor in ascertaining whether the state has discharged its obligations under the Convention.

\(^{51}\) Airey v. Ireland, supra note 22, at para. 32

\(^{52}\) See Stubbings v. United Kingdom 1996-IV, 1487, at paras. 64: “Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives.”

\(^{53}\) Botto v. Italy 1998-I, 412, at para. 35
Given the Court's stated aim of making rights practical and effective and the obligation on states under Article 1 to secure effective protection of the Convention's guarantees to everyone in their jurisdiction, it seems appropriate that the starting point for any assessment of an Article 8 issue is to establish the nature and scope of the guarantee in the context of the case, irrespective of whether the alleged infringement arises as a result of an act or an omission.

Article 9 of the Convention protects the individual from interference with the right to freedom of thought, conscience and religion. This right is fairly complicated in nature, with the state having various intertwined responsibilities with regard to promoting pluralism and tolerance in society, whilst recognizing the right of individuals to manifest their religious beliefs and the right of others to express contrary and sometimes controversial views on religious matters. Some religions will be more politically powerful than others, and the European Court has required states to take positive action to facilitate the exercise of religious beliefs, for example by requiring the provision of religious observances for those deprived of their liberty\(^5\) or by recognizing exemptions from general civic or legal obligations\(^5\).

The encouragement of mutual tolerance and understanding among religious groups may require that the state take positive action to protect the religious sensibilities of adherents of a particular faith against offensive statements made by others. However, the right to such protection must be balanced against the right of others to express controversial ideas. In *Otto-Preminger-Institut v. Austria*\(^5\), the Court stated that, while members of a religion must tolerate denials of their religious beliefs and the propagation of other religious doctrines, "a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others. The respect for the religious feelings of believers as

\(^{54}\) Guzzardi v. Italy (1980) A 39, at para. 110  
\(^{55}\) Jewish Liturgical Association Cha'are Shalom Ve Tsedek v. France (27 June 2000), para. 76
guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society."

Given that the religious chemistry in a particular state is a matter which the state authorities are in a better position than the Court to gauge, the balancing of competing rights in this area is a matter in which states will be given a measure of discretion in the form of a margin of appreciation. However, this does not relieve the state of the duty to provide reasons for the alleged violation of rights. While the state will be given discretion to balance competing interests, the Court will not countenance a denial of rights where there is no justifiable reason for so acting.

Article 10 protects the right to freedom of expression, which has been described by the European Court as being "one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone." Perhaps in recognition of this importance, the Court has imposed duties on states to ensure that individuals are free to express ideas on issues of public interest. Such duties not only relate to ensuring that state laws, including laws concerning relations between private individuals, provide for free and open dissemination of information, but also relate to the taking of practical steps to ensure the exercise of Article 10 rights. For example in Ozgur Gundem v. Turkey, a newspaper was forced to cease operation due to repeated violent attacks on newspaper staff, distributors and newsagents associated with the paper. Despite the sending of numerous reports and petitions to the authorities, the Turkish government had conducted only cursory investigations into the attacks and provided little or no protection to those associated with the newspaper. The Court recognised that effective protection of rights requires a contextual analysis of the substance of the right in question. In this case, effective protection of the newspaper's right to disseminate its views could only have been afforded by appropriate measures.

56 (1994) A 295-A
57 ibid at para. 47
58 ibid at para. 56
59 ibid at para. 49
60 See for example Fuentes Bobo v. Spain (29 February 2000)
61 (16 March 2000)
taken to investigate the attacks and provide effective protection to those associated with the newspaper. In the circumstances, the Turkish authorities had failed to discharge their positive obligation\(^62\).

The right to freedom of assembly and association in Article 11 may also impose a positive obligation on states to provide an environment in which associational activities may be pursued. In *Plattform 'Artze fur das Leben' v. Austria*\(^63\), the Court held that state authorities could be required to take appropriate measures to protect groups peacefully exercising their right to demonstrate. A failure to protect demonstrators from violent counter-demonstrations may have a significant “chilling effect” on persons seeking to exercise their democratic right to gather in groups to express commonly held ideas. However, in this case, the Court emphasized that states were to be afforded a measure of discretion in choosing the best means by which to protect Convention rights. The Austrian authorities had provided police protection for the demonstration, but the demonstrators had changed their route, contrary to the advice of the authorities. In light of the fact that some police protection had been provided and that no actual violence had ensued, the Austrian authorities were not found to be in violation of their positive obligation.

A constant theme running through the positive obligation cases under Articles 8 - 11 is the need to consider the “fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.”\(^64\) The extent to which the European Court will interfere in the balance between competing rights which has been struck at the domestic level will depend largely on the nature of the right in question and the measures sought by the applicant. Where the right in question is fundamental to the functioning of

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62 The right to an appropriate domestic investigation has also been held to apply to cases under Article 2 (see Hugh Jordan v. United Kingdom (4 May 2001), paras. 87 - 92; McKerr v. United Kingdom (4 May 2001), paras. 92 - 97; Kelly and Ors v. United Kingdom (4 May 2001), paras. 75 - 80; and Shanaghan v. United Kingdom (4 May 2001), paras. 69 - 74. With regard to Article 3, see Assenov and Ors. v. Bulgaria 1998-VIII, 3264, at para. 102 and Veznedaroglu v. Turkey (11 April 2000), at paras. 23-35.

63 (1988) A 139

64 Rees v. United Kingdom (1986) A 106, at para. 36
democracy or the protection of individual autonomy, any state failure to act will be subject to much stricter Court scrutiny than rights which may be described as more social or economic in nature.

2.3 Positive Obligations Under Articles 2 and 3 of the Convention: A Willingness to Review Administrative Inaction

In recent years, the European Court has shown itself to be more than willing to analyze state omissions in relation to administrative decisions which domestic courts had consistently regarded as non-justiciable on grounds of institutional incompetence or overwhelming public policy.

In the case of Hill v. Chief Constable of West Yorkshire\(^65\), the House of Lords set out in strong terms the attitude of the English courts with regard to the role of the courts in reviewing discretionary decisions made by the police force. In that case, the mother of a young woman, Jacqueline Hill, who had been the last victim of Peter Sutcliffe, a notorious serial killer in the north of England in the late 1970s and early 1980s, sued West Yorkshire Police on the basis that there had been fundamental flaws in their investigation of the case. The legal basis of Mrs Hill’s case was that the police owed a duty to the public to take reasonable care in exercising their role of investigating and suppressing crime. It was always going to be difficult for Mrs Hill to show the necessary proximity between the police and a general member of the public who could not be reasonably perceived to be at particular risk, but the House of Lords decided to go much further than simply decide the case on this basis.

In addition to the fact that the police owed no duty of care to the general public to identify and apprehend criminals, there were clear public policy reasons for refusing to review decisions made by police officers in the course of investigations. Lord Keith stated that the “general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their

\(^{65}\) [1989] A. C. 53 (hereinafter “Hill”)
function in the suppression of crime... In some instances the imposition of liability may lead to the exercise of a function being carried out in a detrimentally defensive frame of mind... A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at trial. The result would be significant diversion of police manpower and attention from their most important function, that of the suppression of crime.”

Lord Templeman added that “The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties. This action is... misconceived and will do more harm than good.”

This “blanket immunity” from suit which effectively prevented review of police decisions (including decisions not to intervene to protect individuals at risk of harm) was considered by the European Court in Osman v. United Kingdom, a case which has had a fundamental impact on the scope of positive obligations under the Convention. The Court found that the policy established by the House of Lords in Hill amounted to a denial of a right to a hearing by an independent and impartial tribunal in the determination of one’s civil rights. In finding a violation of Article 6(1), the Court stated that “the application of the rule [of police immunity] without further enquiry into the existence of competing public interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant’s right to have a determination on the merits of his or her claim against the police in deserving cases.”

More significantly, with regard to positive obligations, the European Court also displayed a willingness to review discretionary operational decisions made by public

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66 ibid at p. 63
67 ibid at p. 65
68 1998-VIII, 3124 (hereinafter “Osman”)
69 Article 6(1) of the Convention states that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”
bodies in order to ascertain whether the Convention rights of the individual had been properly taken into consideration by the public authority. The Osman case involved a teacher (Paget-Lewis) who developed an unhealthy attraction for a pupil (Ahmet Osman) at his school. Over a period of 2 years, the teacher displayed increasing irrationality, which events were reported to the police and was subject to numerous forms of disciplinary sanction at work. Eventually, Paget-Lewis’ employment at the school was terminated and he was subsequently involved in a collision with a car in which one of Osman’s friends (of whom Paget-Lewis was jealous) was traveling. The decision was made to arrest Paget-Lewis, but the teacher subsequently disappeared and apparently became involved in a number of vehicle accidents at various locations in England in cars which he had hired in his adopted name of Osman. In early March 1988, Paget-Lewis was spotted around the houses of Osman and his friends, with such sightings being reported to the police, but no arrest was forthcoming. On 7th March 1988, Paget-Lewis shot and killed Osman’s father, seriously wounding Ahmet in the process, before traveling to the school headmaster’s house, wounding the headmaster and killing his son.

The Osman family argued that the police had been made aware of the series of events leading up to the shootings, which pointed towards the possibility of a potential violent attack and had an obligation under Article 2 of the Convention\(^{71}\) to protect Ahmet and his family from readily identifiable threats to their lives. Aside from the public policy concerns raised by the House of Lords in Hill with regard to the police, the English courts had, particularly since the late 1980s, tended to avoid reviewing discretionary decisions by public authorities which were affected by budgetary restrictions, on grounds that courts were not competent to weigh up the claims of competing interests which were vying for public resources\(^{72}\). However, the argument advanced by the applicants in Osman demanded that the courts were required to assess such

\(^{70}\) Osman, supra note 68 at para. 150

\(^{71}\) Article 2 (para. 1) states “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”
discretionary choices in order to ascertain whether the fundamental rights of the applicant had been given appropriate consideration by the public authorities. The British government, on the other hand, argued that choices made by public authorities involving the allocation of finite resources were not suitable for review by the courts. To impose positive obligations on states with regard to such decisions would "tie the hands" of the state with regard to the means chosen to regulate society and would undermine democracy.

The European Court began by noting the obligation of states under the first sentence of Article 2 to "protect the right to life of citizens by effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions." In the opinion of the Court, it followed that "Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."

The Court was, however, patently conscious of the difficulties which would arise if states were obliged to provide an impossibly high level of individual protection of everyone in the community, particularly in highly unpredictable areas such as police protection from unlawful injurious attacks. The Court stated that "bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing." In addition to the need to give states a measure

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72 See, for example, R v. Cambridge Health Authority ex parte B [1995] 2 All E. R. 129 (hereinafter "Cambridge Health Authority"), dealing with the issue of allocation of resources in the National Health Service.

73 Osman, supra note 68 at para. 115

74 ibid at para. 115

75 ibid at para. 116
of discretion with regard to the allocation of resources, the Court also pointed out that competing interests of others had to be taken into account when considering the scope of any positive obligations which individuals are seeking to attach to public authorities. For example, in the realm of law enforcement, the Court is required to consider the “need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.”

The state’s right to a degree of discretion in this difficult area and its right to a measure of deference relating to the balance to be struck between competing interests must necessarily be construed so as to still make the Convention rights practical and effective. In contrast to the English domestic courts, the European Court has declared itself willing to analyze the balance struck by domestic public authorities to ensure that proper consideration has been taken of fundamental rights. In the case of law enforcement, the fundamental test is that “it must be established to [the Court’s] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”

The individual is not required to show that the authorities acted with wilful disregard or gross neglect. Rather, “it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.”

76 ibid at para. 116. Article 5 of the Convention protects the right to liberty and security of the person. Article 8 of the Convention protects the right to respect for private and family life, home and correspondence.

77 Until the enactment of the Human Rights Act 1998, Convention rights were of minor persuasive force in the English courts. Rights issues were largely ignored in cases such as Hill and Osman (in the English Court of Appeal (see note 168 below) and were subordinated to policy factors.

78 ibid at para. 116

79 ibid at para. 116
The European Court’s application of these principles to the facts of the *Osman* case not only shows a willingness to analyze in depth the actual state of knowledge of (and the options open to) the police at each stage of the investigation, but also a refusal to use hindsight as a tool to evaluating the actual situation as it would have appeared to the authorities at the time. After a lengthy analysis of the facts of the case, the Court found that "the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis." Further, while the police must discharge their duties in a manner which respects the rights of individuals in society, "they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results." On this basis the Court proceeded to find no violation of Article 2.

It may be argued that the European Court’s method of analysis set out in *Osman* provides little in the way of solid guidelines with regard to when a positive obligation will attach to state authorities and when it will not. A contextual enquiry into the scope of a particular right, coupled with analysis of whether the state has been placed under an “impossible or disproportionate burden” does not immediately lend itself to consistent decision making. However, it may also be argued that because there are so many contextual factors which may impact on the evaluation of what constitutes effective protection of Convention rights, a more precise or rigid formula is not possible or desirable.

Since *Osman*, the European Court has stuck to the formula enunciated in that case regarding the balance to be struck between the right of the individual to protection and the right of the state to a reasonable measure of discretion in allocating government

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80 ibid at para. 121
81 ibid at para. 121
resources and striking a balance between competing claims in society. Subsequent cases do, however, assist in developing an understanding of where the Court will strike this balance.

In *Paul and Audrey Edwards v. United Kingdom*\(^{82}\), the applicants’ son was arrested, remanded in custody and, due to accommodation constraints, forced to share a cell with another inmate, Richard Linford, who was subsequently diagnosed as suffering from paranoid schizophrenia. On admission to the prison, Linford had displayed “bizarre and violent”\(^{83}\) behaviour, and had previously been noted as suffering from schizophrenia and a personality disorder. Nevertheless, Linford was placed in a cell with Edwards, who also suffered from schizophrenia. Linford proceeded to stamp and kick Edwards to death in their cell. Due to defects in the emergency warning system at the prison, it may have taken prison officers anything up to 17 minutes to respond to an emergency call being made from the cell.

The applicants complained that their son’s right to life required that the prison authorities should have taken measures to prevent a foreseeable and life-threatening attack by a fellow prisoner. The European Court relied extensively on the terms of the *Osman* judgment, repeating that not every claimed risk to life can “entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing.”\(^{84}\) However, where individuals are in the custody of the state, they are in a particularly vulnerable position and any obligation on the state with regard to protecting such individuals is increased. In the circumstances of the case, the crucial enquiry was “firstly, whether the authorities knew or ought to have known of the existence of a real and immediate risk to the life of Christopher Edwards from the acts of Richard Linford and secondly, whether they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”\(^{85}\)

\(^{82}\) (14 March 2002)
\(^{83}\) ibid at para. 17
\(^{84}\) ibid at para. 55
\(^{85}\) ibid at para. 57
The Court found that the cumulative failures in both the screening system for prisoners at the prison and the monitoring system related to prisoner safety amounted to a failure to protect the life of Christopher Edwards in violation of Article 2.

In contrast to the Edwards case, Mastromatteo v. Italy\(^{86}\) illustrates circumstances in which the European Court will judge the imposition of a positive obligation as placing an “impossible or disproportionate burden” on the state. Two convicted criminals absconded while on “prison leave”, a measure used in Italy to assist with the re-integration of prisoners into society. The two prisoners were subsequently involved in an armed bank robbery, after which the perpetrators became embroiled in a gun battle with police. The applicant’s son, an innocent bystander, was killed by a stray bullet from this gunfight.

The applicant claimed that the release of the prisoners on prison leave was an act of gross negligence, having regard to their record of violent crime. He argued further that the government had been unable to point to any meaningful measures which had been taken to supervise the actions of the prisoners while on leave or to any effective measures taken to find the prisoners following their escape. In the argument of the applicant, these factors constituted a violation of his son’s right to life, in that a real and foreseeable threat to life had been caused by manifest failures and incompetence on the part of the authorities.

The Court, however, refused to extend the obligation to protect individuals from real and foreseeable threats to life to cover situations where there is a general threat of violence to the population at large. In other words, there could be no “obligation to prevent every possibility of violence.”\(^{87}\) The Court concluded that there were “sufficient protective measures for society”\(^{88}\) in the Italian system and also found that, in any event, there was insufficient evidence before the authorities (at the time of release) that

\(^{86}\) (24 October 2002)
\(^{87}\) ibid at para. 68
the release of the two prisoners would have caused a real and immediate threat to life, far less a particular threat to the life of Mr Mastromatteo. There was accordingly no violation of any positive obligation arising under Article 2.

In these cases the Court has considered a whole host of contextual factors in deciding whether, on balance, the state has failed to appropriately protect the right to life of the individual. However, with regard to discretionary decisions concerning the protection of life, Jeremy McBride has noted that there are three main hurdles which the applicant must overcome in order to establish that a positive obligation exists under Article 2, namely the proof of significance, specificity and official awareness89.

With regard to “significance”, the applicant must show that the situation was life-threatening. Fundamental to this requirement is the issue of foreseeability. After all, it would appear unjustifiable to be required to take preventive measures against an action of a third party (or even the applicant him or herself) where the danger could not have been foreseen. The significance of a threat may appear clear where there is a foreseeable risk of a serious physical attack, but the Court will not readily attach responsibility to the state where a danger to life had not, at the time, been recognized by medicine or science90. Issues related to “significance” may also arise in relation to medical treatment, where state responsibility may be engaged if an individual’s life can be shown to be in danger if he or she is unable to receive medical treatment.

Secondly, the Court will consider issues of “specificity”, a matter which is related to the need to prove a “real and immediate” threat to life and the requirement not to place an “impossible or disproportionate burden” on the state. A state’s responsibility will be engaged where there is a readily identifiable threat from a readily identifiable source. The more general the class of persons indicated by the applicant as being the source of

88 ibid at para. 72
90 L. C. B. v. United Kingdom (1998) 4 B. H. R. C. 447 concerned the exposure of a British serviceman to radiation during nuclear tests in the South Pacific during World War II. The dangers of such exposure, including the risk of one’s offspring having an increased pre-disposition to developing leukaemia were not known at the time.
the threat to life, the more difficult it will be to impose an obligation on the state to have
protected the individual from an attack by a member of that general class. As the
Mastromatteo case shows, it will also be much more difficult to infer a positive
obligation where the individual at risk is one of a wide range of potential victims.
However, the facts and context of a particular case may infer that a state response was
required, notwithstanding the fact that there was a large or unknown class of potential
victims. McBride states that “if it had been established in the L.C.B. case that radiation
could be expected to have fatal effects on the offspring of persons exposed to it,
uncertainty as to the membership of a potentially vast group of victims would not be
sufficient to defeat a claim that the risk involved was one requiring a response. In such
cases, and others involving environmental pollution and natural disasters, the
specificity is supplied by the event rather than the persons; a clear link between it and
the potential harm to them is sufficient for a response to be required.”

Lastly, there is the requirement that the authorities have an awareness of the purported
threat to life and that they have the capacity to respond. Any special relationship
between the individual at risk and the state is relevant in this regard, in that public
authorities have a heightened responsibility with regard to, for example individuals in
the custody of the state or other persons who can be seen to be particularly vulnerable,
such as children.

91 McBride, supra note 89 at p. 47
92 Paul and Audrey Edwards, supra note 82. For an example of a case where supervision of a prisoner
was deemed sufficient under Article 2, see Keenan v. United Kingdom (3 April 2001): Mark
Keenan suffered from chronic psychosis and committed suicide while held in custody at Exeter
prison. In considering whether the authorities had omitted to take any steps which should have
been taken to guard against any potential suicide risk, the Court found (at para. 98) that “on the
whole the authorities made a reasonable response to the Mark Keenan’s conduct, placing him in
hospital care and under watch when he evinced suicidal tendencies. He was subject to daily
medical supervision by the prison doctors, who on two occasions had consulted external
psychiatrists with knowledge of Mark Keenan. The prison doctors, who could have required his
removal from segregation at any time, found him fit for segregation. There was no reason to
alert the authorities on 15 May 1993 that he was in a disturbed state of mind rendering an
attempt at suicide likely. In these circumstances, it is not apparent that the authorities omitted
any step which should have reasonably been taken, such as, for example, a 15 minute watch.”
Many of the circumstances referred to by the applicant as pointing towards a real risk of suicide
were described by the Court as “speculative”, and there was therefore no violation of a positive
obligation arising under Article 2.

93 See, for example Z and Others v. United Kingdom (10 May 2001) (hereinafter “Z. and Ors.”).
The "official notice" requirement was the fundamental flaw in the applicant's case in *Osman*. Similarly, in *Danini v. Italy*\(^{94}\), the applicant failed on grounds that the authorities could not reasonably be assumed to have detected a "real and immediate" threat to life, despite the fact that the issuer of the threats (the woman's ex-fiance) suffered from a mental disorder and had threatened to kill her. There had been no history of violence associated with the ex-fiance's medical condition and the death threat had been an isolated incident. Therefore, in the opinion of the Court, there could not reasonably be assumed to be any requirement on the part of the authorities to act. The Court has established that the "official notice" requirement does not merely require that the authorities play a reactive role, responding to complaints made by the potential victim. This was implicit in the Court's criticism of the British authorities' handling of a terrorist operation on Gibraltar\(^{95}\), with the Court making it clear that the planning of operations should be consistent with the state's obligation to minimize the risk of loss of life.

Having considered the significance and specificity of the threat and the state of knowledge of the authorities and their capacity to respond, the Court will then move on to consider the extent to which the state should be given discretion to strike the appropriate balance between competing interests in society. Rights will often be necessarily curtailed in order to facilitate the furtherance of the greater societal good. States are also required to comply with the fundamental rights of suspects, such as the right to privacy, the right to liberty and the right to be presumed innocent until proven guilty. These considerations may necessarily limit the legitimate powers available to public authorities in neutralizing threats to individuals. There will often be a number of legitimate ways in which individual rights can be protected and the crucial question will be with regard to the *balance* that has been struck between competing rights. The European Court, however, has refused to defer to the discretionary judgment of public authorities without justification. The Court has not been afraid to consider issues of

\(^{94}\) (1996) D. R. 24

\(^{95}\) *McCann and Ors. v. United Kingdom* (1995) E. H. R. R. 97
resource allocation, in that it will analyze a particular decision of a public authority to ensure that proper account has been taken of the Convention right in question. The Court has indicated that certain rights are more "fundamental" than others, and the more fundamental the right, the more difficult it will be for the state to argue that they should be given discretion to limit rights on the basis of financial considerations.

These considerations have also been relevant to recent developments with regard to positive obligations under Article 3 of the Convention\(^\text{96}\). In \textit{E and Ors. v. United Kingdom}\(^\text{97}\) and \textit{Z and Ors.}\(^\text{98}\), the United Kingdom government were found to have failed to discharge their positive obligation to protect children at real and foreseeable risk of sexual abuse from third parties. In \textit{E and Ors}, the Court noted that Article 3 represented one of the most fundamental values of a democratic society, namely that torture or inhuman or degrading treatment must be prohibited in absolute terms. States' obligations under Article 1, when taken with Article 3 "\textit{requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.}\(^\text{99}\)"

Having decided that serious physical and emotional abuse fell within the scope of "inhuman and degrading treatment", the critical issue for the Court was whether "the local authority (acting through its Social Work Department) was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse.\(^\text{100}\)"

Having regard to the facts of the case, including social enquiry reports which should have precipitated further investigation, statements provided by abused children and a

\(^{96}\) Article 3 states "\textit{No one shall be subjected to torture or to inhuman or degrading treatment or punishment.}\"

\(^{97}\) (26 November 2002) (hereinafter "\textit{E and Ors.}\")

\(^{98}\) supra note 93

\(^{99}\) \textit{E and Ors}, supra note 97 at para. 88

\(^{100}\) ibid at para. 92
pattern of offending on the part of the abuser, the Court concluded that “the pattern of lack of investigation, communication and co-operation by the relevant authorities disclosed in this case must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered.” Accordingly, there was a violation of Article 3. Crucially, the British Government’s argument that there could be no positive obligation in circumstances where it was not clear that the abuse would have been prevented if there had been better communication and co-operation between government departments was dismissed. The “but for” test was not the yardstick of state responsibility. Rather, “failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.”

Z and Ors again concerned an alleged violation of Article 3 on the basis that the governmental social services department failed to adequately protect children at risk of serious physical abuse. The public authority had been notified of circumstances pointing towards severe neglect as early as 1987, but had removed children from the family home in 1992. In the interim, the children had been subjected to what was described by a child psychologist as “horrific experiences”. The Court acknowledged the “difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life”, but in light of the public authority’s statutory duty to protect children at risk and the wide range of measures at their disposal, the “present case... leaves no doubt as to the failure of the system to protect these child applicants from serious, long-term neglect and abuse.” There was accordingly a violation of Article 3.

101 ibid at para. 100
102 ibid at para. 99
103 Z and Ors, supra note 93 at para. 74
104 ibid at para. 74
105 ibid at para. 74
The desire of the Court not to place an "impossible or disproportionate burden" on the state is perhaps illustrated by the case of *D.P. & J.C. v. United Kingdom*\(^{106}\), another case involving sexual abuse and an asserted positive obligation on the government authorities to intervene to protect children at risk of harm. In contrast to the *E and Ors.* and *Z and Ors.* cases, however, the Court could find no direct evidence that the authorities were aware or should have been aware of the abuse. There were no factors which pointed to deeper problems in a family plagued by financial hardship and occasional criminal proceedings. The Court reiterated the sensitive counterbalancing issues at play in considering whether to remove children from the family home, and in the circumstances found that "[for] the social services to be justified in taking the draconian step of cutting permanently both applicants' links with their family would have required convincing reasons, which were not apparent at that time."\(^{107}\) Since it had not been shown that the authorities should have been aware of sexual abuse in the family home, there could be no positive obligation to take any action to prevent the abuse from happening.

