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A Corrective Justice Account of Building Authority Liability in Canadian Negligence Law

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A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Law

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Abstract

In its decisions in *Kamloops v Neilsen* and *Rothfield v Manolagos*, the Supreme Court of Canada adopted a policy-driven justification for imposing liability on building authorities whenever the negligent exercise of their building regulation mandate led to any member of the public suffering any form of foreseeable loss. From its beginnings, this legal doctrine was incoherent and unjustified. It has also become an aberration within Canadian law as, beginning with the decision in *Cooper v Hobart*, the Supreme Court of Canada resiled from its earlier policy-based approach to imposing liability. What is required is a repudiation of the current legal doctrine, and its replacement by a new understanding of building authority liability. This new understanding is based on corrective justice, at a theoretical level, and a rights-based understanding of negligence law, at the doctrinal level. The current basis of building authority liability, with liability arising from the ability to foresee possible future losses, should be replaced by an inquiry into whether a building authority acted in such a way that it assumed responsibility to a particular person and caused that person to shift their behavior in detrimental reliance on that assumption. This new basis for building authority liability is assisted by the recent development within Canadian law of a rights-based understanding of claims for negligent misrepresentation and negligent performance of a service, an understanding that specifically employs the concept of an assumption of responsibility. Adapting this approach to building authority liability will allow it to be coherent both internally and with the wider field of Canadian negligence law.

Keywords: public authority liability, corrective justice, negligence, negligent misrepresentation, pure economic loss, building regulation, building codes, municipalities, local government.

Summary for Lay Audience

Beginning in the mid-1980s, Canada's courts began to permit private citizens to sue municipal governments for financial losses they suffered to their real estate which could be blamed on municipal building inspectors carelessly doing their jobs at some point in the past. Municipalities could be held liable for any careless conduct on the part of their building inspectors, regardless of how far removed in time a plaintiff was, regardless of whether there had been any contact between the plaintiff and the municipality, and regardless of whether the plaintiff had actually been left financially worse off. However, the reasons and justifications offered by courts for permitting these claims were incomplete and unpersuasive. Also, starting around 2000, Canadian courts began to decide against permitting claims in similar situations from proceeding, offering new justifications and reasons for excusing government actors from legal liability in cases that were very similar to the claims they continued to allow against municipalities for the conduct of their building inspectors. This dissertation argues that Canadian law should no longer permit claims against municipal governments for careless building inspection, but should instead restrict the legal liability of municipalities to situations in which municipalities have specifically assumed responsibility to an individual who suffers harm in reliance on a municipality's actions with respect to building inspection. This new understanding of how and when a municipality can be liable for how it exercises building regulation powers is not only more coherent and rational, but will also mean that this area of the law will align with how Canadian courts treat other similarly-situated government actors.

Dedication

This work is dedicated to my parents, Pieter and Evelyn de Vries, both for their continued and unconditional love and support, and for providing me with years of dinner table conversation that was the perfect training ground for a future litigator.

Acknowledgments

A project of this scale could not have been accomplished without the support of many individuals.

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I also thank my partners at Shillington LLP and later Shillington McCall LLP for accommodating my desire to pursue part-time graduate studies while still being an active member of the firm. Special thanks are due to Jessica Vanderlee and Breanna Willan who kept my law practice running smoothly during the time I was working on this dissertation. Thanks are also due to Alex Neaves, Maura Thompson, and Sheila Handler who took the time to read this dissertation in its near-final form and offered many helpful comments.

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CHAPTER 1 – INTRODUCTION

Buildings are important. At the most basic level, humans need shelter in order to survive. At a more advanced level, buildings provide the settings where we live, work, socialize and carry out most of the activities of modern living. For many, the purchase of a building (a house) is one of the most significant life choices they will make, and that building often is the largest legally recognized asset (and the largest financial liability) they will acquire in a lifetime.¹

Given the importance of buildings, it comes as little surprise that the construction of buildings has been a ripe area for government intervention and regulation. This is by no means a modern phenomenon – the earliest known legal systems had specific provisions for building regulation.² Today in Canada and in many other common law jurisdictions the regulation of buildings has been delegated by central governments to public authorities such as municipalities, local authorities, and local boards. Along with this regulation has come the question of responsibility: what happens, and who is responsible, when there is a breach of the regulatory scheme? While the responsibility of the regulated person (the builder or owner/occupier of a building) to comply with the regulation is usually axiomatic, if the regulatory scheme is one designed for the public welfare, should any responsibility lie with the regulator itself to ensure compliance or to answer for the

¹ See generally Thomas Sowell, *The Housing Boom and Bust*, revised ed (New York: Basic Books, 2010) at 5.

² Perhaps the earliest example is the law code of the Babylonian emperor Hammurabi (circa 1792—1750 B.C.). Eschewing the modern approach based on prescribed empirical standards for building construction, Hammurabi's code employed the singular expedient of prescribing the death penalty for anyone who designed or constructed a building that collapsed "on someone else's head". See Susan Wise Bauer, *The History of the Ancient World: From the Earliest Accounts to the Fall of Rome* (New York: W.W. Norton & Company, 2007) at 173–76.

consequences when regulation is not followed? The issue this dissertation addresses is what legal consequences should attach when these public authorities are careless in the exercise of this regulatory jurisdiction, leading to buildings that are unsafe, defective, or otherwise not usable as they are intended.

1.1: The Problematic Legacy of *Anns*

While the regulation of the construction and physical state of buildings is only one of the numerous and diverse activities engaged in by modern governments, by a curious tangent of judicial history – a tangent that commenced with the 1978 decision of the House of Lords in *Anns v Merton Borough Council*³ – the legal liability of a public authority in the exercise of its jurisdiction over matters of building safety has become a paradigmatic case for the consideration of the negligence liability of public authorities in general.

The legacy of *Anns* is problematic. The House of Lords' decision allowed public authorities to be subject to unique obligations and liabilities not previously recognized by the common law. The decades that followed would see the Commonwealth's highest courts consider, reconsider, adopt, modify, or repudiate *Anns*.⁴ Alongside this broad narrative is a narrower debate: in what circumstances should a public authority's negligence in the exercise of its building regulation jurisdiction give rise to legal remedies? This dissertation will deal with this debate in the Canadian context.

³ [1978] AC 728 (HL) [*Anns*].

⁴ See eg *Hamlin v Invercargill City Council*, [1996] 1 NZLR 513 (PC); *Sutherland Shire Council v Heyman* (1985), 60 ALR 1; *Kamloops (City) v Nielsen*, [1984] 2 SCR 2 [*Kamloops*]; *Murphy v Brentwood District Council*, [1991] 1 AC 398 [*Murphy*].

When *Anns* was adopted in Canada in *Kamloops (City) v Nielsen*,⁵ the result was, theoretically, the imposition of a duty of care in negligence on a building authority (usually a municipality) whenever the actions of that authority in enforcing building regulation could give rise to a reasonably foreseeable risk of harm if done negligently. But what has practically resulted is an unprincipled, doctrinally incoherent and, some have argued, uncontrolled imposition of broad liability on public authorities. The leading Canadian text on municipal liability summarizes this view well:⁶

The reality in this area of the law is that Canadian courts have rendered municipalities virtual insurers of property owners and occupiers who have suffered damage from building defects, while paying lip service to a fault-based standard.

Yet despite such criticism, detailed analysis of building authority liability, as a discrete topic in Canadian law, is sparse in legal literature.⁷ Modern treatises on municipal liability generally treat the current law of building authority liability as an unfortunate given.⁸ While there continues to be a significant body of critical literature on public authority liability more generally, building authority liability does not normally merit specific treatment.

⁵ *Ibid.*

⁶ David G Boghosian & J Murray Davison, *The Law of Municipal Liability in Canada* (Markham: LexisNexis Canada Inc., 1999) (loose-leaf updated 2015, issue 82) at §5.90.

⁷ Most of the available literature tends to date from an earlier period. See e.g. John Hucker, “Woe Unto the Building Inspector (and the Municipality): A Comment on *McCrea v. City of White Rock*” (1974) 20 McGill LJ 598; RE Bilson, “Should City Hall be Worried? *City of Kamloops v. Nielsen*” (1984) 2 Sask L Rev 345; Pam Horton, “*Kamloops v. Nielsen*: Municipal Liability for Community Planning Negligence” (1986) 44 UT Fac L Rev 109.

⁸ See e.g. Boghosian & Davison, *supra* note 6; Hillel David et al, *Thomson Rogers on Municipal Liability* (Aurora, Ontario: Canada Law Book, 1996).

This dissertation is a response to this lack of detailed and critical analysis of building authority liability. This dissertation will not argue that holding building authorities liable for negligent building regulation enforcement is wrong, whether legally, politically, or morally. What this dissertation will do is posit an alternative model for conceiving of building authority liability. This model will be derived from a standpoint of corrective justice. In broad strokes, it will argue that the reasonable foreseeability of harm approach adopted in *Kamloops* is misguided because it cannot be used to articulate a principled, coherent scheme of its own internal elements: duty of care, breach, causation (factual and legal), and damage. Also, the articulation of the duty of care flowing out of *Kamloops* is unjustifiably broad, which has resulted in the well-founded criticisms of it. Furthermore, this duty of care is increasingly difficult to reconcile with current trends in Canadian negligence law, leading to incoherent legal doctrine and increased difficulty in a predictable application of the law to future cases.

This dissertation will argue that the reasonable foreseeability of harm approach adopted in *Kamloops* should be replaced with an approach based on the concept of assumption of responsibility. In doing so, the jurisprudential basis for building authority liability will be shifted from *Anns* to *Hedley Byrne & Co v Heller & Partners*.⁹ By proceeding from the concept of assumption of responsibility, as opposed to reasonable foreseeability of harm, there can be a principled and coherent understanding of building authority liability.

⁹ [1964] AC 465 (HL) [*Hedley Byrne*].

1.2: Assumptions and Methodology

1.2.1: Theoretical Lens

This dissertation will argue that building authority liability should be understood exclusively through the lens of private law. The theoretical implication is that only those theories of law that treat private law as a self-contained, autonomous area of law are usable for this inquiry. These are the theories of law based around individual rights, which are usually associated with the concept of Kantian right, and which find their most express formulation in the theory of corrective justice.

To be sure, there are competing theories of private law, most notably instrumentalist or economic theories. Yet these theories are simply unworkable for what this dissertation seeks to do. This dissertation will not argue that building authority liability can or should serve some kind of purpose, nor will it argue that building authority liability reflects or serves some form of efficiency or utility. These are questions that are more appropriate for a study of building regulation from the perspective of political science or economics. Instead, this dissertation seeks to understand building authority liability as a self-contained, private law phenomenon. Currently, building authority liability, as understood and applied by courts, is a private law matter. This dissertation thus seeks to grapple with building authority liability in the context in which it is situated.

1.2.2: Source Material

This dissertation will draw upon two general sources. First, there are primary legal sources: legal materials in the form of reported cases and statutes. Second, there are secondary legal sources, the extra-judicial and extra-legislative literature, usually scholarly, that reviews, comments on, and offers critiques and possible reforms of law as expressed in primary sources.

While the focus of this dissertation is on Canadian law, there is a large body of comparative legal sources to draw upon, since Canadian law in this area drew heavily on pre-existing English law, which eventually took a divergent path from Canadian law, which allows for juxtaposition and comparison.

The critical focus of this dissertation will be on the development of the modern law of building authority liability. The starting point, in so much as one can be identified, is the 1972 decision of the English Court of Appeal in *Dutton v Bognor Regis United Building Co Ltd*.¹⁰ From this starting point the analysis of building authority liability will continue until the present.

1.2.3: Methodology

This dissertation will employ two analytical methodologies. First, it will review building authority liability in light of principles of private law in general and negligence law in particular. This dissertation will operate from the assumption that there are particular foundational principles of private law, normally embodied in several leading cases such as *Donoghue v Stevenson*¹¹ and *Hedley Byrne*,¹² which can be used to assess the correctness of particular areas of private law.¹³ The second analytical methodology is an assessment of building authority liability from an internal point of view: can a given account of building authority liability be used to articulate a principled, coherent scheme of its own internal elements: duty of care,

¹⁰ [1972] 1 ALL ER 262 [*Dutton*].

¹¹ [1932] AC 562 (HL) [*Donoghue*].

¹² *Supra* note 9.

¹³ This methodological approach is heavily indebted to that employed by Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2009), although this dissertation does not share Beever's conclusions with respect to the negligence liability of public authorities.

breach, causation and damage.¹⁴ As this dissertation will show, the current Canadian law of building authority liability is both incompatible with general private law principles and is internally incoherent in that it does not allow for an intelligible elaboration of its own elements.

1.3: Structure of the Dissertation

The ultimate goal of this dissertation is to provide a coherent account of a cause of action for building authority liability following the traditional negligence progression of duty, breach, causation, and damage, and to demonstrate that this new account is superior – theoretically, doctrinally, and practically – to the current account of building authority liability in Canadian law.

The following chapters can be grouped into three larger parts. The first part (chapters 2 and 3) will outline the context and underlying theoretical assumptions of the dissertation. The second part (chapters 4 and 5) will survey the development of building authority liability in English and Canadian law. The third and final part will provide the detailed account of this dissertation’s proposal for the cause of action for building authority liability. This part will be dividing in chapters that deal with the separate elements of the cause of action: duty of care (chapter 6), the standard of care (chapter 7), and causation and damage (chapter 8). Each of these chapters will provide a review and critique of the current understanding of the particular element in Canadian law, which will be followed by this dissertation’s proposal for each element, which will then be both explained in detailed and justified.

¹⁴ This methodological approach draws heavily on the writings of Weinrib: Ernest J Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012); Ernest J Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1988) 97 Yale LJ 949.

1.3.1: Context, Actors, and Issues

Reduced to its simplest form, the subject matter of this dissertation is a private law claim against a public authority, particularly a claim in negligence. Chapter 2 provides an overview of this subject matter. It explains and reviews the concept of a public authority in general, and a building authority in particular, in the Anglo-Canadian legal tradition. It provides an overview of the typical characteristics of a building authority: a public agency usually mandated by legislation to monitor and enforce compliance with building codes, regulations, and constructions standards, usually by approving plans for proposed construction, inspection of buildings under construction, and responding to possible non-compliance in existing buildings. It then moves to an overview of the tort of negligence, and its contrast with other forms of private law, such as contract or property law. It will also explain why this dissertation excludes any substantial consideration of public law in favour of an understanding of building authority liability as arising from a bilateral, private law relationship between plaintiff and defendant. Emphasis will be placed on the influence of the English legal scholar AV Dicey on modern conceptions of private law as applied to governments.

Chapter 3 provides the normative and theoretical context for this dissertation. It will review how Kantian ideas have inspired the idea of corrective justice functioning as the underlying basis of a private law that can be understood as an autonomous, coherent, and self-justifying system of legal principles. It will discuss the lynchpin idea of corrective justice: that the relationship between the plaintiff and the defendant is a single normative unit and that unit is the means by which private rights and remedies must be determined. Private rights are correlative as between a plaintiff and defendant – private rights do not derive from the circumstances or status of

persons in isolation. This emphasis on correlativity and the relationship between a plaintiff and defendant is crucial for this dissertation's goal of a formulating a concept of public authority liability based on the assumption of responsibility.

A key implication of corrective justice is that the correctness or justifiability of any part of private law does not need to be assessed by being measured against some external consideration, value, or goal. This is a crucial point for this dissertation, as public authority liability has often been seen and understood by some courts and commentators as being heavily influenced by social, economic, or other extra-legal considerations. This dissertation will argue that such factors are undesirable and unworkable as explanations for building authority liability.

1.3.2: The History of Building Authority Liability

The history of building authority liability, set against the wider backdrop of public authority liability, consists of two related stories. First there is the story of the decision in *Hedley Byrne*, where it was held that a duty of care could be created when a plaintiff detrimentally relies on an undertaking by a defendant to give information or advice. *Hedley Byrne* generated criticism, praise, and some degree of uncertainty as to its actual implications. While it initially dealt only with negligent misrepresentation, its underlying principle, as courts discovered, could be extended beyond claims in negligent misrepresentation to cover a wide spectrum of situations in which a defendant's conduct interferes with the autonomy of a plaintiff by preventing him or her from making alternate, more beneficial choices.

Second, there is the story of the legacy of *Anns*, how that decision came about, and how it was treated in both English law and the wider common law world. *Anns* was decided only six years after the Court of Appeal's decision

in *Dutton*, was based on facts that were effectively identical, and enshrined the reasoning of *Dutton* into English and, later, Canadian law. In *Anns* the House of Lords sought to massively overhaul the entire law of negligence by replacing compartmentalized duties of care in negligence with a general concept of a duty of care based on the reasonable foreseeability of harm. *Anns* also signaled a more expansive willingness to award damages for pure economic loss. Finally, in a step that would be of great significance for public authorities, *Anns* witnessed the apparent dissolution of the misfeasance/nonfeasance distinction in negligence law. This paved the way for claims based not only on careless conduct directly causing harm but also on careless failures to act or failures to confer benefits on plaintiffs. This opened up wide swaths of new liabilities for public authorities.