### 2.4 Justification for the Application of Positive Obligations to Administrative Inaction

The European Court has explicitly stated that positive obligations will be inferred where the legal infrastructure in a particular state permits interference with Convention rights, even where the act of interference is at the hands of a (private) third party. Such an obligation arises as a result of the requirement of Article 1 of the Convention that states secure the benefit of the Convention's guarantees in national law. While the imposition of positive obligations is in part justifiable on the basis that "the boundaries between the State's positive and negative obligations... do not lend themselves to precise definition."\(^{108}\), an expansive interpretation of Convention rights as encompassing such positive obligations could have a huge impact on the allocation of resources within society, normally an area which is the sole domain of elected legislators and their

\(^{106}\) (10 October 2002)  
\(^{107}\) ibid at para. 113
officials. However, where there are genuine rights issues at stake, it seems entirely correct to refuse to defer blindly to the exercise of governmental discretion on the basis that a “choice” has been made. Rather, it seems appropriate to use the framework of the Convention to establish which failures on the part of the state are worthy of censure and which are not.

Often active interference by the state and a decision not to legislate or act will be a distinction without a difference. For example, states which have ratified Protocol 6 to the Convention would be in violation of this Protocol if they were to seek to implement a sentence of capital punishment. In addition, it is likely that lengthy periods on “death row” would constitute a violation of Article 3’s prohibition of torture and inhuman or degrading treatment. However, the act of extradition to face trial for a crime which potentially carries the death penalty has been held by the European Court to constitute a violation of Article 3, notwithstanding the fact that the actual detention conditions and death penalty would be imposed by the receiving state. The point is, that a system of “practical and effective” human rights protection lets down those within its scope of protection if it strikes at active interference but does not strike at administrative decisions which carry as a necessary consequence an interference with protected rights.

In Soering, the British government were seeking to extradite Jens Soering to the U.S.A. to face trial. The act of extraditing triggered the responsibility of the United Kingdom government. But what if the United States government decided to act covertly and bring the fugitive back to the U.S.A. informally? Would the U.K. be under any obligation to protect the individual from kidnap, where there was a prospect of treatment which violated one or more of the Convention guarantees?

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109 Article 1 of Protocol 6 states “The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.”
110 Soering, supra note 32
111 ibid at para 111
112 See for example D. v. United Kingdom 1997-III, 777, where a violation of Article 3 was established on the basis of the deportation of an individual in the advanced stages of AIDS to a country where there were no appropriate healthcare facilities.
These three scenarios regarding capital punishment involve interference with the same Convention guarantees (Article 3 and Protocol 6), but the process with regard to ascertaining whether there has been a violation of these provisions in each scenario involves different considerations. In my opinion it is entirely correct that the Convention’s framework of interpretation should be used to ascertain whether the state’s action (or failure to act) constitutes a violation of these provisions. In the first case, there is direct interference by the member state which would be directly in contravention of the member state’s obligations.

In the second case, the offensive interference by the member state is the action of extradition to face proscribed treatment in a non-member state. In this case, the treatment suffered by the individual is exactly the same, albeit at the hands of a different actor. In addition, the member state is implicitly involved in the chain of causation by facilitating the treatment through the extradition process.

The European Court has now firmly established that individuals may not be deported where there is a significant risk that they will be subject to torture or inhuman or degrading treatment or punishment, even if such treatment is at the hands of private individuals. With regard to capital punishment, however, a significant risk that the death penalty will be imposed will be enough to engage the responsibility of the member state under Article 3. In extradition cases, there are a host of contextual factors which must be considered but which simply do not arise in cases where the member state itself is imposing the punishment. For example, the state has an interest in maintaining a positive relationship with states which are fellow parties to extradition treaties. States also have an interest in not becoming considered as a haven for fugitives and may consider themselves as having a sovereign right to control the persons who are

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113 See H.L.R. v. France 1997-III, 745 at para. 34 and Cruz Varas and Ors. v. Sweden (1991) A 201 at para. 69. It is worth noting that neither of these cases involved a violation of Article 3, since the applicants had failed to satisfy the Court that they would suffer proscribed treatment on their arrival in the destination state.
entitled to remain within their shores. Against these interests, the state has a clear obligation under Article 1 of the Convention to secure to everyone within its jurisdiction, the right to be free from torture or inhuman degrading treatment. Since the state is involved to a significant extent in the chain of causation leading to the offensive treatment and Article 3 rights have been described as being fundamental to the scheme of human rights protection under the Convention, the state would be required to provide convincing reasons why extradition should be allowed, notwithstanding the state’s Convention obligations.

In the third scenario, different contextual factors are again at play. There is no “act” on the part of the member state. Rather, the state remains effectively passive, and the individual is forced to rely on a positive duty on the member state to act to protect him or her from proscribed treatment. Following Osman, the state of knowledge on the part of the state authorities will be crucial. For example, a policy of passive compliance with informal attempts at removal will likely engage the responsibility of the state. Intentional non-interference with such action is in practice difficult to distinguish from active extradition, when the state’s Article 1 responsibilities are taken into account. It would, however, probably impose an “impossible or disproportionate burden” on the state to place an obligation on it to protect an individual where there was little or no prior notice of the removal. The circumstances of the case must be such that it is reasonable to engage the responsibility of the state under the Convention.

114 In Chahal v. United Kingdom (1996)-V, 1831, the European Court stated at para. 73 that “Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens.” Notwithstanding the fact that deportation was also being sought on the grounds of national security, the Court found that deportation would constitute a violation of Article 3 due to the significant risk of reprisals against Mr Chahal if he was returned to India.

115 In Aksoy v. Turkey 1996-VI, 2260, the European Court stated at para. 62 that “Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.”
In each of the three scenarios, the individual suffers treatment which violates the Convention’s protection against torture or inhuman or degrading treatment. It therefore seems appropriate that the Convention should be used to assess whether the member state can justifiably be held responsible for such treatment. It is, however, crucial that the appropriate balance is struck between on the one hand the protection of the Convention rights of the individual and on the other the interests of the state in both being given an area of discretion to balance competing rights and not being placed under an impossible or disproportionate burden with regard to its responsibilities under Article 1.

While it has proceeded to do so in cases such as Osman, can the European Court properly gauge the impact of resources in ascertaining the nature and scope of obligations incumbent upon states under the Convention? While the administrative decisions in Osman were affected by budgetary constraints, they were decisions about whether or not to act, not decisions about resource allocation. It is entirely proper that the Court should have taken into account the difficulties faced by the police in discharging their functions as a result of staffing levels and workload. But can questions of resources be properly considered by the Court without a detailed knowledge of the actual budgetary restraints on administrative bodies? Is there not a danger that courts will not properly appreciate the effect of restrictions on resources by considering the fact that there are “finite resources” in the abstract? Indeed, the task of the Court becomes altogether more complicated when considering questions of pure resource allocation such as the allocation of funds to provide healthcare services.

Healthcare professionals are constantly required to make critical decisions affecting (literally) the lives of their patients. Where these decisions involve decisions about the viability of life-saving treatment, it is apparent that the Article 2 rights of patients are affected. So can Courts analyze administrative decisions which may deny one person treatment with a low chance of success, in the knowledge that such a decision may free up critical funds for a range of other treatments? In England, the courts have traditionally held such decisions to be non-justiciable. In Cambridge Health...
Authority\textsuperscript{116}, Lord Bingham M.R. in the Court of Appeal noted that "[difficult] and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make."\textsuperscript{117} His Lordship continued that it would be "totally unrealistic to require the authority to come to the court with its accounts and seek to demonstrate that if this treatment were provided for B then there would be a patient C, who would have to go without treatment."\textsuperscript{118}

The Cambridge Health Authority case, however, did not expressly consider whether the applicant possessed a right to life and if so, whether this right was affected by the decision to refuse treatment. This was despite the fact that in Budgaycay v. Secretary of State for the Home Department\textsuperscript{119}, a case involving the repatriation of a refugee, Lord Bridge had stated that "[t]he most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the closest scrutiny."\textsuperscript{120}

O'Sullivan argues that the non-justiciability doctrine as exemplified in Cambridge Health Authority is an inappropriate response to the need to provide healthcare providers with an appropriate degree of discretion in making clinical choices over whether or not to provide treatment to terminally ill patients\textsuperscript{121}. Rather, he argues that the concept of the margin of appreciation provides an appropriate framework within which to distinguish between cases involving a \textit{bona fide} exercise of discretion and

\textsuperscript{116} In this case, the applicant suffered from acute myeloid leukaemia and had approximately six to eight weeks to live. The child's only chance of survival was a further dose of chemotherapy, followed by a bone marrow transplant. The chances of the chemotherapy achieving the full remission necessary to facilitate the transplant were placed in the region of 10 to 20%. The cost of the combined treatment was in the region of £75,000. The Health Authority had refused to sanction the treatment on the basis that "the substantial expenditure on treatment with such small prospect of success would not be an effective use of resources. The amount of funds available for healthcare are not limitless"  

\textsuperscript{117} ibid at p. 137  \textsuperscript{118} ibid at p. 137  \textsuperscript{119} [1987] 1 All E. R. 940  \textsuperscript{120} ibid at p. 952
cases where the rights of the patient demand action on the part of the authorities. Where, for example, “the medical evidence shows that the prospects of success of a treatment are very low but the cost of treatment is substantial..., the courts are likely to regard the health authority as acting within its margin of appreciation.”

The European Court of Human Rights has declared itself willing to analyze the omissions as well as the acts of state authorities. In doing so, the Court runs the risk of becoming an “unelected legislature” and must therefore remain sensitive to the fact that administrative decisions are made against the backdrop of a vast array of contextual factors. If the Court is to continue with its stated aim of making rights “practical and effective”, it is essential that it should not be diverted from analyzing state decision making on grounds that it is not “its role”. Where a failure to act on the part of a state authority means that an individual is not able to exercise or enjoy a fundamental right or freedom, it is entirely correct that the Court should review the decision of the authority to ascertain whether such rights have been given appropriate consideration. The problem is in finding the balance between the unremitting protection of rights and the right of the state to a measure of discretion in making its administrative decisions.

122 ibid at p. 394
3. PUBLIC AUTHORITY LIABILITY IN TORT AND THE LIABILITY OF POLICE FOR FAILING TO PROTECT INDIVIDUALS FROM RISK OF HARM.

3.1 Public Authority Liability in Tort in England

Public law has traditionally concentrated on the *legality* of governmental action rather than remedies for breach. By contrast, tort law has, at least since 1932, dealt with the allocation of fault between individual private individuals to those with whom they may be said to have a relationship of “neighbourhood” and who have suffered loss as a result of their acts or omissions. The tort of negligence fulfils a fundamentally important role in society, providing both a means of restitution for negligent acts and means of deterring individuals from undertaking activities which they are unable to discharge with reasonable care. As stated in Chapter 1, however, plaintiffs are increasingly seeking to sue “deep pocketed” public authorities, attempting to persuade the courts that a private law duty of care with regard to the discharge of statutory functions should co-exist with the traditional public law duties. The issue of public authority liability in tort is one where there is by no means a consensus among commonwealth courts or among commentators.

Prior to the House of Lords decision in *Home Office v. Dorset Yacht Co.* in 1970, it was extremely difficult in commonwealth jurisdictions to succeed in a negligence action against a public authority on the basis of its performance (or non-performance) of its statutory function. In *East Suffolk Rivers Catchment Board v. Kent et al.*, the defendant water authority undertook to repair a break in the sea wall, which had caused the plaintiff’s land to flood. The board took 178 days to complete the work which might have been completed in 14 days if undertaken with greater diligence. As a result of the delay, the plaintiffs’ property suffered damage. The House of Lords held that the action in tort could not succeed due to the fact that the board was exercising statutory

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124 [1941] A. C. 74
discretion, which could not be reviewed by the courts in absence of any additional new
damage inflicted by the statutory authority. Lord Romer stated that “[where] a statutory
authority is entrusted with a mere power it cannot be made liable for any damage
sustained by a member of the public by reason of failure to exercise that power. If in the
exercise of their discretion they embark upon an execution of the power, the only duty
they owe to the public is not thereby to add to the damages that he would have suffered
had they done nothing.”

In Dorset Yacht however, a majority in the House of Lords established that a negligence
action could be founded on the basis that a public authority owed a duty of care in
respect of the discharge of its statutory function to those at reasonably foreseeable risk
of harm. A party of borstal trainees was working on Brownsea Island on the south coast
of England under the supervision and control of three borstal officers. The officers had
been given clear instructions with regard to maintaining appropriate supervision of the
trainees, but in breach of these instructions, the officers simply went to bed, leaving the
trainees to their own devices. During the night, seven trainees escaped and boarded a
nearby yacht, which they subsequently set in motion, causing damage to other yachts in
the vicinity.

Showing a willingness to review the conduct of public officials where carelessness in
the discharge of a statutory duty causes loss to members of the public, Lord Reid was of
the opinion that “there is very good authority for the proposition that if a person
performs a statutory duty carelessly so that he causes damage to a member of the public
which would not have happened if he had performed his duty properly he may be
liable... The reason for this is, I think, that Parliament deems it to be in the public
interest that things otherwise unjustifiable should be done, and that those who do such
things with due care should be immune from liability to persons who may suffer
thereby. But Parliament cannot reasonably be supposed to have licensed those who do
such things to act negligently in disregard of the interests of others so as to cause them

\[125\] ibid at p. 102
Thus, the crucial issue became whether harm had arisen as a result of the public authority failing to discharge its statutory function with due care, rather than simply whether additional damage had been caused by the public authority.

Lord Reid recognized that Parliament could not have intended for every plaintiff to recover losses caused by an error of judgment in the exercise of a statutory discretion. However, there “must come a stage where the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred.” Such sentiments were echoed by Lord Morris of Borth-y-Gest, when he stated that “the fact that something is done in pursuance of statutory authority does not warrant its being done unreasonably so that avoidable damage is negligently caused.”

Turning to the facts of the case at hand, Lord Reid concluded that he “could not imagine any more unreasonable exercise of discretion than to release trainees on an island in the middle of the night, without making any provision for their future welfare.”

Dorset Yacht deals with the execution of statutory duties in contravention of specific instructions and in circumstances of clearly foreseeable third party harm. It was not clear, however, whether or not it could be taken as supporting the general proposition that a relationship of proximity and foreseeability of harm could by themselves require a statutory discretion to be exercised in a particular way. Lord Diplock, however, gave an indication of the justifiable boundaries of judicial intervention when he stated that “It is not the function of the court, for which it would be ill suited, to substitute its own view of the appropriate means for that of the department or authority by granting a remedy by way of civil action at law to a private citizen adversely affected by the way in which the discretion has been exercised. Its function is confined in the first instance to deciding whether the act or omission complained of fell within the statutory limits imposed on the department’s or authority’s discretion. Only if it did not would the court

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126 Dorset Yacht, supra note 123 at p. 1030
127 ibid at p. 1030
128 ibid at p. 1036
129 ibid at p. 1031
have jurisdiction to determine whether or not the act or omission, not being justified by the statute, constituted an actionable infringement of the plaintiff's rights in civil law."\textsuperscript{130}

The notion established in \textit{Dorset Yacht} that immunity could be attached to \textit{bona fide} exercises of statutory discretion, but not to acts or omissions outwith the scope of such discretion was developed by the House of Lords in 1978 in \textit{Anns v Merton London Borough Council}\textsuperscript{131}. The plaintiffs, the tenants under a long lease of a property in Wimbledon, sued the local authority for failing to appropriately enforce building control measures with regard to the construction of their property. The builders had been under an obligation to construct foundations to a depth of at least 3 feet, with the council surveyor to be given an opportunity to inspect the foundations before they were covered up. In fact, the foundations were only constructed to a depth of two feet six inches and it was not established whether any inspection had been made by the local authority.

The general test for negligence was set out by Lord Wilberforce, who gave the majority judgment. "First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood, such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed."\textsuperscript{132}

In cases involving public authority defendants acting (or failing to act) on the basis of a statutory power, Lord Wilberforce established what has become generally known as the policy/operational distinction, as an important consideration in the second part of his formulation. To rely purely on the "neighbourhood principle" or on any factual relationship of "control" would be "to neglect an essential factor which is that the local

\textsuperscript{130} ibid at pp. 1067 - 1068

\textsuperscript{131} [1978] A. C. 728. (hereinafter "Anns").
authority is a public body, discharging functions under statute: its powers and duties are definable by public, not private law. The problem which this type of action creates, is to define the circumstances in which the law should impose, over and above, or perhaps alongside, these public law powers and duties, a duty in private law towards individuals such that they may sue for damages in a civil court. A public authority exercising a “discretion” conferred by a statute could not be subject to liability for negligence with regard to policy decisions taken within the scope of that discretion. For example, a decision to scale down a particular service in order to allocate more money to something else would, in general, not be reviewable by the courts. However, an authority could be liable in respect of the operational measures taken to implement that policy, including a failure to implement a “policy” decision with due care. Delivering the majority decision, Lord Wilberforce stated the issue thus: “Most, indeed probably all, statutes relating to public authorities or public bodies contain in them a large area of policy. The courts call this “discretion” meaning that the decision is one for the authority or body to make and not for the court. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area.”

However, Lord Wilberforce did not believe that all decisions made by public authorities were immune from attack. While acknowledging that public authorities require to “strike a balance between efficiency and thrift”, and the ultimate decision as to whether the balance has been struck correctly should be decided by the ballot box rather than the courts, His Lordship was of the opinion that to suggest that a decision simply not to inspect was not reviewable, as it involved a matter of policy was “too crude an argument.” Such an argument “overlooks the fact that local authorities are public bodies operating under statute with a clear responsibility for public health in their area. They must, and in fact do, make their discretionary decisions responsibly and for

132 ibid at pp. 751 - 752
133 ibid at p. 754
134 ibid at p. 754
135 ibid at p. 754
136 ibid at p. 754

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reasons which accord with the statutory purpose... If they do not exercise their discretion in this way they can be challenged in the courts. Thus, to say that councils are under no duty to inspect, it is not a sufficient statement of the position. They are under a duty to give proper consideration to the question whether they should inspect or not. Their immunity from attack, in the event of failure to inspect, in other words, though great is not absolute."^{137} Thus, the benchmark as to whether immunity from suit will attach to a particular decision is not simply whether it is a "policy" decision, but rather whether the public authority in question gave "proper consideration" to the issue of whether or not to exercise a particular discretion. A conscious decision not to inspect would therefore appear not be actionable, as this would be in accordance with the discretion afforded by a statutory power. A negligent inspection, however, or a failure to consider whether or not to use the power of inspection, would appear to be actionable. From Lord Wilberforce's speech, however, it is not completely clear whether the requirement of "proper consideration" relates to the qualitative issues which the public authority should take into account or whether a mere recorded decision would suffice.

Lord Wilberforce was also of the opinion that there was no absolute boundary between statutory powers and statutory duties with regard to the existence of a private law duty of care. His Lordship set out the issue thus: "It is said that there is an absolute distinction in the law between statutory duty and statutory power — the former giving rise to potential liability, the latter not;... I do not believe that any such rule exists;"^{138} Rather, the extent to which a private law duty of care could be superimposed upon a public authority's public law duties depended in large measure upon the nature and wording of the statute itself. It could only be ascertained whether a duty of care arose, therefore, after consideration of the scope of discretion afforded to the public authority in the relevant statute. To illustrate the point, Lord Wilberforce discusses the case of Sheppard v. Glossop Corporation^{139}, where he distinguishes between a decision to not

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^{136} ibid at p. 755
^{137} ibid at p. 755
^{138} ibid at p. 755
^{139} [1921] 3 K. B. 132
to provide street lighting (within the scope of the empowering statute's discretion) and a
decision to provide such lighting with a resultant failure to provide an appropriate
standard of maintenance to keep the lighting in working order (outwith the scope of
such discretion). In other words, "[i]t is irrelevant to the existence of this duty of care
whether what is created by the statute is a duty or a power: the duty of care may exist in
either case. The difference between the two lies in this, that, in the case of a power,
liability cannot exist unless the act complained of lies outside the ambit of the
power."140 Thus, a decision taken within the bounds of statutory discretion could not
give rise to a private law duty of care, but action or a decision taken outside the bounds
of such discretion could do so. Lord Wilberforce's tool for distinguishing between the
two was the distinction between policy and operation.

The line between something which is a matter of "policy" and something which is a
matter of "operation" will, however, often be difficult if not impossible to ascertain.
This is emphasized by the fact that although "this distinction between the policy area
and the operational area is convenient, and illuminating, it is probably a distinction of
degree; many "operational" powers or duties have in them some element of
"discretion". It can safely be said that the more "operational" a power or duty may be,
the easier it is to superimpose upon it a common law duty of care."141 Thus, Lord
Wilberforce implicitly recognizes that, since decisions of varying types and degrees will
be made at different administrative levels (for example, in Dorset Yacht, the decision to
send the group to Brownsea Island was a decision taken within the bounds of statutory
discretion, but the decision of the officers to go to bed and leave the boys to their own
devices was not), the enquiry cannot simply be about whether or not a decision was
made.

One of the difficulties with Anns is the lack of provision by the court of practical tools
which can be used to ascertain whether or not a decision is a bona fide exercise of
statutory discretion. Simply to consider whether something is a matter of policy or

140 Anns, supra note 131 at p. 758
141 ibid at p. 754
operation is to beg the question which requires answering, a fact that was recognized by Lord Wilberforce himself. For its faults, Anns was a genuine and courageous attempt to demarcate the bounds of legitimate government activity which should not be subject to private law negligence actions. By requiring public authorities to give “proper consideration” to the decision whether or not to exercise a statutory power, Lord Wilberforce was obviously concerned to require that governmental power be exercised responsibly, leaving no scope for arbitrary or careless decision-making. As we shall see, however, Anns did not find favour with the future members of the Court of Appeal and the House of Lords, with the courts preferring a more restrictive approach to the issue of public sector negligence.

During the 1980s, the English courts explicitly attempted to keep the applicability of the Anns decision within confined boundaries\(^\text{142}\), culminating in the “recasting” of Lord Wilberforce’s two part formula into the stiffer tripartite test set out by the House of Lords in Caparo Industries v. Dickman\(^\text{143}\) and the unanimous decision of the House of Lords in Murphy v. Brentwood District Council\(^\text{144}\), which explicitly overruled Anns with regard to allowing recovery for negligent inspection causing pure economic loss. The facts of Murphy were that the local authority approved the design of concrete raft foundations for houses, which foundations subsequently turned out to be inadequate, developing cracks and requiring extensive repair works to be carried out. Lord Keith began by stating that the two-stage test set out by Lord Wilberforce in Anns “has not been accepted as stating a universally applicable principle.”\(^\text{145}\) The Law Lords all decided the case on the basis that defective foundations which had always been part of


\(^\text{143}\) [1990] 2 A. C. 605. In this case Lord Bridge of Harwich stated (at pp. 617 – 618) that “in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.” The three requirements of foreseeability, proximity and “fair, just and reasonable” have become known as the “Caparo criteria”.

\(^\text{144}\) [1991] 1 A. C. 398

\(^\text{145}\) ibid at p. 461
the fabric of a house did not constitute "physical damage" and therefore the cost of rectifying the damage was pure economic loss and was therefore not recoverable in negligence. While the Lords did not fully address the issue of the general test for public liability set out by Lord Wilberforce in *Anns*, it is clear, as Lord Hoffman later stated in *Stovin v. Wise* that "[in Anns] the Council stated that it owed no duty to inspect and therefore could not be liable for negligent inspection. The House rejected this argument. So far as it held that the council owed a duty of care in respect of purely economic loss, the case has been overruled by *Murphy v. Brentwood D. C.* The House left open the question of whether the council might have owed a duty in respect of physical injury, although I think it is fair to say that the tone of their Lordships' remarks on this question was somewhat sceptical."  

A number of English decisions during the 1980s and 1990s considerably narrowed the scope for attaching a duty of care to a public authority, both by restrictively defining the requirement of proximity, and on grounds that it would not be "just and reasonable" to infer a duty of care in the circumstances of the case. Such cases have tended not to advance to any analysis of whether or not there had been a *bona fide* exercise of discretion, since other factors in the preliminary stages of the enquiry tend to render this issue redundant. This is well illustrated by a series of cases involving the fire brigade, which were decided together in 1997. In *Capital and Counties plc v. Hampshire County Council*,[148] the fire brigade attended a fire at commercial premises occupied by the plaintiffs. The Station Officer ordered that the sprinkler system be disabled, despite the fact that the brigade were not themselves effectively fighting the fire and the seat of the fire had not yet been detected. Stuart-Smith L. J. stated the general principle that "the fire brigade are not under a common law duty to answer the call for help and are not under a duty to take care to do so. If therefore they fail to turn up in time because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable."[149] The basis for this principle was that there is no general expectation

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[146] [1996] A. C. 923
[147] ibid at p. 948
[148] [1997] 2 All E. R. 865 (hereinafter "Capital and Counties")
[149] ibid at p. 878
that fires will necessarily be extinguished by the fire brigade, merely a hope that they will. It is therefore not “just and reasonable” to impose a duty of care in such circumstances, absent factors while provide the appropriate degree of proximity between the parties\(^{150}\). In Capital and Counties, however, the fire brigade had arrived on the scene and had “by their positive act exacerbated the fire so that it rapidly spread.”\(^{151}\) Having decided that there was no statutory exemption from liability and no overwhelming principle of public policy which required that the fire brigade benefit from immunity from suit, the Court of Appeal held that the actions of the Station Officer in disabling the sprinkler system was negligent.

In the two companion fire brigade cases\(^{152}\), however, a duty of care was not established, since the required degree of proximity was not shown in the circumstances. In the court’s opinion, “a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to come under a duty of care merely by attending the fire ground and fighting the fire.”\(^{153}\) This approach causes problems, in that it seems to be suggesting that the requirement of proximity was established in Capital and Counties, not by the relationship between the parties, but by the actions of the Station Officer in turning off the sprinkler system. Surely a better approach is to state that the necessary degree of proximity is not established merely by the making of a 999 call, but is shown by the presence of the fire brigade at the scene of a fire. It is at that point that the member of the public has a reasonable expectation that the brigade will fight the fire in a responsible and professional manner. The enquiry would then centre on the reasonableness of the decisions taken, in order to ascertain whether the fire brigade’s duty of care had been discharged.

In the first of the two companion cases, a controlled explosion on wasteland had sent debris into a nearby property. The fire brigade had satisfied themselves that no danger

\(^{150}\) Stuart-Smith L. J. stated that “Alexandrou’s case is clear authority for the proposition that there is no sufficient proximity simply on the basis that an emergency call is sent to the police” (at p. 878)

\(^{151}\) ibid at p. 882

\(^{152}\) John Munroe (Acrylics) Ltd. v. London Fire and Civil Defence Authority and Church of Jesus Christ of Latter Day Saints (Great Britain) v. West Yorkshire Fire and Civil Defence Authority (both reported at [1997] 2 All E. R. 865)
was present on the wasteland, but some time later a fire broke out at the plaintiff's premises, causing extensive damage. In the second case, the fire brigade quickly arrived at the scene of a fire, but no less than seven fire hydrants were either unable to be located or were found not to be working, resulting in extensive delay to the fire-fighting effort. The theme which runs through these cases is that in order to form the foundation of a negligence claim, the plaintiff must be able to point to some "special relationship" with the defendant, a requirement which would appear difficult to satisfy. The only circumstance in which the court was prepared to find a duty of care was one in which the fire brigade had actually made matters worse by attending at the scene. One could be forgiven for thinking that the statement by Stuart-Smith L. J. that the fire brigade owed no duty to attend at the scene of a fire signalled a return (with regard to public authority negligence at least) to the laissez faire "every man for himself" pre-Donoghue v. Stevenson approach to negligence.

Perhaps the most restrictive interpretation of public authority negligence has come from the House of Lords in Stovin v. Wise. The plaintiff had been seriously injured when his motorcycle collided with a car driven by the first defendant, which had emerged from a junction where the view was obstructed by a bank of earth in a neighbouring field which belonged to British Rail. In the year previous to the accident, British Rail and the local authority had entered into negotiations whereby the bank would be removed. However, the work had never been progressed. The plaintiff sued the local authority on the basis that, as a road user, he had a proximate relationship with the authority, and therefore owed him a duty of care to remove the dangerous obstacle.

Lord Hoffmann, speaking for the three member majority of the House of Lords considered it important that the case involved an omission rather than an allegedly negligent act. "It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is doing nothing in particular shall take steps to

153 ibid at p. 886
prevent another from suffering harm from the acts of third parties or natural causes."\(^{154}\)
The law does not, in general reward those who voluntarily confer benefits on other people. There must therefore be “some special reason why he should have to put his hand in his pocket.”\(^{155}\) Lord Hoffmann was not convinced that the mere existence of a statutory power was sufficient to create a relationship of ‘proximity’ between the roads authority and the road user that, but for the statute, would not otherwise exist. Neither did he find any cogent reason to turn a statutory “may” into a common law “ought”.

Rather than approach the issue of the existence of a duty of care in the same way as Lord Wilberforce in *Anns*, Lord Hoffmann chose to approach the subject the other way round, “starting with situations in which a duty has been held to exist and then asking whether there are considerations of analogy, policy, fairness or justice for extending it to a new situation.”\(^{156}\) With regard to Lord Wilberforce’s requirement that the public authority give “proper consideration” to the question of whether or not to exercise its discretion, Lord Hoffmann clearly disagrees, stating that “[A] public body almost always has a duty in public law to consider whether it should exercise its powers, but that does not mean that it necessarily owes a duty of care which may require that the power should actually be exercised.”\(^{157}\)

Lord Hoffmann made it abundantly clear that the test for a duty of care in such circumstances would be a strict one which went beyond the need merely to point to a “special relationship” between the parties. Lord Hoffmann stated that “the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not

\(^{154}\) *Stovin v. Wise*, supra note 146, at p. 943
\(^{155}\) ibid at p. 944
\(^{156}\) ibid at p. 949
\(^{157}\) ibid at p. 950
The sentiments underlying such a restrictive position appear to be that "the fact that public services are provided at the public expense to confer benefits or protection on members of the public does not mean that a person who fails to receive those benefits or protection will be entitled to sue for compensation on the ground that the authority acted negligently in failing to provide them." Lord Hoffmann's position seems very far removed indeed from that of Lord Wilberforce with regard to the extent to which the public should be required to take public services as they find them. In the last section of his opinion, Lord Hoffmann states that "Drivers of vehicles must take the highway network as they find it. Everyone knows that there are hazardous bends, intersections and junctions."  

Policy issues have also ultimately played a significant part in restricting the liability of public authorities when the courts have considered whether it is "fair, just and reasonable" to impose a common law duty of care. For example, in *Rowling v. Takaro Properties Ltd.*, Lord Keith noted the need for the courts to consider "pragmatic" issues, such as the dangers of "overkill" in liberally applying tort law rules to disputes involving public authorities. In addition, as we have seen, in *Hill v. Chief Constable of West Yorkshire* (the case which ultimately laid the foundations for the challenge of the English judicial system under Article 6 of the European Convention by the Osman family), the House of Lords effectively precluded any judicial investigation into police activity with regard to their role in the investigation and suppression of crime. As demonstrated by the cases which followed the *Hill* judgment, plaintiffs who sought to sue the police over alleged negligence in the way they discharged their public role, faced a virtually impossible task in light of the language used by the House of Lords in *Hill*.

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158 ibid at p. 953. See also the opinion of Lord Browne-Wilkinson in *X (Minors) v. Bedfordshire County Council* [1995] 2 A. C. 633 (hereinafter "X (Minors)") at p. 761  
159 Lord Hoffmann: "Human Rights and the House of Lords" (1999) M. L. R. 159 at p. 163  
160 *Stovin v. Wise*, supra note 146, at p. 958  
3.2 Liability of the Police in Negligence in England

In *Alexandrou v. Oxford*, the police were called to a suspected burglary at the plaintiff’s commercial premises. Assuming that the alarm had been activated as a false alarm, police officers made a cursory examination of the property and failed to notice that entry had been forced to the premises through the rear entrance. Some time later that evening, a substantial quantity of merchandise was stolen and the plaintiff sued the police authorities in negligence on the basis that they had failed to make an adequate investigation into the circumstances of the activation of the burglar alarm. A unanimous Court of Appeal struck out the plaintiff’s case on the grounds that since the police had been made aware of the activation of the alarm in an 999 emergency call, this could not be termed a case involving a “special relationship” between the police and the plaintiff which may result in the imposition of a duty of care. Since *Hill* had established that there was no general duty on the part of the police with regard to the suppression of crime, the case fell squarely within the terms of *Hill* and therefore disclosed no cause of action. Significantly, Glidewell L. J. stated that, even if there did exist the requisite relationship of proximity between the plaintiff and the police, “it would be necessary to consider whether, as a matter of general policy, the police should be under the duty proposed.” Having considered the judgments of Lords Keith and Templeman in *Hill*, His Lordship concluded that “the observations of Lord Keith and Lord Templeman in *Hill*'s case in relation to the effect on the police of their being potentially liable in negligence were general, not limited to the facts of that case. I would therefore hold that it is not fair or reasonable that the police should be under any such common law duty as is here proposed.”

Similarly, in *Ancell v. McDermott*, the Court of Appeal struck out a claim against the police which had been made after the plaintiff had skidded on a patch of diesel fuel which had been noted some time previously by the officers of Bedfordshire

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162 [1993] 4 All E. R. 328
163 ibid at pp. 338 - 339
164 ibid. at p. 340
165 [1993] 4 All E. R. 355
constabulary. Beldam L. J. commented that recent English cases had required that, in addition to the requirements of foreseeability and proximity, it had to be “fair, just and reasonable” to impose a duty of care. Despite the fact that foreseeability and proximity were much clearer in this case than in *Hill*, His Lordship was “not persuaded that there is any sufficient distinction from the reasoning which led the House of Lords to reject the existence of a duty in Hill’s case to justify the imposition of a duty to act in the circumstances of the present case.”\(^\text{166}\) Dealing with the public policy considerations enunciated in *Hill*, Beldam L. J. was of the opinion that “these considerations apply with equal force in the present case. I have already indicated the extreme width and scope of the duty to take care contended for by the plaintiffs. The diversion of police resources and manpower if such a duty were held to exist would, in my judgment, extensively hamper the performance of ordinary police duties and create a formidable diversion of police manpower.”\(^\text{167}\)

Lastly, when the facts of *Osman* itself came before the Court of Appeal\(^\text{168}\), the plaintiffs’ case was struck out, although in this case solely on the basis of the public policy considerations set out in *Hill*. McCowan L. J. was of the opinion that the plaintiffs had an arguable case that there was proximity between themselves and the police amounting to a special relationship. Nevertheless, he found nothing in the *Hill* judgment to indicate that the public policy considerations were designed to apply to policy considerations and not to the more operational aspects of police work. In His Lordship’s opinion, “such a distinction is not to be supported by the speeches in Hill’s case. Indeed, I consider such a dividing line to be utterly artificial and impossible to draw in the present case.”\(^\text{169}\) Lastly, McCowan L. J. dismissed the argument that the public policy considerations would not apply where the class of victim was sufficiently proximate and sufficiently small. “I cannot accept that submission. Lord Keith plainly

\(^\text{166}\) Ibid. at p. 365  
\(^\text{167}\) Ibid. at p. 366  
\(^\text{168}\) *Osman v. Ferguson* [1993] 4 All E. R. 344  
\(^\text{169}\) Ibid. at p. 353
treats public policy as a separate point which is not reached at all unless there is a duty of care."\footnote{ibid. at p. 354} 

While the English courts have attempted to restrict the grounds on which negligence actions against public authorities may succeed, circumstances in which loss has been exacerbated due to the negligent exercise of a statutory discretion or in which the public authority acts negligently when in a position of “control” of an individual over whom it has control under statute, may still yield a successful outcome, provided the requisite elements of proximity and foreseeability of harm can be shown and the court is convinced that it is “fair just and reasonable” to infer a duty\footnote{See Yun Kun-yeu v. A-G of Hong Kong [1987] 2 All E. R. 705. Lord Keith acknowledged that a duty of care could still be established on the basis of the criteria set out in Dorset Yacht. However, this case involved reliance by investors on the competent use by the Commissioner of Deposit-taking Companies in Hong Kong of discretionary powers pursuant to its regulatory functions it held by virtue of the Deposit-taking Companies Ordinance 1976. In finding that there was no duty of care owed to potential investors, Lord Keith stated (at pp. 713-714) that “In contradistinction to the position in the Dorset Yacht case, the commissioner had no power to control the day-to-day activities of those who caused the loss and damage. As has been mentioned, the commissioner had power only to stop the company carrying on business and the decision whether or not to do so was clearly well within the discretionary sphere of his functions. In their Lordships’ opinion the circumstances that the commissioner had, on the appellants’ averments, cogent reasons to suspect that the company’s business was being carried out fraudulently and improvidently did not create a special relationship between the commissioner and the company of the nature described in the authorities. They are also of the opinion that no special relationship existed between the commissioner and those unascertained members of the public who might in the future become exposed to the risk of financial loss through depositing money with the company.” Arguments on behalf of the commissioner to the effect that the public policy considerations in Hill should be extended to other public authorities on the basis that “A sound judgment would be less likely to be exercised if the commissioner were to constantly looking over his shoulder at the prospect of claims against him, and his activities would be likely to be conducted in a detrimentally defensive frame of mind.” (at p. 715). However, Lord Keith refused to apply the policy considerations in Hill, stating that the legislature was in a better position than the courts to weigh up such policy matters. Instead, he chose to dismiss the appeal on the basis that there was no cause of action due to no “special relationship” having been shown.} \footnote{Swinney v. Chief Constable of Northumbria Police [1996] 3 All E. R. 449 is one of the only exceptions to date. The Court of Appeal held that there was an arguable case that a police officer had voluntarily assumed a duty of care to an informant when he agreed that her name as the source of the information should remain confidential. Ward L. J. was of the opinion that “there are here other considerations of public policy which also have weight, namely the need to}
cases which followed it, signalled “a return to the ‘category’ approach to duty of care eschewed by Lord Atkin in Donoghue v. Stevenson, whereby negligence law once again resembles a patchwork quilt, with certain classes of decision makers enjoying immunity, usually on policy grounds. Thus, the English species of incrementalism has embraced certainty at the expense, some would say, of both flexibility and over-arching coherence.”

It appears safe to say that there is a clear tendency towards the restriction of liability of public authorities in private law negligence actions, particularly in situations where plaintiffs are seeking to establish a duty of care on the basis of a public authority’s failure to act. While it seems entirely appropriate for public authorities to be given freedom to exercise their statutory discretion, it must be questioned whether such judicial restriction encourages responsible governmental decision making. Of course it may be argued that encouraging responsible government is not a function of tort law, but it must be remembered that regulation of private conduct is an important aspect of tort law’s role, so surely the effect of judicial scrutiny of administrative decisions should be a policy consideration for the courts. What appears clear, however, is that Lord Wilberforce’s valiant attempt to ensure the “proper consideration” of administrative choices in important areas of public health appears to have failed.

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preserve the springs of information, to protect informers, and to encourage them to come forward without an undue fear of the risk that their identity will subsequently become known to the suspect or to his associates. In my judgment, public policy must in this field must be assessed in the round, which in this case means assessing the applicable considerations advanced in Hill’s case, which are, of course, of great importance, together with the considerations just mentioned in relation to informers, in order to reach a fair and just decision on public policy.”

(At pp. 464-465)

Hoyano: “Policing Flawed police Investigations: Unravelling the Blanket” (1999) 62 M. L. R. 912 at p. 913. The policy arguments advanced of Lords Keith and Templeman in Hill have been severely criticized by Marcus Tregilgas-Davey in “Osman v. Metropolitan Police Commissioner: The Cost of Police Protectionism” (1993) 56 M. L. R. 732: “First, ...nothing more effectively focuses the mind and hence improves the quality of decisions of a police officer than the knowledge that the decision may be subject to scrutiny by a court of law. Second, the argument could be equally levied against all professionals. However, the argument that holding doctors liable for medical negligence would make them less efficient or hold back the much needed advancement of medical science has never been accepted as a sufficiently cogent reason for exempting the medical profession from liability. Third, the imposition of such a duty would not involve ‘second guessing’ police discretion. Many aspects of police investigations into criminal offences are already ‘re-investigated’ by courts in civil actions for wrongful arrest, unlawful detention and malicious prosecution” (at pp. 734 – 735).
In the case of the police, however, the position appears to be even more extreme. The fact that the failure of the courts to consider competing policy factors led the European Court of Human Rights to judge that this amounted to a violation of an individual’s basic right of access to a court is a damning indictment. Perhaps the most worrying thing about the position is the obvious frailty of the policy arguments advanced by the House of Lords in favour of blanket immunity. As will be shown later in this chapter, there are convincing policy reasons why the police should be subject to judicial scrutiny of their conduct in the investigation and suppression of crime.

3.3 Public Authority Liability in Canada Since Ann's

In contrast to the English courts, the Canadian courts have followed the Ann's decision to this day. However, the decisions often appear difficult to reconcile, a fact that Linden attributes to the illusory nature of the policy/operational distinction and the amorphous nature of terms such as “planning”, “discretionary”, “operational” and “administrative” which have often been used by the courts. In general, though, and in contrast with the English courts, the trend seems to be towards increasing the liability of public authorities, an occurrence which led Sopinka J. to state in 1989 that in “comparatively recent years, the law of torts has evolved by imposing on public authorities a common law duty of care based on the neighbourhood or proximity principle, frequently called the Ann's principle. This has resulted in substantially increasing their liability in negligence for activity which they are authorized to carry on by statute but in respect of which the statute imposes no duty of care... The expansion of liability... has created a crisis in this area of the law.”

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175 See Linden, Canadian Tort Law, 7th ed. (Markham: Butterworths, 2001) at p. 619

176 Sopinka J. (dissenting) in Just v the Queen in Right of the Province of British Columbia [1989] 2 S. C. R. 1228 (at p. 1248) (hereinafter “Just”).
It is apparent from even a cursory examination of the Canadian case law that the development of tort in the realm of public liability has followed a very different path in Canada to that followed in the U.K. Lord Wilberforce’s formulation of the public sector duty of care in Anns remains the starting point for any Canadian tort analysis, with the Supreme Court of Canada seeking to put flesh on its bones by incrementally developing the common law by applying Lord Wilberforce’s principles to differing circumstances and differing statutory frameworks.

In the leading case of City of Kamloops v. Nielsen177, a case involving an allegedly negligent failure to enforce a stop-work order pursuant to the municipality’s building control framework, the Supreme Court of Canada embraced the Anns approach. Wilson J., speaking for herself and two other members of the Court established her own two stage formulation of the Anns principle. In her opinion, "in order to decide whether or not a private law duty of care existed, two questions must be asked: (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so, (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise? These questions, Lord Wilberforce said, must be answered by an examination of the governing legislation."178

This reference to the governing legislation is sometimes overlooked, but is critical to any analysis of duties of care owed by public authorities. In Swinamer v. Nova Scotia (Attorney-General)179, for example, McLachlin J. supported the “long-standing view that public authorities owe no private duties to individuals capable of founding a civil action, unless such a duty can be found in the terms of the authority’s enabling statute.”180 The semantic form of any statutory duty or power will go a long way

177 [1984] 2 S. C. R. 2
178 ibid. at pp. 10 - 11 (emphasis added)
180 ibid. at p. 449
towards establishing the scope of any private law duty of care which can be deduced therefrom. That is not to say, however, that statutory duties will necessarily entail a duty of care and a statutory power will not. As Wilson J. states, "[such] a distinction.. overlooks the fact that parallel with public law duties owed by public authorities there may co-exist private law duties to avoid causing damage to other persons in proximity to them."\(^{181}\)

Wilson J. dealt directly with two issues which have played a major part in the recent development of the English case law, namely the misfeasance/non-feasance argument and the "floodgates" argument. The municipality argued that a failure to exercise a by-law could not establish a duty of care, since this was a case of non-feasance. Wilson J. agreed with Schroeder J.A. in *Schacht v. The Queen in Right of the Province of Ontario*\(^{182}\) that the issue of the presence of a private law duty eludes a simple misfeasance/non-feasance analysis. Following through her *Anns* analysis, Wilson J. states that "the City could have made a policy decision either to prosecute or to seek an injunction. If it had taken either of those steps, it could not be faulted. But not to consider them at all was not open to it... The City at the very least had to give serious consideration to taking the steps toward enforcement that were open to it."\(^{183}\) In other words, non-feasance cannot shield a public authority from liability where there has been a failure to give proper consideration to whether a statutory discretion should be exercised. In the opinion of Wilson J., "the appellant [cannot] take any comfort from the distinction between non-feasance and misfeasance where there is a duty to act or, at the very least, to make a conscious decision not to act on policy grounds. In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the bona fide exercise of discretion."\(^{184}\)

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\(^{181}\) *Kamloops*, supra note 174 at p. 10

\(^{182}\) [1973] 1 O. R. 221. In that case police officers failed to warn the plaintiff of an excavation on the highway and as a result, he suffered personal injuries. Schroeder J. A. stated "Looked upon superficially the passivity of these two officers in the face of the manifest dangers inherent in the inadequately guarded depression across the highway may appear to be nothing more than non-feasance, but in the case of public servants subject not to a mere social obligation, but to what I feel bound to regard as a legal obligation, it was non-feasance amounting to misfeasance."

\(^{183}\) *Kamloops*, supra note 174 at p. 24

\(^{184}\) ibid. at p. 24
Wilson J.’s opinion is that where a decision has been made in bad faith or for an improper purpose, “for that very reason, the authority has not acted with reasonable care.”

An issue which vexed the House of Lords in Hill and which led to the police force in the U.K. enjoying a widespread immunity from suit was the “floodgates argument”, the notion that allowing a duty of care to flow from a flawed police investigation would lead to a torrent of claims, defensive attitudes and low morale in the police force and the diversion of funds and manpower towards defending law suits rather than fighting crime. In Kamloops, the municipality argued that the acceptance of Anns into Canadian tort law would open the floodgates to a similar torrent of claims. Wilson J., however, believed that “the decision in Anns contains its own built-in barriers against the flood... [The] principle will not apply to purely policy decisions made in the bona fide exercise of discretion. This... prevents the courts from usurping the proper authority of elected representatives and their officials. At the same time, however, the principle ensures that in the operational area, i.e. in implementing their policy decisions, public officials will be exposed to the same liability as other people if they fail in discharging their duty to take reasonable care to avoid injury to their neighbours.”

As Wilson J. herself accepted, analysis of whether a public authority has given proper consideration to the exercise of a statutory discretion is a “matter of very fine distinctions.” It seems entirely appropriate that public authorities should not be given licence to act negligently purely because they have a statutory discretion whether or not to act. As the House of Lords noted in Dorset Yacht, when conferring a statutory discretion, it cannot be assumed that Parliament intended that the discretion should be exercised without due care or consideration to those who may be injured as a result. If it can be argued that the prospect of law suits encourages defensive attitudes among

\[\text{185} \text{ ibid. at p. 24}\]
\[\text{186} \text{ ibid. at p. 25. This echoes the principle set out by Lord Blackburn in Geddis v. Proprietors of Bann Reservoir (1878) 3 App. Cas. 430 (at pp. 455 - 456) that “I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently.”}\]
public authorities, surely it can also be argued that the prospect of law suits encourages more transparent and responsible decision making.

In *Just*, the plaintiff and his daughter had been in their car traveling north to Whistler along the Sea to Sky Highway, when they were stopped in a line of traffic. A boulder weighing more than a ton fell from the hillside above the highway and crushed the plaintiff's car, causing him severe injuries and killing his daughter. The plaintiff sued the Province on the basis that they had been negligent in failing to properly maintain the highway.

Cory J., speaking for the majority attempted to more accurately delineate the situations where a duty of care would attach to a public authority with regard to the exercise of its statutory powers. He distinguished “true policy decisions” from issues of “implementation” and stated that the Crown “must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand, complete Crown immunity should not be restored by having every government decision designated as one of policy”\(^\text{188}\). As a general rule, the level at which a particular decision is made, as well as whether the decision concerns “budgetary allotments for departments or government agencies” or is based upon “social, political or economic factors” will be indicative of whether it is a “true policy” decision. Despite the fact that s. 8 of the *Highway Act*\(^\text{189}\) contained a power to maintain the highways rather than a duty, and the fact that a policy was in place with regard to the inspection of the highways, Cory J. nonetheless found that it was appropriate for the court to consider the reasonableness of the inspection policy. “Policy decisions” which would attract immunity would usually only be those which had been made at a high level of authority, involving considerations of “financial, economic, social or political factors or constraints.”\(^\text{190}\) Cory J. stated that a true policy decision could be made at a lower level “provided that the government establishes that it was a reasonable decision

\(^{187}\) ibid at p. 23
\(^{188}\) ibid at p. 1239
\(^{189}\) R. S. B. C. 1979, c. 167
\(^{190}\) *Just*, supra note 176, at p. 1240
In stating that "[the] manner and quality of an inspection system is clearly part of the operational aspect of governmental activity and falls to be assessed in the consideration of the standard of care issue," Cory J. perhaps illustrates the value judgments inherent in any application of the policy/operational distinction. After all, it may equally be argued that lower level decisions are just as deserving of the term "policy" as those made in the upper echelons of public administration. Nevertheless, if one is to use the policy/operational distinction, one must make it clear where that dividing line will be drawn. In Just, the majority of the Supreme Court of Canada made it clear that only decisions made on financial, social or political grounds at high levels of authority would be inherently incapable of founding a duty of care at common law.

In Just, the court was not, however, unanimous. Sopinka J. was outnumbered 6 to 1, but was not deterred from delivering a defiant dissenting judgment. He was clearly of the opinion that the approach of the court based on Anns was subjecting governmental bodies to unjustifiable scrutiny with regard to exercises of their statutory discretion. Sopinka J. distinguishes Kamloops on the basis that a failure to enforce a stop-work order was a failure to comply with a decision made under the relevant by-laws and was therefore a departure from the duty created by the by-law. In contrast, Just involved a direct challenge to a decision to adopt a particular method of road inspection. In a passage reminiscent of more recent English authorities, Sopinka J. stated that "[if], as here, the statute creates no duty to inspect at all, but simply confers a power to do so, it [follows] logically that a decision to inspect and the extent and manner thereof are all discretionary powers of the authority." With some justification, he pointed to the decision in Barratt and asked how a duty of care could not be inferred with regard to decisions as to the manner of inspection of the state of roads in North Vancouver, but a duty of care could be imposed with regard to decisions as to the manner of inspection of rock faces which overlooked a British Columbia highway.

191 ibid at p. 1241 (emphasis added)
192 ibid at p. 1242
Following *Just*, there was some fairly trenchant criticism in Canada of the Court's approach. Nevertheless, the law seemed fairly clear with regard to the fairly limited types of decisions taken at higher levels of authority which would attract immunity from suit. However, the Supreme Court of Canada cast doubt on the authority of *Just* in the cases of *Brown v. British Columbia (Minister of Transportation and Highways)* and *Swinamer v. Nova Scotia (Attorney General)*.

In *Brown*, the plaintiff's pick-up truck skidded on a patch of black ice and left the highway, causing the plaintiff injury. There had already been three accidents on that stretch of road that morning, but since the Department of Highways had decided to maintain the "summer service" of sanding roads into November, there had been a slower response from sanding trucks than there would have been had the "winter service" been in operation. The plaintiff alleged that the decision to maintain the "summer service" into November was negligent, given the prevailing weather conditions at that time of year.

There was no suggestion that the decision of the Department of Highways was patently unreasonable or had been made in bad faith. Cory J., speaking for four members of the Court, stated that "the decision of the department to maintain a summer schedule, with all that it entailed, was a policy decision... involving classic policy considerations of financial resources, personnel and, as well, significant negotiations with government unions. It was truly a governmental decision involving social, political and economic factors." In the *Highway Act*, it is stated that "The minister may... maintain a highway across any land taken under the powers conferred by this Act," and under the *Ministry of Transportation and Highways Act* "the minister has the management,"
charge and direction of all matters relating to the acquisition, construction, repair, maintenance, alteration, improvement and operation of... highways.” The question was asked whether these statutory provisions inferred a duty of care to prevent injury to road users from icy conditions. Cory J. stated that “the Department is only responsible for taking reasonable steps to prevent injury. Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive.” Ice on the province’s roads was capable of causing injury and, since the Department of Highways had the statutory power to maintain the roads, it had, in accordance with Wilson J.’s judgment in Kamloops, a duty to decide whether or not to exercise that power. Since a policy decision was taken, based on economic and other factors to maintain the summer schedule into November, with no suggestion that this decision was irrational or taken for an improper purpose, the Department was acting within the bounds of its statutory discretion and no duty of care could be formed.