Chapter 4 tracks the stories of *Hedley Byrne* and *Anns* in English law. It reviews how the House of Lords' initial enthusiasm for *Anns* rapidly ran into trouble, leading to a repudiation of the building authority liability imposed in *Anns* in *Murphy v Brentwood District Council*,¹⁵ which was followed by a repudiation of the entire *Anns* approach to the duty of care in *Caparo Industries v Dickman*.¹⁶ Finally, English law then adopted *Hedley Byrne* as the default duty of care test for claims in nonfeasance against public authorities in *Michael v Chief Constable of South Wales Police*.¹⁷

Chapter 5 tracks the same stories in Canadian law, stories which are both longer and more difficult in the telling. It surveys Canadian jurisprudence on building authority liability, both before and after the reception of *Anns* into

¹⁵ [1991] 1 AC 398 [*Murphy*].

¹⁶ [1990] 2 AC 605 (HL) [*Caparo*].

¹⁷ [2015] UKSC 2 [*Michael*].

Canadian law, and identifies several general themes or patterns in this area of the law, all of which highlight why this area of law is in need of reform.

First, the current law of building authority liability that derives from *Kamloops* is fundamentally incomplete. While the 1984 decision in *Kamloops* adopted *Anns* into Canadian law, it did not really attempt to articulate a detailed conception of building authority liability. Further Supreme Court of Canada cases on building authority liability, particularly *Rothfield v Manolakos*¹⁸ and *Ingles v Tutkaluk*,¹⁹ left behind a duty of care jurisprudence that is overly broad and incomplete, in that there is a total absence of any explanation of how this duty of care could arise in particular cases, how the negligent exercise of building regulation jurisdiction could cause damage, or what types of damages can legally and factually be caused by such negligence.

The likely reason for the incompleteness of the law of building authority liability is tied to two further themes. First, building authority liability was isolated from other developments in Canadian law, particularly with respect to the recovery of pure economic loss. Canadian building authority liability never developed beyond the limited statement of it in *Rothfield*. But only three years after *Rothfield*, the Supreme Court of Canada embarked on the task of articulating the modern Canadian law of pure economic loss.²⁰ However, none of these cases involved building authority liability, nor was

¹⁸ [1989] 2 SCR 1259 [*Rothfield*].

¹⁹ 2000 SCC 12 [*Ingles*].

²⁰ The first of these cases was *Canadian National Railway Co. v Norsk Pacific Steamship Co.*, [1992] 1 SCR 1021, followed by *Winnipeg Condominium Corporation No 36 v Bird Construction Co.*, [1995] 1 SCR 85 [*Winnipeg Condominium*] and *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210.

the law that emerged from these cases integrated into building authority liability.

Then in its 2001 decision in *Cooper v Hobart*,²¹ the Supreme Court of Canada practically, but not officially, followed the lead of the House of Lords in *Caparo* and repudiated the *Anns* test for the duty of care in favour of a more restrictive test which emphasized proximity over mere foreseeability of harm. Post-*Cooper* the law of public authority liability in Canada has been a story of far more restrictive duties of care.²² But because the Supreme Court of Canada did not officially repudiate *Anns*, all of the pre-*Cooper* law with respect to building authority liability was left in place. The result is that building authority liability has been abandoned by developments in the larger law of public authority liability. This has also left a gaping inconsistency in Canadian law, whereby some public activities, including building regulation, are subject to broad liability in negligence while other activities give rise to either limited or no liability.²³

1.3.3: A Proposed Cause of Action

The third and final part is the heart of this dissertation. It will articulate a new conception of building authority liability superior in terms of coherence and principle than that which currently exists in Canadian law. This

²¹ 2001 SCC 79 [*Cooper*].

²² See generally Russell Brown & Shannon Brochu, “Once More Unto the Breach: *James v. British Columbia* and Problems with the Duty of Care in Canadian Tort Law” (2008) 45 *Alta L Rev* 1071 at 1071—72.

²³ As this dissertation will discuss, this division generally follows the division between areas of municipal responsibility (where the key judicial authorities pre-date the Supreme Court of Canada’s decision in *Cooper*) and areas of provincial or federal responsibility (where the key authorities post-date *Cooper*).

analysis will be divided according to the general elements of a cause of action in negligence: duty, breach, causation, and damage.

Chapter 6 addresses the duty of care, beginning with a critique of the current articulation found in *Rothfield*. As stated in *Rothfield*, a building authority will owe a duty of care to all those who it is foreseeable will suffer damage as a result of a negligent exercise of its building regulation jurisdiction. In addition to suffering from all the faults of the *Anns* approach,²⁴ the statement of the duty of care in *Rothfield* was based entirely on the status and actions of the defendant. But a duty of care must be owed to a particular plaintiff, and the circumstances of that plaintiff's relationship with the defendant will dictate whether a duty of care actually exists and the content of that duty of care. Instead of liability based on a proper, bilateral relationship between a plaintiff and defendant, what *Rothfield* created was the idea that negligence on the part of a building authority existed in the air. What resulted was a general presumption that negligent building inspections were almost automatically actionable whenever a plaintiff suffered some kind of disappointed expectation or problem with a property, regardless of the separation in time, space, and relationship that might exist between the plaintiff and the building authority.

This dissertation will argue that the duty of care should instead be based on the concept of assumption of responsibility. In doing so, the jurisprudential

²⁴ See Robert Stevens, "Torts" in Louis Blom-Cooper, Gavin Drewry & Brice Dickon, eds, *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009) 629 at 637—44. Stevens enumerates the particular sins of *Anns* as: the improper conflation of loss with right, the classification of the loss as property damage as opposed to economic loss, permitting recovery for pure economic loss, the policy/operational dichotomy, the creation of a cause of action for a failure to confer a benefit, and the improper invocation of policy considerations. To this list we might add negating the doctrines of consideration and privity of contract and the general blurring of the boundary between tort and contract: Christian Witting, *Street on Torts*, 14th ed (Oxford: Oxford University Press, 2015) at 30.

basis for the duty of care will be shifted from *Anns* to *Hedley Byrne*. This will not be an argument that building authority liability should be entirely co-extensive with the law of negligent misstatement. Rather the duty of care can be aligned with the broader understanding of *Hedley Byrne* that has emerged,²⁵ particularly after the decision of the United Kingdom Supreme Court in *Michael*²⁶ and the decisions of the Supreme Court of Canada in *Deloitte & Touche v Livent Inc*²⁷ and *1688782 Ontario Inc v Maple Leaf Foods Inc*.²⁸

Chapter 7 addresses the standard of care, an analysis that is heavily contingent on the previous chapter's analysis and critique of the duty of care. Duty of care and standard of care are mutually dependent concepts: what constitutes a breach of the duty of care cannot be understood apart from what that duty is and to whom it is owed. Of course, if the duty of care is inherently flawed, the associated standard of care will reflect those flaws. This is precisely what occurred post-*Rothfield*: the standard of care was articulated as one of an "ordinary, reasonable and prudent inspector in the same circumstances."²⁹ But this is a standard of care defined in isolation, without reference to any particular duty to or relationship with a potential plaintiff. The breach, or lack thereof, of such a standard of care is only indicative of a breach of a public law obligation: a legislative requirement to do a particular task. It is not, on its own, indicative of a breach of a discrete private law duty owed to a particular person.

²⁵ Stevens, *ibid* at 642—43.

²⁶ *Supra* note 17.

²⁷ 2017 SCC 64 [*Livent*].

²⁸ 2020 SCC 35 [*Maple Leaf*].

²⁹ *Ingles*, *supra* note 19 at para 40.

The correct approach, this dissertation will argue, is to re-orientate the standard of care to the actual relationships that can exist between building authorities and plaintiffs, thereby providing the context for a proper private law duty of care to exist and for its associated standard of care to be cogently articulated. The usual plaintiff in a building authority liability case does not suffer damage simply because a building authority or its agents were careless in an abstract or isolated sense – he or she suffers damage due to some particular interaction with the building authority. This can be understood as an assumption of responsibility,³⁰ an interference with personal autonomy,³¹ or a form of warranty³² being created by the interaction between the building authority and the plaintiff. The point is that the standard of care must relate to this interaction, not a general public law duty on a building inspector to do his or her job. A further implication is that, in contrast to the single standard of care articulated in *Rothfield*, the standard of care in any given building authority liability case may be variable, depending on the factual circumstances giving rise to the plaintiff-defendant relationship and, in particular, the nature of the responsibility assumed by the building authority to a given plaintiff.

Chapter 8 addresses causation and damage. While causation and damage normally occupy separate headings in tort law, in this context they are inextricably bound to each other, and will accordingly be addressed in tandem. One of the more insidious legacies of *Dutton* and then *Anns* was the failure to distinguish between the physical defects occurring in buildings and

³⁰ *Michael*, *supra* note 17.

³¹ See generally Stephen Perry, “Protected Interests and Undertakings in the Law of Negligence” (1992) 42 UTLJ 247.

³² Russell Brown, “Assumption of Responsibility and Loss of Bargain in Tort Law” (2006) 29 Dal LJ 345.

the damage that plaintiffs may have suffered in law. This failure was compounded by a general failure by courts to recognize or fully appreciate the implications of the fact that, in almost all building authority liability cases, the physical creation of the defects complained of was attributable to someone other than the building authority. Post-*Rothfield* jurisprudence was marked by an overemphasis on the existence of physical defects in a building, and the proof of a defect was usually treated as legally synonymous with proof of damage. Canadian courts either ignored or simply refused to grapple with the underlying nuances of causation and damage in building authority cases, particularly those involving plaintiffs whose true losses were not personal injuries or property damage but pure economic losses.

The key nuance here is to shift the focus from a search for causal relationships between building authority negligence and building defects, which are usually non-existent because building authorities do not actually construct buildings, and the actual nature of the damage that plaintiffs in building authority liability cases suffer. With respect to the latter, absent situations where a building defect results in personal injury or property damage, the damage suffered is purely economic: the loss is of the opportunity to place a fully informed value or take a fully informed decision with respect to one's economic interests. Once this is acknowledged, the concept of building authority negligence causing damage has to be rethought and, like the questions of duty and standard of care, has to be re-orientated to look at actual relationship between the parties, both in terms of what damage was actually caused and how it was caused.

Cases involving plaintiffs who have suffered personal injury from building defects are the particular scenario where this dissertation will propose a significant departure from existing case law. This dissertation will not argue that the doctrinal basis of building authority liability differs based on

whether the plaintiff has sustained personal injury or some other form of loss. In fact, current Canadian law does not draw such a distinction either and, as this dissertation will argue, there is no principled basis to justify different legal treatment of cases involving plaintiffs who have sustained personal injuries. If, as this dissertation argues, the duty of care in building authority liability cases is properly re-orientated to the actual relationship between a building authority and a plaintiff then many of the existing cases that have allowed recovery by a plaintiff for physical injuries will be seen as wrongly decided. This is because they involved situations where no duty of care existed, since there were no antecedent circumstance between the plaintiff and the building authority that would allow for the conclusion that the plaintiff's conduct was somehow impacted by the building authority's actions. The practical reality is that outside of unique cases, such circumstances will not be present.

1.4: Coherence and Principle

The purpose of this dissertation is not to argue that the idea of holding building authorities liable in negligence is wrong. It is accepted that private law has a valid role to play in the regulation of the activities of public authorities and in the remedying of certain losses those activities may cause if carried out improperly. Instead, what this dissertation asks is that the reason why building authorities are held liable is made coherent and sensible. This will result in individual decisions being based on principle and not simply on judicial policy. The end-product of this dissertation – a revised cause of action for building authority liability – will not carry the implication that all previous case law in this area is incorrect. Under the proposed cause of action, there would still be a broad basis for recovery in cases involving pure economic loss, cases which constitute the overwhelming majority of building authority liability cases. However, under the proposed cause of

action some cases which may be paradigmatic for the recovery of pure economic loss under the existing Canadian law of building authority liability should no longer result in findings of liability or recoverable damages against building authorities. Also, this dissertation will advocate different outcomes in the minority of cases that involve personal injury. Yet, as will be argued, there never really was any principled basis for liability in such cases.

1.5: A Final Comment

For the reader, it is only fair that some disclosure be made about the background of the author. And in doing so, academic convention, particularly its distaste for the first person, will be briefly suspended.

The eminent British jurist Sir Robert Megarry once posed the rhetorical question: who is “the most important person in the courtroom”? His answer: “the litigant who is going to lose”.³³ If the losers in a system of civil justice cannot understand, and therefore cannot accept, the judgments meted out by our courts, that system cannot properly function. For more than 15 years, I have been practicing as a civil litigator defending municipalities and other public agencies against tort claims. Over this time, I have come to appreciate that municipal liability is one of those areas of the law where Sir Robert’s question is all the more poignant. The recent past has seen a considerable expansion of the scope of municipal liability, particularly in building authority liability. This expansion in liability has been matched by an increasingly incoherence in the legal doctrine behind it. The result is an increasingly number of municipal defendants being left feeling bewildered and unfairly blamed.

³³ Sir Robert Megarry, “Temptations of the Bench” (1978) 16 *Alta L Rev* 406 at 410.

The goal of this dissertation is both to demonstrate that a particular area of private law is riddled with error, uncertainty, and incoherence, and to posit a more coherent legal doctrine that should replace it. Should this dissertation's arguments be adopted, it is possible that the future liabilities of municipalities would be reduced. For the skeptical reader who might query whether what follows may be motivated less by academic virtues than a desire to further the interests of those that "pay the piper",³⁴ further comment will be found in the conclusion, but here I can only offer my assurances that my motives are scholarly, not mercenary. And for those not convinced, or who feel that the possibility of bias is too strong, I can do no better than invoke the words and spirit of another author who has faced the charge of self-interested scholarship:³⁵

And if my poor talents, my little experience of the present and insufficient study of the past, should make the result of my labours defective and of little utility, I shall at least have shown the way to others, who will carry out my views with greater ability, eloquence and judgment, so that if I do not merit praise, I ought at least not to incur censure.

³⁴ Or my mortgage.

³⁵ Niccolò Machiavelli, *The Prince and the Discourses* (New York: Random House, 1950) at 103.

CHAPTER 2 – THE LEGAL AND INSTITUTIONAL CONTEXT

The subject matter of this dissertation is a private law claim in negligence by a private person against a particular public authority, a building authority, in the exercise of one of its public roles, the jurisdiction over building regulation. This chapter defines the elements of this subject matter and provides the legal context in which these claims arise.

2.1: The Place of Building Authorities within the State

A claim against a building authority is a form of claim against the state, but the state is not a single, monolithic entity. What is therefore needed is both a definition of a building authority and an explanation of its place within the state.

2.1.1: Public Authorities, Municipalities, and the State

Anglo-Canadian law has never developed a detailed theory of the “state”,¹ preferring instead to treat the Crown as the apex of the state’s constituted authority.² In this usage, the Crown has a dual meaning: the natural person of the current monarch (but only in his or her public capacity) and the executive branch of government (but not the legislative or the judicial branch).³ However, the actual exercise of the executive power is handled by other individuals, usually arranged in a hierarchy of government ministers

¹ Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Square* (Cambridge: Cambridge University Press, 2012) at 1.

² Peter Hogg, Patrick Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 12.

³ *Ibid* at 11—13.

who direct the activities of various civil servants spread across government departments.⁴

While the Crown was understood as the ultimate sovereign power, it never came to totally personify the state and only ever represented part of the public sphere.⁵ The scope of the public sphere beyond the Crown grew with the development of the modern administrative state and, later, the welfare state. These expansions of government activity brought a new government actor to prominence: the public authority. There is no strict definition of a “public authority” but it is term regularly used across common law jurisdictions to describe similar entities. These entities are public agencies, boards, tribunals, foundations, and the like that are tasked with implementing particular public functions. They usually share several common characteristics. First, they are legally constituted as corporate bodies, which carry out their functions via individuals who holds positions within them. Second, they are usually created by legislation – hence why they are also referred to as “statutory” public authorities – and have their character, duties, and powers defined by higher levels of government to whose oversight they are subject. Finally, they are public as they engage in activities related to the public at large, have powers that private persons do not, and lack certain freedoms and capacities held by private persons.

In Canada public authorities include entities such as school boards, emergency services, police forces, professional regulators, and conservation authorities, to name but a few. However, the most discernable public authority in Canada is likely the municipality, since a broad range of government functions have been assigned to municipalities.

⁴ *Ibid* at 12—13.

⁵ McLean, *supra* note 1 at 8.