In Swinamer, the plaintiff had suffered extensive injuries when an elm tree fell across his truck. The tree suffered from Artists Conk, a severe fungus infection which can be discovered only by drilling into a tree and testing the drill core. Earlier the same year, the Transportation Department for the region had instituted a policy of identifying dead trees in the region as a preliminary step in the removal of these potential driving hazards. The tree which caused Mr Swinamer’s accident was not marked, primarily because it had been in full foliage during the summer months, and displayed no outward signs of being “dead”.

Following on from the reasoning of the Court in Just, where the Court had found a duty of care on the provincial Department of Highways to protect travelers from dangerously situated rocks, Cory J., again speaking for the majority was of the opinion that there could be “no reasonable distinction drawn between dangerously situated rocks which fall on a highway and obviously dead and hazardous trees which fall on the

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201 ibid at s. 14
202 Brown, supra note 195 at p. 439

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highway."\textsuperscript{203} What distinguished \textit{Swinamer} from \textit{Just}, however, is that there was no general policy to inspect trees, simply a policy "to identify obviously dead and dangerous trees in order to apply for funds to remove them."\textsuperscript{204} In other words, where a policy decision is made, there is only a duty to proceed with due care \textit{within the scope of that policy}. Since there had been no obvious sign that the tree in question was dead or an obvious danger, there was no question that the survey had been carried out negligently.

It must be said, that \textit{Brown} and \textit{Swinamer} represent a much more deferential approach to public sector negligence than that which was apparent in \textit{Just}. While the Supreme Court proceeded on the basis that the \textit{Just} judgment established the boundary between justiciable and non-justiciable public sector decisions, the court displayed a much greater readiness to accept public authority exercises of statutory discretion as matters of "policy". I would suggest that the more context-sensitive approach adopted by the court in \textit{Brown} and \textit{Swinamer} is a more appropriate approach to the policy/operational distinction than the broad-brush approach adopted by Cory J. in \textit{Just}.

3.4 Police Liability for Negligently Handled Investigations in Canada

Police investigations present a complex web of competing issues. Police will often seek to lure criminals into a trap, seeking to secure sufficient evidence for a prosecution. However, given their role as protectors of the public, they must also be mindful of the need to protect citizens or at least warn them of impending danger. Then there is the issue of the civil rights of suspects. And running through each investigation is the need to justify the money being spent on an investigation. The police, like other public authorities, run on a limited budget, and in any event, it is entirely unreasonable to require the police to assure each member of the community that he or she will remain free from harm at all times.

\textsuperscript{203} \textit{Swinamer}, supra note 196 at p. 459
\textsuperscript{204} ibid. at p. 464
The difficulties with such cases are brought into sharp focus by the facts of *Osman* itself. While Paget-Lewis displayed some irrational behaviour, even the European Court of Human Rights acknowledged that the police probably did not have sufficient grounds to detain him. However, the English Court of Appeal did not even get to the stage of considering the duties of the police under the relevant statute or their alleged negligence in failing to apprehend the suspect, since the policy factors in *Hill* exempted the police from any negligence claim based on an allegedly flawed investigation. As will be argued below, however, such a policy of immunity can be attacked on a number of levels, not least on the basis that there are overwhelming public policy arguments against such a policy being in place.

In Canada, the Supreme Court of Canada has not yet had to deal with alleged negligence in the conduct of a police investigation. However, the Ontario High Court of Justice has considered cases concerning operational negligence and negligent investigations, and has approached the subject in a very different way to the House of Lords.

In *Air India Flight 182 Disaster Claimants v. Air India*\(^\text{205}\), the plaintiffs were relatives of individuals killed when a bomb exploded on a commercial airliner in 1985. Among others, they sued R.C.M.P. officers who were responsible for certain elements of security at Pearson International Airport in Toronto. Holland J. held that the *Anns* formula should apply, in that “no duty of care arises in respect of acts or omissions involving a statutory discretion, so long as due consideration is given to the exercise of the discretion and the discretionary decision is made responsibly.”\(^\text{206}\) A duty of care may arise more readily where “a government official is acting in execution of a policy or discretionary decision.”\(^\text{207}\) While it would be difficult to infer a duty of care to the general public, “this does not exclude a duty of care to a more limited class of individuals such as the passengers and crew aboard Air India flight 182.”\(^\text{208}\) Holland J.

\(^{205}\) (1988) 44 D. L. R. (4\(^{th}\)) 317
\(^{206}\) ibid. at p. 325
\(^{207}\) ibid. at p. 325
\(^{208}\) ibid. at p. 326
gives the example of “a servant of the Crown who is placed in charge of checking passengers for weapons [who] would clearly owe a duty of care to passengers on board that flight. Each person must be considered individually when deciding whether or not, based on foreseeability and proximity, a duty of care will arise.”

Since Holland J.’s *Air India* judgment concerned a motion to have the case against certain defendants’ struck out, there was no application of these principles to the facts of the case. In *Jane Doe v. Board of Commissioners of Police for Municipality of Metropolitan Toronto et al*210, the principles were applied to facts concerning alleged negligence in the conduct of a police investigation. However, the main analysis with regard to the duty of care owed by the police to the plaintiff again came during a motion to have the case struck out211.

In 1986, a serial rapist was at work in a particular neighbourhood in Toronto. The plaintiff was readily identifiable as a potential victim of the rapist, as she was a white, single woman residing in a second or third floor apartment in the Church-Wellesley area of the city. The police specifically decided not to warn the plaintiff and others in a similar position, since this would be likely to “cause hysteria on the part of the women and would alert the suspect to flee and not engage in further criminal activity”. Such a failure denied the plaintiff the opportunity to take steps to ensure her safety.

At the outset, Henry J. dismissed the public policy arguments which had been advanced by Lords Keith and Templeman in the House of Lords in *Hill*. “Mr Finlay paints a somewhat dramatic picture of the defendants, the police hierarchy, having to divert resources to defending this and future litigation that may be expected to follow, should this action succeed – resources that ought otherwise to be devoted to the essential duties of keeping the peace, preventing crime, apprehending criminals and in general protecting the public... It is no answer where the circumstances are such that the police

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209 ibid. at p. 325  

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hierarchy may be found liable to a plaintiff at trial, to say that the inconvenience of the police occasioned by defending their conduct should deprive the plaintiff of recourse to the courts. Where a private law duty may arise on the pleadings, it is the role of the courts to intervene if asked and to define the limits of accountability of police conduct.\textsuperscript{212}

With regard to the complex mix of police powers and duties to be found in statute and the common law, Henry J. stated that "in the area of investigation and law enforcement, the police in exercising their powers and duties make decisions that are primarily a matter of discretion... In the bona fide exercise of their discretion, they must be left free to make decisions as to the allocation of personnel and resources to an investigation, whom and what crimes to investigate and how to go about it... There are cases, however, where a private law duty to an individual member of the public may arise in respect of a breach of which the courts will intervene and an action may lie at the instance of a complainant among the general public."\textsuperscript{213}

While Henry J. agreed with the House of Lords in Hill that the police could not owe a duty of care to the public at large with regard to a failure to apprehend a criminal, the same could not be said where there was a "special relationship of proximity between the police and an individual member of the public which imposed the duty on the police to act in a particular manner."\textsuperscript{214} Such would be the case where an individual at

\textsuperscript{212} ibid, at p. 430
\textsuperscript{213} ibid, at p. 408. Reliance was placed on Lord Denning's demarcation of police responsibilities in \textit{R. v. Metropolitan Police Commissioner; ex parte Blackburn} [1968] 1 All E. R. 763, where he stated (at p. 769) "I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace... No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

\textsuperscript{214} ibid, at p. 421. In \textit{Millette v. Cote} (1970) 17 D. L. R. (3rd) 247, Galligan J. held that a constable who was at the scene of an accident while on patrol had a duty to warn persons using the highway of the dangerous conditions that existed: "...there is a basic and fundamental duty on the part of a police officer to observe and report dangerous conditions seen by him on his patrol" (at p. 266). In \textit{Beutler v. Beutler} (1983) 26 C. C. L. T. 229, a motorist drove through the wall of a store and demolished a gas meter. Whilst Rutherford J. found no duty of care on the basis that the officers had a mistaken belief that no explosion would follow the release of gas, he nevertheless found
foreseeable risk of harm was injured due to the escape of a person under police custody\textsuperscript{215}.

Police officers involved in an investigation undertake both discretionary and operational duties, but Henry J. approved of Lord Wilberforce's statement that the distinction between policy and operation is often one of degree. The more operational a power or duty is, the easier it is to superimpose on it a duty of care. In light of the knowledge available to the police, Henry J. had "\textit{no hesitation in holding that the pleading raises the elements of knowledge, foreseeability and special relationship of proximity between the police and the plaintiff that assuming they can be proved raise a duty of care to her which they breached.}"\textsuperscript{216}

At trial, McFarland J. found that a duty of care was established on the basis that women living in the plaintiff's neighbourhood were at imminent and clearly foreseeable risk of harm. The decision not to warn potential victims was made as a result of an assumption that the women would over-react to the threat and of "shop talk" at the police station to the effect that a previous rapist had fled when potential victims had been warned of the danger. The decision not to warn was made "\textit{in the face of almost certain knowledge that the rapist would attack again and cause irreparable harm to his victim.}"\textsuperscript{217} In the view of McFarland J., "\textit{their decision in this respect was irresponsible and grossly negligent. There is simply no evidence before this court which could be interpreted as suggesting that no warning should have been given in this case.}"\textsuperscript{218}

\textsuperscript{215} This is similar to the circumstances of \textit{Dorset Yacht}, supra note 123.
\textsuperscript{216} \textit{Jane Doe (1)}, supra note 211 at p. 426
\textsuperscript{217} \textit{Jane Doe (2)}, supra note 210 at p. 738
\textsuperscript{218} ibid. at p. 738
3.5 The Policy/Operational Distinction: Is it the Correct Approach?

In dealing with public authority liability in negligence, it is necessary to distinguish between statutory powers and duties. Statutory duties by their nature create obligations and are usually actionable for their breach. In such circumstances it is not necessary to establish liability in tort at common law, although the statute may itself establish a standard higher than the common law standard of reasonable care.219 In this section, the emphasis is on tort liability with regard to statutory powers, where the empowering statute provides a discretion whether or not to confer the relevant benefit.

The "policy/operational distinction" as the touchstone for establishing the presence of a duty of care has come under sustained attack since the decision in Anns, not only from English judges, but also from commentators who argue for an extensive immunity from suit for public authorities and commentators who argue against such an immunity. The basic premise of Lord Wilberforce, that discretionary decisions taken within the ambit of a particular statute are not capable of founding a private law duty of care, is probably not in dispute. However, the issues of where to draw that line and how to do it are matters in which there is a wide divergence of opinion.

Bailey and Bowman argue220, for example, that the ordinary balancing procedures inherent in the common law principles of negligence are sufficiently flexible to deal with the issue of whether a decision is taken in the bona fide exercise of discretion and is therefore not justiciable by the courts. The writers argue that the policy/operational distinction is too blunt an instrument and "has proved inadequate for the purpose of identifying the allegedly non-justiciable cases at a preliminary stage, and unhelpful in dealing with them on the merits."221 As can be seen from the Canadian cases involving road inspection, diametrically opposite judgments can result from differing definitions of these vague terms. Bailey and Bowman no doubt have a point, in that the content and

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219 British examples include Part 1 of the Consumer Protection Act 1987, c. 43 and the Animals (Scotland) Act 1987, c. 9.
boundaries of the terms "policy" and "operation" are dependant almost entirely on one's concept of the scope of the legitimate statutory discretion. If "policy" means an exercise of discretion within the scope of a particular statute, then the distinction is fair, but that does not change the fact that the distinction provides little assistance in ascertaining what is a \textit{bona fide} exercise of discretion and what is not.

Drawing an analogy to the standards required of a professional exercising due skill, Todd argues that the relevant question which requires to be answered in assessing whether a common law duty of care should attach to the conduct of a public authority is "\textit{whether a decision was within the ambit of the relevant discretion or was reasonably open to the defendant or, conversely, whether it was outside the range of decisions that a reasonable person charged with the activity in question could have made}"\textsuperscript{222}. As will be explored below, however, critics would argue that this approach remains an example of judicial legislation, in that the courts are substituting their own judgment of what constitutes a reasonable decision for that of the persons to whom the legislature has devolved that task. Where there is a statutory discretion whether or not to act, it is difficult to argue that, absent some persuasive circumstance which would point towards requiring action, a plaintiff should be entitled to require the discretion to be exercised in their favour.

Critics who argue for a wide ranging government immunity with regard to the exercise of statutory powers maintain that are there good reasons for the courts to deny actions against public defendants \textit{because they are public} defendants. The Canadian courts, after all, have acknowledged that "\textit{the Crown ....must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions.}"\textsuperscript{223} But is this possible while remaining true to Lord Wilberforce's endorsement of review of governmental decisions as a means to establishing whether "proper consideration" had been given to whether or not to act? Various arguments have been made to the effect that the Canadian courts have gone too far in their willingness

\textsuperscript{221} ibid at p. 455
\textsuperscript{222} Todd, supra note 9 at p. 47
to allow the conduct of public authorities to be subject to a private law duty of care. Critics complain that, in effect, the government has become something akin to an insurer against “risks that ought, as a matter of policy, to lie where they fall in a complex administrative state”\textsuperscript{224}.

Feldthusen argues that the development of the policy/operational distinction by the Canadian courts has been conducted on the basis of a misinterpretation of \textit{Anns}, in that he takes Lord Wilberforce to mean that “\textit{the bona fide exercise of statutory discretion, even in the context of policy implementation, is immune from negligence law}”\textsuperscript{225}. Thus, in the opinion of Feldthusen, the approach of the Supreme Court of Canada in cases such as \textit{Just} has been incorrect in tending to conclude that immunity is lost once the operational stage of a higher level planning decision begins, irrespective of further discretionary decisions which require to be made. If Feldthusen’s approach is correct, it would lead to a very wide immunity indeed, with only the most procedural of actions being subject to review. The main bases for Feldthusen’s argument are rooted in constitutional theory and require to be considered in turn.

The two main arguments which have been advanced in favour of an expansive doctrine of governmental immunity are based in constitutional theory and institutional competence. Cohen and Smith argue\textsuperscript{226} first that public authorities are creatures of statute which should be controlled in the exercise of their statutory functions by the legislature which created them. This is reflected in public law, whereby actions of public authorities can be judicially reviewed in terms of the scope of their powers, but not generally in terms of the grounds of their decisions. If the substantive decisions of public authorities were subject to review by the courts, the courts would be substituting their policy decisions for those of the bodies which have been democratically elected to make such decisions.

\textsuperscript{223} \textit{Just}, supra note 176, at p. 1239
Public authorities are engaged in activities which involve decisions of resource allocation, which Cohen and Smith argue the courts are institutionally incompetent to review. Commentators who seek to use private law principles to analyze the conduct of public authorities fail to acknowledge the unique nature of the state. Private parties do not confer discretionary public benefits. If a private party is unable to take part in a particular field of activity, it can refrain from acting. This is sometimes described as the “deterrent effect” of tort law. Public bodies with statutory duties simply do not have the luxury of refraining from acting in a particular area. Given the scope of its responsibilities, the state is involved in polycentric disputes, the resolution of which will invariably involve the setting of priorities and the balancing of numerous competing societal interests. Cohen and Smith cite a large number of factors which the state takes into account when resolving such disputes and conclude that the “the traditional bilateral dispute-resolution process carried on in courts is ill-suited to deal adequately with legislative and many bureaucratic activities of this sort.”

It is difficult to argue with the proposition that decisions of public authorities to allocate resources to one purpose rather than another should not be actionable in negligence. For example, if more money is spent on libraries at the expense of the fire brigade, it would not be justifiable in a modern democratic state to allow recovery against the government on the basis that the fire brigade was inadequately resourced and, but for such inadequacy they would be in a position to respond more promptly to emergency calls. However, critics such as Feldthussen and Cohen and Smith would advocate a

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227 ibid at p. 8
228 ibid at p. 8. The authors also cite a number of additional reasons why private law negligence principles do not have an easy application to public authorities. Traditional negligence law operates on a series of economic assumptions related to private sector parties, such as the effect of deterrence, and the assumption that parties conduct their affairs with a view to maximizing short-term shareholder profit. The ability of the state to set the rules in which it operates has no parallel in the private market and makes these traditional assumptions to public authorities inapplicable. In addition, the nature of the activities carried on by public authorities is very different to that of private actors. Socially accepted state activity may blatantly injure the interests of private citizens in order to confer benefits on others, a right which has no ready parallel in the private sector.
governmental immunity which would protect the ineptitude of public authorities from action in circumstances which had little to do with the making of genuine discretionary decisions. While it is entirely justifiable for broad policy decisions within the scope of the applicable statute to be protected from liability in tort, it is also entirely justifiable to provide for the establishment of a duty of care in circumstances where foreseeable harm has been caused by a decision is taken which has little to do with resource allocation or the genuine discretion afforded by the statute. It is essential, however, to establish principles in replacement of or in addition to the policy/operational distinction in order to demarcate the boundaries of justifiable governmental discretion.

Commentators who have argued against a wide concept of government immunity from tort actions have criticized the policy/operational distinction as the touchstone of the establishment of a duty of care. Smillie maintains that Lord Wilberforce in Anns envisaged an enquiry based entirely on the consideration of whether governmental conduct had been undertaken within the limits of statutory discretion\textsuperscript{229}. This is the case irrespective of whether or not the conduct involved “policy” matters or “operational” matters. In other words, “instead of treating the term “discretionary” as a conclusory label for government action which attracts a complete immunity from liability for negligence, Lord Wilberforce uses the term merely to recognize a statutory capacity for choice which gives rise to a further judicial inquiry into whether that power of choice has been exercised within express or implied statutory limits”\textsuperscript{230}. In conclusion, Smillie recommends an approach where the negligence inquiry would be confined to consideration of the reasonableness of the reasoning process, not the substance of the policy itself\textsuperscript{231}. Relevant factors relating to resource allocation could be taken into consideration by the courts and the duty owed by the public authority “would be limited to taking reasonable care to pay due regard to any relevant statutory consideration intended by the legislation to represent the plaintiff’s interest”\textsuperscript{232}. This construction finds favour in the majority opinion of Cory J. in Just, when he states that the Court

\textsuperscript{230} ibid at p. 220
\textsuperscript{231} ibid at p. 221
\textsuperscript{232} ibid at p. 221
would not accept as immune from challenge “a system that called for the inspection of the roads in a large urban municipality once every five years. Once a policy to inspect is established then it must be open to a litigant to attack the system as not having been adopted in a bona fide exercise of discretion and to demonstrate that in all the circumstances, including budgetary restraints, it is appropriate for a court to make a finding on the issue”\(^{233}\).

While he was in the minority, Lord Nicholls in \textit{Stovin v. Wise} provided a persuasive approach to public authority negligence. Throughout his opinion runs a feeling that the citizen is entitled to expect a decent level of service from their public authorities. Public authorities are vested with statutory powers, and where the exercise of these powers fails to live up to the reasonable expectations of the public, causing harm, the damnified individual should be entitled to sue in negligence. Such a position is in stark contrast to the general approach of the English courts in the last 25 years, but can be particularly contrasted with the extreme approach of Lord Hoffmann in the same case.

While Lord Hoffmann’s approach was not entirely unexpected, given the attitude displayed by the English courts to public authority negligence, his requirement that the establishment of a duty of care actionable in damages would have to be envisaged by the statute is difficult to support. Since one is considered in cases such as \textit{Stovin v. Wise} with the imposition of a common law duty of care rather than breach of a statutory duty, the approach of the statute to the issue of compensation would seem to be fairly irrelevant. Even if one subscribes to Lord Hoffmann’s view that public law irrationality is required, once that hurdle is crossed, it should be possible to found a duty of care if the constituent elements of the \textit{Caparo} criteria are satisfied.

Lord Nicholls notes that “proximity” is not “\textit{legal shorthand for a concept with its own, objectively identifiable characteristics. Proximity is convenient shorthand for a relationship between two parties which makes it fair and reasonable that one should} \(^{233}\) \textit{ibid at p. 221} \(^{233}\) \textit{supra note 176 at pp. 1238 - 1239}
owe the other a duty of care."\textsuperscript{234} His Lordship paints \textit{Anns} as a response to "growing unease over the inability of public law, in some instances, to afford a remedy matching the wrong. Individuals may suffer loss through the carelessness of public bodies in carrying out their statutory functions. Sometimes this evokes an intuitive response that the authority ought to make good the loss. The damnified individual was entitled to expect better from a public body. Leaving the loss to lie where it falls is not always an acceptable outcome."\textsuperscript{235} While these sentiments may ring true with many who become frustrated at what they see as public sector inefficiency, it is difficult to see how cases such as \textit{Stovin v. Wise} can provide the necessary proximity to justify the establishment of a duty of care. Lord Nicholls proceeds to discuss the failure of the local authority to "discharge its statutory responsibilities with reasonable care."\textsuperscript{236} But there was a statutory discretion whether to act, not a duty to do so. Thus, the logical leap from governmental choice to governmental responsibility seems difficult to justify.

With regard to the standard to be used to ascertain the level at which governmental decisions become reviewable by the courts in public law, however, Lord Nicholls makes some very good points. In discussing cases (including \textit{Anns}) which have identified a no-go area for duties of care, Lord Nicholls notes that such an "exclusionary approach presupposes an identifiable boundary, between policy and other decisions, corresponding to a perceived impossibility for the court to handle policy decisions. But the boundary is elusive, because the distinction is artificial, and an area of blanket immunity seems undesirable and unnecessary. It is undesirable in principle that in respect of certain types of decisions the possibility of a concurrent common law duty should be absolutely barred, whatever the circumstances. An excluded zone is also unnecessary, because no statutory power is inherently immune from judicial review."\textsuperscript{237} Rather, Lord Nicholls advocates a more open-ended approach, whereby, as the part played by broad discretionary characteristics in the exercise of power grows, the less readily would a common law duty be superimposed.

\begin{footnotesize}
\textsuperscript{234} \textit{Stovin v. Wise}, supra note 146 at p. 932
\textsuperscript{235} ibid at p. 933
\textsuperscript{236} ibid at p. 933 (emphasis added)
\textsuperscript{237} ibid at p. 938
\end{footnotesize}
One of the main problems with trying to establish a general approach to public sector negligence with regard to failures to exercise statutory powers is that the nature of public bodies, as well as the form of the statutes which govern their powers and duties vary infinitely. However, the difficulty in establishing consistent and justifiable principles must not stand in the way of ensuring that our public authorities are denied the right to act negligently with regard to matters which are fundamentally important to our lives, while being given ample scope to exercise powers provided by Parliament. Even Lord Browne-Wilkinson admits to having difficulty with the question as to why "a grossly delinquent authority [should] escape liability."238 As Lord Nicholls stated, public law does not always provide an appropriate remedy for an unjustifiable exercise of statutory power.

A context-sensitive approach must surely therefore be mandated, one which protects public authorities from unjustified actions, but at the same time enables the citizen to recover from the government in circumstances where he or she was reasonably entitled to expect a public authority to exercise a power, and has suffered loss or damage as a result of the failure of the public authority to do so. First, however, the courts must convince themselves that it is appropriate for them to review the decisions of governmental bodies. The courts in Canada do not appear to have a problem doing so, and in England, the courts have little or no problem with judicially reviewing administrative decisions on grounds of public law irrationality. So why should it be so different in the realm of establishing a private law duty of care?

The context-sensitive approach advocated, based upon Lord Atkin's famous approach to neighbourhood239, while taking into account the peculiarities of the function of public

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238 X (minors), supra note 158 at p. 761
239 In Donoghue v. Stevenson, supra note 15, Lord Atkin famously stated (at p. 580) "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation
authorities, would appear to protect the individual from arbitrary or unjustified failure to exercise statutory discretion, while also protecting the public authority (and therefore society) from the cost of unjustified legal actions. The conduct of public authorities surrounding a particular factual situation is often a maze of acts, omissions, policy decisions at varying levels of authority and operational actions. Whether a duty of care in private law is formed, therefore, is a question which can only be answered in light of the form and content of the governing legislation, the nature of the public body and the factual circumstances of the case.

In cases such as Capital and Counties, public authorities are clearly subject to a duty of care where they undertake a particular activity and then proceed to make matters worse, causing loss. However, proceeding to make matters worse may be a result of failing to do a particular thing in circumstances where that action is called for. In other words, it is arguable that the extent to which the authority owes a prima facie duty to the plaintiff should be largely dependant on the relationship between the parties. While this factor is important, it is only so in the context of the wider factual matrix, which establishes whether it is reasonable to require a particular action to be undertaken.

Cases involving a requirement that a particular statutory discretion be exercised are more troublesome. As the Canadian trilogy of Just, Brown and Swinamer show, the usefulness of the policy/operational test is severely restricted by the fact that the distinction between policy and operation is often illusory. In short, the application of the policy/operational test is not conducive to consistent decision making. Rather, the preferable approach is to first consider the proximity of the parties and the foreseeability of harm. Unlike negligence actions between private parties, however, there is the additional hurdle of ascertaining whether a failure to act is within the justifiable bounds of statutory discretion. This is an inquiry which is dependant partly on the terms of the statute, but also on whether it would be prima facie unreasonable (ie irrational in the public law sense) to exercise the discretion in the circumstances of the case. It is at this

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*as being so affected when I am directing my mind to the acts or omissions which are called into question.* (emphasis added)
stage that it is appropriate to consider all relevant policy factors in order to ascertain in all the facts of the case whether a duty of care should be owed.

Like Lord Nicholls, I share the opinion that carelessness on the part of public authorities should result in a remedy to match the wrong. In cases where damage has been caused, the remedies afforded by public law often simply do not provide satisfaction. The difficulty in stating principles of general application results from the fact that the situations which would call for their application are infinitely varied. The courts should approach the subject, not with a preconceived intention of restricting public sector liability just because the case involves an element of statutory discretion, but rather with a mind to analyzing the statutory and factual context in order to establish whether or not the plaintiff should be permitted to recover for the damage caused.