On a first impression it might seem strange that municipalities are public authorities, given that they are often seen as a third level of government in Canada's federal system, one which, like the provincial and federal governments, is composed of democratically elected officials that are supposed to formulate policy and enact legislation reflective of a popular mandate, as opposed to simply being responsible for the implementation of legislative and policy decisions made by others.

However, municipalities have always occupied an ambiguous position in the modern state. Traditional thinking about governments generally assumes a polarity between individual citizens and the state. Municipalities, as intermediate institutions between the state and citizen, are in a somewhat paradoxical position. They are creatures of the state and can thus be conceived of as simply another department of the state's administrative apparatus. At the same time, municipalities are given the tasks and character of government, a role which feasibly violates the state's monopoly on government power and democratic legitimacy.

Two general understandings of the legal status of municipalities and their relationship with the state have developed in the common law world. The first is often referred to as Dillon's Rule, which takes its name from the former Chief Justice of the Iowa Supreme Court, John F Dillon, and his scholarship and judicial opinions on municipal government.⁶ Dillon's Rule holds that municipal and local governments have very narrow powers and can only engage in activities that are specifically sanctioned by the state. In

⁶ Dillon wrote two treatises on municipal law: John F Dillon, *Treatise on the Law of Municipal Corporations* (Chicago: James Cockcroft & Company, 1872); John F Dillon, *Commentaries on the Law of Municipal Corporations*, 5th ed (Boston: Little, Brown, and Co, 1911). The two opinions he wrote that are most associated with his eponymous rule are: *Clark v City of Des Moines*, 19 Iowa 199 (1865); *City of Clinton v Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455 (1868).

effect, municipal governments are nothing more than agencies of the state.⁷ The second understanding, often associated with the American jurist Thomas Cooley, is that municipal and local governments should be understood as having inherent sovereignty linked to a right to local government on the part of citizens.⁸ This second understanding sees municipalities as truly intermediate governments and not mere state agencies.

In Canada, more restrictive understandings of municipal power have prevailed. While municipalities may have some characteristics of a distinct level of government, they lack any constitutional status for their existence, powers, or jurisdiction. Instead, Canada's constitution explicitly assigns legislative authority over municipalities to the provinces⁹ and municipalities are "creatures of the legislature": they have no powers not assigned to them via provincial legislation and have no independent existence outside the provincial level of government.¹⁰ Recent legislative and judicial reforms have

⁷ The classical formulation of Dillion's Rule is:

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: first, those granted in *express words*; second, those *necessarily or fairly implied* in, or *incident to*, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

See Joan C Williams, "The Invention of the Municipal Corporation: A Case Study in Legal Change" (1985) 34 Am U L Rev 369 at 401, citing Dillion, *Treatise on the Law of Municipal Corporations*, *ibid* at 101—02.

⁸ Cooley's ideas were developed in his 1868 treatise on constitutional law (for a modern edition, see: Thomas M Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (New York: Da Capo Press, 1972)). See also Joan C Williams, "The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law" (1988) Wisc L Rev 83 at 88, 148.

⁹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(8).

¹⁰ See eg *Smith v London (City)* (1909), 20 OLR 133 at para 34 (Div Ct): "[t]he municipality in Ontario is wholly a creature of the legislature — it has no abstract rights — it derives all its

given Canadian municipalities broader and more discretionary jurisdiction,¹¹ yet they remain statutory agencies of provincial governments. But while they are agencies of the provinces, municipalities do have a separate juridical existence, and are normally treated as a form of corporation.

2.1.2: Building Authorities and Building Regulation

A “building authority” can be defined as a public authority that exercises a building safety and regulation jurisdiction. Building regulation follows a similar pattern across many common law jurisdictions. Building regulation jurisdiction is normally granted or imposed by legislation on a public authority, permitting or requiring it to monitor and enforce compliance with established building codes and building standards. In Canada municipalities are the public authorities normally vested with jurisdiction over building regulation. Ontario, Canada’s most populous province, provides a good example of these arrangements. Ontario municipalities are municipal corporations created under provincial legislation.¹² Ontario has also enacted legislation creating a mechanism for the enactment and enforcement of a province wide *Building Code*.¹³ That same legislation delegates the exclusive

powers from statute, and the same hand which gave may take away”. See also *McCutcheon v Toronto (City)* (1983), 41 OR (2d) 652 at 663 (HCJ).

¹¹ These reforms began with changes to the legislative basis of municipal power in several Canadian provinces which replaced historic allocation of specific powers to municipalities with a set of broad powers granted, along with a broad authority to determine their governance structures. See generally Scott D Gray, “An Overview of Changes to the Municipal Act 2001 Made by Bill 130” (Paper delivered at the Ontario Bar Association, 2007 Institute of Continuing Legal Education, 5 February 2007) [unpublished]. These legislative changes were followed and paralleled by judicial ones, most notably a series of decisions of the Supreme Court of Canada that recognized the new, broader powers of municipalities: *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231; *Nanaimo (City) v Rascal Trucking Ltd*, [2000] 1 SCR 342; *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40.

¹² Currently the *Municipal Act, 2001*, SO 1992, c 25.

¹³ The current legislation in Ontario is the *Building Code Act, 1992*, SO 1992, c 23, and the *Building Code* is a regulation made under that statute: *Building Code*, O Reg 332/12. The

responsibility for the enforcement of the legislation and the *Building Code* to the municipalities in which the building activity is taking place.¹⁴ Similar arrangements exist across many Canadian provinces, with some variations. For instance, some provinces mandate that municipalities assume the duties of building authorities,¹⁵ whereas other provinces provide municipalities with jurisdiction, but no obligation, to enact building regulation schemes.¹⁶

Building regulation is normally based on the enforcement of building codes which prescribe empirical standards for particular aspects of construction. Building codes will often prescribe specific standards for construction but will also incorporate or refer to other codes, standards, or specifications created by governments, other public agencies, or non-government actors. The exercise of the jurisdiction to monitor and enforce compliance with building codes usually takes the form of review and approval of new buildings, both in concept and in actual construction, and investigations into existing buildings where there is a reason to believe there is a lack of building code compliance. Since all new buildings normally require approval and inspection, the review of new construction, as opposed to investigations of non-compliance, constitutes the main exercise of a building authority's jurisdiction.

Canadian Commission on Building and Fire Codes has published a *National Building Code* since 1941, and provinces have variously adopted the *National Building Code* entirely, have adopted parts of it, or have enacted their own building codes which can borrow parts of the *National Building Code* in their jurisdiction. Much of Ontario's *Building Code* is based on the *National Building Code* but there are substantial differences. See generally Halsbury's Laws of Canada, *Construction Law*, "Performance: Building Control: Building Codes" (II.7.(1)) at HCU-62.

¹⁴ *Building Code Act, 1992, ibid*, s 3.

¹⁵ These provinces include Manitoba: *The Buildings and Mobile Homes Act*, CCSM c B93, s 4; and Saskatchewan: *The Uniform Building and Accessibility Standards Act*, SS 1983-84, c U-1.2, s 4.

¹⁶ This is the current arrangement in Alberta: *Safety Codes Act*, RSA 2000, c S-1, s 66; and British Columbia: *Community Charter*, SBC 2003, c 26, s 8(3)(1); *Local Government Act*, RSBC 2015, c 1, s 298.

2.2: Private Law

The subject of this work falls under the broad heading of private law: the branch of law that is “concerned principally with the mutual rights and obligations of individuals”.¹⁷ It encompasses contract law, property law, trusts, and this dissertation’s subject, tort law. Before elaborating these concepts, some preliminary issues should be addressed: what is the basis for using a system of law intended to apply as between private persons to a government actor? And how does the use of private law interact with or relate to other forms of remedies against government?

2.2.1: Remedies against Government: Public Law and Private Law

The review or oversight of government action by an independent judiciary is a widely accepted method of safeguarding individual rights, enforcing constitutional standards and norms, maintaining the separation of powers, and ensuring that government actors do not exceed or abuse their jurisdiction. The means by which this oversight is implemented has tended to follow one of two models. First, there is the model that is dominant in civilian jurisdictions where government action of any type is reviewed by specialized courts tasked exclusively with hearing such cases and which apply specialized laws applicable only to government action in resolving those cases. Second, there is the model which prevails in common law jurisdictions, where government action can be reviewed at public law or at private law.¹⁸ With review under public law, usually understood as falling under the

¹⁷ Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge: Cambridge University Press, 2003) at 1, who further notes that private law also concerns “corporations and government agencies in many of their relationship with individuals”.

¹⁸ WIC Binnie, "Attitudes Towards State Liability in Tort: A Comparative Study" (1964) 22 UT Fac L Rev 88 at 97.

subjects of constitutional and administrative law as implemented through the mechanism of judicial review, courts may review government decisions and grant remedies such as injunctions, declarations, or prerogative writs, all of which concern the alteration or undoing of a particular government action. Review under private law takes the form of civil actions against governments and their agents based on traditional private law concepts such as tort or contract. As with civil actions in general, the primary private law remedy against governments is an award of damages.¹⁹

In both its doctrinal elaboration and its practical adjudication, common law systems tend to maintain a strong delineation between public law and private law, a delineation that also applies when one of the involved parties is a public authority. Public law review of government action and private law claims for damages against governments are normally conducted in separate proceedings, and the remedy of monetary damages or compensation is generally absent in public law matters. This does not mean that public law is entirely absent from private law proceedings against public authorities or other government actors. As will be discussed, there are numerous instances where public law has had (or might have) an influence on such private law proceedings (although, as will also be discussed, whether such influence is helpful or deleterious is another matter).

¹⁹ See generally *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at para 24:

Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases ... and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.

How and why the common law developed its mixture of public and private law remedies against public authorities has been the subject of considerable study and debate. Several factors were at play, and most of them are conveniently instantiated in the writings and legacy of Albert Venn Dicey (1835-1922). Dicey was an English jurist who embodied certain strains of English legal and political thinking: a Whiggish tendency to see the individual, as opposed to the collective, as the proper unit of social organization; an aversion to the institutional expansion of government; and a belief that the common law and the courts that administered it were the repository and the safeguard of individuals' liberties and rights against the government.²⁰ Dicey sought to articulate the concept of the "rule of law" in the English legal tradition. One of Dicey's core ideas has become known as his "equality principle", the idea that all individuals in English society, regardless of position or class, were subject to the same law with none being subject to separate forms of law:²¹

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the

²⁰ For a general discussion of Dicey's scholarship and influence see Bernard J Hibbitts, "The Politics of Principle: Albert Venn Dicey and the Rule of Law" (1994) 23 *Anglo-Am L Rev* 1; Dan Priel, "The Political Origins of English Private Law" (2013) 50 *JL & Soc'y* 481; Mark D Walters, *AV Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge: Cambridge University Press, 2020).

²¹ Albert Venn Dicey, *Introductory to the Study of the Law of the Constitution*, 6th ed (London: Macmillan and Co, 1915) at 189.

commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.

Dicey felt that the rule of law was threatened by the possibility of a continental or civilian system of public or administrative law – his *bête noire* was the French system of *droit administrative* – developing in England. It was fundamentally wrong that “[a]n individual in his dealings with the state does not, according to French ideas, stand on anything like the same footing on which he stands in dealings with his neighbour”.²² For Dicey a separate system of administrative law meant special privileges for government actors,²³ licence for the rights of individuals to be arbitrarily restricted,²⁴ and protection of government officials from civil liability for wrongs done to private individuals.²⁵ The superior (and English) approach was “equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts”.²⁶

²² *Ibid* at 184.

²³ Hibbitts, *supra* note 20 at 17—19; Walters, *supra* note 20 at 245.

²⁴ *Ibid*.

²⁵ Dicey, *supra* note 21 at 197. Dicey’s concern was not that public or administrative law courts would be irrationally prejudiced against the claims of private individuals but rather that the application of public law standards would regularly shield government actors from liability for wrongful conduct that would normally give rise to liability were it committed by a private individual:

The party wronged by an official must certainly seek relief, not from the judges of the land, but from some official Court. Before such a body the question which will be mainly considered is likely to be, not whether the complainant has been injured, but whether the defendant, say a policeman, has acted in discharge of his duties and in bond fide obedience to the commands of his superiors. If the defendant has so acted he will, we may almost certainly assume, be sure of acquittal, even though his conduct may have involved a technical breach of law.

²⁶ *Ibid* at 215. Dicey was not the only English jurist with a suspicion of civil law. Dicey’s contemporary, Fredrick Maitland, while acknowledging that England’s legal insularity throughout its history may have stunted coherent development of its legal doctrine in some fields, believed it benefitted in a “constitutional” and “political” sense, as “Roman law here as elsewhere would have sooner or later have brought absolutism in its train”: Frederick

Dicey's influence eventually fell out of favour, at least in the areas of law with which he was primarily concerned: constitutional and administrative law, both of which are now fully developed subjects in Anglo-Canadian law. Yet his equality principle has had a continued influence in the realm of tort law and appears to have had a role in the ongoing existence of the common law's use of private law to resolve claims against public authorities.

The utility of using private law to address improper conduct by public actors continues to be controversial, and there have been calls for its replacement by a different system of law.²⁷ However, while building authorities and other public authorities are not necessarily the equivalent of private persons, Canadian law has long since accepted they can be held liable in the same fashion as private individuals in certain circumstances and a Diceyan idea of equality is well-entrenched in Canada.²⁸ Thus while mention will be made of public law issues when relevant, this dissertation is premised on the idea

Maitland, *The Constitutional History of England: A Course of Lectures Delivered* (Cambridge: Cambridge University Press, 1908) at 21–22.

²⁷ See eg *Paradis Honey Ltd. v Canada*, 2015 FCA 89.

²⁸ Bruce Feldthusen, “Bungled Police Emergency Calls and the Problems with Unique Duties of Care” (2017) 68 UNBLJ 169 at 184—85:

...I would suggest that most Canadians do not conceive of their constitution as consisting of one set of rules for private citizens and another set for public officials. True, it is often appealing to prefer that a loss be shifted to a deeper pocket, especially when an avoidable loss is suffered by a vulnerable plaintiff. ... But the temptation to create unique public duties must be measured against the fact that a society that normalizes unique obligations will also normalize unique public immunities and privileges. ... I am even more confident that Canadians do not generally approve of unique excuses for government negligence. The question must be considered as a broader one than that of unique liabilities. We are really talking about conceptualizing government and private parties as separate and distinct in private law. This has not been our tradition. Our tradition has been that public actors should be "under the same law that applies to private citizens." This is a fundamental political principle. [citations omitted]

that private law is a proper modality to deal with issues of government misconduct, and to the particular nature of private law we now turn.

2.2.2: The Tort of Negligence

Negligence is a part of tort law, and unfortunately neither concept lends itself to a succinct definition. There is long-standing scholarly debate as to how to define and delineate the various legal relationships and remedies and make up the law of obligations.²⁹ One common explanation is that the law of obligations consists of the law of contract, which concerns the identification and enforcement of binding promises, the law of restitution, which concerns unjust enrichment and how is its reversed, and the law of tort, which concerns the remedying of wrongs.³⁰ Defining tort law as concerned with “wrongs” does not provide a positive, freestanding explanation of what tort law is. Instead, tort law must often be explained in an apophatic manner.³¹

²⁹ For an overview, see MA Jones et al, *Clerk & Lindsell on Torts*, 23rd ed (London: Sweet & Maxwell, 2020) at §1-03.

³⁰ See generally Andrew Burrows, *Understanding the Law of Obligations: Essays on Contract Tort and Restitution* (Oxford: Hart Publishing, 1998) at 1–8.

³¹ *Hall v Herbert*, [1993] 2 SCR 159 at 199:

It is difficult to define the nature of a tort. ... Perhaps it is easiest to begin by saying what it is not. A tort is not a crime. Although criminal law and tort law grew from the same roots they are today quite distinct and different. ... Nor is the law of torts contractual in its nature. Contract law seeks to enforce the rights which arise out of an agreement whose parties have voluntarily agreed to be bound by its terms. The law of contract seeks to enforce the terms of the agreement specifically or provide compensation for its breach. Nor can torts fall under the title of quasi-contractual relief. That remedy seeks to prevent unjust enrichment that might, for example, arise out of payment of money under mistake. The law of tort covers a much wider field than does contract or quasi-contract. It provides a means whereby compensation, usually in the form of damages, may be paid for injuries suffered by a party as a result of the wrongful conduct of others.

See also Peter Birks, “The Concept of a Civil Wrong” in David Owen, ed, *The Philosophical Foundation of Tort Law* (Oxford: Oxford University Press, 1997) 31 at 51:

A civil wrong is the breach of a legal duty which affects the interest of an individual to a degree which the law regards as sufficient to allow that

Practically, tort law is the label for “a residual collection of various civil wrongs” that do not fall under the headings of contract or restitution.³²

Negligence is tort law’s largest and most widely applicable sub-category, applying across a wide range of what would colloquially be called unintentional or accidental conduct. Negligence is not easily defined as an isolated concept. Instead, negligence is best defined by the circumstances required for a claim in negligence to exist, which are:³³

1. The plaintiff and the defendant are in a relationship to which the law attaches liability for the careless infliction by the defendant of particular kinds of damage on the plaintiff. This is referred to as the *duty of care*.
2. The defendant fails to live up to that duty, referred to as a *breach* by the defendant of his or her *standard of care*.
3. There is a causal connection between the defendant’s carelessness and the damage suffered by the plaintiff, referred to as *causation* or *factual causation*.

individual to complain on his or her own account rather than as a representative of society as a whole. Obligations arising from wrongs are explained and justified as responses to breaches of duty. The reason why we have other categories of causative event is that there are three classes of event which create primary obligations which are directly enforced and to which the notion of breach of duty (wrong) is irrelevant.

³² Erika Chamberlain & Stephen GA Pitel, eds, *Fridman’s The Law of Torts in Canada*, 4th ed, (Toronto: Thomson Reuters, 2020) at 1. See also Tony Weir, *An Introduction to Tort Law*, 2d ed (Oxford: Oxford University Press, 2006) at ix, who describes tort law as a “ragbag” and suggests the following definition: “In contract matters the courts may be predominantly described as a debt-collection agency ... but in tort they function as a complaints department – with the difference that the claimant, unlike the customer, is not always right – and the complaints are of such different kinds that many various reactions may be appropriate”.

³³ Jones et al, *supra* note 29 at §7-04. For a Canadian articulation of the elements, and additional commentary upon them, see Allen Linden & Bruce Feldthusen, *Canadian Tort Law*, 10th ed (Toronto: LexisNexis Canada, 2015) at 118–20; Chamberlain & Pitel, *ibid* at 365–69, 459–85, 503–27, and 529–58.

4. The damage suffered by the plaintiff was a sufficiently foreseeable consequence of the defendant's carelessness. The issue here is whether, as a matter of law, there is a sufficient connection between the defendant's carelessness and the plaintiff's injury. This can be referred to positively as the existence of *legal causation* or *proximate cause*, or negatively as the absence of *remoteness*.

Negligence is unified to a degree by the concept of reasonableness. Both the existence of a duty of care and legal causation are measured by the standard of reasonable foreseeability. For the former, a defendant's duties of care extend to those persons the defendant should reasonably foresee as being affected by his or her actions.³⁴ For the latter, in order for there to be legal causation (the absence of remoteness), the damage that actualized must have been reasonably foreseeable to the defendant.³⁵ Reasonableness also plays a role in the standard of care. Whether a defendant has breached the standard of care – whether the defendant's conduct has been negligent – is measured by the objective standard of the “reasonable person in similar circumstances”.³⁶

³⁴ This is often referred to as the “neighbour principle” derived from the famous speech of Lord Atkin in *Donoghue v Stevenson*, [1932] AC 562 at 580 (HL):

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 contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

³⁵ See generally *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at paras 12–18. For a detailed review of the history of remoteness in negligence law, see Linden & Feldthusen, *supra* note 33 at 382–403; Chamberlain & Pitel, *supra* note 32 at 529–58.

³⁶ Linden & Feldthusen, *ibid*, at 152–58. Adapting Lord Green's famous dictum that the reasonable person was the equivalent of the “man on the Clapham omnibus”, Linden & Feldthusen suggest the more Canadian concept of the “person on the Yonge Street subway”.

2.2.3: Typical Negligence Claims against Building Authorities

Reported cases reveal two general types of negligence claims against building authorities, both of which are defined by the nature of the damage allegedly sustained by the plaintiff. The first and most common scenario involves plaintiffs who have suffered financial loss as the result of the alleged negligence of a building authority for failing to prevent or ensure the repair of building code violations. The facts of *Kamloops (City) v Neilson* provide a good example of this type of claim.³⁷ In *Kamloops* the son of a municipal councillor had built a house for his parents. The construction was carelessly carried out, and the building authority was aware of this, having issued several building code orders against the property. After completion, the builder's parents took possession of the house, which they later sold to an unsuspecting third party, who later discovered the structural defects when they manifested themselves. He sued the building authority for the cost of repairs. The plaintiff's losses were financial, either because he had purchased a home that was worth less than what he had paid for it (given the defects in its construction, which would have reduced its value had they been known) or because he was faced with having to pay for repairs to make the home livable.

Second, there are those plaintiffs who have sustained physical damage to either their property or themselves as a result of building defects that a building authority allegedly failed to prevent or order repaired at some earlier time. *Mortimer v Cameron*,³⁸ a 1994 decision of the Court of Appeal for Ontario, illustrates one of the most extreme examples of this scenario. The plaintiff was injured when he fell through the wall of an enclosed exterior

³⁷ [1984] 2 SCR 2 [*Kamloops*].

³⁸ (1994), 17 OR (3d) 1 (CA).

landing of a second storey apartment at which he was a guest. The building authority, the City of London, was successfully sued for negligence in reviewing and approving plans for the enclosure and for not properly inspecting it during construction, both of which occurred more than 15 years prior to the plaintiff's fall.

A unifying characteristic of these negligence claims is that the actual source of the damage, the defect in the building, is not physically created by the building authority. While the negligence of the building authority is predicated on the existence of a defect, the building authority's actual negligence is based upon the absence of an intervening regulatory act by it with respect to the defect.

By way of a concluding point, the two types of claims discussed above are not exhaustive of the potential negligence liability of building authorities.

Building authorities can be liable in cases where their negligence or that of their agents causes direct physical damage, such as when an inspector damages a building while inspecting it or is involved in a motor vehicle accident while on the way to a construction site that injures a third party.

Building authorities can also be liable in negligence when the careless exercise of their regulatory powers inflicts freestanding damage (as opposed to merely preventing damage that results from the acts of a third party).

This could occur when a building authority carelessly issues orders, such as those prohibiting occupancy or use of a property, that cause a person to suffer damage, such as the loss of a property for business or residential means, or incurring expenses to conduct repairs that were not legally required.

However, in these other negligence cases the damage is being caused by the direct action of the building authority.

This dissertation is concerned only with the previously mentioned "absence of an intervening act" as the basis for building authority negligence. The

additional types of negligence liability, where damage is caused by the direct action of the building authority, will not be reviewed. There are three reasons for this. The first is a matter of volume: these other forms of negligence liability constitute a small minority of reported case law on building authority liability, whereas the overwhelming majority of reported cases are of the type this dissertation will analyze. Second, cases where building authorities are held liable for the direct infliction of damage do not raise any particular doctrinal controversy or dispute, and can usually be decided without raising novel or debatable issues of law. In contrast, and as the third reason, it is the cases involving liability for the absence of an intervening regulatory act that have seen the development of new law and the creation of doctrinal controversies, and where building authority liability has had the most influence on the wider field of tort law.

CHAPTER 3: THE NORMATIVE CONTEXT – CORRECTIVE JUSTICE

3.1: Introduction

The goal of this dissertation is both to critique the current state of doctrinal law on the negligence liability of building authorities and to posit an alternative, superior doctrinal law. The superiority of one form of doctrinal law over another is not necessarily self-evident. Any claim that one doctrinal articulation is a better one involves implicit or explicit normative, theoretical, and epistemological claims not just about particular instances of doctrinal law, but about the idea of law more generally. The discussion of such claims falls into the realm of legal theory, also known as jurisprudence, elegantly described by Thurmond Arnold as the search for “the unifying principles which are behind all of the various activities of admittedly legal institutions” with the goal of “prov[ing] that such principles exist, and to define them in general terms sufficiently broad so that all the little contradictory ideals appearing in the unending process of particular cases will appear to be part of one great set of ideals”.¹

Discussion of legal theory tends to focus on what have been labelled “interpretative” theories or accounts of law: theories which seek to provide a better understanding of law by revealing an intelligible order within the law, by identifying the important features or characteristics of law, and by showing the connections between those features.² In the context of a common law system, interpretive theory has been described as a method to “reconcile

¹ Thurmond W Arnold, “Apologia for Jurisprudence” (1935) 44 Yale LJ 729 at 729.

² Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 5.

case law with a general account of the law”.³ Interpretative theories can be contrasted with “historical” theories, which seek to reveal the law’s causal history and explain why particular laws have developed over time; “descriptive” theories, which seek to accurately describe the law at a given time; and “prescriptive” theories, which describe what the law should be in a given context, or what an ideal law would be in a given situation.⁴ While interpretative theory differs from these other theories, any exercise in interpretative theory usually involves historical, descriptive, and prescriptive aspects. Such is this case with this dissertation’s theoretical approach.⁵

The purpose of this chapter is to identify and explain the theoretical basis employed by this dissertation to explain and justify the doctrinal law it argues for – corrective justice – and the various doctrinal approaches to tort law associated with it. First, a detailed explanation of corrective justice’s normative content, doctrinal application, and methodology is provided. Second, the place of corrective justice in the larger field of tort theory is discussed, an exercise which also provides a forum for explaining why corrective justice is the preferable theoretical basis for dealing with the private law liability of public authorities. The chapter then concludes by discussing the discrete question of how corrective justice can be used to interpret and evaluate private law claims against public authorities.

3.2: Corrective Justice and Private Law Theory

The articulation of a systematic theory of private law provides both a means by which to understand private law’s substantive content and a justification

³ Allan Beever & Charles Rickett, “Interpretative Legal Theory and the Academic Lawyer” (2005) 68 MLR 320 at 325.

⁴ Smith, *supra* note 2 at 4–6.

⁵ *Ibid* at 5.

for that substantive content. Theoretical or jurisprudential inquiries into private law tend to be narrowly focused. There are rarely attempts to articulate grand universal theories that encompass entire legal systems. While private law theorists may draw upon more universal theories such as natural law, positivism, or legal realism, their end-products tend to be exclusively applicable to private law. There is a further tendency to have an even narrower focus, with some theorists focusing on the area of private law known as the “law of obligations”, encompassing contracts, torts, and restitution, to the neglect of other areas of private law such as company law, family law, or trusts. Tort law, as an even more discrete field of study, has also generated its own discernable realm of theoretical study, normally labelled “tort theory”, which usually focuses on two issues: understanding and justification.⁶ Understanding refers to crafting an account of tort law that is as unified and as explanatory as possible,⁷ while justification refers to those ideas that explain why tort law recognizes (or should recognize) certain actions by a defendant to be wrongful and particular losses of a plaintiff to be worthy of a remedy.⁸ While corrective justice is applicable to the law of obligations as a whole, it tends to be most closely associated with tort law.

3.2.1: Corrective Justice Articulated

Corrective justice is most closely associated with the scholarship of Ernest Weinrib, particularly his 1995 book *The Idea of Private Law*.⁹ Weinrib

⁶ Allan Beever, *A Theory of Tort Liability* (Oxford: Hart Publishing, 2016) at 3.

⁷ *Ibid* at 3—4.

⁸ See generally Peter Cane, “Justice and Justifications for Tort Liability” (1982) 2 *Oxford J Leg Stud* 30.

⁹ Ernest J Weinrib, *The Idea of Private Law*, revised ed (Oxford: Oxford University Press, 2012). While Weinrib’s scholarship continues to be prominent in scholarship on corrective justice and will be cited throughout this dissertation as the main authority on corrective justice, many other scholars have written about and endorsed the idea of corrective justice.

argues that there are three mutually supporting ideas underlying private law. First, there is formalism: the possibility of an “immanent moral rationality” in law. *Rational* refers to an apolitical character, which distinguishes law from politics and ideology, a “restrained, relatively apolitical method of analysis” that can be contrasted to the more open-ended and indeterminate subject of politics. *Moral* refers to the presence of a normative force, law’s intelligible normative order and a “guiding vision about human associations”. *Immanent* refers to elaboration from within, the idea that law can be derived from and understood according to a standpoint internal to law. The key implication of formalism is that it portrays law as being both understandable on its own without being situated in a larger context and as having a moral or normative force despite not being contingent upon external explanations or justifications. Law can be understood on its own terms.¹⁰

Second, there is the idea of corrective justice itself. The concept is traced back to the work of Aristotle, particularly the *Nicomachean Ethics*.¹¹ Aristotle provides the most formal (the most abstract) account of the “structures that can be latent in external dealings among people”.¹² There

See eg Jules Coleman, *Risk and Wrongs* (Cambridge: Cambridge University Press, 1992); George P Fletcher, “Fairness and Utility in Tort Theory” (1972) 85 Harv L Rev 537; Peter Benson, “The Basis of Corrective Justice and Its Relation to Distributive Justice” (1991) 77 Iowa L Rev 515; Hanoch Dagan, “The Distributive Foundation of Corrective Justice” (1999) 88 Mich L Rev 138; Peter Cane, “Corrective Justice and Correlativity in Private Law” (1996) 16 Oxford J Leg Stud 471.

¹⁰ Weinrib, *ibid* at 22–24.

¹¹ Modern editions of Aristotle’s work usually employ the pagination of the editions published by the Berlin Academy between 1831 and 1870. An accessible English language text of the *Nicomachean Ethics* can be found in Richard McKeon, *The Basic Works of Aristotle* (New York: Random House, 2001).

¹² Ernest J Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1988) 97 Yale LJ 949 at 977.

are two possible forms of justice. Each is mutually exclusive, since they both cannot exist in the same legal relationship, and each can be expressed mathematically¹³ (permitting direct compatibility with a formalist understanding of law). First, there is corrective justice, which exists when there is equality between two persons in a bipolar transaction and which is violated when an interaction between two persons causes a loss to one. Second, there is distributive justice, which exists when all members of a community receive a share of something in proper proportion to criteria governing distribution, and which is violated when there is a failure in proper distribution.¹⁴

Finally, there is the normative content of private law, which is reducible to the idea of free will as it is elaborated in the philosophy of Immanuel Kant. Kant's ideas on free will and practical reason can be distilled into the concept of "Kantian right": the relationship between agents that possess free will, in that the agents are capable of preventing the content of their wills from determining the actions they take.¹⁵ Kantian right is not simply an observation about human behavior as an empirical phenomenon: that humans have the capacity to "intend what we do not desire and desire what we do not intend".¹⁶ Instead, Kantian right recognizes that persons have a juridical "personality", which Weinrib defines as a "capacity for purposiveness, which assumes legal significance when externalized".¹⁷

¹³ Weinrib, *supra* note 9 at 56–58.

¹⁴ *Ibid* at 56–58.

¹⁵ *Ibid* at 84–87.

¹⁶ Roger Scruton, *Kant: A Very Short Introduction* (Oxford: Oxford University Press, 2001) at 92.

¹⁷ Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 23. A more detailed explanation is provided (at 24):

Kantian right provides the core from which expanding layers of social and legal structures can grow.¹⁸

The corrective justice conception of private law does not necessitate or dictate any particular private law doctrines. Weinrib argues that while positive (doctrinal) law should give concrete legal expression to ideas of corrective justice, it should not be expected that corrective justice should provide pre-existing answers to any possible private law dispute.¹⁹ Corrective justice can, however, provide private law doctrine with a set of concepts and ideas that are necessary for private law to maintain a coherent and internally supported character. Legal indeterminacy, or the need for legal judgment, will never go away but private law should always be able to maintain its autonomy from other areas of human knowledge and activity.²⁰

The central concept for Weinrib is the idea of correlativity: private law must treat juridical relationships as single normative units in which the acts of doing and suffering (and their antecedent ideas of duty and right) must be understood as based on the same norm(s), deriving from an exclusively bipolar interaction that does not attach any preferential status to either party.²¹ The key juridical relationship in private law is that of plaintiff and

As the basis of the private law's attention to the parties, purposiveness without regard to particular purposes defines the conception of the person that underlies liability. This conception is what the natural right tradition called "personality" ... personality refers to the capacity for purposive agency that forms the basis for the capacity for rights and duties in private law. Personality encapsulates the normative standpoint from which private law has to view the parties if it is to regard them as having its rights and being subject to its duties.

¹⁸ Weinrib, *supra* note 9 at 87–109.

¹⁹ *Ibid* at 214–27.

²⁰ *Ibid* at 204–06.

²¹ *Ibid* at 120–26.

defendant. The correlativity between them is one of equals and is based on rights and their corresponding duties. Private law, properly understood as an exercise in corrective justice based on correlativity, is in a position to self-regulate based on its own rationality. Correlativity provides the normative background against which private law's abstract ideas, such as negligence as a basis for civil liability, and its specific determinations, such as whether a particular person failed to exercise reasonable care, can operate in an interdependent, mutually-self defining manner: "the determinations specify the abstractions, and the abstractions regulate the determinations".²²

Weinrib provides the following illustration:²³

Correlativity, then, is the abstraction distinctive to private law that lies at the apex of a system of nested abstractions and determinations. One can imagine this system as a juridical version of Jacob's ladder, 'set earthward with its head reaching into the heavens, and the angels of the Lord ascend and descend on it'. Each rung of this ladder both abstracts from the determinations below it and provides the determination for the rung above it. The ascent up the ladder is from the more particular to the more inclusive. The most inclusive abstraction of all is correlativity, because it abstracts from the content of all the other abstractions of private law. And like the angels who first ascend and then descend, corrective justice works its way up from the particular normative ideas and institutional arrangements of private law to the abstract representation of its structure, and then works back down to hold the particulars true to that structure.