3.6 Liability of the Police for Negligently Handled Investigations

It cannot be doubted that the police, like many other public authorities have an extremely difficult job to do. Criminals are becoming more and more sophisticated and the police are being put under pressure to "deliver" by an increasingly consumerist public. In addition, the police are under increasing pressure with regard to the justification of expenditure and the use of manpower. But is it not also true that the law should promote the public's vested interest in the effective discharge of police functions? And is it not fair to say that the public is entitled to responsible decision-making on the part of the public authorities which act on its behalf? Lords Keith and Templeman would argue that such considerations lie behind their policy statements in Hill. But Lords Keith and Templeman do not propose an answer to the question of how to police the police. In fact, the recent British reliance on internal police inquiries rather than court proceedings has, if anything, shown that the effective removal of the threat of law suits from the police is not having the desired effect. Indeed, as Hoyano

240 On this subject, see Weiler: "Who Shall Watch the Watchmen? Reflections on Some Recent Literature About the Police" (1969) 11 Crim. Law Quart. 420

241 Hoyano, supra note 173, cites the recent criticism made by the judicial inquiry regarding the police investigation into the death of Stephen Lawrence, a black teenager, allegedly at the hands of a
points out, the “confidence of the House of Lords in the unfailing ‘best endeavours’ of the CID in all cases may seem somewhat naïve in retrospect, after the findings of endemic incompetence and institutional racism in the Metropolitan Police by the recent judicial inquiry into the Stephen Lawrence murder investigation.”

If there are public policy concerns which militate towards allowing the police exemption from negligence actions on the basis that such actions would divert time, money and effort away from their statutory functions, surely there are equally convincing public policy arguments to the effect that such actions may be necessary to ensure that decisions are made responsibly and efficiently. At the Court of Appeal stage in Home Office v. Dorset Yacht Co. Ltd. Phillimore L.J. asked rhetorically “How can it be public policy that government servants should be free from liability if they exercise their duties negligently? It is public policy that they should exercise them with proper care.” In addition, Sossin has argued that “attaching less immunity to the position of a public official leads to more accountability, and ultimately to more public trust in both the person occupying that position and the position itself.” It is quite correct to state that individuals in society are not entitled to demand that a particular statutory discretion be exercised in their favour, for Parliament has afforded the relevant public authority a choice which is made on the basis of a whole host of factors, including cost. It is surely arguable that carelessness, decisions made for an improper purpose or a failure to consider whether or not to exercise the discretion were not envisaged by Parliament and should be capable of founding a duty of care.

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group of white men: “Experience from the Stephen Lawrence enquiry has taught us that ‘in-house’ post-mortems may lack the zeal of the adversarial trial process, the vision and objectivity to perceive misconceptions and attitudes which distort investigative practices, and the will to aspire to new standards of competence.” (at p. 933). It took 4 years of intense lobbying by the Lawrence family to force a public enquiry, which eventually delivered a damning indictment of the Kent Police investigation, (see Sir William MacPherson of Cluny: “The Stephen Lawrence Inquiry” (London: H.M.S.O., 1999) Cm 4262-I)

Hoyano, supra note 173 at pp. 932-933.

ibid, at p. 435

It is at least arguable that subjection of governmental decision making to such scrutiny encourages clear and responsible decision making. If by “defensive attitudes”, critics mean that public authorities will be forced to give due consideration to the exercise of all statutory discretions, then the encouragement of “defensive attitudes” would be seen by many as a good thing. As Linden has stated, “occasional tort suits... may remind the police that, even if they escape disciplinary or criminal proceedings for their misconduct, they may be answerable in a civil suit for their abuse of power. This cannot help but render the police more cautious and responsive to the interests of the individuals with whom they must deal in their everyday work.”

It is true to say that governments are involved in a financial juggling act whereby some services will gain and some will suffer, depending on the circumstances, but this is not a sufficient reason to protect the government from having to defend in an open forum a decision to exercise or not exercise a particular discretion. Statutory powers are designed to give public authorities discretion regarding the means chosen to discharge their public duties, they are not designed to give public authorities a license to act carelessly or for improper purposes. As Williams has stated “the degree by which power will inevitably be abused... varies inversely with the degree of public accountability.”

One notable factor about the Jane Doe (2) judgment is that the exercise of discretion by the police was not pigeon-holed as one of “policy” or one of “operation”. Rather, it shows that a tort analysis can proceed on the basis of consideration of statutory and common law powers and duties, foreseeability of harm, proximity of the parties and any relevant public policy considerations. The decision not to issue a warning was clearly an exercise of discretion, but it was not towards what Lord Wilberforce would term the “policy end of the spectrum” and did not deal with any of the issues which were pointed out by Cory J. in Just as being the hallmarks of a “policy” decision. Although


248 See supra note 190
virtually all police discretionary decisions are affected by restrictions on resources, this was a tactical decision which was shown to be based on clearly flawed and based on both incomplete information and unjustifiable sexist attitudes.

The Jane Doe case can be seen to be important to the extent that it signifies a willingness on the part of the judiciary to subject administrative decisions of police officers to tort law scrutiny. However, as Childs and Ceyssens state, there is still some way to go before we can accurately ascertain where the boundaries of police duties to warn lie. "Doe provides little guidance to police and their governing bodies in discharging this new-found duty to warn potential victims of crime. There are several issues that must be resolved. What is the extent of that duty? How far must police go to seek out potential victims and ensure the message is heard? What level of information in police hands will trigger the duty?" 249

Insofar as one can take the Jane Doe case as representing the law of Canada on the appropriateness of judicial involvement in the review of police investigations, the standpoint of the Canadian and English courts on the issue can be sharply contrasted. While it is appropriate to take public policy factors into account, this should be done as part of a wider consideration of the statutory and factual context, not by means of creating a blanket immunity from suit. The contextual approach, evaluating the nature of duties required by statute and considering issues of proximity, foreseeability and policy would appear to be a more sensitive and responsive way to treat such an important issue, and would also be seen to be more in line with the benchmark cases of Donoghue v. Stevenson, Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd250 and Dorset Yacht.

The driver behind the House of Lords' wish to confer a sweeping immunity on the police in Hill was the need to avoid the diversion of police time, money and effort away from policing and towards the defence of law suits. It is far from clear, however, that


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subjecting police investigations to an ordinary tort analysis will create a litigation crisis for the law enforcement community. Indeed, empirical research conducted in England in light of the decision of the Court of Appeal in *Capital & Counties* indicated that, far from uniformly encouraging "defensive practice", many of the English fire brigades studied had reacted in a positive way to the imposition of a duty of care on the fire brigade in that case[^251]. Further, as I will explain, there are convincing policy reasons why exercises of police discretion *should* be reviewable by the courts.

In order to establish a duty of care on the part of the police, a plaintiff must show first that they acted outwith the scope of their discretion. The plaintiff must also show that there was a foreseeable risk of harm and a proximity of relationship with the police. Showing proximity will in itself be very difficult in most cases, and will prove fatal to the vast majority of cases where the victim, as in *Hill* is one of a large number of potential targets. It will also be open to the defendants to show that there are other public policy reasons why a duty of care should not be imposed. Once the duty of care stage is passed, the plaintiff is still required to show causation and breach of duty. Causation in particular may prove difficult on the basis that the court will require to be convinced that the damage would not have materialized had the requested action been implemented.

All of this shows that there are many hurdles which the plaintiff will be required to cross before his or her case is proved, and also that there are plenty of safeguards in the tort process against an unjustified "open season" on public authorities. As Henry J. stated in *Jane Doe (1)*, actions such as these are by their very nature self-limiting, as "they can only validly be launched in very special circumstances."[^252]

[^250]: [1964] A.C. 465
[^251]: J. Hartshorne, N. Smith and R. Everton, "*Caparo Under Fire: A Study Into the Effects Upon the Fire Service of Liability in Negligence*" (2000) 63 M. L. R. 502. The authors state at p. 517 that "This issue of increased accountability, a need to be more diligent, and an emphasis on the need to maintain high standards are themes that resonate throughout these questionnaires."
[^252]: *Jane Doe (1)*, supra note 211 at p. 430
But as well as the legal limitations of such actions, there are convincing social reasons why police investigations should be reviewable by the courts. The fact that the Osman case displayed a series of contradicting accounts between the plaintiff and defendant served in many ways to show the carelessness with which the police had handled the case. Objective facts were difficult to ascertain, due to the absence of police notes as to the existence of statements, logging of telephone calls and the like. In many cases it was alleged that important messages had not been passed on to the relevant people and that important events had been ignored. Even after the decision had been made to arrest the suspect, it was alleged that efforts made to follow up leads and capture the suspect were lackadaisical and ineffective. Would removing the threat of litigation from the police remove inefficiencies and encourage responsible decision making? It is doubtful. Yet this is precisely the reasoning which led the House of Lords in Hill to confer its policy of immunity.

In Jane Doe, the complaint was that police had made a decision not to inform women of imminent danger as a result of improper purposes and stereotyped views. Is a policy of blanket immunity likely to increase the chances of more thorough investigation of facts or lower the likelihood of institutional sexism and racism? Again, it is doubtful. The question must be asked "Why must it be detrimental to open closed investigations to ascertain whether they have been competently conducted, if lessons could be learned for future investigations?"253

Hoyano argues that in Canada "civil litigation against the police has helped to reinforce recognition of the need for greater public accountability, and for enhanced access of police officers to formal legal training and to legal advice with regard to specific investigations."254 This, she argues is a better way to bring police conduct under prompt judicial scrutiny than the more "tortuous and uncertain"255 course of political lobbying for a judicial enquiry which complainants have been compelled to follow in England.

253 Hoyano, supra note 173 at p. 932
254 ibid. at p. 931. With regard to the effect that judicial review of police investigations has had on police investigatory and training methods, see Childs and Ceyssens, supra note 249
255 ibid. at p. 931
Tort law appears to be regarded in Canada, more than in England as an "instrument of public policy, which appropriately establishes reasonable standards of conduct, not just for private citizens, but also for those charged with public functions." \(^{256}\)

It is common practice in the criminal courts to see close scrutiny of police investigations to ensure that the due process rights of suspects have been respected and the rules of evidence adhered to. In such cases, it is unthinkable that the courts would just accept that all relevant procedures had been undertaken and refuse to scrutinize police conduct on grounds that it is good policy to avoid "defensive policing". It is also true that the civil courts do not shy away from adjudicating intentional torts against police defendants. So it is difficult to see any convincing reasons why the rules should be different for police negligence claims.

As a society, it is in our interests for the law to reflect the need for our public officials to display the highest levels of integrity. As Linden has stated, "Tort law performs a valuable function in seeking to control the conduct of the police. That this task is thought to be of critical import to society is witnessed by the number of special studies that have been commissioned on the question in the last few years." \(^{257}\) With any principle of blanket indemnity, however, "the fundamental principle of accountability which underpins tort law is eroded." \(^{258}\) One of the most pressing concerns which the European Court of Human Rights had with the English system was the absence in practical terms of the right to "have the police account for their actions and omissions in adversarial proceedings." \(^{259}\) After ten years, the Osman family were still waiting for answers as to why the police did not act more effectively or sooner in protecting them from attack. While a negligence action may not ultimately have succeeded on the merits, they may have been a little closer to obtaining those answers.

\(^{256}\) ibid. at p. 932  
\(^{257}\) Linden, supra note 246 at p. 71  
\(^{258}\) Hoyano, supra note 173 at p. 933  
\(^{259}\) Osman, supra note 68 at para. 153
It must be remembered that, no matter how useful the tort system may be perceived to be in “policing the police”, it is always open to Parliament to remove any public body from the scope of common law negligence actions. Practically every negligence action involving a public authority begins with an analysis of the scope and nature of the powers and duties of the authority under its governing legislation. A clear exclusion of negligence liability will be a complete defence.

Notwithstanding the positive approach of the Canadian courts in subjecting police conduct to judicial scrutiny in the realm of tort, it is my intention to explore the possibility of scrutinizing allegedly defective police investigations through a different avenue: by utilization of the Charter of Rights and Freedoms.
4. DOES THE CHARTER REQUIRE THE PROTECTION OF THE INDIVIDUAL FROM THIRD PARTY HARM?

In Chapters 2 and 3, the role of tort law and international human rights law has been examined with regard to requiring executive (and in particular, police) action. In this Chapter, the role of the Charter of Rights and Freedoms and in particular the development of the Charter with regard to imposing positive obligations on government is considered. The general approach of the Court to alleged violations of s. 7’s protection of the right to security of the person will be considered, followed by an examination of the propriety of this approach when applied to situations where the individual may require protection from the state (and in particular the police) where threatened with physical harm.

4.1 Applying the Charter to Failures to Act

The Charter was enacted in 1982 with the primary goal of protecting the fundamental rights and freedoms of the individual from unjustified state interference. Interference in this sense was often taken to be limited to state action, mainly in the form of offending federal or provincial legislation, which would encroach on the individual’s Charter rights. The state has awesome power when compared with the individual, and the right of the individual not to have his or her rights trampled by powerful government was perhaps foremost in Pierre Trudeau’s mind when he stated that a “constitutional bill of rights in Canada would guarantee the fundamental freedoms of the individual from interference, whether federal or provincial.”

Such an approach has at times been reflected in the language of the Supreme Court of Canada. In an early Charter case, Dickson J. (as he then was) stated that the Charter’s purpose “is to guarantee and to protect, within the limits of reason, the

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261 Hunter v. Southam Inc. [1984] 2 S. C. R. 145
enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms. In McKinney v. University of Guelph, La Forest J., in emphasizing the reasons why the Charter applies to government and not to individuals stated that "Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual." This is consistent with classic liberalist theory, which is often taken to be the philosophical underpinning for the protection of individual rights. Such theory would hold that the individual has a set of inviolable rights which the state is not constitutionally entitled to curtail by its action. Since liberalist theory concerns the right of the individual to act as he or she pleases subject only to certain justifiable restrictions, it is perhaps difficult to conceive of an individual right which could compel governmental action.

However, a review of the text of the Charter leads to the conclusion that certain rights actually require positive action on the part of the government. For example, s. 23 states that Canadian citizens have the right to have their children educated in either French or English and, where numbers warrant, the right to the provision of minority education facilities funded by the public purse. The right to public funding of minority languages education clearly calls for positive public action. Such an interpretation of s. 23 has been reinforced by the Supreme Court of Canada in Mahe v. Alberta and Arsenault-Cameron v. Prince Edward Island. Whilst there is only a right to public funding of minority education facilities where numbers warrant, Major and Bastarache JJ. stated in Arsenault-Cameron that "Section 23 imposes a constitutional duty on the province to provide official minority language education to children of s. 23 parents where the numbers warrant. ... Section 23 ...mandates that provincial governments do whatever is practicably possible to preserve and promote minority language education." In both

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262 ibid at p. 156 (emphasis added)
263 [1990] 3 S. C. R. 229
264 ibid at p. 262 (emphasis added)
265 [1990] 1 S. C. R. 342 (hereinafter “Mahe”)
266 [2000] 1 S. C. R. 3 (hereinafter “Arsenault-Cameron”)
267 ibid at pp. 24 - 25
Mahe and Arsenault-Cameron the Supreme Court of Canada overturned more restrictive interpretations of s. 23 by lower courts and ruled that both a failure to allow minority language parents “management and control” of their children’s education (Mahe) and an executive decision not to establish a minority language school, despite there being sufficient demand (Arsenault-Cameron) were unconstitutional.

Also on the subject of language, Sections 16 through 20 impose further positive obligations on the state, including an obligation to print the statutes, records and journals of Parliament and the legislature in both English and French. s. 10 requires that an individual be informed of his rights when arrested or detained and s. 14 requires the provision of an interpreter where an accused person does not understand or speak the language in which the proceedings are conducted. By necessary implication, a number of other rights, such as the s. 3 right to vote in elections and the s. 11 right to a fair trial require the expenditure of funds.

There are, therefore, clear textual indications that the Charter was not intended to be a civil rights instrument based purely on liberalist theory. Indeed, s. 32 which sets out the persons who are subject to the Charter’s terms, refers merely to “the Parliament and government of Canada in respect of all matters within the authority of Parliament” and to “the legislature and government of each province in respect of all matters within the authority of the legislature of each province”, not to the acts of such bodies. On this point, Dianne Pothier has noted that “Section 32 is worded broadly enough to cover positive obligations on a legislature such that the Charter will be engaged even if the legislature refuses to exercise its authority”.

Thus, in light of the text of the Charter, it is difficult to support a contention that the Charter works purely as a restraining device on governmental action. Beyond the rights which explicitly or by necessary implication require governmental action, though, the

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268 s. 32(1)(a) of the Charter
269 s. 32(1)(b) of the Charter
question of whether individual rights can require governmental action depends largely on the courts’ interpretation of the scope of the rights enshrined in the Charter, and indeed, on their general approach to the constitutional relationship and interface between government, the legislature and the courts.

It has been suggested that the Charter’s constitutional context and philosophical underpinnings point away from a restrictive liberal interpretation of Charter rights. While liberalist philosophies no doubt inform the interpretation of the Charter, it is only one of a number of influences. Indeed “[i]t would be surprising ..if a document enacted in 1982 were a pure reflection of liberal thinkers such as Locke and Jefferson.” Such a view has been echoed by David Beatty, who has stated that “in law, and at their core, rights are not so much about insulating highly individualized and discrete spheres of private autonomy from any public supervision or control as they are about basic obligations that politicians and their officials must meet when they invoke the constitutional authority of the state and the sovereignty of the people to infuse their political platforms with the coercive force of law.” In addition, government has always been viewed in Canada as having a “nation-building role that goes beyond the narrow function of preserving common-law rights and ensuring public morals and safety.” On the same theme, Jackman has argued that “Canadians not only recognize that there is no necessary contradiction between individual freedom and state power, but expect governments to act affirmatively to support and maintain individual freedom, by providing the means for its exercise.” The communitarian goals of the Charter’s section on language rights certainly seems to give support to this statement.

Black has suggested that “the recognition of positive obligations under the Charter is consistent with the historical Canadian view about the role of government in society. It also reflects the affirmative nature of the rights incorporated in the Charter. Positive

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274 Black, supra note 272 at p. 300
remedies requiring the extension of government benefits and programs are essential if
we are to adhere to the principle that governments should not be allowed to act with
impunity in an unconstitutional manner.”276 In another article, Black argues that the
application of the Charter to underinclusive legislation is essential in order to give the
equality rights in s. 15 proper effect277. This view echoes that of David Beatty when he
stated that “[as] rules of constitutional law, rights protect a person’s autonomy and
integrity by prohibiting anyone who exercises any power of the state from acting in... a
zealous, overbearing and disrespectful way.”278

In recent years, the Supreme Court of Canada has considered the nature of positive
obligations under the Charter and has refused to give a narrow interpretation of the
nature and scope of the rights in question. The Court has, however, been criticized for
acting beyond its powers in a way which unjustifiably restricts the role of the
legislature279, and has recently been divided on the extent to which the Charter can be
used to review decisions made by the legislature with regard to the allocation of
resources within society amongst competing claims.

In Eldridge v. British Columbia (Attorney General)280, the plaintiffs argued that a
failure to provide hearing interpretation services to hearing-impaired patients violated
their equality rights under s. 15 of the Charter. At the outset, La Forest J., delivering the
judgment of a unanimous Court, stated that “a constitution incorporating a bill of rights
calls for a generous interpretation avoiding what has been called the “austerity of
tabulated legalism” suitable to give to individuals the full measure of the fundamental
rights and freedoms referred to.”281

276 supra note 271 at p. 262
277 supra note 272 at p. 300
279 supra note 273 at p. 485
The British Columbia Court of Appeal had dismissed the plaintiffs’ case partly on the basis that the hospital provided equal care to deaf and hearing patients, and therefore any resultant obligation on deaf persons to pay for sign interpretation if they so required it was an inequality which existed "independently of the benefit provided by the State." The Court, however, felt that this mischaracterized the practical reality of healthcare delivery. Effective communication is an indispensable component of the delivery of medical services and therefore a failure to provide sign interpretation services as part of healthcare delivery denied deaf persons equal benefit of the law and discriminates against them in relation to hearing persons.

It is noteworthy that Eldridge concerns a failure to confer a benefit on a particular class of persons. While it is true that the government had acted in the sense that it provided healthcare services, the objectionable aspect of this service was clearly the fact that the public authority did not provide a particular benefit to a discrete group of disabled persons. While La Forest J. expressly refused to venture an answer to the question whether a violation of s. 15 could be constituted by a failure to act where the inequality was inherent in society and was not a direct result of the implementation of underinclusive legislation or policy, what is clear from the decision in Eldridge is that where the government “enters the fray”, it must do so in a way which respects the individual’s equality rights.

The following year in Vriend v. Alberta, the Supreme Court of Canada was called upon to consider the constitutionality of underinclusive provincial human rights legislation in Alberta. In general terms, the Individual’s Rights Protection Act prohibited discrimination in public notices, public accommodation, services or facilities, tenancy, employment or trade union membership on the basis of race, religion, colour, sex, physical or mental disability, age, ancestry or place of origin. Despite having received positive evaluations, promotions and salary increases, Delwin Vriend was dismissed from his position as a laboratory co-ordinator at King’s College, in Edmonton.

282 ibid at p. 676
shortly after disclosing the fact that he was homosexual to the President of the College. The sole reason given for the termination of Vriend's employment was his non-compliance with the policy of the College on homosexual practice. Vriend was not able to file a complaint against his employers based on the IRPA since sexual orientation was not a protected ground.

The Supreme Court of Canada dealt directly with the fact that the case dealt with a legislative omission rather than an act. The Court was unanimous in its view with regard to arguments that the court must defer to decisions of the legislature not to enact a particular provision. Cory J., with whom all members of the Court agreed on this point, was of the opinion that "[apart] from the very problematic distinction [that such arguments draw] between legislative action and inaction, this argument seeks to substantially alter the nature of considerations of legislative deference in Charter analysis... The notion of judicial deference should not... be used to completely immunize certain kinds of legislative decisions from Charter scrutiny." Rejecting the opposite view taken by the majority in the Alberta Court of Appeal, Cory J. was explicit in his recognition that legislative omissions were as susceptible to Charter review as legislative acts. It was not a question of the Court imposing on the legislature its view as to what constitutes "ideal legislation", but rather "of determining whether the challenged legislative act or omission is constitutional or not." If the relevant legislation excluded persons from protection in a way which offended the Charter's equality guarantees, the Court would be required to say so. Indeed, to "do less would be to undermine the Constitution and the rule of law."
Definitively, Cory J. states that the "application of the Charter is not restricted to situations where government actively encroaches on rights."\footnote{ibid at p. 533} In the opinion of the Court, such a position is required in order to safeguard the rights of the individual with regard to underinclusive legislation, as otherwise "legislation which was worded in such a way as to simply omit one class rather to explicitly exclude it would be immune from Charter challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. The result would be illogical and more importantly unfair. Therefore, where, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the Charter."\footnote{ibid at p. 533}

Having found that s.15 could apply to underinclusive legislation, and in light of the fact that sexual orientation had already been found by the Court to be protected by s.15 as an "analogous ground" in another case\footnote{Egan v. Canada [1995] 2 S. C. R. 513}, the Court then unanimously found that the failure to include sexual orientation as a protected ground in the \textit{IRPA} was a violation of the Charter's equality provisions which could not be justified as being demonstrably justified in a free and democratic society. As LaForest J. had done in \textit{Eldridge}\footnote{Eldridge, supra note 280 at p. 678}, Cory J. expressly left open the question of whether the \textit{Charter} could be used in other contexts to require legislative action\footnote{Vriend, supra note 283 at p. 534}.

In \textit{Dunmore v. Ontario (Attorney General)}\footnote{[2001] 3 S. C. R. 1016 (hereinafter "Dunmore")}, the Supreme Court was called upon to decide whether the \textit{Charter} right of freedom of association was violated by the repeal of protective labour relations legislation, which effectively reinstated clause 3(b) of the Ontario \textit{Labour Relations Act}\footnote{ibid at p. 533}, which excluded agricultural workers from the protection of that Act with regard to unionizing activity. In the opinion of Bastarache J., writing for 7 members of the Court, the question boiled down to whether "in order to make the freedom to organize meaningful, s. 2(d) of the Charter imposes a positive
obligation on the state to extend protective legislation to unprotected groups." While there was not found to be any right to protective legislation per se, "legislation that is underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom." The Court found such a "unique context" to exist in Dunmore, in that the exclusion of agricultural workers from labour relations protection made it practically impossible for such workers to engage in associational activities. With regard to positive obligations, the crucial point in Dunmore is that, despite the fact that the actual restrictions on associational activity were imposed by the (private) employers of workers, the state had an obligation to extend protective legislation to persons who otherwise would be effectively unable to assert their s. 2(d) rights.

In a separate concurring judgment, L’Heureux-Dube J. found a violation of s. 2(d) on somewhat simpler grounds. While s. 2(d) involved a “freedom” rather than a “right”, it was unduly restrictive to construe freedoms as involving an absence of interference or constraint. Rather, it should be acknowledged that an absence of “government intervention may in effect substantially impede the enjoyment of fundamental freedoms”. The Court has consistently adopted a purposive approach to the interpretation of Charter rights and this led L’Heureux-Dube J. to the conclusion that “a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action may be required.” Having noted that the Supreme Court had considered the purpose of s. 2(d) to be to “protect the collective pursuit of common goals”, and that the purpose of s. 3(b) of the Labour Relations Act was to prevent agricultural workers from unionizing,
L’Heureux-Dube J. concluded that the failure to protect the associational activities of agricultural workers was a violation of the rights enshrined in s. 2(d).