Weinrib turns to Kant for the normative content of the rights protected by corrective justice. This reliance on Kant is not random – Weinrib argues that

²² Ernest J Weinrib, *Reciprocal Freedom: Private Law and Public Right* (Oxford: Oxford University Press, 2022) at 4–7.

²³ *Ibid* at 7.

Aristotle's account of corrective justice is "inchoately Kantian".²⁴ Kant's conception of rights – the "juridical manifestation of self-determining agency" – provides the only account of rights that complements Aristotle's idea of corrective justice that is based on both equality and the correlativity of doing and suffering.²⁵ Drawing on this normative source of Kantian right, the two main rights protected by private law are bodily integrity, since "[t]he body houses the free will and is the organ of its purposes",²⁶ and the "right to the external objects of the will" such as rights in property or contract.²⁷ Injustice occurs whenever a wrongful act (a breach of a duty) causes injury to a right that has a relationship with the duty that was breached. Thus correlativity is a requirement for both the existence of rights and duties and also their breach:²⁸

To be coherent, tort doctrine elaborates legal concepts that treat the defendant's act and its effect on the plaintiff as an integrated sequence in which there is a single injustice that is the same for both parties. In legal terms, the sequence begins with the defendant's breach of the standard of reasonable

²⁴ Weinrib, *supra* note 9 at 80–83.

²⁵ *Ibid* at 82. Weinrib further explains how Aristotle and Kant's ideas on justice are founded on similar concepts:

First, the abstraction from particulars corresponds to what Kant termed "negative freedom," the capacity of the agent to rise above the givenness of inclination and circumstance. Second, the equality of the parties corresponds to the irrelevance for the normative dimension in agency of the particular features – desires, endowments, circumstances, and so on – that might distinguish one agent from another and that therefore might form the basis of comparing and judging them unequal. Third, the sheer correlativity of doing and suffering corresponds to Kant's treatment of doing and suffering as a single normative sequence in which, regardless of the particularities of doer and sufferer, the doing must be capable of morally coexisting with the suffering that it causes.

²⁶ *Ibid* at 126–29.

²⁷ *Ibid*.

²⁸ Weinrib, *supra* note 17 at 44.

care, and ends in the factual causation of injury. However, the sequence can be regarded as integrated only if its two termini operate not as atomistic elements that the law simply adds together, but as constituents of liability that, for purposes of tort law, each derive their significance from the other.

Yet while corrective justice cannot provide antecedent answers to future legal disputes, it does not preclude the analysis of existing legal precedents to determine whether they correspond to corrective justice and, where they do not, to consider whether adherence to corrective justice would make private law more coherent and rational.

3.2.2: Corrective Justice and Rights-Based Tort Law

The application of corrective justice to the articulation of doctrinal tort law is most closely associated with what may be termed “rights-based” approaches to tort law. In this context, the idea of “right” tracks closely the definition offered by Hohfeld, in which “right” is the correlative of the idea of “duty”, with an invasion of the former constituting a breach of the latter: “In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place”.²⁹ Hohfeld suggested that it would be better to think of “right” in this context as being the equivalent to a “claim”, hence why the Hohfeldian tradition sometimes refers to “claim rights”.³⁰

A rights-based approach to tort law assumes that tort law cannot be understood or justified by focusing on the wrongs that tort law recognizes or the remedies it grants, and that primacy must be given to the rights that tort

²⁹ Wesley Newcomb Hohfeld, “Some Fundamental Concepts as Applied in Judicial Reasoning” (1913), 23 Yale LJ 16 at 32.

³⁰ *Ibid* at 30–32.

law protects, which are antecedent to any wrongs or remedies tort law may recognize.³¹ This dissertation will draw upon two particular sources of rights-based doctrinal tort law: Allan Beever and Robert Stevens.

One of the most comprehensive attempts at crafting a rights-based statement of doctrinal private law is Allan Beever's 2007 book *Rediscovering the Law of Negligence*, wherein Beever lays out a comprehensive statement of a principled, rights-based interpretation of the law of negligence. Beever argues that the common law of negligence, particularly as it is found in several leading cases, allows for the articulation of a "principled approach" to negligence law based on corrective justice.³² This principled approach is superior to current approaches to negligence law, since it jettisons any need for reliance on "policy" which Beever defines as anything apart from "the rules and doctrines of law itself".³³

Using corrective justice to understand the law of negligence is not an exercise in using the former as a first principle by which to derive the existence and content of the latter. Instead, for Beever the doctrinal content of negligence law is the antecedent, and a review of that content (particularly its leading cases) demonstrates that corrective justice is instantiated in it:³⁴

My claim is not that the cases apply corrective justice in the sense that the judges who decided the cases had a general theory of corrective justice in mind that they utilize to generate principles and outcomes (though I do not rule that

³¹ Beever, *supra* note 6 at 2—3.

³² Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) at 28–29.

³³ *Ibid* at 3—5, noting that "policy" must be defined in a negative way since there is no limitation on what may count as a valid policy consideration that informs the content of negligence law.

³⁴ *Ibid* at 29 [emphasis in original].

out either). But nor is my claim merely that the cases are consistent with corrective justice. My claim is that the cases contain reasons that are reasons of corrective justice. They are reasons of corrective justice because corrective justice demands the application of those reasons to the case and because other forms of morality do not demand the application of those reasons but may, in fact, demand the application of conflicting reasons. Hence, as the leading cases that I discuss proceed on the basis of those reasons demanded by corrective justice, those cases are not merely compatible with corrective justice, they are instances of corrective justice.

Beever takes the same approach to the rights underlying negligence law. He does not offer a freestanding theory of the rights on which negligence law is based, instead arguing that they can, like the idea of corrective justice, be gleaned from leading negligence cases.³⁵ Beever argues that the law of negligence is based on negative rights (rights that impose corresponding duties to not violate them, but do not impose an obligation on others to prevent harm or otherwise provide benefits to the right-holder).³⁶ Beever identifies three broad categories of “primary” rights: contract, property, and the law of persons.³⁷ Of note, these primary rights can generally be grouped under the Kantian rights of bodily integrity and external objects of the will. These primary rights are supplemented by “secondary” rights, which arise whenever a primary right is infringed and function as the law’s response to the invasion of a primary right. The secondary rights provided by private law

³⁵ *Ibid* at 60–68. While Beever does not adopt a theory of rights, elsewhere (at 65) he endorses Weinrib’s reliance on Kantian right: “...the approach which holds that the rights base of the law of negligence is founded on Kantian right is plausible” and in later writings Beever specifically adopted a Kantian basis for his theory of private law: Beever, *supra* note 6 at 19–21.

³⁶ *Ibid* at 210–22.

³⁷ *Ibid* at 214.

are the legal cause(s) of action a plaintiff may bring and the legal entitlement to remedies in the form of damages or other compensation.³⁸

A related statement of rights-based tort law is offered by Robert Stevens in his 2007 book, appropriately titled *Torts and Rights*.³⁹ Like Beever, Stevens argues for a rights-based understanding of tort law, one in which liability in tort exists upon the violation of the defendant's right. This can be contrasted with a "loss model" wherein liability flows from the infliction of a loss.⁴⁰ Like Beever, Stevens identifies three rights protected by tort law, although Stevens frames these rights slightly differently: reputation, bodily safety, and property.⁴¹ Unlike Beever, who openly relies on ideas of corrective justice in his account, Stevens eschews any reliance on a specific private law legal theory. Stevens acknowledges that corrective justice "seems to explain some of the key features of the law of torts" and is "less bad than an attempt to explain the law of torts through its functions or goals", but is incomplete because it does not provide an account of "the primary rights we do and do not have".⁴²

As to the source of our primary rights, Stevens agrees with Beever that they can be found in the judicial decisions that make up the common law, but Stevens goes on to offer a more detailed explanation. Primary rights derive from "moral" rights, rights that are "capable of being deduced from the nature and experience of ourselves, and the world and society in which we

³⁸ *Ibid* at 212–14. In this context, Beever is considering private law as a whole, not just the law of negligence.

³⁹ Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 5

⁴⁰ *Ibid* at 1–3.

⁴¹ *Ibid* at 5: Stevens relies on *Allen v Flood*, [1898] 1 AC 1 at 29 (HL).

⁴² *Ibid* at 327.

live”.⁴³ Drawing on natural law theory, Stevens suggests that “[r]ational people can recognize such rights without them being given force of law”.⁴⁴ In short, Stevens offers an account of primary rights that simply exist by virtue of longstanding recognition as opposed to being based on some metaphysical truth or being deduced from *a priori* principles.

3.2.3: Corrective Justice and the Common Law Method

The work of the doctrinal scholars provides the means by which corrective justice, as a theoretical framework, can be integrated with the method of the common law to produce a methodology by which past legal developments may be studied and critiqued and prescriptive arguments for legal developments articulated. Corrective justice, as a theory of law, and common law, as a process of both law-making and legal reasoning, share similar methodological assumptions.

The common law understands law as deriving from the decisions of individual judges and is usually contrasted to the civil law method under which the law is predominantly instantiated in legislative instruments. With the common law, in a general sense, the law is created by judges who hear and decide individual cases, with those decisions then being interpreted and applied by subsequent judges. Since the creation, interpretation, and application of the law all occur within the singular act of a judge’s decision in any individual case, the content of the common law is always defeasible: it is continuously revisable and refinable as it is applied to new and unique cases.

⁴³ *Ibid* at 330

⁴⁴ *Ibid* at 330-31. Stevens distinguishes between legal rights that are based on moral rights, and which are almost exclusively found in judicial decisions, from legal rights that are the creation of legislatures based on policy choices. He also notes that many moral rights, for whatever reason, have not been translated into legal rights.

While the common law can adapt and improve, it is never able to achieve a level of fixity as may be found in legislative law.⁴⁵ The common law, it has been argued, should not even be understood as containing legal rules but should instead be understood as a system of customary law deriving its content from knowledge and practices transmitted through time and its authority from conformity with the past.⁴⁶

Like the common law, corrective justice is not concerned with the creation of formulaic, comprehensive rules of law. Weinrib argues that corrective justice is a *structural* principle, which “refers to a pattern of argument to which the content (whatever it is) of private law should conform; and not a *substantive* principle, which “directly presents a proposed content for legal doctrine”.⁴⁷ Corrective justice provides a set of general principles that are immanent in private law (elaborated from within private law) and which allow private law to be self-regulating. Like the common law, corrective justice accepts a degree of indeterminacy in the substantive content of law. This is not a flaw in corrective justice, merely a recognition of the “inevitable consequence of the relationship between general and particular”.⁴⁸ Corrective justice provides a set of boundaries within which particular disputes can be resolved and the schema by which judicial reasoning can be distinguished from non-

⁴⁵ See generally Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Mass: Harvard University Press, 2009) at 103—05.

⁴⁶ The most eloquent articulation of this view of the common law can be found in AWB Simpson, “The Common Law and Legal Theory” in AWB Simpson, ed, *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Clarendon Press, 1973) 77. This dissertation generally adopts the understanding of the common law posited by Simpson and Schauer, *ibid.*

⁴⁷ Weinrib, *supra* note 17 at 10 [emphasis added].

⁴⁸ Weinrib, *supra* note 9 at 223.

judicial reasoning and by which normative relationships can be judicially intelligible.⁴⁹

One of the foremost applications of the complementary methodologies of corrective justice and the common law was posited by Beever in *Rediscovering the Law of Negligence*. As mentioned above, Beever starts with the common law as it currently exists. The cases of which it is composed can be divided into four categories:

1. Central cases, which are “of the utmost importance to the law” and which form the “backbone” of negligence law;⁵⁰
2. Standard cases, which are “the general run of the mill cases that broadly exemplify the principles found in the central cases”;⁵¹
3. Controversial cases, which appear to be consistent with existing case law but which also “appear to jar with the law in some way”;⁵² and,
4. Divisive cases, which are inconsistent with other cases.⁵³

Borrowing Rawls’ concept of “reflective equilibrium” – the process by which a previously held theory is examined in light of moral intuition with the result

⁴⁹ *Ibid* at 226—27. Weinrib expands on these ideas by explaining how corrective justice is both determinate (in a general sense) and indeterminate (in the particular sense):

The forms of justice are both determinate and indeterminate. They are indeterminate in that they do not predetermine exhaustively the particular results they govern. They are determinate in that they establish the bounds of coherence for the particulars that fall under them. In determining character, kind, and unity of juridical relationships, the forms of justice determine all that they need to, or can, determine.

⁵⁰ Beever, *supra* note 32 at 30. Beever provides *Donoghue v Stevenson*, [1932] AC 562 (HL) as an example of a central case.

⁵¹ Beever, *ibid*.

⁵² *Ibid*.

⁵³ *Ibid*. Beever provides the specific example of cases across the Commonwealth dealing with the recovery of economic loss.

that either the theory is affirmed, the intuition is discarded, or both are modified – Beever argues that a coherent theoretical understanding of law can be constructed. In the particular context of negligence law, the outcomes in individual cases are the reference points for moral intuitions. Cases and theory exist in a mutually reinforcing relationship: theory is used to assess cases and cases are used to assess and restructure theory. This process of reflective equilibrium allows the articulation of a principled approach to law (which, Beever argues, is a corrective justice account).⁵⁴ Such a process has the same spirit as Lord Mansfield’s classic statement that the common law “works itself pure”.⁵⁵

3.3: Corrective Justice and the Competing Theories of Private Law

Properly placing corrective justice within the larger body of tort theory involves stepping into an academic minefield. Military metaphors are not overwrought here: tort scholarship has been described as “war” amongst its competing theorists,⁵⁶ who have been described as suffering from “increasing polarization” and “accelerating myopia of their scholarship”.⁵⁷ There are two broad camps of tort theory, although the exact boundaries between them are debated, and their peripheries are populated by associated sub-theories and scholars who are viewed by those in the centre as falling somewhere between eccentric family members and unrepentant heretics. This bi-polar situation has been described by many labels: instrumentalist versus non-instrumentalist, justice/morality versus efficiency, principle versus policy,

⁵⁴ *Ibid* at 25—42.

⁵⁵ *Omychund v Barker* (1744), 26 Eng Rep 15 at 23 (Ch).

⁵⁶ Michael L Rustad, “Twenty-First Century Tort Theories: The Internalist/Externalist Debate” (2013) 88 Ind LJ 419 at 422.

⁵⁷ Christina Carmody Tilley, “Tort Law Inside Out” (2017) 126 Yale LJ 1320 at 1335.

amongst others. Perhaps the most illuminating label is that of internal versus external. As explained by Rustad:⁵⁸

In tort jurisprudence, the divide is between internalists who view torts as principally a private-law subject and externalists who emphasize tort's public policies such as deterrence, efficiency, social justice, and other macrolevel policies. Corrective justice and civil recourse theory are the leading internalist perspectives, whereas law and economics is the leading externalist perspective.

Historically, insomuch as tort theory existed it tended towards an internal, moral perspective: tort law was concerned with moral blameworthiness of particular actions.⁵⁹ But starting in the nineteenth century some scholars and jurists began to view tort law as a means to achieve social policy goals that were external to any ideas of moral blameworthiness or individual justice. This development coincided with the rise of legal realism, the school of jurisprudence that views the development of legal doctrine as being the result of external, often unspoken, considerations brought to bear on legal disputes by judges in deciding cases.⁶⁰

The foremost of the externalist approaches to tort law is law and economics, which understands tort law as a “means of regulating social behavior based on any of a menu of resource-allocation commitments”.⁶¹ Just outcomes in torts cases are not about interpersonal morality but are a means to incentivize the efficient allocation of resources by shifting losses in the face of

⁵⁸ Rustad, *supra* note 56 at 422, n 18.

⁵⁹ John CP Goldberg, “Twentieth-Century Tort Theory” (2003) 91 *Geo LJ* 513 at 516—17: “in the traditional account, tort law was understood, like its more prominent cousin criminal law, to set standards of right and wrong conduct.” See also Tilley, *supra* note 57 at 1327—28.