In a short dissenting opinion, Major J. was of the opinion that the Court had gone too far in recognizing a positive obligation on the state to protect the associational activities of agricultural workers. In his opinion, the organizational difficulties experienced by such workers were not caused by the state, and thus the state could not be held to be responsible for their effective inability to exercise a Charter freedom. Major J. did not have to consider whether there was a violation of the s. 15 equality rights of agricultural workers, as he did not consider that the group constituted an “analogous ground” under s. 15. Major J. did not comment on the factors which distinguished the case from Vriend, where he had found that the exclusion of sexual orientation as a protected ground under IRPA had engaged the responsibility of the state and had constituted a violation of s. 15, despite the fact that discrimination on grounds of sexual orientation was not strictly caused by the state. Perhaps Major J. regarded that underinclusive legislation could only be attacked under s. 15 of the Charter and not under other sections containing substantive rights, but there is nothing in his partly dissenting opinion in Vriend to give the impression that he took such a narrow view of the Charter’s application. In Vriend, Major J. wrote that the “inescapable conclusion is that there is no reason to exclude that group from s. 7 [of the IRPA] and I agree with Justices Cory and Iacobucci that to do so is discriminatory and offends their constitutional rights.” Nowhere in his opinion in Vriend does Major J. refer to the causes of discrimination. Rather, the important factor is the discriminatory effect of the underinclusive nature of the legislation. It is difficult to see any reason to make a distinction between legislation which excludes from protection workers on one hand and homosexuals on the other, where both suffer a violation of their constitutional rights as a consequence.

While Dunmore is similar to Eldridge and Vriend in that it deals with underinclusive legislation, it is significant in that all but one member of the Court conducted a

302 Vriend, supra note 283 at p. 585
contextual analysis of the right in question in order to come to a conclusion whether state inaction constituted a Charter violation. There is nothing in these judgments to indicate that such an analysis is confined to particular substantive rights, rather than the language of the majority it is apparent that the Court will consider whether government interference makes it practically impossible to exercise any right or freedom.

Very recently, in Gosselin v. Quebec (Attorney General)\textsuperscript{303}, the Supreme Court has been required to consider the extent to which the state can be required to guarantee a particular standard of living as a result of the Charter guarantee of the right to life, liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice. The case concerned the Regulation Respecting Social Aid\textsuperscript{304}, which amended the Quebec Social Aid Act\textsuperscript{305} in 1984 in the light of growing unemployment among young adults. The effect of the Regulation was to cap the levels of benefits available to individuals between the ages of 18 and 30, and to incentivize persons in that age range to undertake vocational training by increasing benefits conditional on participation in such programs.

The legislation was attacked on the basis that it established a discriminatory distinction between individuals based on age (a protected ground under s. 15 of the Charter), contrary to the Charter’s equality guarantees, and also on the basis that the right to security of the person enshrined in s. 7 of the Charter entailed a right to a particular level of income.

With regard to the s. 15 argument, the Court held by a 5 to 4 majority that the legislation, when viewed in context, did not deny human dignity or treat the subject as being less worthy on one of the s. 15 enumerated or analogous grounds and thus, could not violate the Charter’s equality provisions. Quoting Iacobucci J. in Law v. Canada (Minister of Employment and Immigration)\textsuperscript{306}, McLachlin C. J. stated that the purpose

\textsuperscript{303} 2002 S. C. C. 84 (hereinafter “Gosselin”)
\textsuperscript{304} R. R. Q., c. A-16, r. 1
\textsuperscript{305} R. S. Q., c. A-16
\textsuperscript{306} [1999] 1 S. C. R. 497 at p. 525
of s. 15 was to “prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.” However, not every adverse distinction made on the basis of an analogous or enumerated ground would violate s. 15. Indeed, some such distinctions may actually contribute to the promotion of substantive equality. In the circumstances of the case, the majority considered that, while the legislation did not correspond perfectly to Miss Gosselin’s personal circumstances, it had the purpose of trying to encourage people to become self-sufficient and was “consonant with her human dignity and freedom”. The legislation, therefore did not violate s. 15 of the Charter.

The importance of Gosselin with regard to the debate on positive obligations, however, was with regard to the s. 7 argument. The argument advanced by Miss Gosselin would stretch the concept of positive obligations beyond anything the Supreme Court had hitherto allowed. If the Court agreed with Miss Gosselin, the state would be required to provide a particular level of income to persons in order to ensure their security of the person, irrespective of benefits given to other people. This would take the positive obligations debate outwith the realm of “underinclusiveness” and would have a fundamental impact on governmental discretion with regard to the allocation of resources.

McLachlin C.J., again speaking for the majority, was of the opinion that the rights enshrined in s. 7 did not guarantee the type of benefits sought by Miss Gosselin. In the opinion of McLachlin C.J., the jurisprudence indicated that s. 7 did not “protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of

307 Gosselin, supra note 303 at para. 20
308 See Corbiere v. Canada (Minister of Indian and Northern Affairs) [1999] 2 S. C. R. 203
310 Gosselin, supra note 303 at para. 73
She considered whether the application of s. 7 should be extended in this case, but decided that it should not. McLachlin C.J. seems to be more restrictive in her approach to positive obligations under s. 7 than the majority of the Court were with regard to s. 2(d) in Dunmore, when she states that s. 7 "speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, it has been interpreted as restricting the state's ability to deprive people of these." While this seems to restrict the application of s. 7, both with respect to the sphere of its application (to matters relating to the administration of justice) and with respect to the propriety of using s. 7 as a basis for the imposition of positive obligations, it is noteworthy that on both fronts, McLachlin C.J. explicitly acknowledges that there may be situations in the future where a different interpretation may be appropriate, by stating that "[One] day s. 7 may be interpreted to include positive obligations... It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases."

Two members of the Court in Gosselin were, however, prepared to give s. 7 a more expansive interpretation than the majority. The opinions of Arbour J. and L'Heureux-Dube J. show a willingness to grapple with the thorny issue of whether s. 7 can be used to require a particular level of state action, where a failure to do so would result in a violation of the right to security of the person.

Arbour J. rejects the contention that s. 7 is limited to dealing with cases involving the administration of justice. In Winnipeg Child and Family Services v. K.L.W, the Court had held that parents' s. 7 rights had been affected by the apprehension of their child pursuant to legislative authority and in the absence of a judicial order. The crucial point was that "the apprehension itself was entirely disconnected from the justice system and

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311 ibid at para. 77
312 ibid at para. 81 (emphasis in the original)
313 ibid at para. 82
314 [2000] 2 S.C.R. 519
administration and simply involved implementation of a legislative provision by a
government official." In addition, Arbour J. finds the contention that the scope of s. 7
ingothts is restricted by the fact that it is found in the "Legal Rights" section of the
Charter to be unconvincing and contrary to the generous and purposive approach which
has consistently been adopted by the Court in interpreting Charter rights.

Moving on to the issue of whether s. 7 can be used to impose positive obligations on the
state, Arbour J. notes that the word "deprive" is "sufficiently broad to embrace
withholding that have the effect of erecting barriers in the way of the attainment of
some object." Further, the Supreme Court's decisions in the cases of New Brunswick
(Minister of Health) v. G(J) and Blencoe v. British Columbia (Human Rights
Commission) contained passages which supported the contention that state inaction
could engage s. 7. Having considered the role that s. 1 has to play in the interpretation
of the Charter, Arbour J. concludes that "every suitable approach to Charter
interpretation, including textual analysis, purposive analysis and contextual analysis,
mandates the conclusion that the s. 7 rights of life, liberty and security of the person
include a positive dimension."

It was also argued by the government that the Court was not institutionally competent to
consider issues of resource allocation. While Arbour J. agreed that the Courts are ill-
equipped to decide policy matters concerning resource allocation, the Court in Gosselin
was being required to answer the question "whether the state is under a positive
obligation to provide basic means of subsistence to those who cannot provide for
themselves.. The role of courts as interpreters of the Charter and guardians of its
fundamental freedoms against legislative or administrative infringements by the state

315 Gosselin, supra note 303 at para. 315
316 ibid at para. 317. In Big M Drug Mart, Dickson J. stated "The meaning of a right or freedom

guaranteed by the Charter [is] to be ascertained by an analysis of purpose of such a guarantee;
it [is] to be understood, in other words, in the light of the interests it [is] meant to protect."
317 ibid at para. 321
318 [1999] 3 S. C. R. 46 (hereinafter "New Brunswick v. G")
319 [2000] 2 S. C. R. 307 (hereinafter "Blencoe")
320 Gosselin, supra note 303 at para. 357

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requires them to adjudicate such rights based claims. In other words, the Court was not being asked to stipulate the level of subsistence that a person should be given, a question which Arbour J. agreed was non-justiciable. Rather, the question in this case was whether s. 7 of the Charter required that the state provide the level of subsistence which the state itself had stipulated as corresponding to the "ordinary needs" of recipients.

Arbour J. cites 3 criteria which require to be established in order to found a Charter claim based on a governmental failure to act. These are:

1. The claim must be grounded in a fundamental Charter right or freedom rather than in access to a particular statutory regime.
2. A proper evidentiary foundation must be provided, before creating a positive obligation under the Charter, by demonstrating that exclusion from the regime constitutes a substantial interference with exercise and fulfillment of a protected right.
3. It must be determined whether the state can truly be held accountable for any inability to exercise the right or freedom in question.

Arbour J. answered all 3 questions in the affirmative, and thus found a prima facie violation of the s. 7 right to security of the person. While the legislation may satisfy the "pressing and substantial purpose" requirement of the Oakes test, the legislation did not impair the rights in question as little as possible and therefore the prima facie violation could not be saved by s. 1.

4.2 Validity of Imposing Positive Obligations Under the Charter

As can be seen from these cases, the Supreme Court of Canada has shown itself to be willing not only to declare laws invalid which actively violate rights, but also to analyze failures to act which substantially interfere with the exercise of the rights and freedoms

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321 ibid. at para. 332
322 ibid. at para. 365
enshrined in the *Charter*. This judicial activism has, however, been characterized by some as “judicial imperialism” and as signalling the “legalization of politics”, with the judiciary using its role as the interpreter of the *Charter* as a means to amend legislation of which it does not approve. Such claims proceed on the basis that such judicial activism is undemocratic, in that the courts are controlling the scope of legislation in a way that unjustifiably impinges on the role of the democratically elected legislature. This, however, assumes a debatable definition of “democracy” and takes a narrow view of the rights enshrined in the *Charter*.

An expansive interpretation of *Charter* rights, with the courts reviewing legislative decisions to implement (or, as we have seen, not to implement) particular policies, diminishes democracy, in that the courts are “[thwarting] the will of representatives of the... people.” In the words of Iacobucci J., the argument proceeds on the basis that “judicial review, it is alleged, is illegitimate because it is anti-democratic in that unelected officials (judges) are overruling elected representatives (legislators)” Society chooses the course of social policy by means of the ballot box, and it can therefore be argued that only the legislature has the power to decide whether or not a particular policy should or should not be implemented. To allow unelected judges to restrict or expand the scope of particular legislative policies withdraws from society the right to exert its will on legislators through the political process. In addition, “[when] unelected judges choose to legislate, parliamentary checks, balances and conventions are simply shelved.”

Morton has argued that this will have dangerous consequences. In stating that “if we want to avoid American-style interest-group battles over judicial appointments, Canadian judges must cease and desist from their new Charter imperialism”, he raises the spectre of “court packing” and the political appointment of judges, who would

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325 *Vriend*, supra note 283 at para. 133
327 Morton, supra note 279 at p. 124
be chosen on the basis of their political persuasions rather than their legal ability. On a similar vein, McClung J.A. in the Alberta Court of Appeal in Vriend stated that “if we continue to push the constitutional envelope as we have over the past 20 years... An overridden public will in time demand, and will earn, direct input into the selection of their judges as they do with their legislative representatives.”

In the analysis of such arguments, it must be remembered that the Charter altered the Canadian constitutional landscape in 1982. In the words of Dickson C. J. C., Canada went, at that time, from a system of Parliamentary supremacy to constitutional supremacy, with “each Canadian [being] given individual rights and freedoms which no government or legislature could take away.” The crucial role of interpreting the scope of Charter rights and delimiting the proper bounds of legislative discretion was given to the courts, a deliberate choice of the federal and provincial governments. However, as has been discussed above, the expansive and purposive approach which the courts have adopted in the interpretation of many Charter rights has been attacked by critics as being undemocratic and having gone beyond the intent of the framers of the Charter. To such critics the “living tree of the Supreme Court of Canada and the Privy Council is... a weed out of control.”

Claims that the courts are acting “undemocratically” hinges on a particular definition of democracy, namely that federal and provincial legislatures should be given a wide discretion within which to implement the policies which formed the basis of their political mandate. However, Black has used the theories of democracy developed by Monaghan and Ely to justify judicial intervention where “conscious choices” of the legislature fail to respect the rights of the individual. While the writers agree that in

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328 Vriend v. Alberta, supra note 326 at p. 619
330 Vriend, supra note 283 per Iacobucci J. at p. 563
331 Black, supra note 277 at p. 127
general courts should not overturn substantive decisions made by democratically elected legislatures, "they do think it is the proper role of judges to ensure that the legislative process reflects democratic principles and to intervene when there is reason to believe that that process is itself systematically malfunctioning."\textsuperscript{334}

It must be remembered that governments are elected and re-elected by appealing to the majority, and in such a system it is easy for "unpopular" or less politically powerful minorities to have their interests consistently discounted. However, in the opinion of Ely, democracy requires "that in the making of substantive choices the decision process will be open to all on something approaching an equal basis, with the decision-makers held to a duty to take into account the interests of all those their decisions affect."\textsuperscript{335} The point is that democracy "requires that all citizens be allowed to participate in the democratic process, wither directly or through equal consideration by their representatives. Parliamentary sovereignty is a means to this end, not an end in itself."\textsuperscript{336} On this basis, there is, in cases such as Vriend, which involved a group which has traditionally suffered the effects of stereotype and prejudice and Dunmore, which involved a group of individuals who were politically less powerful than their employers, a clear argument in favour of judicial review. As Iacobucci J. noted in Vriend, "[d]emocratic values and principles under the Charter demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate... [Judges] are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the Charter."\textsuperscript{337}

\textsuperscript{334} Black, supra note 277 at p. 128
\textsuperscript{335} Ely, supra note 333 at p. 100
\textsuperscript{336} Black, supra note 277 at p. 128
\textsuperscript{337} Vriend, supra note 283 at pp. 566 – 567. Monahan and Finkelstein have demonstrated in "The Charter of Rights and Public Policy Processes of Government" (1992) 30 Osgoode Hall L. J. 501, that the Charter has made an important imprint on the decision making processes at the legislative levels of government. While this process is often portrayed negatively as the "Charter-proofing" of legislation, it must necessarily entail proper consideration of Charter rights in the legislative process.

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When considering whether the courts are entitled to judicially review legislative or governmental acts or omissions, it must be remembered that the legislature will always have the last say. s. 33 of the Charter dictates that a legislature may provide that an Act or provision will operate notwithstanding the fact that it contravenes a Charter right. The potential effect of this provision is often overlooked, but the courts should be confident in undertaking their purposive Charter analysis in the knowledge that it is always open to the legislature to take a legislative decision outwith the scope of Charter review.

While judicial review of legislative decisions can be justified on the basis that all persons require to be given equal consideration in our legislatures and governmental institutions, the courts must bear in mind that legislative action or inaction cannot be analyzed in a “rights vacuum”. Legislation will usually interfere with rights and freedoms to some extent, and legislatures will often be called upon to weigh up competing social factors and the impact of resources when reaching their decisions. The need to accord appropriate deference to legislatures has been noted by the Supreme Court of Canada. In Irwin Toy v. Quebec (A.G.), Dickson C.J., Lamer and Wilson JJ. stated that when “striking a balance between the claims of competing groups, the choice of means; like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature’s deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature’s representative function.”

However, that is not to say that the courts should carry judicial deference to the point of allowing government “an unrestricted licence to disregard an individual’s Charter

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338 s. 33(1) of the Charter states that:
“Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”

339 [1989] 1 S. C. R. 927
340 ibid at p. 993.
This point was made by McLachlin J. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, when she stated that to "carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded." Indeed, as Hogg has pointed out, it should not be the case that the courts should defer to the will of government just because it makes choices to limit rights in circumstances which may favour other members of society. To do so would be to discount the importance of Charter rights in the scheme of the constitution. Also, Jackman makes the point that the persuasiveness of the argument that courts should defer to government choices weakens the further from the legislative arena an administrative decision gets. Discussing the decision of the British Columbia Court of Appeal in *Eldridge*, Jackman states that "[by] concluding that the violation of equality rights of the deaf is justified under section 1, Lambert J. A. confounds an exercise of discretion by a legislative delegate with parliamentary democracy itself... In place of unprincipled deference, the courts should insist that governments demonstrate, on the facts of each case, how the violation of individual rights promotes rather than undermines democratic principles." It is therefore apparent that the court must undertake a contextual analysis of the extent to which the right of the individual overrides the interests to be advanced in affording the state deference to pursue its legislative strategy. The courts must, however be mindful, that they cannot stray into matters which are truly beyond their competence. For example, in *Gosselin*, Arbour J. implicitly realized that the Court was able to answer the question of whether the state had an obligation to provide a basic level of subsistence to the individual, but was

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342 [1995] 3 S. C. R. 199
343 ibid at pp. 332 - 333
344 P. Hogg, *Constitutional Law of Canada*, loose leaf ed., vol. 2, (Scarborough: Thomson Carswell, 1997) at sec. 35.2; "It should not be possible to take away a right just because, on balance, the benefit to others will outweigh the cost to the right-holder... Section 1 of the Charter would outweigh everything that follows if it were interpreted as permitting the Court to uphold a limit on a guaranteed right whenever the benefits of the law imposing the limit outweighed the costs."
345 (1995) 7 B. C. L. R. (3rd) 156 (C. A.)
unable to state exactly *what level* of subsistence would be required in order to provide the individual with “base level” requirements.

In summary, it is clear that the Supreme Court of Canada has declared itself to be willing to scrutinize governmental or legislative decisions where these have violated substantive *Charter* rights. To concentrate on the form rather than the substance of such violations would be to diminish the protections which the *Charter* was meant to provide and the Court has implicitly realized that reviewing legislative or governmental silence or inaction is consistent with the role that was given to the courts in the implementation of the *Charter* in 1982. However, the difficulties inherent in governing with finite resources have been recognized, along with the recognition that social policy may require certain rights and freedoms to be circumscribed for the benefit of society. The various opinions of the members of the Court in *Gosselin*, however, illustrates that there is perhaps some disagreement within the Court with regard to the extent to which the courts should review decisions which arise out of the need to make difficult decisions based on the allocation of public resources.

4.3 s. 7 of the *Charter*: One Right or Two?

When the Osman family found their access to the English domestic courts curtailed by the exercise of judicial policy, they turned to the European Court of Human Rights in Strasbourg and presented the issues as involving core human rights considerations. The state had an obligation to secure the right to life and the right to private and family life of the Osmans and had been found wanting when core values central to these rights had been threatened by an identified third party. In the end, the Court refused to place a narrow interpretation on the content of rights, but at the same time placed significant restrictions on state liability for failure to discharge asserted positive obligations. There had to be a significant element of culpability on the part of the state, represented by the required elements of sufficiency, specificity and proximity, in order to engage the

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responsibility of the state with regard to it obligation under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of [the] Convention.”

The Charter does not have an equivalent to the Convention’s Article 1, but nevertheless has been interpreted so as to seek to provide effective protection of fundamental rights and freedoms. Where required by the text of the Charter or the context of a particular case, several of the Charter’s rights have been interpreted as imposing positive obligations on the state. While the role of the police under the Charter in the context of criminal cases has been extensively reviewed by the Supreme Court of Canada, the Court has not yet had the opportunity to review the obligations of the police with regard to the protection of members of the public from threats of harm pursuant to its role in the investigation and suppression of crime. However, given the fact that “[with] the advent of the Charter, security of the person has been elevated to the status of a constitutional norm,” and the importance which has been traditionally attached to security of the person in international human rights, the degree to which s. 7 extends beyond prohibiting active state interference with physical (or psychological) integrity can be seen to be a fundamentally important issue.

s. 7 bestows on the individual the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The semantic form of s. 7 has been the subject of considerable debate, not least

347 It should be noted that s. 1 of the Charter states that “[the] Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably be justified in a free and democratic society.”


349 R. v. Morgentaler [1988] 1 S. C. R. 30 (hereinafter “Morgentaler”), per Dickson C. J. C. at p. 53. s. 7 of the Charter establishes that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.”

350 See supra note 32

351 On the application of s. 7 to psychological integrity, see Blencoe, supra note 319 and New Brunswick v. G, supra note 318
in the Supreme Court of Canada itself, with regard to whether the section should be read as conferring two separate rights (the right to life, liberty and security of the person and the right not to be deprived of these rights except in accordance with the principles of fundamental justice) or as conferring a single right, but containing two parts (the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice).

The latter construction would seem to be the more sensible approach, and the one which has formed the basis of the approach of the Supreme Court of Canada. The “two right” theory would seem to suggest that part of the sentence could simply be ignored, with the analysis moving to the s. 1 justification stage as soon as a prima facie violation of the right to life, liberty and security of the person had been shown. If that had been the intention of the legislature, why say anything at all about fundamental justice when plaintiffs could simply by-pass the requirements of the second half of the sentence? Since it would appear much simpler to establish a violation of the right to life, liberty and security of the person than it would be to establish a deprivation of the right and to show that the deprivation also violated the principles of fundamental justice, the “two right” approach would, in most cases, make the “fundamental justice” part of s. 7 redundant. In addition, this approach would “give s.7 an extraordinarily broad sweep.”

The “single right” approach, however, is also not without its problems, in that it does not appear to be supported by the grammatical form of the English version of s. 7. On

352 In “Section Seven of the Canadian Charter of Rights and Freedoms” (1989) 68 Can. Bar. Rev. 560, Eric Colvin writes that “A free-standing right to life, liberty and security would cover any ground upon which guarantees of due process and fundamental justice might work. The latter guarantees would be otiose. The conjunctive reading of the provisions enables this result to be avoided. The cost, of course, is grammatical distortion.” (at p. 563)
353 Hogg, supra note 344 at para. 44.2
354 In Gosselin, supra note 303, Arbour J. stated “Only by ignoring the structure of s.7 – by effectively reading out the conjunction and with it the first clause – is it possible to conclude that it protects exclusively “the right not to be deprived of life liberty and security of the person except in accordance with the principles of fundamental justice.” (at para. 340) It should be noted that the grammatical form of the French version of s. 7 is more supportive of the “single right” approach: “Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu’en conformité avec les principes de justice fondamentale” This was noted by
the face of it, the section does appear to confer two separate rights. However, the Supreme Court of Canada has consistently approached the subject in accordance with this “single right” approach, first asking whether the right to life, liberty or security of the person has been violated, and secondly, whether the prima facie violation also breached the requirements of fundamental justice. In general, the approach of the Court has been that there can be no violation of s. 7 without a breach of the principles of fundamental justice.355

In the early days of Charter interpretation, another version of the “single right” theory was advocated by those seeking to promote a narrow construction of the terms “life”, “liberty” and “security of the person”. The argument was effectively that these terms should be construed as different aspects of a single concept rather than as entirely separate concepts which should be developed independently by the courts. In Singh v. Canada (Minister of Employment and Immigration)356, however, Wilson J. considered that “it is incumbent upon the Court to give meaning to each of the elements, life liberty and security of the person, which make up the “right” contained in s. 7.”357 The Court has sought to do just that, independently advancing interpretations of each of the independent aspects of the s. 7 right.

The Supreme Court of Canada has recently sought to restrict the scope of s. 7’s application by stating that “s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice.”358 In Gosselin, Bastarache J. even


See Chiarelli v. Canada (Minister of Employment and Immigration) [1992] 1 S. C. R. 711 (Where a system of deportation is in accordance with the principles of fundamental justice, there could be no violation of s. 7).

[1985] 1 S. C. R. 177 (hereinafter “Singh”)

ibid. at p. 205

Gosselin, supra note 303 per McLachlin C.J. (Gonthier, Iacobucci, Major and Binnie JJ. concurring) at para 77. LeBel J. took a similar approach. Both agreed, however that “it is not appropriate, at this point, to rule out the possibility that s. 7 might be invoked in circumstances unrelated to the justice system.” (per LeBel J. at para. 414).
went as far as to suggest that s. 7 could only be triggered in an adjudicative context.\(^{359}\)

The position of the majority in *Gosselin* is supported by statements by Lamer J. (as he then was) in *Reference re. Ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*\(^{360}\) where he stated “the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual’s interaction with the justice system, and its administration.”\(^{361}\)

Similarly, in *New Brunswick v. G*\(^{362}\), Lamer C.J. stated that “the subject matter of s. 7 is the state’s conduct in the course of enforcing and securing compliance with the law, where the state’s conduct deprives an individual of his or her right to life, liberty and security of the person.”\(^{363}\)

This approach seems in many ways to have been influenced by the positioning of s. 7 within the “Legal Rights” section of the *Charter*. In *Prostitution Reference*, Lamer J. noted “the guarantees of life, liberty and security of the person are placed together with a set of provisions (ss. 8-14) which are mainly concerned with criminal and penal proceedings... It is significant that the rights guaranteed by s. 7 as well as those guaranteed in ss. 8-14 are listed under the title “Legal Rights”... The use of [this term] suggests a distinctive set of rights different from the rights guaranteed by other sections of the *Charter*.\(^{364}\)

In order to support their argument for a narrow application of s. 7, Lamer J. and Colvin both rely on the source of principles of fundamental justice as famously set out in *Re B.C. Motor Vehicle Act*\(^{365}\), but Colvin approaches this issue from...
the point of view that "[the] initial declaration of a right to life, liberty and security is treated as a mere declaration, with legal effect flowing only from the right not to be deprived thereof except in accordance with the principles of fundamental justice." I would suggest that any construction of s. 7 which concentrates primarily on the "fundamental justice" element will inevitably conclude that the section is first and foremost concerned with the relationship between the individual and the justice system. However, in my opinion it is clearly arguable that the scope of the right should extend to the administrative acts and omissions of government where the result is a deprivation of the right to life, liberty or security of the person.

In the opinion of Arbour J., "there is considerable room for doubt as to whether the placement of s. 7 within the "Legal Rights" portion of the Charter is controlling of its scope." In particular, the approach of Lamer J. and Professor Colvin in limiting the scope of s. 7 by reference to its placement within the Charter rather than the nature and purpose of the right itself does not sit well with the generous and purposive interpretation of rights which has consistently been advocated by the Supreme Court of Canada when developing the interpretation of Charter rights. Indeed, it may be argued that Lamer and Colvin approach is more consistent with the more "legalistic" approach to interpretation which was adopted in cases under the Canadian Bill of Rights. As Arbour J. states, "one should not underestimate the significance of the context in which Lamer J. made his comments in Prostitution Reference. At the time, almost all s. 7 cases involved challenges to state action in the context of criminal proceedings. To now continue to insist upon the restrictive significance of the placement of s. 7 within the "Legal Rights" portion of the Charter would be to freeze constitutional interpretation in a manner that is inconsistent with the vision of the

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366 supra note 352 at p. 563
367 Gosselin, supra note 303 at para. 316
368 The classic statement of the purposive approach was made by Dickson C.J. in Big M Drug Mart (see supra note 299)
369 R.S.C. 1985, App III. In Big M Drug Mart, supra note 299, Dickson C.J. specifically contrasted this approach with the purposive approach he proposed for the Charter.
Constitution as a “living tree” which has always been part of the Canadian constitutional landscape.”

In considering the scope of s. 7’s protection, it is perhaps of comparative interest to note that Article 5 of the European Convention, which protects the right to liberty and security of person, has been interpreted as protecting the individual from arbitrary or unjustified deprivations of physical liberty, with the European Court’s case law concentrating primarily on state rules and regulations regarding detention. Reed and Murdoch state that “The focus of... Article 5 is the loss of personal freedom. ‘Liberty and security of person’ is best considered as a unitary concept of conferring protection against arbitrary interference with freedom of person of either a substantive or a procedural nature by a public authority.” However, it should be noted that the interpretation of Article 5 has been heavily influenced by the fact there are extensive provisions within that Article relating solely to arrest and detention. This can be

Gosselin, supra note 303 at para. 317. The Court stated in Reference re Provincial Electoral Boundaries (Sask.) [1991] 2 S. C. R. 158 at p. 180 that “The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed... It also suggests that the past plays a critical, but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions, and must be capable of growth to meet the future.”

Reed and Murdoch, supra note 17 at p. 203 In Cyprus v. Turkey (10 May 2001), the Court stated at para. 226 that “the applicant state’s complaint relates to the vulnerability of what is an aged and dwindling population to the threat of aggression and criminality and its overall sense of insecurity. However, the Court considers that these are matters which fall outside the scope of Article 5 of the Convention and are more appropriately addressed in the context of its overall assessment of the living conditions of [these individuals] seen from the angle of the requirements of Article 8.”

Article 5 states:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   (a) the lawful detention of a person after conviction by a competent court;
   (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonable considered necessary to prevent his committing an offence or fleeing after having done so;
   (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
contrasted to the generality of s. 7, which does not contain any such detailed provisions. Rather, the argument for a narrow interpretation of s. 7 rests largely on the fact that it appears in the “Legal Rights” portion of the Charter: on the face of it, a weaker argument than if the rights in sections 8 – 14 had been more explicitly cross-referred to the terms of s. 7 itself.

Reliance by those who would seek to place a narrow interpretation on s. 7 on the basis of the European interpretation of liberty and security of person also run into two further problems. First, s. 7 has the added component of the right to life. While Hogg is of the opinion that “so far as ‘life’ is concerned, the section has little work to do”\textsuperscript{373}, reliance on the European approach must recognize that in the European system, the right to life under Article 2 has, in cases such as \textit{Osman} been held to have been capable of violation as a result of acts or omissions by the full range of administrative government actors.

Secondly, in the European system, extradition and deportation cases where there is a potential issue of ill-treatment on arrival at the destination, have consistently been dealt with under Article 3’s protection against torture and inhuman or degrading treatment\textsuperscript{374}. In Canada, however, such cases have been considered under s. 7, not under s. 12’s prohibition on cruel and unusual treatment or punishment\textsuperscript{375}. While deportation cases usually involve consideration of the process used in hearings under the \textit{Immigration Act}\textsuperscript{376}, and may therefore be considered to come within the “Justice System” category proposed by Chief Justice Lamer and the majority in \textit{Gosselin}, extradition cases have traditionally involved purely administrative decisions with no judicial element. Indeed,

\begin{quote}
\textit{(f)} the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition...”
\end{quote}

\textsuperscript{373} Hogg, supra note 344 at para. 44.6
\textsuperscript{374} See in relation to extradition to face trial for crime which may carry the death penalty, \textit{Soering}, supra note 32. In relation to deportation where there are dangers of reprisals on arrival, see \textit{Cruz Varas v. Sweden}, supra note 113 and \textit{Chahal v. United Kingdom}, supra note 114.
\textsuperscript{375} In \textit{Kindler v. Canada (Minister of Justice)} [1991] 2 S. C. R. 779 (hereinafter “\textit{Kindler}”), La Forest J. stated (at p. 831) that “The Minister’s actions do not constitute cruel and unusual punishment. The execution, if it ultimately takes place, will be in the United States under American law against an American citizen in respect of an offence that took place in the United States. It does not result from any initiative taken by the Canadian government.”
\textsuperscript{376} R.S.C. 1985, c. 1 - 2
the process would not even qualify as what Bastarache J. would term “an investigation that would at some point lead to... a [judicial] proceeding.”

In *United States v. Burns and Rafay*, the Charter issue before the Supreme Court of Canada was whether the decision by the Minister of Justice to extradite Messrs Burns and Rafay to Washington to face first degree murder charges (which potentially carried the death penalty if conviction ensued) without seeking assurances that the death penalty would not be sought, violated s. 7. The governmental act challenged by the claimants was the *administrative act* of extraditing without seeking assurances, *not* the actual imposition of the death penalty itself, which was obviously to be carried out by another state. Yet there is no discussion whatsoever as to whether s. 7 is wide enough in scope to cover the situation of the claimants. Also, *Burns* is not an isolated case. In *Canada v. Schmidt*, La Forest J. for the majority stated during his s. 7 analysis “*that the surrender of a fugitive to a foreign country is subject to Charter scrutiny notwithstanding that such surrender primarily involves the exercise of executive discretion. In Operation Dismantle v. The Queen [1985] 1 S.C.R. 441, Dickson J. made it clear that “the executive branch of the Canadian government is duty bound to act in accordance with the Charter.”*” In the companion cases of *Kindler* and *Reference Re Ng Extradition*, the Supreme Court of Canada was again called upon to adjudicate the compatibility with the Charter of an executive decision to extradite persons accused of murder in the United States. All members of the Court agreed that the correct heading under which to adjudicate the matter was s. 7 and were apparently entirely unperturbed by the fact that the governmental action in question had no link to the judicial system.

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377 *Gosselin*, supra note 303
378 [2001] 1 S. C. R. 283 (hereinafter “*Burns*”)
379 *In Burns*, ibid, the Court stated (at p. 321) that “*it is evident that the respondents are deprived of their liberty and security of the person by the extradition order.*” (emphasis added)
380 [1987] 1 S. C. R. 500 (hereinafter “*Schmidt*”)
381 *ibid* at pp. 521 - 522
382 supra note 375
383 [1991] 2 S. C. R. 858 (hereinafter “*Ng*”)
384 Also, in *Morgentaler*, supra note 349, while Dr. Morgentaler et al were challenging provisions of the criminal code which made it illegal to perform abortions which did not conform to the statutory scheme, the case was ultimately decided on the basis of the s. 7 rights of the *women* who were
In summary, I am of the opinion that to curtail the applicability of s. 7 to matters involving the interface between the individual and the judicial system is inconsistent with the practice of the Supreme Court of Canada and, more importantly, is strangely out of step with the traditional purposive and generous approach which the Court has always sought to take to Charter interpretation. It is entirely foreseeable that life, liberty or security of the person could be profoundly affected by the state's administrative conduct, and to deny the protection of the Charter to these individuals on the basis of the positioning of the section within the Charter itself would appear to be giving in to the "austerity of tabulated legalism" which the Supreme Court has specifically eschewed in previous Charter cases. If there is a fear that a more generous approach to the scope of s. 7 will open the way for a flood of claims which can be characterized as interferences with life, liberty or security of the person, I would suggest that, as will be discussed below, unmeritorious cases would be stopped in their tracks by the need to show that there had also been a breach of the principles of fundamental justice.

4.4 Positive Obligations Under s. 7

In light of the approach of the Court in Dunmore, Vriend and Eldridge, where the Court was virtually unanimous in supporting the correctness of a purposive and contextual approach geared towards establishing the core interests inherent in the right and the parameters of the right in relation to the proposed imposition of positive obligations, the approach of the majority in Gosselin is perhaps difficult to understand. Cory J. explicitly recognized in Vriend that evaluating Charter issues by means of an acts/omissions analysis involved problematic distinctions and Bastarache J. in Dunmore

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385 See Minister of Home Affairs v. Fisher [1980] A. C. 319 (P. C. Bermuda), where Lord Wilberforce stated at p. 328 that "These antecedents, and the form of Chapter I [of the Constitution of Bermuda] itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

386 See the judgment of La Forest J. on behalf of a unanimous Court in Eldridge, supra note 280.
specifically acknowledged that a failure to act "may, in unique contexts, substantially impact the exercise of a constitutional freedom." 1, so it is not clear why the Gosselin majority were so content to rely on the presence of the word "deprive" in s. 7 as precluding the possibility of the imposition of positive obligations under that section.

A clue to the reason for the approach of the majority may lie in some of the words used by McLachlin C.J. in her opinion. As a general statement of s. 7 interpretation, the Chief Justice stated that "s. 7 has been interpreted as restricting the state’s ability to deprive people of [the right to life, liberty and security of the person]". Interestingly, however, the significance of the use word "deprive" had not been even considered by the Court in the extradition or deportation cases under s. 7, where the focus had been on the likelihood of the suffering of proscribed treatment at the destination and the significance of the role of the Canadian state in the "chain of causation" leading to that treatment. Given the fact that the Chief Justice’s s. 7 analysis turned on the interpretation of a particular word, together with the importance of the issue at stake, it appears bizarre that there is no analysis of the real meaning that should be given to that particular word, particularly with regard to whether it can be given a wider meaning than requiring a positive state act. In her dissenting opinion, Arbour J. notes that the Shorter English Dictionary defines the word "deprive" in a number of ways, including "keep[ing] out of or debar[ing] from." 3

It must be noted, however, that the Chief Justice quickly qualified her general statement by stating that "[o]ne] day s. 7 may be interpreted to include positive obligations... [T]he Canadian Charter must be viewed as a "living tree capable of growth and expansion within its natural limits"... It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases." 4 Perhaps even more significantly, McLachlin C.J. goes on to state that "[t]he question is not whether s. 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the

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1 Dunmore, supra note 294 at para. 22
2 Gosselin, supra note 303 at para. 81
3 ibid at para. 321
question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards." It may therefore be seen that it is the particular nature of the claim in Gosselin rather than the mere fact that it is founded in s. 7 that led the Court to its conclusion. What is unsatisfactory about this however, is that the argument chosen by the majority to defend its position appears to be a rule of general application rather than one which is responsive to the facts of the particular case.

The apparent ease with which Arbour J. deconstructs the arguments in favour of the narrow interpretation of s. 7 is perhaps testament to the flimsiness of the threshold argument advanced by the majority. Convincing arguments have been made in favour of interpreting s. 7 as conferring the right to adequate living standards, however such arguments raise difficult questions of justiciability and the proper roles of the courts and the legislature. It would be unfortunate indeed if the judges of the Supreme Court of Canada, who have displayed themselves so willing to tackle such issues in the recent past, were to hide behind legal formalism in an attempt to avoid determining the answers to such questions now.

It is my intention in the remainder of this chapter to assess the parameters of the concepts of "security of the person" and "fundamental justice" in order to attempt to ascertain whether s. 7 should confer a right on the individual to protection by state law enforcement agencies against third party harm.

391 ibid. at para. 83
392 See, for example Jackman, supra note 271 and Wiseman "The Charter and Poverty: Beyond Injusticiability" (2001) 51 U. of T. Law. J. 425. Martha Jackman has stated that "the disqualification of substantive rights claims on the grounds that these might entail unanticipated or undue financial and administrative burdens for governments, or might confound the role of the legislatures with the role of the courts, is a form of judicial deference which is unsound in principle, and discriminatory in practice.": "Poor Rights: Using the Charter to Support Social Welfare Claims" (1993) 19 Queen’s L. J. 65 (at p. 94)
Respect for the physical integrity of individuals is a value which is held in the highest regard in modern democratic states. Criminal law provisions which proscribe offences against the person are rooted in the premise that society does not tolerate invasions of bodily security. Civil law also attaches great significance to the right of individuals to make important decisions with regard to their body and what happens to it. This was recognized by Chief Justice Dickson when he stated in Morgentaler that the “law has long recognized that the human body ought to be protected from interference by others. At common law, for example, any medical procedure carried out on a person without that person’s consent is an assault... Similarly, art. 19 of the Civil Code of Lower Canada provides that “The human person is inviolable” and that “No person may cause harm to the person of another without his consent or without being authorized by law to do so.” With the advent of the Charter, however, security of the person “has been elevated to the status of a constitutional norm.”

But what would constitute a violation of security of the person? MacDonald states that “Security of the person no doubt applies to any legislatively mandated interference with physical integrity, such as surgical intervention, organ transplants, blood transfusions, electroshock treatment, lobotomies, compulsory extraction of bodily fluids, and sterilization.” The application of s. 7 to physical injury was confirmed by Wilson J. in Singh, where she states that “security of the person” must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.

393 See, for example, cases on informed consent to medical treatment, such as Reibl v. Hughes [1980] 2 S. C. R. 880
394 Morgentaler, supra note 349 at p. 53
395 ibid. at p. 53
397 Singh, supra note 356 at p. 207
In addition to the physical element, MacDonald notes, however, that it is possible that “a degree of mental and social well-being is a component of security of the person... In Operation Dismantle v. the Queen... the Court left open the possibility that other non-physical infringements might be subject to Charter review.”\textsuperscript{398} This view was borne out in Morgentaler, where Dickson C.J. stated that “The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person.”\textsuperscript{399}

In Morgentaler, a majority of the Supreme Court of Canada held that the administrative structure put in place to regulate therapeutic abortions violated s. 7 of the Charter on the basis that the restricted access to suitably equipped hospitals and the delays incumbent in the statutory scheme constituted a danger to health. Interestingly, three of the five majority judges also considered that a loss of control over one’s own body may also constitute a violation of security of the person\textsuperscript{400}. This approach was further developed in Prostitution Reference\textsuperscript{401} and in Rodriguez v. British Columbia (Attorney General)\textsuperscript{402}, where, in the latter case, 8 of 9 Justices agreed that the continued criminalization of assisted suicide constituted a deprivation of the right to security of the person\textsuperscript{403}.

\textsuperscript{398} MacDonald, supra note 396 at p. 248  
\textsuperscript{399} Morgentaler, supra note 349 at p. 56  
\textsuperscript{400} Dickson C.J., speaking for himself and Lamer J. stated (at p. 63) that “s. 251 is a law which forces women to carry a foetus to term contrary to their own priorities and aspirations and which imposes serious delay causing increased physical and psychological trauma to those women who meet its criteria.” (emphasis added). Wilson J. considered (at p. 173) that what the law does is “assert that the woman’s capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is not, in my view, just a matter of interfering with her right to liberty in the sense of her right to autonomy in decision making, it is a direct interference with her physical “person” as well... How can there be anything that comports less with human dignity and self-respect?”

\textsuperscript{401} In Prostitution Reference, supra note 360, Lamer J. stated at p. 1177 that “Section 7 is... implicated when the state restricts individuals’ security of the person by interfering with, or removing from them, control over their physical or mental integrity”

\textsuperscript{402} [1993] 3 S. C. R. 519

\textsuperscript{403} Sopinka J. for the majority stated at p. 588 that “personal autonomy, at least with respect to the right to the right to make choices concerning one’s own body, control over one’s physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.”
In both New Brunswick v. G and Winnipeg Child and Family Services v. K. L. W., interferences by the state in the parent-child relationship by means of wardship proceedings were deemed to be a serious interference with the psychological integrity of the parent. Interference with psychological integrity was again relied on in Blencoe, where the claimant alleged that the delay of the British Columbia Human Rights Commission in dealing with sexual harassment claims against him had had a severe impact on his psychological state. Bastarache J. for the majority agreed that severe state-imposed psychological stress could trigger the application of s. 7, but emphasized the fact that there was a threshold of severity of psychological harm which required to be reached before s. 7 could apply.

For the purposes of this thesis, it is not essential to test the absolute outer limits of what may or may not be included in the term “security of the person”. It is sufficient to note that a violation of bodily integrity or a severe interference with psychological integrity will be sufficient to trigger the applicability of s. 7’s provisions. What is important to note, however, is that the relevant interference with security of the person is only that which can be attributed to the state. The constant theme running through the cases is that physical or psychological harm is only actionable under the Charter where it is state-imposed. This issue was discussed at length in Blencoe, where Bastarache J. stated that “In Rodriguez, all of the members of the Court agreed that government actions deprived Mrs. Rodriguez of the right to terminate her life at the time of her choosing. In the absence of government involvement, Mrs. Rodriguez would not have suffered a deprivation of her s. 7 rights... The decisions in Morgentaler and Rodriguez do not, in my opinion, obviate the need to establish a significant connection between the harm and the impugned state action to invoke the Charter.”

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404 [2000] 2 S. C. R. 519
405 Bastarache J. stated at p. 356 that “It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one’s own body free from state interference or the prospect of losing guardianship of one’s children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.”
406 ibid. at p. 350 (emphasis added)
where state conduct is a “contributing cause” of the breach of the individual’s security interests, it is at least required that the prejudice of such interests are “seriously exacerbated”\(^{407}\) by the impugned state action in order to invoke the Charter.

In the deportation and extradition cases which have come before the Supreme Court of Canada under s. 7, however, the Court has tended to take a fairly broad view of causation with regard to the applicability of the Charter. In Singh, for example, Wilson J. disagreed with Pratte J.’s assertion in the Federal Court of Appeal that “[the] decision of the Board did not have the effect of depriving the applicant of his right to life, liberty and security of the person. If the applicant is deprived of any of those rights after his return to his own country, that will be as a result of the acts of the authorities or of other persons of that country, not as a direct result of the decision of the Board. In our view, the deprivation of rights referred to in section 7 refers to a deprivation of rights by Canadian authorities applying Canadian laws.”\(^{408}\) Wilson J. took a broader view of the Charter’s application, stating that “a Convention refugee has the right under s. 55 of the [Immigration] Act [1976] not to “...be removed from Canada to a country where his life or freedom would be threatened...”. In my view, the denial of such a right must amount to a deprivation of security of the person within the meaning of s. 7.”\(^{409}\) Wilson J. took this approach notwithstanding the fact that there was no more than a “well-founded fear” that the applicants would be subjected to physical ill-treatment if repatriated.

A similar approach can be found in the death penalty extradition cases such as Burns and Rafay and Kindler. In Schmidt, La Forest J. stated that “Situations... may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial

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\(^{407}\) ibid, at p. 350

\(^{408}\) Singh v. Minister of Employment and Immigration [1983] 2 F. C. 347, at p. 349

\(^{409}\) Singh, supra note 356 at p. 207. This approach has recently been followed in Suresh v. Canada (Minister of Citizenship and Immigration) [2002] S. C. R. 3 (hereinafter “Suresh”), where a unanimous Supreme Court of Canada stated (at para. 54) that “the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government’s participation and the deprivation ultimately effected.”
there one that breaches the principles of fundamental justice enshrined in s. 7.⁴¹⁰ In Burns and Rafay, the Court confirmed that, notwithstanding the fact that the potential physical punishment was to be meted out in the United States, the ""responsibility of the state" is certainly engaged under the Charter by a ministerial decision to extradite without assurances. While the Canadian government would not itself inflict capital punishment, its decision to extradite without assurances would be a necessary link in the chain of causation to that potential result."⁴¹¹

The Court has, however, been careful to restrict Charter scrutiny to Canadian governmental actors. In Argentina v. Mellino⁴¹², for example, the majority held that the Charter did not apply to a case of excessive delay in extradition proceedings, where the delay was caused by the foreign state, not by any Canadian court or official. The Court has, however, given the Charter effect with regard to actions taken by Canadian government officials outside Canada. In R. v. Cook⁴¹³, a statement extracted by two Canadian police officers from an American citizen in the United States was not in conformity with the Charter, since the suspect had received an inadequate warning of his right to counsel. Despite the fact that the statement had been obtained outside Canada, the majority of the Supreme Court of Canada held that the Charter applied and the statement was therefore inadmissible since the interrogation had been conducted by Canadian government officials.

From the jurisprudence of the Supreme Court of Canada discussed above, it can be ascertained that in order to establish a prima facie breach of s. 7 of the Charter in relation to security of the person, three conditions must be satisfied. Firstly, there must be an interference with the physical or psychological integrity of the individual, which, in the case of interference with psychological integrity must be "significant"⁴¹⁴. There has also been a measure of support within the Court for the view that a significant interference with the right to make important decisions regarding one's own autonomy

⁴¹⁰ Schmidt, supra note 380 at p. 522
⁴¹¹ Burns, supra note 378 at p. 319 (emphasis in original)
⁴¹² [1987] 1 S. C. R. 536
⁴¹³ [1998] 2 S. C. R. 597
may affect one’s right to security of the person. Secondly, there must be a “sufficient causal connection”\(^{415}\) between the participation of the state and the deprivation of the security interest. Thirdly, the conduct of the state must constitute a breach of the principles of fundamental justice, and it is to this third requirement that I now turn.

### 4.6 Fundamental Justice

A violation of s. 7 must necessarily involve a breach of the principles of fundamental justice. “Fundamental Justice” is, however, a vague concept, so what is to be taken into account by the Court? In *Re B. C. Motor Vehicle Act*\(^{416}\), Lamer J. set out the classic guide to the type of principles which should be considered at this stage of the s. 7 analysis. Having rejected the argument that the principles of fundamental justice are concerned purely with procedural matters\(^{417}\), Lamer J. considered that such principles “are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach... is consistent with the wording and structure of s. 7, the context of the section and the character and larger objects of the Charter itself.”\(^{418}\) Hogg has commented on the “inadequacy of this formulation to provide any real guidance for the future.”\(^{419}\), but Lamer J. himself noted that “those words [fundamental justice] cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.”\(^{420}\) As Hogg points out, absolute liability had long been a part of the Canadian criminal justice framework, but was nevertheless judged to be *contrary* to the basic tenets of the legal system in *Re B. C. Motor Vehicle Act*. While almost 20 years have passed since Lamer

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\(^{414}\) See *Blencoe*, supra note 319 at p. 356  
\(^{415}\) See *Suresh*, supra note 409 at para. 54  
\(^{416}\) supra note 365  
\(^{417}\) In this case, the government argued that to extend the “principles of fundamental justice” beyond procedural safeguards would be for the courts to exceed their mandate under the *Charter* and pronounce on the substantive wisdom of legislative enactments. Lamer J., however, felt that in order to give persons the full benefit of the *Charter’s* protection, it may be appropriate for the Court to consider substantive concepts.  
\(^{418}\) *Re B. C. Motor Vehicle Act*, supra note 365 at p. 503  
\(^{419}\) *Hogg*, supra note 344 at para. 44.10(b)  
\(^{420}\) *Re B. C. Motor Vehicle Act*, supra note 365 at p. 513
J.'s judgment, it seems fair to say that there still appears to be significant uncertainty as to the type of interests which are to be taken into account at the "fundamental justice" stage of the s. 7 analysis.

The Supreme Court of Canada has in many cases described the task of adjudicating the "principles of fundamental justice" as being a "balancing act", which may involve policy matters rather than as involving the identification of applicable basic tenets of the legal system. In Cunningham v. Canada, McLachlin J. stated that the "principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally." The notion of a "fair balance" involving such issues as "the interest of society in being protected against violence" seems to be something different from Lamer J.'s apparent requirement that "there should be some basis in legal history or legal doctrine for the principles of fundamental justice." It may be that the factors to be weighed in the balance will accord with what may be termed "basic tenets of the legal system", but a further consideration of the cases decided by the Supreme Court of Canada suggests that the Court is willing to take a wider scope of principles into consideration.

In Kindler, the majority thought it appropriate to consider policy matters such as the "need to preserve an effective extradition policy and to deter American criminals fleeing to Canada as a "safe haven" as relevant considerations in balancing the "principles of fundamental justice". While Lamer J. was keen in Re B. C. Motor Vehicle Act to avoid consideration of matters of "general public policy" at this stage of the analysis, in cases such as Kindler and Ng, that is apparently exactly what the Supreme Court of Canada has done. While the balance came down in favour of the opposite

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421 In Thomson Newspapers v. Canada [1990] 1 S. C. R. 425, five judges appear to present five different basic tenets of the legal system as being the applicable "principle of fundamental justice".
422 [1993] 2 S. C. R. 143 (hereinafter referred to as "Cunningham")
423 ibid. at p. 152
424 ibid. at p. 152
425 Hogg, supra note 344 at para. 44.10(b)
conclusion in Burns and Rafay, the Court again thought it appropriate to consider the same policy matters as it had done in the 1991 extradition cases. It is not easy to discern any “tenet of the legal system” that had changed between 1991 and 2001, so the explanation for the opposite conclusion in the two sets of cases must be that the balance of policy factors, including increased concern over wrongful convictions in death penalty cases, now weighed against extradition without assurances. It may even be the case, as Hogg suggests, that “the variety of... outcomes can be accounted for only by the enormous discretion that the Supreme Court of Canada has assumed for itself under the rubric of fundamental justice. Any change in the composition of the Court or even in the judges' perceptions of public opinion can lead to different results.”

The tendency to couch decisions regarding fundamental justice in political rather than legal terms is not limited to extradition cases. In Rodriguez, for instance, the majority upheld the interference with the applicant’s security of the person on the grounds that it was in accordance with the principles of fundamental justice. Suicide, assisted suicide, counseling suicide and attempted suicide had all been crimes under the common law for some considerable time, and only relatively recently (1972) has suicide been decriminalized. It therefore would have been simple for Sopinka J. to refer to the common law position as being the relevant “tenet of the legal system”, but instead he states that in addition, the relevant principles must be “fundamental”, in the sense that they would have general acceptance among reasonable people.” As Hogg states, “a more orthodox view would be that a search for a consensus among reasonable people is a task that is more appropriate to Parliament than the courts; and, in any case, it is hard to see how it would illuminate any basic tenets of the legal system.” It can therefore be seen that the Court has moved away from considering purely legal issues in its quest to ascertain the principles of fundamental justice. But the more the Court strays into areas of policy, the more difficult it gets to ascertain what constitutes a principle

426 Kindler, supra note 375 per McLachlin J. at p. 850
427 Hogg, supra note 344 at para 44.10(b)
429 Hogg, supra note 344 at para. 44.10(b)
relevant to s. 7, and indeed to ascertain the respective roles of the principles of fundamental justice and s. 1 in Charter analysis.