⁶⁰ Tilley, *ibid.*

⁶¹ *Ibid* at 1329.

inefficient allocations.⁶² More recently, additional externalist tort theories have arrived in the form of a loose coalition of approaches that draw on the critical legal studies movement and assess tort law through a variety of lenses such as gender, race, or class with the aim of critiquing the way existing legal orders distribute wealth, power, and risk.⁶³

A detailed discussion of the differences, similarities, and competing virtues of internalist and externalist tort theories is beyond the scope of this dissertation. For present purposes, several key differences can be identified between internalist accounts, particularly corrective justice, and externalist accounts. An analysis of these differences will show why corrective justice is a preferable theoretical lens for this dissertation's project. Before reviewing these differences, a brief comment will be made on the methodology for comparing legal theories.

Scholars have suggested criteria that can be employed when evaluating a particular legal theory or when assessing the preferability of different, competing legal theories. In the setting of private law, one widely used set of criteria is the four posited by Stephen Smith. The first criterion is *fit*: a given theory must be consistent with and supported by the legal facts it purports to explain.⁶⁴ Second, the theory must be *coherent*, in that it presents law or an area of law as being consistent with itself (or at least non-

⁶² *Ibid.* For a general survey of law and economics, see David D Friedman, *Law's Order: What Economics has to Do with Law and Why It Matters* (Princeton, NJ: Princeton University Press, 2001).

⁶³ See generally Peter Cane, "The Anatomy of Private Law Theory: A 25th Anniversary Essay" (2005) 25 *Oxford J Leg Stud* 203 at 205–06.

⁶⁴ Smith, *supra* note 2 at 7–11. For critical comment on Smith's criteria, see Andrew S Gold, "Internal and External Perspectives: The New Private Law Methodology" in Andrew S Gold, ed, *The Oxford Handbook of the New Private Law* (Oxford, Oxford University Press, 2020) 3 at 10–12.

contradictory with itself)⁶⁵ and able to work as a unified system,⁶⁶ or one which is explainable by reference to a single principle.⁶⁷ Third, there is the criterion of *morality*.⁶⁸ This concerns the interaction between the justification of law and its intelligibility. In this context morality does not mean correspondence with some pre-determined morality existing as a kind of metaphysical certainty, rather it means that: “Insofar as the law is, or could be thought to be, supported by recognizably moral principles, law’s claim to authority is intelligible. It is intelligible because we have satisfactorily explained why legal actors might claim the law is morally justified”.⁶⁹ Finally, there is *transparency*: “law is transparent to the extent that the reasons legal actors give for doing what they do are their real reasons. By contrast, law is not transparent if the real reasons are hidden”.⁷⁰

With this framework in mind, the two relevant differences between internalist and externalist accounts will be reviewed. As will be shown the major areas of divergence, both of which show corrective justice as a preferable theory, are with respect to the criteria of *morality* and *transparency*.

3.3.1: Conceptual Integrity

In a common law system, the delivery of written reasons is how courts proclaim and justify their decisions. The understanding of law is thus an

⁶⁵ Smith, *ibid* at 11, who describes this as a “less demanding” understanding of coherence.

⁶⁶ *Ibid*, who describes this as the “more demanding” understanding of coherence.

⁶⁷ Gold, *supra* note 64 at 15.

⁶⁸ Smith, *supra* note 2 at 13–24. Smith reviews three different definitions of the morality criterion, settling on one he labels the “moderate” version.

⁶⁹ *Ibid* at 20.

⁷⁰ *Ibid* at 24.

exercise involving both language and rhetoric. Negligence law, the tort under consideration in this dissertation, relies upon several concepts, such as “duty”, “fault”, “carelessness” and even “negligence” itself, that carry particular linguistic and rhetorical baggage. Negligence law is expressed in language that, at least in the colloquial sense, has two characteristics. First, it is moral, in that it carries connotations of actions being right or wrong; second, it is relational, in that it refers to relationships between individuals, as opposed to the relationship between individuals and larger groups, or individuals’ conduct considered in isolation.

The language used to describe negligence law poses no difficulty for a corrective justice analysis, given that the latter is a theory of interpersonal (relational) morality.⁷¹ But every instrumentalist approach accepts, to some degree, a disconnect between the language used in negligence law and the substantive content of negligence law. This is not a surrender to indeterminacy of language or ambiguity of legal concepts. It is an acceptance that concepts such as “duty” or “negligence” have a defined meaning and function, but they just happen to be different from what those concepts would normally mean. For instance, a law and economics approach sees a ruling that a defendant carelessly caused damage to the plaintiff not as a normative pronouncement on something the defendant did to the plaintiff but instead as a determination as to what standard of conduct as between the plaintiff and

⁷¹ Allan Beever, “Corrective Justice and Interpersonal Responsibility in Tort Law” (2008) 28 *Oxford J Leg Stud* 475 at 477:

[C]orrective justice focuses on interactions between individuals. Corrective justice is, therefore, an interpersonal or bipolar justice. Questions of corrective justice are answered, not by looking at individuals in isolation or at societies as a whole, but by examining interactions between individuals. Accordingly, to hold that tort law is a regime of corrective justice is to hold that aspects of tort law are to be explained in an interpersonal way.

defendant would have resulted in the greatest economic efficiency and the best allocation of scarce resources that have competing uses (ideas that are rarely found in tort decisions).⁷² Much of instrumentalist tort theory actively embraces the idea that courts deciding negligence cases are employing the language of negligence law as a screen for the actual reasons for deciding cases, whatever they are.⁷³

Turning to the criteria for assessing theories, significant divergences have already emerged. The criteria of *fit*, *morality*, and *transparency* pose few difficulties for corrective justice. It seeks to explain the legal treatment of interpersonal disputes, which aligns with the subject matter of negligence cases (*fit*); its moral aspect based on interpersonal morality aligns with the language and ideas used in negligence law (*morality*) and with how those ideas are expressed by courts (*transparency*). In contrast, leaving aside any issue of how instrumentalist theories may *fit* with negligence law, the criteria of *morality* and *transparency* pose problems for them. With *morality*, the supposed justifications for the legal outcomes these theories advocate are notably absent from much of the language and ideas in negligence law. This contrasts with language of interpersonal morality used by corrective justice, which is infused into negligence law. But the greatest problem for instrumentalist theories is with *transparency*. As discussed above, these theories embrace the idea that the actual reasons for laws and legal outcome

⁷² For an example of this type of law and economics analysis, see Friedman, *supra* note 62 at 47–62.

⁷³ See generally Beever, *supra* note 32 at 8–17. For a rare judicial example, see the speech of Lord Denning in *Lamb v Camden London Borough Council*, [1981] QB 626 at 636 (CA): “The truth is that all these three – duty, remoteness, and causation – are all devices by which the courts limit the range of liability for negligence or nuisance. ... All these devices are useful in their way. But ultimately it is a *question of policy* for the judges to decide”. [emphasis added].

is concealed behind language and concepts that not only fail to indicate the real reasons, but suggest different, non-existent reasons.

A theoretical approach that accepts and aligns with the meaning of the concepts found in law should be superior to one which assumes such concepts are either meaningless or are masks for different ideas and justifications. At a minimum, the latter approach is wasteful and adds a pointless layer of complexity to legal scholarship. However, scholarly efficiency is not the only consideration. As much as possible, the language and concepts used to explain and justify the law should reflect those explanations and justifications.⁷⁴ While some degree of indeterminacy of language is inescapable, this is not a licence to reduce the language of law to what Thomas Hobbes cynically dubbed the “the money of fools”.⁷⁵

The importance of certainty in language is accentuated when we are dealing with the statement and explanation of law. The entire common law system presupposes that courts can express in language not only what they decide but why they decided it. As explained by the Supreme Court of Canada:⁷⁶

At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges.

⁷⁴ See generally Richard Weaver, *Ideas Have Consequences* (Chicago: University of Chicago Press, 2013) at 134—52.

⁷⁵ Thomas Hobbes & Edwin Curley, *Leviathan : With Selected Variants from the Latin Edition of 1668* (Indianapolis: Hackett Publishing Company, 1994) at 19.

⁷⁶ *R v Sheppard*, 2002 SCC 26 at para 5.

In the case of negligence law, the language and concepts are those of interpersonal morality, especially the ideas of duties and their breach.⁷⁷

Corrective justice, a theory of justice based on interpersonal morality, is thus an ideal theory to bring to bear on negligence law.

3.3.2: Private Law as an Autonomous Subject

Corrective justice understands private law as being an autonomous body of knowledge that is both internally intelligible and which provides its own normative content. This is what lies behind the label of “internalist” often attached to corrective justice: the concepts and ideas within private law are sufficient to both understand what private law is and articulate how it should apply, while the outcomes prescribed by private law are not justified by referenced to an external source. Whereas externalist theories such as law and economics (or any theory with a title of “law and...”) look to an external source for the purpose of private law, corrective justice holds that whatever purpose private law has is entirely internal to private law.

In many ways private law does not actually have a purpose other than simply being itself. In what may be his most memorable figure of speech, Weinrib compares private law to love: “Explaining love in terms of extrinsic ends is necessarily a mistake, because love does not shine in our lives with the borrowed light of an extrinsic end. Love is its own end. My contention is that, in this respect, private law is just like love”.⁷⁸

⁷⁷ See generally Roger Scruton, *The Palgrave Macmillan Dictionary of Political Thoughts*, 3rd ed (Palgrave Macmillan, 2007) *sub verbo* “duty”. The ideas of “duty” and “obligation” are generally understood as moral concepts which provide “both a reason and motive for action”, and can be juxtaposed to utilitarian or consequentialist arguments for particular actions.

⁷⁸ Weinrib, *supra* note 9 at 6.

At this point, reference can be made to the criterion of *transparency*, which is satisfied by corrective justice far more than by externalist or instrumentalist theories. Smith specifically linked the transparency criterion to an “internal” explanation of law,⁷⁹ which follows the corrective justice account, whereas externalist theories, by definition, cannot offer internal accounts of law but must instead draw upon external, non-legal sources.⁸⁰

The autonomy in a corrective justice account does not mean that private law is hermetically sealed off from all other realms of human knowledge or experience. Rather autonomy means that private law is not subordinated to other forms of knowledge or experience. Weinrib (employing a less ambitious simile than love) argues that:⁸¹

One comprehends private law by comprehending the mode of justification that animates it from within. This includes taking seriously the discourse through which a sophisticated system of private law aspires to express its own rationality. Inasmuch as this rationality is immanent, it can be grasped from within and only from within. Just as one understands mathematics by working through a mathematical problem from the inside, so one understands private law by an effort of mind that penetrates to, and participates in, the structure of thought that private law embodies. Private law, accordingly, is not only self-illuminating, but also self-regulating.

This does not mean that other disciplines are irrelevant to private law. However, private law regards their insights from its own perspective and assimilates them to its own immanent rational purpose. Conclusions of alien disciplines enter private law on its terms, not on theirs.

⁷⁹ Smith, *supra* note 2 at 24.

⁸⁰ *Ibid* at 31–32.

⁸¹ Weinrib, *supra* note 9 at 214.

A corrective justice account is what makes the project of this dissertation possible. At the risk of being trite, it allows this dissertation about a particular private law phenomenon to be about private law and not public policy, economics, or any other subject.

There is a further practical consideration involved. Externalist theories presume that private law should comply with or further some goal or policy. But as Beever notes, the number and variety of policy arguments in law has reached the point where (a) there is no longer any consensus on what policy arguments are relevant or irrelevant, giving every policy argument *prima facie* validity, and (b) policy arguments can now be deployed to support any conceivable doctrinal content for law.⁸² Furthermore, most policy arguments are controversial, with differing views being held by different persons, making any selection between them a political matter.⁸³ The challenge that many externalist accounts pose, at least when wedded to a scholarly project that is prescriptive, is that the selection or articulation of the external goals to be employed can be determinative of the project as a whole. In short, the debate is not over law but over the proper goals that law should instantiate.⁸⁴

This challenge is accentuated in the realm of public authority liability, since any complete account of it must contend with what this dissertation terms the “public character” problem. As discussed in chapter 2, a public authority is a part or extension of the state and the state is not the equivalent of a private person. The state has certain characteristics and capabilities that are

⁸² Beever, *supra* note 32 at 5.

⁸³ *Ibid* at 6—8.

⁸⁴ As noted by Tilley, *supra* note 57 at 1336, critics of instrumentalist theories – the various “law and ...” fields – claim that such theories simply subsume law into other fields of knowledge, and do not engage with law as an autonomous body of knowledge.

public in nature and which could never be attributable to private persons. The issue then becomes how, if at all, private law can be understood to apply as between a private person and a public one. The answer to the public character problem, at its most basic level, requires some articulated idea of the state and how it relates to a private person. As will be discussed, an internalist account is able to provide an answer that makes only a straightforward descriptive claim about the state: the boundary between public and private activities. Such an answer is not available to an externalist account as it denies private law a self-sufficient autonomy and demands that private law's explanation and justification be found outside of it. But in the search for external goals or justifications for private law, it is exceedingly difficult for an externalist account of public authority liability to avoid being drawn into questions not only about what the state is but what the state is expected to do. It will be pulled into an arena where the questions are fundamentally political and the answers are indeterminate.

Even limiting the public character problem to a constitutional liberal democratic state like Canada, there are wide ranging debates about the nature of the state's relationship to society, all of which could inform an externalist account of private law. Should the state be socialized, libertarian, or communalist? Should it promote individual responsibility, collective responsibility, cultural cohesion, or social justice? Should it prioritize economic growth, wealth redistribution, or environmental preservation? Numerous additions could be made to this inventory of considerations, all of which could be presumptively brought to bear on the content of private law doctrine, and which would dictate a wide variety of doctrinal outcomes.

The claim being made here is practical and not epistemic or metaphysical. A theoretical account of private law that relies on answers to the questions of what a state should do adds another layer of non-legal considerations to any

analysis of doctrinal private law, a layer whose cumulative weight further crushes the scope for law to have an independent existence and reduces the ability to articulate independently meaningful and coherent private law doctrine.

3.4: Corrective Justice and the Public Character Problem

At this juncture, it is appropriate to return to and explicate the claim made previously in passing: that an internalist account of private law, particularly a corrective justice account, can both successfully deal with the public character problem and do so without being contingent upon positions on external, controversial, and political questions.

A public authority's participation as a party in a private law dispute must occur in a circumscribed way. By way of illustration, consider *Bell v Sarnia*,⁸⁵ in which the plaintiff successfully sued the City of Sarnia in the Ontario High Court of Justice and recovered damages flowing from the defendant municipality's negligent advice regarding zoning controls. Mr. Bell was a private person whose status and role in the case was limited to his role as the plaintiff. The state, on the other hand, was present in several guises and played many parts: it provided the forum for the adjudication of the case (a federally appointed judge in a provincially constituted court), established the positive law that applied to the dispute (both common law and legislation enacted by the provincial government) and, should it have been necessary, would have also lent its near monopoly on force and coercion to enforce the judgment rendered against the defendant. But the state also played another role: it was the defendant, in the form of the City of Sarnia, a municipal corporation.

⁸⁵ (1987), 59 OR (2d) 123 (HCJ) [*Bell*].

To apply corrective justice to *Bell*, we must conceive of a correlative relationship of doing and suffering between Mr. Bell and the City of Sarnia when the City of Sarnia is not only part of the same entity that provides the legal context of the determination of whether a wrong has occurred, and which is also the entity vested with the power to determine whether a wrong has factually and legally occurred. What is needed is a coherent and sufficiently detailed idea of the state that permits some parts of it to participate in relationships with private persons that are compatible with the idea of corrective justice while at the same time permits other parts of it to fulfill the roles of creating and implementing the legal and institutional context corrective justice requires. At the same time, this conception of the state has to permit the existence of private law relationships that are not contingent upon assumptions about what the state must or should do in any given situation. As the following section will elaborate, such a conception of the state and its relationships to private persons can be derived from a combination of the political philosophy underlying corrective justice and the Diceyan conception of the rule of law.

3.4.1: Kant's Conception of the State

Corrective justice generally draws on two sources of moral and political ideas: Aristotle and Kant. Unfortunately, while Aristotle's analysis contains extensive discussions of politics and government, he is of limited assistance in seeking a definition or theory of the modern state. This absence of useful commentary is the result of bad timing: from Aristotle's perspective, the modern idea of the state was roughly 2,000 years in the future.⁸⁶

⁸⁶ The timing of the birth of the modern state is debated. Philip Bobbitt places it in the early 16th century in the city-states of Renaissance Italy, occurring when princes and oligarchs, facing external threats and mounting costs of administration, established bureaucratic institutions to better govern their holdings which eventually assumed the ideas of legitimacy, continuity, integrity, and sovereignty that had been previously associated with the

The adjective “modern” is not superfluous here. If we return to *Bell* we can discern several characteristics the state requires in order to participate in a private law relationship. First, it is *reified*, in that it is a discernable entity with certain characteristics and bounded by particular limits. Second, it is *detached*, in that it is discernibly separate from the individuals who are its citizens, subjects, or inhabitants. Third, it is *relational*, as it can interact with other entities, whether individuals, other parts of itself, or other states. Aristotle may have been familiar with certain polities or communities such as city-states or empires but the modern idea of the state would have been foreign to him, as would the idea of an individual having a legal claim against the state.⁸⁷

Immanuel Kant (1724-1804) lived and wrote after the modern idea of the state had emerged, and he did turn his mind to political questions. However,

individual ruler: Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (New York: Random House, Inc, 2002) at 80—82. In contrast, see FW Maitland, “The Crown as Corporation” in David Runciman & Magnus Ryan, eds, *State, Trust, and Corporation* (Cambridge: Cambridge University Press, 2003) 32 at 38, who argues that the idea of the state in the English legal tradition did not emerge until the 17th century. For a different perspective, see Alan Ryan, *On Politics* (New York: Liveright Publishing Corporation, 2012) at 403–08, who argues that the institutional idea of the modern idea of the state can be traced back to the institutions of the medieval papacy but that the idea of the state as a distinct entity is properly traceable to Thomas Hobbs (1588-1679).