An important issue with regard to failures on the part of government officials to protect or provide certain services to the public where to fail to do so would result in an interference with the security of the person, is the discretion which it is appropriate to give to governmental bodies in matters concerning allocation of resources. However, the Supreme Court of Canada has given mixed responses when faced with the issue of whether societal matters should be considered under the principles of fundamental justice in s. 7 or in the consideration of whether any prima facie violation of s. 7 is "demonstrably justified in a free and democratic society."430

In R. v. Swain431, Lamer C.J. was of the opinion that it was "not appropriate for the state to thwart the exercise of an accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's section 7 rights. Societal interests are to be dealt with under section 1 of the Charter where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. In other words, it is my view that any balancing of societal interests against the individual rights guaranteed by section 7 should take place within the confines of section 1."432 Such sentiments were echoed by McLachlin J. in Rodriguez, where she stated that "it is not generally appropriate that the complainant be obliged to negate societal interests at the s. 7 stage, where the burden lies upon her, but that the matter be left for s. 1, where the burden lies on the state."433

As we have seen, however, these opinions can be contrasted to the approach of the majority in Rodriguez, Kindler and Ng and unanimous Courts in Cunningham and

430 s. 1 of the Charter states that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
431 [1991] 1 S. C. R. 933
432 ibid at p. 977
433 Rodriguez, supra note 428 at p. 622
Burns and Rafay, where societal interests were clearly taken into account at the “fundamental justice” stage. This is despite the statement by Lamer C.J. in New Brunswick (Minister of Health and Community Services) v. G(J) that “the rights protected by s. 7 – life, liberty and security of the person – are very significant and cannot ordinarily be overridden by competing social interests.” The result is confusion. As Singleton stated in 1994, “[twelve] years after the coming into force of the Charter, the Supreme Court has yet to develop a conceptually coherent approach to the consideration of societal interests, with important differences remaining among justices on this point which is so crucial to the determination of individual rights under section 7.”

Pure questions of resources will usually be considered at the s. 1 stage, but it is apparent that it will be very difficult for matters of “administrative expediency” to justify a violation of rights. In New Brunswick (Minister of Health and Community Services) v. G(J), the cost of implementing a policy of state-funded counsel for wardship hearings was presented by the Minister as a justification for limiting the rights of parents. Lamer C.J., speaking for himself and five other members of the Court, stated that “a parent’s right to a fair hearing when the state seeks to suspend such parent’s custody of his or her child outweighs the relatively modest sums, when considered in light of the government’s entire budget, at issue in this case.” Indeed, in Re B. C. Motor Vehicle, Lamer J. went as far as to state that “Section 1 may, for reasons of administrative expediency, successfully come to the rescue of a violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.”

It must, however, be the case that resource issues can negate the right to security of the person. To take the example of healthcare in a public system, such as the National

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434 New Brunswick v. G, supra note 318 at p. 92.
436 supra note 318 at p. 92.
437 supra note 318 at p. 93.
438 Re. B. C. Motor Vehicle, supra note 365 at p. 518.
Health Service in the United Kingdom, treatments are regularly withdrawn or not provided on the basis of a minute chance of success coupled with high cost. The right of access to medical treatment clearly has implications under the right to security of the person, but it is appropriate (within reason) to allow resource allocation decisions to be made by healthcare professionals on the basis that they operate on finite resources. But should justifications on the basis of cost be made with reference to the principles of fundamental justice or under s. 1? In my opinion, in stating that a s. 7 violation could only be saved by s. 1 in the most extreme circumstances, Lamer J. went too far in Re B. C. Motor Vehicle, in that there may be a broad category of administrative factors which are better considered under s. 1, where the balancing process inherent in the proportionality mechanism of the Oakes test seems better suited to the task than consideration of the basic tenets of the legal system which make up the principles of fundamental justice. It seems fair that in cases where a prima facie violation of rights is justified on grounds of cost, that the state should bear the burden of proving that justification.

4.7 Responsibilities of the Police Under s. 7

Since the majority of the cases in the “Legal Rights” portion of the Charter have concerned issues of criminal legal process, it is perhaps not surprising that the actions of the police have figured prominently in the Court’s Charter jurisprudence. For example, as noted above, police officers who failed to appropriately inform a suspect in the United States of his right to counsel were judged to be acting unconstitutionally. Police officers have also been held to have violated the right to be free from unreasonable search or seizure under s. 8 where a search of property was conducted without an appropriate warrant. It is therefore well settled that evidence gathered by

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442 R. v. Feeley [1997] 2 S. C. R. 13. See also R. v. Evans [1996] 1 S. C. R. 8, where a violation of s. 8 was constituted by a search conducted on the basis of an anonymous tip and the olfactory observations of a police officer interviewing the householder at the front door.
police officers in contravention of the Charter rights of suspects will be inadmissible at criminal trial.

But does the Charter apply to the conduct of the police when discharging their duties with regard to the investigation and suppression of crime? Even if that question is answered in the affirmative, in cases where an applicant is seeking to utilize the Charter in order to impose obligations on the police to act, important and difficult questions of the Charter’s application arise. What is clear is that the Charter applies to autonomous bodies exercising discretion conferred by statute\(^{443}\), and to bodies which are implementing “keystone tenet[s] of government policy”\(^{444}\). As we have seen\(^{445}\), the police in Canada have obtained their unique blend of duties and powers partly from statute and partly from the common law. It appears clear however, that in exercising their discretion in the investigation and suppression of crime, the police are both exercising an “imprecise discretion conferred by legislation” and pursuing a keystone tenet of government policy. In light of the statements of the Supreme Court of Canada in Slaight and Eldridge, it therefore seems equally clear that the exercise of that discretion must be carried out in accordance with the Charter’s requirements.

While the Supreme Court of Canada has not yet had cause to consider the extent of police duties under the Charter with regard to the investigation and suppression of crime, the issue has been considered by the Ontario High Court in the Jane Doe cases. The plaintiff alleged that the failure on the part of the police to warn her of the readily foreseeable danger to her safety, together with the decision to use her and other women in a similar position as ‘bait’ constituted a violation of her security of the person under s. 7. While Henry J. recognized the “wide discretion that must be allowed to the police

\(^{443}\) See Slaight Communications Inc. v. Davidson [1989] 1 S. C. R. 1038. Lamer J. for the majority stated (at p. 1077) that “As the constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of that inconsistency of no force and effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter... Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.” (emphasis added)

\(^{444}\) Eldridge, supra note 280 at para. 50

\(^{445}\) supra note 213
in investigating and prosecuting crimes"446, he noted that Wilson J. had considered in Morgentaler that "a woman's security of the person could be violated if her body is treated as a "means to an end which she does not desire but over which she has no control.""447 Henry J. then proceeded to conduct a useful review of cases under the Fourteenth Amendment to the U. S. Constitution, which had established that the existence of a "special relationship" between the police and the individual was crucial in establishing whether there was a constitutional duty to act448. Such a relationship was found to exist, for example, in Balistreri v. Pacifica Police Dept.449, where a woman and her property were subjected to continual harassment and vandalism at the hands of her estranged husband, all of which was reported to the police, who repeatedly failed to act. Having stated that any policy matters which could be argued as providing a "qualified immunity" from suit should be provided as a justification under s. 1, Henry J. proceeded to find that the plaintiff's case disclosed a triable issue and should proceed to trial.

In the disposal of the appeal of Henry J.'s order450, Moldaver J. revisited the plaintiff's case under s. 7 of the Charter and again refused to strike the claim out, stating that the "plaintiff claims that she was deprived of her right to security of the person. The defendants chose, or at least adopted a policy which favoured the apprehension of the criminal over her protection as a targeted rape victim. By using Ms Doe as 'bait' without her knowledge or consent, the police knowingly placed her security interest at

446 Jane Doe (I), supra note 211 at p. 433. See also R. v. Beare [1988] 2 S. C. R. 387 per La Forest J. (at p. 500)
447 ibid at p. 433, quoting Wilson J. in Morgentaler, supra note 349 at p. 173
448 In Ketchum v. Alameda County 811 F. 2d 1243 (9th Cir. (Cal.) 1987), the Federal Court of Appeal stated (at p. 1247) that "[t]he prevailing rule in the [United States Court of Appeals of the various federal] circuits is that citizens have no constitutional right to be protected by the state from attack by private third parties, absent some special relationship between the state and the victim or the criminal and the victim that distinguishes the victim from the general public." (emphasis added). The Court proceeded to set out the type of factors which would be considered in establishing whether a "special relationship" existed. These were:

1. Whether the victim or the perpetrator was in legal custody at the time of the incident or had been in legal custody prior to the incident...
2. Whether the state had expressly stated its desire to provide affirmative protection to a particular class of specific individuals...
3. Whether the state knew of the claimant's plight."
449 855 F. 2d 1421 (9th Cir. (Cal.) 1988)
450 Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1990) 72 D. L. R. 580
risk. This stemmed from the same stereotypical and, therefore, discriminatory belief already referred to. According to the plaintiff, she was deprived of her right to security of the person in a manner which did not accord with the principles of fundamental justice. These principles, while entitled to a broad and generous interpretation, especially in the area of law enforcement, could not be said to embrace a discretion exercised arbitrarily or for improper motives. As a result, the plaintiff claims that her rights under s. 7 of the Charter were violated. Again, in my opinion, these pleadings do support such a violation.\(^{451}\)

At trial, McFarland J. relied on the analysis of the Charter issues carried out by Henry J. and Moldaver J. at the previous hearings to find a violation of s. 7 which could not be saved by s. 1.\(^{452}\) What is unfortunate is that in each of the three judgments, is that there is no real attempt to discuss the impact of the fact that the impugned conduct was a failure to act, nor to discuss the approach to be taken to the principles of fundamental justice in such cases. It is obvious that the judges considered that the failure to act was as a result of a conscious decision of the police made on improper grounds, and that this triggered the responsibility of the state under the Charter, but the issue of the responsibility of the state and discussion of the appropriate approach to the relevant principles of fundamental justice should surely have merited closer consideration.

It was clear in Gosselin that the majority had reservations about the application of s. 7 to failures to act. As stated above, McLachlin C.J.'s reliance on a rather narrow interpretation of the word “deprive”, however, perhaps displays a reluctance to extend the scope of s. 7 to the kind of government intervention being sought in that case. Indeed, it must be remembered that the possibility that positive obligations may be appropriate in other s. 7 cases was expressly left open by the Chief Justice when she stated that “[one] day s. 7 may be interpreted to include positive obligations.”\(^{453}\) As I have stated above, I believe that the approach of the Gosselin majority to positive obligation is too formalistic and at odds with the methods of purposive Charter

\(^{451}\) ibid. at p. 589
\(^{452}\) Jane Doe (2), supra note 210 at p. 740
interpretation that the Court has long applied. If s. 7 is not to apply to failures to act, this should be on the basis that there is lacking the sufficient nexus between the individual and the state, not on a narrow interpretation of the words of the section itself.

In *Blencoe*, Bastarache J. established the need for a “significant connection” between the harm to the individual’s security interests and the impugned action of the state. In *Suresh*, a unanimous Supreme Court of Canada held that s. 7 would be applicable where there was a “sufficient causal connection between our government’s participation and the deprivation ultimately effected.” In cases where there is harm (or even a significant risk of harm) visited on individuals by third parties, and that harm is sufficiently serious to warrant the protection of s. 7, the Court has long upheld the notion that the involvement of the state in the chain of causation should be assessed to establish whether the state should be held responsible under the *Charter* for its conduct.

In my opinion this is entirely in line with the oft-quoted principle of *Charter* interpretation that *Charter* rights should be understood in terms of the interests they were meant to protect. In the investigation and suppression of crime, there is often a complex series of acts and omissions which result in a certain factual situation. While in the end, the critical point in the *Jane Doe* can be described as a “failure to act”, it must be remembered that this failure resulted from a conscious decision (i.e. a positive act) to that effect. Therefore, to apply an exclusionary rule based on whether the impugned conduct at the critical point was an act or an omission is often to ignore the complexities of the situation.

So what are the interests that s. 7 was meant to protect? As was discussed above, the answer appears to be that the right to “security of the person” protects the individual from serious interferences with bodily integrity and psychological integrity, and may cover the right to self-determination with regard to the right to make important

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453 *Gosselin*, supra note 303 at para. 82
454 supra note 406
455 *Suresh*, supra note 409 at para. 54
456 In *Big M Drug Mart*, supra note 299, Dickson J. stated (at p. 344) that “[t]he meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such
decisions about one’s own life. Where such interests are adversely affected due to the involvement of the state, surely it then follows that s. 7 should apply and the plaintiff be required to show that the principles of fundamental justice have been breached. It must be remembered here, that in order for the Charter to apply, the level of involvement of the state is critical, as the state has a significant role in the chain of causation that it can be said to have caused the breach of security interests. Of course, it may be argued that the state has no part in the chain of causation where harm is visited upon individuals by third parties, but the state is significantly involved where it is in a special relationship with the victim. In my view, where there is a commitment to the purposive approach to rights, it is essential that state actors are required to respect the fundamental rights of individuals when discharging their functions and making discretionary choices. This, coupled with the importance of the right to self-determination inherent in the concept of “security of the person” developed by Wilson J. in Morgentaler, makes s. 7 directly applicable to circumstances such as those faced by the plaintiff in Jane Doe. The decisions of the Supreme Court of Canada in Eldridge, Vriend and Dunmore have established that it is simply not sufficient to analyze the content of rights in isolation from the factual and societal context in which a particular case arises. In those cases, the substance of the protected rights were denied to the individuals protected because the government did not extend protection to cover their situation. Indeed, political arguments to the effect that the judiciary should display a “hands off” attitude to cases involving failures to act were rejected primarily because the rights in question had been deemed worthy of constitutional protection and because an evaluation of whether these rights had actually been violated transcended a simple acts/omissions analysis. One of the most important roles played by the Charter is the need to send a signal that the rights of individuals require to be respected in governmental decision making. In cases such as Jane Doe it is clear that her right to security of the person at the very least would have required that she be notified of a clear, foreseeable and readily identifiable threat to her bodily integrity, a core s. 7 value.

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The requirement for a “special relationship” between the state and the individual before a positive obligation can arise in the realm of the protection of personal security interests is one which has permeated the jurisprudence of the European Court of Human Rights and in the United States with regard to the Fourteenth Amendment and has proved useful in rooting out cases where there could have been no reasonably justifiable obligation on the state to act. Such a requirement could prove very useful as a threshold issue with regard to s. 7, with plaintiffs being required to show that the state was sufficiently “involved” in order to trigger the application of the Charter. Complaints of harassment (Osman), police knowledge (Jane Doe) and any added element of state control over the victim or his or her assailant (Paul and Audrey Edwards) could all be used in order to show that there was a sufficient nexus between the individual and state so as to make the Charter applicable. As a further threshold requirement, the Supreme Court of Canada could use some of the concepts developed in Dunmore in order to establish whether a positive obligation should apply. In that case, a positive obligation was held to apply where an absence of action would make it practically impossible to enjoy a constitutional right. In the s. 7 context, the analysis could involve an inquiry into whether the utilization of any state powers (taking into account the rights of third parties) would have prevented the interference with security interests.

The requirement to show a “special relationship” which demanded action could be used to stamp out any attempt to use s. 7 as a means to attempt to establish a general duty to protect the public. Plaintiffs would be required to show that there existed a degree of proximity between the individual and the state in order to establish that the state could justifiably be given a significant role in the chain of causation leading up to the deprivation of security interests. However, such evidence would only be useful if it can also be shown that the police could have acted within their powers in a way which would have prevented the deprivation of security interests.

This proposed structure would root out cases where there lacked the elements of sufficiency, specificity and proximity which the European Court has required in its cases involving positive obligations. Even if the threshold is passed by plaintiffs, and
they can show physical harm (thus violating the relevant security interests), they are still required to show a breach of the principles of fundamental justice in order to establish a *prima facie* violation of s. 7. Given the recent approach of the Supreme Court of Canada in favouring a “balancing of interests” at the fundamental justice stage, it is likely that the Court would consider at this point state interests such as the discretion which should be afforded to the police in tackling crime and the societal interest in ensuring that sufficient evidence was gathered to secure a conviction. Insofar as such policy considerations are factors which have always been given regard under the common law, they can perhaps be termed “basic tenets of the legal system”, but it is unlikely that this term even closely describes the type of factors considered under “fundamental justice” by the present Court. In short, given the confused state of affairs regarding the respective roles of the principles of fundamental justice and s. 1, it is difficult to assess how the Court would deal with the factors such as those mentioned above and other issues such as the basic impact of resources.
5. **CONCLUSION**

In a constitutional system based on the Westminster model of Parliamentary supremacy, the common law developed as a means of protecting the liberty interests of the individual from the arbitrary or unwarranted interference from other individuals and from the state. However, unlike systems which are based on an entrenched bill of rights, it is open to government in the Westminster system to legitimise the infringement of such interests by means of the enactment of legislation. While the common law has developed to allow the individual the right to challenge governmental decisions on the basis of the reasonableness of decisions taken pursuant to statutory authority, governmental decisions which are given the force of law are not challengeable. Thus, the right of the individual to challenge the acts and omissions of government is expressly subject to the fundamental principle that (except in the sense that the government is ultimately answerable to the people via the ballot box), the government is not fettered with regard to the scope of its legislative choices. While the United Kingdom has, since 1953, had international obligations pursuant to the European Convention on Human Rights, Convention Rights were not directly enforceable in the British Courts prior to the enactment of the *Human Rights Act 1998*. Indeed, even that Act does not entitle the courts to set aside an Act of Parliament or any part thereof, where it is found to be in contravention of a Convention Right[^457].

In contrast, since 1982, Canadians have been entitled to enforce their *Charter* rights through the domestic courts and directly challenge legislative enactments which breach the *Charter*’s provisions. As we have seen, there has been a manifest parting of the ways between the English and Canadian courts on the issue of public sector liability in negligence, with the Canadian courts being much more willing to subject governmental conduct to close scrutiny than their English counterparts. It is perhaps notable that this divergence has occurred in the period when Canada has embraced its movement

[^457]: s. 4(2) of the *Human Rights Act 1998* allows the House of Lords, High Court or (in Scotland) the Court of Session to issue a ‘declaration of incompatibility’ where a particular legislative provision is judged not to be compatible with a particular Convention Right. However, s. 4(6) of the *Act* expressly states that the issue of such a declaration “does not affect the validity,
towards becoming a constitutional democracy, while Britain has retained its traditional reliance on the doctrine of Parliamentary supremacy. While the Canadian courts have, particularly since the late 1990s, become more comfortable with reviewing the substantive choices of government in the context of Charter adjudication, the British courts have retrenched their position from the heady days of Anns and Lord Wilberforce's wish to ensure that the interests of the individual were given "proper consideration" by public authorities exercising statutory functions.

It is in the interests of society as a whole to ensure that every citizen is given equal consideration by the state when it comes to the allocation of resources amongst competing claims. Indeed, as we have seen, theories of democracy have been developed by Ely and Monahan which concentrate on the right of individuals to equal consideration by their representatives rather than the mere application of majority rule. A lack of willingness on the part of the courts to scrutinize the discretionary decisions of public authorities can be seen to be a significant weakness in the system of public accountability mandated by the principle of the rule of law. Reports of miscarriages of justice and "institutional racism" in public authorities only heighten the importance of the maintenance of a fair and transparent system of public accountability. If we are to avoid arbitrariness and prejudice gaining a foothold in public decision making, enforcing fair, effective and public scrutiny of administrative decision making is surely a necessity for the well-being of our society.

While as a general principle, the effective enforcement of public accountability is indisputably a goal towards which society should aim, it should also be remembered that public authorities ultimately have a difficult job to do. Faced with a huge number of potential claims for resources, balancing the budget calls for a number of fundamentally important decisions to be made. Indeed, in seeking to advance certain causes, it is

continuing operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made.”

458 See supra note 333
459 See supra note 332
460 See Epp, supra note 13
461 See Hoyano, supra note 173

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inevitable (and justifiable) that the interests of some will be adversely affected. Whether or not a public authority succeeds in balancing such competing interests is ultimately a political decision which is to be adjudicated at the polls rather than in the courts.

So how can we ensure that the courts properly enforce democratic accountability without encroaching unduly on the discretion properly to be afforded to the government with regard to the implementation of policy? I have sought in this thesis to examine how two distinct areas of law, tort and civil rights, can have a part to play in ensuring democratic accountability. Of course, it must be remembered that this system of accountability is reinforced by other forms of legal or political process such as public inquiries, but negligence or civil rights actions against public authorities in the courts are fundamentally important, given that they arise independently of political will and can be brought by the individual citizen as a means of scrutinizing government conduct.

In the realm of tort, the English courts have sought to restrict the liability of public authorities with regard to failures to act, by means of strictly interpreting the requirements of establishing a private law duty of care, as well as taking into account a number of policy factors which militate towards a finding that it is not "fair, just and reasonable" to impose a duty. This position is typified by the judgment of Lord Hoffmann in Stovin v. Wise, where he stated that a failure to exercise a statutory discretion could only be actionable in damages if the failure was both unreasonable in the public law sense and if the statutory regime envisaged a remedy in damages if there was a failure to exercise the discretion. As suggested above, a root cause of this development may be the traditional English reliance on Parliamentary supremacy and deference to the decisions of public authorities exercising statutory discretion. In addition to this general position, the English courts have, with regard to certain public bodies such as the police, established a blanket immunity from suit which trumps any countervailing principle of public policy which militates towards the establishment of a duty of care.
With regard to the general position of the English courts, I have advocated the rejection of the current restrictive approach and the adoption of a more context-sensitive approach which would hopefully result in the individual being able to establish a *prima facie* duty of care based on proximity and foreseeability of harm, but which would also enable the public authority to argue that a failure to act was reasonable, given the discretion afforded to the authority under the empowering statute. I would suggest that such a position would not open the floodgates to a tide of unmeritorious claims, as the nature of the claim itself is self-limiting. The requirement of having to show proximity would involve the individual having to show that he or she had a relationship of neighbourhood with the public authority sufficient to warrant the imposition of a duty of care. With the public authority being entitled to argue issues of policy which would militate against the imposition of a duty of care, as well as argue that the discretion afforded under the relevant statute is wide enough to entitle the authority to act as it did, there is plenty of scope for a fair balancing of interests which promotes the democratic right of the citizen to equal consideration without placing public authorities in an intolerable position.

While the Canadian courts have displayed themselves as being more willing than their English counterparts to analyze the reasonableness of government conduct, I would argue that their continued reliance on the policy/operational distinction is flawed. As was argued more fully in Chapter 3 above, the *Anns* test is too malleable in the hands of the person applying it and is not conducive to consistent decision making. As was stated by Lord Nicholls in *Stovin v. Wise*, the boundary between issues of policy and operation is elusive, because the distinction is artificial. It is entirely likely that “policy” issues involving broad discretionary characteristics will not be capable of founding a private law duty of care, but these issues should feed into the court’s assessment of the factual and legal matrix rather than be determinative of the duty of care issue.

As we have seen, both the European Court of Human Rights and the Supreme Court of Canada have displayed a willingness to examine the values inherent in individual substantive human rights in order to establish whether it is appropriate to establish
positive obligations on the state. While tort law and human rights law can be seen in some ways to fulfil different roles in society, it is interesting to note the similarity in the issues which arise in both fields when considering the propriety of establishing the liability of public authorities for failures to act. The European Court of Human Rights has, in the wake of *Osman*, established the criteria of significance, specificity and official awareness, which must be satisfied by anyone seeking to establish a positive obligation on the state. This is similar to the requirement to establish proximity and foreseeability of harm in negligence claims. In addition, the European Court has construed positive obligations in such a way as to avoid placing an “impossible or disproportionate burden” on the state, and the Supreme Court of Canada has utilised s. 1 of the *Charter* in order to fulfil a similar purpose. Again, this has its parallel in the private law of negligence, with a public authority always being able to advance evidence that it should be allowed the discretion to allocate resources between competing claims.

Since both fields of law deal with holding the state accountable for failures in exercising powers, it is perhaps not surprising that similar themes arise in both contexts. As was stated above, the courts have to strive to strike a balance between two important competing interests, the interests of the state in being given appropriate discretion to govern and the interests of the individual in being given equal consideration in the governmental decision making process. I would suggest that it is appropriate in both fields for the courts to be willing to analyse the acts and omissions of public authorities in order to establish whether either a private law duty of care or a fundamental human right has been infringed. In deciding which of the negligence or human rights routes to follow (or, as in the case of *Jane Doe*, whether to follow both), plaintiffs must have regard to the differences in the two types of action. A human rights action must be rooted in an infringement of a particular right enshrined in the human rights instrument, whereas negligence actions are not so confined. Negligence actions, however, are constrained by the statutory framework within which the case exists, and formation of a duty of care will largely depend upon this framework.
As a particular focus, I have concentrated on the acts and omissions of the police with regard to establishing liability in negligence or human rights law. I have sought to establish that, while there may be public policy reasons for restricting the liability of the police with regard to their role in investigating and suppressing crime, there are also convincing public policy reasons for ensuring that police conduct is scrutinized in order to ensure fair and non-discriminatory treatment. Recent publications regarding miscarriages of justice in Canada and institutional racism in the police force in parts of the U. K. serve to emphasise the need for such scrutiny. Indeed, the public policy reasons given by the House of Lords in Hill have been called into question in recent studies.\footnote{supra note 251}

Ultimately, we all deserve an efficient system of government which treats us all with equal consideration. A legal system which promotes the basic right of the individual to be treated with respect and compassion is surely a legal system we would all like to operate under.
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