⁸⁷ Bobbitt, *ibid* at 81:

It is certainly true that there were states before this period [the Italian Renaissance]; but these, like the city-states of Thucydides, did not self-consciously think of themselves as juridical entities separate from (and sometimes in opposition to) civil society. For Thucydides, the State is never a thing – it has no “legal personality” as we might say. The State is always an irreducible community of human beings and never characterized as an abstraction with certain legal attributes apart from the society itself. The modern state, however, is an entity quite detachable from the society it governs as well from the leaders who exercise power.

See also William H McNeill, *The Rise of the West: A History of the Human Community* (Chicago: University of Chicago Press, 1963) at 205, noting that the Greek *polis* was seen by citizens “not as an alien, outside entity, but an integral extension and collective magnification of personal life and power”.

Kant's political philosophy was not as extensive as his work on epistemology, metaphysics, and ethics and there are significant gaps in his ideas.⁸⁸ In general, Kant posited a proper political and legal ordering based on a society organized by law, governed by a sovereign authority that was republican in nature, and based on a respect for private persons and their private rights. Kant elaborated what he understood as the ideal mechanisms of government: there should be a separation of powers, with the executive, legislative, and judicial powers being understood as distinct entities with their own functions and responsibilities while at the same time being mutually dependent and subordinate to one another.⁸⁹

However Kant did not explicitly articulate anything approaching a theory of private remedies against the state. The relationship between the state and the citizen was conceived of with the latter in a collective form, as the “general united will” or a civil society.⁹⁰ But Kant did not address the issue of a single person having private rights against the state (a right distinct from the relationship between the state and the citizenry as a whole).⁹¹ To the contrary, Kant is notorious for his view that the state had no duties to individual citizens and that the citizens generally had no remedies in the event of wrongful action by the state.⁹²

⁸⁸ On this point see Scruton, *supra* note 16 at 113–24. Some commentators have theorized that by the time Kant turned his mind to political philosophy, late in his life, his faculties were already failing. At the very least, as Scruton notes, Kant never laid out a full “critique of political reasoning” or a theory of political ordering based on *a priori* principles.

⁸⁹ *Ibid* at 115–26.

⁹⁰ *Ibid* at 120–25.

⁹¹ See generally Beever, *supra* note 6 at 13, noting that Kant never developed a theory of tort law, since his focus was on primary and fundamental rights rather than on wrongs and remedies.

⁹² See generally Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore: Johns Hopkins University Press, 1967) at 451:

Kant's prohibition on revolution is not based on practical considerations but instead on logic and the necessity of avoiding contradictions. As the supreme authority embodies what is publicly just, to oppose it is, by definition, to promote that which is publicly unjust.⁹³ Kant's idea of private persons being unconditionally required to obey the sovereign is not licence for arbitrary or despotic rule. Rather, both the existence and the power of the sovereign can only be justified on the grounds that both secure the equal freedom of all persons.⁹⁴ This justification necessitates duties and limits on the sovereign: it cannot fail to exercise its public power equally or at all, thereby denying "the capacity of some private persons to limit the conduct of others by virtue of their freedom", nor can the sovereign constrain the freedom of its subjects "in

[Kant] argues that the supreme power in the State has only rights and no duties towards the subject. If the head of the state violates the law the subject may oppose a complaint to the injustice, but not active resistance. In no case is resistance on the part of the people to the supreme legislative power legitimate. It is the duty of the people to bear any abuse of the supreme power, even though it should be considered to be unbearable. Kant's reason is that any resistance of the highest legislative authority must always be contrary to law, and must even be regarded as tending to destroy the whole legal constitution.

⁹³ Dale Jacquette, "Kant on Unconditional Submission to the Suzerain" (1996) 13 *History of Philosophy Quarterly* 117 at 118.

⁹⁴ Jacob Weinrib, "Sovereignty as a Right and a Duty: Kant's Theory of the State" in Claire Finkelstein & Michael Skerker, eds, *Sovereignty and the New Executive Authority* (Oxford: Oxford University Press, 2018) 21 at 34:

Since public authority is justified on the basis of the right of persons to equal freedom, Kant holds that internal to the justification of public authority is the moral standard for assessing its adequacy and directing its reform. A legal system conforms to the terms of its justification to the extent it "makes freedom the principle and indeed the condition for any exercise of coercion." In turn, an exercise of public authority adheres to the terms of its justification to the extent that it is directed toward bringing the existing legal order into the deepest possible conformity with its own internal moral standard. Insofar as the right to rule presupposes the right of each person subject to it to freedom, government cannot deny the right of persons to freedom without thereby undermining the justificatory basis of its own authority.

a manner that cannot be justified with reference to securing the freedom of a plurality of persons under law”.⁹⁵

3.4.2: Modern Kantian Conception of the State

Modern elaborations of Kant’s political philosophy have expanded on the idea of the Kantian state and have attenuated Kant’s prohibition on revolution so as to allow room for private law remedies against the state. A detailed review of the Kantian state is found in the writings of Arthur Ripstein.⁹⁶ According to Ripstein, Kant was concerned with the creation of “public right”: the condition in which institutions guarantee and actualize the rights of persons.⁹⁷ Kant’s political philosophy does not contemplate the state or civil society coming into existence as the result of a contract or compact between free individuals in a state of nature (whether Hobbesian, Lockean, or Rousseauian). The problem with classic social contract ideas is that they presume purely private actions by rights-possessing persons in the state of nature but in such a state no person could acquire rights or successfully enforce those rights, nor would there be any objective standards by which to justify the application of rights to particular situations. In a state of nature, rights can never be “conclusively conclusive”, since they cannot be authorized

⁹⁵ *Ibid* at 39-40. The former restriction on the sovereign concerns “barbarism” and encompasses a state persecuting a minority group within its jurisdiction. The latter restriction concerns “injustice” and prohibits restraints on freedom of persons or imposes obligations on them that do not further the purpose of securing their equal freedom, such as a law that “compels subjects to salute the governor’s hat or forbids them to sniff the perfume of violets”.

⁹⁶ The leading work is Arthur Ripstein, *Force and Freedom* (Cambridge, Mass: Harvard University Press, 2009).

⁹⁷ *Ibid* at 182—83. Ripstein describes Kant’s “postulate of public right”, the need for a rightful condition to be created, in which private rights are given certainty and coherence through a “public standpoint created through institutions”. See also Ernest J Weinrib, “Private Law and Public Right” (2011) 61 U Toronto LJ 191 at 195.

under a universal law applicable to all persons. Rights in the state of nature are conditional or provisional since there is no way for persons to enforce them against each other. Persons have no right to use force against each other, but absent some coercive system of enforcement, no person can be assured of or secure in their own rights. What is required for conclusive rights is a “rightful condition” which is created by the formation of the state.⁹⁸

The formation of the Kantian state, Ripstein argues, is the establishment of an enforceable system of rights between free individuals. A state is required because without one it is impossible for individuals to create or enforce rights and it is impossible to conclusively resolve disputed rights without an external, objective institution.⁹⁹ In the Kantian state, private rights are not self-executable nor are they based on some historical, pre-political state of nature – they are only legal and morally coherent when they are supplemented and transformed by the “public authorization” provided by the

⁹⁸ Ripstein, *ibid* at 145–81. See also Jacob Weinrib, *supra* note 94 at 32, who notes the connection between the necessity of a state to secure private rights and the requirement of unconditional obedience to the sovereign:

Kant holds that consent has no bearing on determinations about whether particular persons are bound by a particular state. ... Kant holds that private persons must submit themselves to the governance of public institutions because they cannot interact with one another on terms of equal freedom in its absence. If it were true that private persons in some time and place had in fact consented to the sovereign’s rule, consent would be irrelevant because the obligation obtains on other grounds. Likewise, the refusal to consent is irrelevant, for refusal would matter only if it was permissible. But no one could have a right to reject a lawful order (in which all can interact on terms of equal freedom) in favor of a lawless one (in which none can). Thus, Kant remarks that persons are not wronged by being compelled to submit to the public authority of a rightful condition.

⁹⁹ Ripstein, *ibid* at 146.

state.¹⁰⁰ Therefore private rights do not precede the state but are the product, in part, of an action by the state in recognizing and endorsing them.

With this more detailed concept of the Kantian state, we have a state that is reified, detached, and relational. However, there remains the issue of how the state, as the institution that creates and determines the rights of private persons, can be in a relationship with a private person whereby that person has an objective, enforceable right against the state. The solution takes the form of a distinction between the sovereign core of the state and the agents who implement the sovereign acts of the state.

3.4.3: The Institutions of the Kantian State

While Kant's thinking pre-dates the emergence of the modern administrative state, he clearly contemplated the existence of public institutions that were not part of the inviolable and uncontradictable sovereign. He recognized the existence of republican institutions below the sovereign (the three branches of government) and also recognized that individual citizens could hold distinct public offices.¹⁰¹

As explained above, the Kantian state creates a rightful condition through omnilateral actions that bind all of its members. However, since the state must act through private persons, a question of legitimacy arises: how does a society both understand and ensure that the persons carrying out state actions are exercising public power as opposed to private ends? Ripstein argues that the solution is found in the concept of public institutions, which “incorporate a distinction between the offices they create and the officials

¹⁰⁰ *Ibid* at 152—59.

¹⁰¹ *Ibid* at 146–147, 173–76.

carrying them out”.¹⁰² While private persons will hold official positions, those positions have a clear “mandate” which, while it may vary between various positions depending on their specific characteristics, are all united by the single purpose of “creating and sustaining a rightful condition”.¹⁰³ Ripstein further explains that the persons holding official positions can exercise distinctive public and private roles:¹⁰⁴

The concept of an official role thus introduces a distinction between the mandate created by the office and the private purposes of the officeholder. That distinction shows what it is for laws rather than people to rule, even though the actual ruling is done by people.

...

The structure of the official role parallels the structure of a person in a private relationship of status: an official is legally empowered to make arrangements for others, and is thereby prohibited from using his or her office for private purposes. Thus officials may neither take bribes nor award government contracts to their friends or family members ... The distinction between an official’s acting within his or her mandate and outside it does not depend on the official’s attitude: legal systems can operate just effectively even if many of their officials do not care about the law or justice, but only about doing their jobs and collecting their pay.

By way of summary, Ripstein notes that “[w]hen officials act within their roles, they act for the state; Kant also makes the stronger claim that they act for the people”.¹⁰⁵

¹⁰² *Ibid* at 191.

¹⁰³ *Ibid* at 192.

¹⁰⁴ *Ibid* at 192—93.

¹⁰⁵ *Ibid* at 194.

This model of the Kantian state is entirely compatible with both the Anglo-Canadian legal tradition in general and AV Dicey's equality principle in particular. Kant's idea of the sovereign being immune from claims by private persons is directly analogous to the Anglo-Canadian prohibition on private persons suing the Crown on the principle that "the King can do no wrong".¹⁰⁶ This was not simply a prohibition on *Lèse-majesté*¹⁰⁷ or a codification of the divine right of kings. Rather, it was response to the problem caused by a sovereign being sued in courts that derived their authority from the sovereign¹⁰⁸ and by the Crown often having the role of the personification and representation of the public.¹⁰⁹ The solution was to deny any private rights against the Crown or the state itself, which was conceived as not having a distinct legal personality. The Crown could, as an act of sovereign power, grant to private persons the right to bring proceedings against it. Historically this took the form of petitions of right issued by English kings,¹¹⁰ and in its more modern version it takes the form of Crown liability legislation which allows private persons to bring proceedings against the Crown as if it were a private person.¹¹¹ However, these measures were not instantiations or recognition of pre-existing rights that private persons held against the sovereign. In terms of the relationships between private persons and the sovereign, they were no different than other unilaterally-granted benefits

¹⁰⁶ See eg *Johnstone v Pedlar*, [1921] 2 AC 262 (HL).

¹⁰⁷ From the French term for "to do wrong to majesty", an offence to a monarch or the state.

¹⁰⁸ Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Square* (Cambridge: Cambridge University Press, 2012) at 205—09.

¹⁰⁹ *Ibid* at 209—10.

¹¹⁰ Peter Hogg, Patrick Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 4—5.

¹¹¹ *Ibid* at 8—11. For examples of such legislation, see *Crown Liability and Proceedings Act*, RSC 1985, c C-50, *Crown Proceedings Act 1947*, 10 & 11 Geo VI, c 44.

that the sovereign could grant to its subjects, and could just as easily withdraw without violating a duty owed to its subjects. Viewed from the perspective of Aristotelian forms of justice, the Crown's recognition of its civil liability and the granting of remedies to private persons arising from that liability can be understood as a matter of distributive justice implemented through public law, albeit public law that employs as its distribution criteria various concepts established through private law.¹¹²

3.4.4: The Institutions of the Anglo-Canadian State

As with the Kantian idea of the state, the Anglo-Canadian idea of the state recognized the involvement of individuals distinct from the person of the monarch in the implementation of executive powers and further recognized that the unlawful exercise of those powers could give rise to private law liability. This idea dates back as early as *Entick v Carrington*,¹¹³ where employees acting of behalf of the King entered and searched the plaintiff's home pursuant to a warrant issued by a royal minister. The defendants were held liable on the basis that the minister in question had no legal authority to issue the warrant and, absent legal authorization, the defendants had committed trespass.

Here was an idea of state action that could give rise to private law liability (the idea that an official acting on behalf of the state could do something wrongful) while still respecting the idea that the King could do no wrong. A state employee or official acting in his or her capacity will be immune from ordinary private law liability but only so long as he or she is acting lawfully

¹¹² It is noteworthy that neither Beever nor Stevens address crown liability in their respective treatises.

¹¹³ (1765), 9 ST 1029 [*Entick*].

(in accordance with the power being exercised). While acting lawfully, the individual or official can be conceived as an instantiation of the state and is entitled to the benefits that status confers. However, when such an individual acts outside the power conferred – when the individual is acting unlawfully – what changes is not the power or action, which still retains a public veneer, but the status of the individual. The unlawfulness of the action takes the individual outside his or her official role, with the result that the unlawful action is a personal action, conducted for personal reasons, and subject to assessment under ordinary law. As McLean explains, this avoids the attribution of any wrongdoing to the state, or even an intention to commit wrongdoing: the will to do wrong will be treated as the individual’s “personal will” as opposed to the state’s “collective will”.¹¹⁴

These ideas were elaborated by Dicey. Dicey’s equality principle encompassed the private law liability of public officials and did so in a manner that maintained the pre-existing avoidance of attributing wrongdoing to the state. Private law responsibility, in Dicey’s view, did not require a court to assess the rightfulness or wrongfulness of state action but simply required the court to consider the actions of an individual and ask whether they fell within the scope of what the state authorized. Yet state authorization was not a licence to arbitrary action. Dicey acknowledged the principle that the Crown could “do no wrong” and while he accepted that this meant that the Crown lacked juridical personality, the Crown and its servants were still subordinate to the law. Therefore, the idea that the monarch could not commit a wrong was not so much a statement of arbitrary

¹¹⁴ McLean, *supra* note 108 at 208.

power as it was a statement that the Crown's servants could never invoke the Crown to immunize wrongful conduct that was not authorized by law.¹¹⁵

While Dicey's views eventually fell out of favour in the field of constitutional and administrative law, his equality principle had a continued influence in the realm of tort law, particularly on the subject of the negligence liability of public authorities. McBride and Bagshaw have employed the label "Diceyan" to describe an understanding of negligence law under which public authorities can owe a duty of care only in situations where a similarly situated private person would owe a duty of care. Put another way, since the law applies equally to all, the public nature of the defendant does not create any grounds for imposing additional duties on the defendant or granting the plaintiff additional remedies. This Diceyan approach or principle is contrasted with alternate understandings under which public authorities can be subject to duties of care that have no analog as between private persons, with those duties being based on a wide variety of factors.¹¹⁶

¹¹⁵ Albert Venn Dicey, *Introductory to the Study of the Law of the Constitution*, 8th ed (London: Macmillan and Co, 1915) at 24—25:

"The King can do no wrong." This maxim, as now interpreted by the Courts, means, in the first place, that by no proceeding known to the law can the King be made personally responsible for any act done by him; if (to give an absurd example) the King were himself to shoot the Premier through the head, no court in England could take cognisance of the act. The maxim means, in the second place, that no one can plead the orders of the Crown or indeed of any superior officer in defence of any act not otherwise justifiable by law.

¹¹⁶ Nicholas J McBride & Roderick Bagshaw, *Tort Law*, 5th ed (Harlow: Pearson, 2015) at 219-21. See also Bruce Feldthusen, "Ten Reasons to Reject Unique Duties of Care in Negligence" in Margaret I. Hall, ed., *The Canadian Law of Obligations: Private Law for the 21st Century and Beyond* (Toronto: LexisNexis Canada, 2018) 25.

3.4.5: Dicey and Kant: Corrective Justice and Public Character

The Diceyan understanding of the private law liability of public authorities can be coupled with Kantian political philosophy to provide an answer to the public character question. Dicey's equality principle is compatible with the bilateral relationship at the heart of corrective justice, while his related idea of legal authorization allows his equality principle to operate in a manner that does not offend the Kantian ideas of public right or the absence of remedies directly against the sovereign.

Dicey does not figure prominently in writings on corrective justice, yet Dicey has been historically linked to the idea of corrective justice. Roach argued that Dicey's idea of the rule of law made him "one of the first theorists to bring a sense of corrective justice into the more political field of constitutional law" and that he posited a "version of corrective justice [that] considers state actors abstractly and individualistically, and emphatically rejects the relevance of their public status."¹¹⁷ On a normative level, a Diceyan account of public authority liability (returning to the application of Dicey advocated by McBride and Bagshaw) adheres to the ideas underlying corrective justice, particularly the idea that the relationship between the plaintiff's right and the defendant's duty and between the act of doing and suffering in a private law wrong is a unified, bipolar normative unit based on transactional equality. These ideas are explained by Weinrib under the umbrella concept of correlativity:¹¹⁸

To satisfy the dimensions of correlativity, the justificatory considerations at work in corrective justice must be unifying,

¹¹⁷ Kent Roach, "The Limits of Corrective Justice and the Potential of Equity of Constitutional Remedies" (1991) 33 *Ariz L Rev* 859 at 868—69.

¹¹⁸ Weinrib, *supra* note 9 at 120–22 [emphasis added].

bipolar, and expressive of transaction equality. They must be unifying in that for the normative gain and the normative loss to be relative to each other, the same norm must be the baseline for both. They must be bipolar in that because one party's normative gain is the other's normative loss, the justificatory considerations must link two, and only two, parties. *And they must be expressive of transactional equality in that by being equally applicable to the party realizing the gain and to the party suffering the loss, they accord preferential treatment to neither.*

The *sine qua non* of the Diceyan account of public authority liability is the refusal to attach any consequence to the public character of the defendant in articulating private law duties and remedies. While the Diceyan account attaches consequences to whether certain actions are authorized by law, this plays no role in the articulation of private law duties and remedies, but rather functions to determine whether private law applies at all.¹¹⁹ The Diceyan account thus exists in juxtaposition to any account of public authority liability that is premised on some preferential or unique treatment of the plaintiff, the defendant, or the transaction between them that is grounded solely on the public character of the defendant.¹²⁰ Thus the Diceyan account of public authority liability is the quintessential corrective justice account.

¹¹⁹ This idea may be illustrated in a different manner by noting that private law often recognizes that a defendant may be excused from liability for a tortious wrong when the wrong in question was authorized by statute. For a general overview, see *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at paras 69–74.

¹²⁰ While it is not possible to provide an exhaustive taxonomy of every account of public authority liability that has been posited by courts and commentators, there are two umbrella categories that can be discerned. First, there are those accounts that treat public authorities no different than private persons. These correspond to the Diceyan account offered by McBride and Bagshaw and the principled approach advocated by Beever. Second, there are accounts that attach some significance to the public character of a public authority by the use of unique legal concepts, the application of public law, or recourse to extrinsic policy considerations that are not applied to private persons. For an overview, see Duncan Fairgrieve & Dan Squires, *The Negligence Liability of Public Authorities*, 2nd ed (Oxford: Oxford University Press, 2019) at §1.07—§1.42.

There is also much to recommend a Diceyan account at a doctrinal level. It avoids forcing courts to try to glean private law obligations from publicly-orientated legislative schemes, maintains a proper distinction between private law remedies and public law review of government action, and generally avoids having courts involve themselves in political questions in the name of private law.¹²¹ Most importantly though, this approach allows for coherence between the law of public authority liability and the rest of negligence law by avoiding the creation of unique duties and concepts that apply only to public defendants.

Both Kant and Dicey posit that private persons have no remedy against the state *qua* the state. For Kant this is explicit: a private person has no enforceable right or coercive remedy against the state. For Dicey, the idea is more by way of implication: the rule of law requires that remedies lie against public authorities whenever they act without legal authorization. By implication, legal authorization confers inviolability, at least from a private law perspective. Regardless of the labels used (state, crown, rule of law) both Kant and Dicey hold that some aspect of a society's public ordering is not properly subject to the same legal relationships that exist between private persons. Where Dicey goes beyond Kant is in setting the outer limits of public ordering, the drawing of the boundary which demarks where private law can and cannot apply. For Dicey this boundary is not drawn in reference to persons (such as the granting of special status or the application of special laws to those persons tasked with carrying out public acts) but instead with reference to actions and whether they fall within the scope of legal authorization. The same boundary drawing technique is found in Kant's

¹²¹ These same issues have been the cause of much of the confusion and incoherence in the law of public authority liability: see generally the comments of Stratas JA in *Paradis Honey Ltd v Canada*, 2015 FCA 89 at paras 119–46.

political philosophy. The only difference is that Kant was not concerned with private law relationships but with the legitimacy of public actions.

Ripstein's arguments about officials in the Kantian state would fall under the modern labels of administrative or constitutional law: he is concerned with the questions of legitimacy of actions of public officials. Yet Ripstein's statement that "it is for laws rather than people to rule" directly parallels Dicey's idea of the rule of law. While Ripstein does not go on to discuss tort liability, the implication is clear: if officials act outside their roles, they are not carrying out public actions for the state but are instead carrying out private actions for the own purposes, all of which can be assessed by the law which applies to private actions. If Dicey's equality principle is Kantian by implication, then Kant's concept of public officials is Diceyan by implication.

3.5: Conclusion

This chapter began by stating the case for the use of corrective justice as the best theoretical lens for this dissertation's goal of analyzing and critiquing the current state of the private law liability of building authorities.

Following on the discussion of corrective justice, rights-based private law, and the public character problem, it is now possible to state a formulation of corrective justice that may be applied to the specific context of claims by private persons against public authorities.

Following Kant and the Anglo-Canadian idea of the Crown, the question of what remedies a private person may have against the state, the Crown, or whatever label we chose to employ for the source of sovereign power or public right in a society is not properly a subject for private law. Whatever remedies may be given are a matter of distributive justice, but this does not offend or undermine the idea of corrective justice. Corrective justice is not a universal theory of legal ordering, and Kantian political philosophy tells us

that there is a distinction between public orderings and private relationships. Corrective justice is concerned only with the latter.

Turning to the specific subject of this dissertation, public authority liability is concerned with the various persons (natural and legal) who carry out public functions. Following Dicey and Kant, it is possible to delineate a boundary between actions that are public, in that they are authorized by law (Dicey) or fall within an official mandate (Kant), and those which are not. These latter actions are subject to private law and can give rise to private law relationships, wrongs, and remedies as if the public actors involved were purely private persons which, according to Dicey and Kant, they properly are. Corrective justice applies to these persons as it would to any other person, with their public character being treated as immaterial.¹²²

In conclusion, while corrective justice scholars may not have significantly addressed how its normative ideas encompass claims by private persons against public authorities, these ideas can be readily applied to the subject of this dissertation without significant modifications. There is no need to invent a new or modified form of corrective justice to deal with the subject of public authority liability.

¹²² The use of legal authorization or mandate as the boundary-drawing concept avoids the problem of wrongful conduct by public officials or agents that is practically indistinguishable from private conduct. The postal worker who enters onto private property to deliver the mail is not liable in trespass not because his or her employment confers an immunity but rather because the act of entering onto private property has been authorized for that individual in the specific circumstances of delivering the mail. In the same way, if that same postal worker gets back into their delivery vehicle and negligently drives it and causes injury, there is no need to debate whether the postal worker is within the course of employment, within a public role, or acting pursuant to a public mandate. The only issue is whether the wrongful conduct (driving negligently) was legally authorized. Since it is (likely) not authorized, the postal worker is liable in tort in the same manner as a private person.

CHAPTER 4: PUBLIC AUTHORITY LIABILITY IN ENGLISH LAW

4.1: Introduction

This chapter explains the development of public authority liability, with a particular focus on building authorities, in English law. Despite Canada's increasing constitutional and practical independence throughout the 20th century, its private law remained heavily reliant on English authority, and nearly all the key ideas, concepts, and principles that informed public authority liability in Canadian law were first elaborated in English law. Therefore, a review of the English law of public authority liability is a necessary antecedent to the study of its Canadian counterpart. This review will also introduce several significant ideas in negligence law that often arise in public authority liability, such as the misfeasance/nonfeasance distinction and the treatment of pure economic loss.

The history of public authority liability in modern English law centres on a 75-year experiment with the creation and enforcement of unique duties of care owed by public authorities. It began in 1941 with *East Suffolk Rivers Catchment Board v Kent*,¹ and was halted 50 years later with *Murphy v Brentwood District Council*.² A further 25 years was required to clear up the legal detritus, and in 2015 in *Michael v Chief Constable of South Wales Police*³ the English law of public authority liability effectively returned to the Diceyan model it originally employed, which is the model of public authority liability advocated in this dissertation. As such, the analysis that follows both provides the necessary historical background to the Canadian law of

¹ [1941] AC 74 (HL) [*East Suffolk*].

² [1991] 1 AC 398 (HL) [*Murphy*].

³ [2015] UKSC 2 [*Michael*].

public authority liability and offers a tentative outline of what that law should be.

4.2: Early Cases on Public Authority Liability

The emergence of public authority liability, as distinct from the liability of the state as represented in the Crown, required the emergence of public bodies that were legally separate from the Crown. This was a relatively recent development – even into the mid-19th century, the apparatus of the English government was minimalist.⁴ Later in that same century, though, a larger number of public bodies began to emerge which exercised an increasing range of public functions, to the point where the tort liability of those bodies became an issue for courts to address.⁵

4.2.1: A Diceyan Common Law

The first significant cases on public authority liability followed a Diceyan approach. In *Mersey Docks Trustees v Gibbs*,⁶ the defendant was a public body charged with operating and maintaining docks in Liverpool while the plaintiffs were owners of cargo ships damaged at the docks due to an absence of cleared channels. The defendant in *Mersey Docks* had invoked its status as a public body, claiming that as it was engaged in a legislatively directed activity, which was financed by tolls intentionally set at a level so that it did not receive any profit, it could not be liable to the plaintiff. The House of

⁴ See Robert Tombs, *The English and Their History* (New York: Vintage Books, 2014) at 498–500.

⁵ Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Square* (Cambridge: Cambridge University Press, 2012) at 143–48. McLean notes that that this expanding public sphere was not solely the result of the creation of new public bodies but also involved private or quasi-government bodies taking on public functions.

⁶ (1866), LR 1 HL 93 [*Mersey Docks*].

Lords rejected this argument and, in so doing, essentially adopted Dicey's equality principle:⁷

In the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things.

In explaining the role of the defendant's public status and legislative mandate, the House of Lords proceeded to endorse the Diceyan model of public authority liability based on legislative authorization:⁸

If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria*: the remedy is to apply for compensation under the provisions of the statutes legalizing what would otherwise be a wrong. This however, is the case, where the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its Acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their Acts; though the one road is made for the profit of the shareholders in the company and the other is not. The principle is, that the act is not wrongful, not because it is a for a public purpose, but because it is authorization by the legislature.

In 1878 in *Geddis v Proprietors of the Bann Reservoir*,⁹ the House of Lords was able to claim that "it is now thoroughly well established that no action

⁷ *Ibid* at 110.

⁸ *Ibid* at 112.

⁹ (1878), 3 App Cas 430 (HL) [*Geddis*].

will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone”.¹⁰

Legislative authorization did not extend to damage that could be avoided by the exercise of reasonable care or, put another way, negligence could never be legislatively authorized.¹¹ However, legislative authorization could not create new duties where none had existence before. This was the issue in the 1890 case of *The Sanitary Commissioners of Gibraltar v Orfila*,¹² where the Privy Council dismissed a claim against a public body arising from the collapse of a retaining wall alongside a public highway as being improperly premised on nonfeasance: the body in question was only tasked with maintaining the surface of the highway and had no responsibility for the structural integrity of the retaining wall.

This Diceyan approach to public authority liability in negligence remained firmly entrenched in English law for years. Even the landmark decision on the duty of care in negligence, *Donoghue v Stevenson*,¹³ did little to immediately disrupt the established Diceyan orthodoxy.

4.2.2: Claims for Breach of Statutory Duty

Over a roughly similar period, English courts were also considering another possible way that tort liability could be imposed on public authorities: through claims for breach of statutory duty. These were cases where a plaintiff sued a defendant not for the tort of negligence, but for breaching some obligation imposed by a statute which was alleged to give rise to a

¹⁰ *Ibid* at 456.

¹¹ *Ibid*.

¹² (1890), 15 App Cas 400 (PC).

¹³ [1932] AC 562 (HL) [*Donoghue*].

private law claim for damages. Such claims were not limited to public defendants, and the case seen as acknowledging the modern tort of breach of statutory duty, *Couch v Steel*, involved a claim against a private defendant.¹⁴

A claim for breach of statutory duty is not a claim in negligence. Liability for breach of statutory duty “is in reality sui generis and independent of any other form of tortious liability”.¹⁵ The other defining feature of a claim for breach of statutory duty is that it was not contingent on a finding of fault or careless conduct. Breach of statutory duty usually resulted in liability on an absolute or strict basis, meaning that all a plaintiff had to prove was that the defendant had breached the statutory obligation, without any requirement that the breach have resulted from carelessness.¹⁶

With the proliferation of legislation in the late 19th century, English courts began to restrict the availability of claims for breach of statutory duty. As early as the 1877 decision in *Atkinson v Newcastle and Gateshead Waterworks Co*,¹⁷ courts began to restrict recovery to the breach of statutes where there was a Parliamentary intention that a private law cause of action would lie for the breach of the statute.¹⁸ While English courts initially struggled to establish a consistent approach to interpretation of statutes to

¹⁴ (1854), 118 ER 1193 [*Couch*]. In *Couch* the plaintiff was a seaman who had fallen ill on a voyage and successfully sued the shipowner for breaching a statutory obligation to maintain a list of specific medicines on board.

¹⁵ MA Jones et al, *Clerk & Lindsell on Torts*, 23rd ed (London: Sweet & Maxwell, 2020) at §8-56.

¹⁶ *London Passenger Transport Board v Upson*, [1949] AC 155 at 168 (HL) [*Upson*]; *Caswell v Powell Duffryn Associated Collieries Ltd*, [1940] AC 152 at 177 (HL).

¹⁷ (1877), LR 2 Ex D 411 (CA) [*Atkinson*].

¹⁸ *Ibid* at 488, where Lord Cairns expressed “grave doubts” that any statutory breach should be treated as presumptively actionable.

determine whether they permitted actions for breach of a statutory duty,¹⁹ the modern trend has been an insistence that a right of action for breach of a statutory duty be expressly provided for in the legislation at issue and a general reluctance to find that a statute implicitly permits a private law cause of action for its breach.²⁰ The result has been that the tort of breach of statutory duty played a minimal role in the development of public authority liability. Instead, the tort of negligence would provide the setting for development and debate.

4.3: *East Suffolk* – Powers and Duties; Misfeasance and Nonfeasance

In *East Suffolk*, the plaintiff's land was flooded when a sea wall partially failed. The defendant was a public authority empowered to undertake flood prevention measures, and while it attempted to stop the flooding, through a variety of negligent actions the flooding of the plaintiff's land continued far longer than it would have had reasonable care been exercised. The plaintiff sued the public authority for the excessively long loss of use of the flooded lands. On appeal to the House of Lords, the plaintiff's claim was dismissed on the grounds that the defendant's legislative mandate was properly construed as giving it "powers" to undertake flood prevention measures as opposed to a "duty" to undertake them. If a public authority is under a duty to do something, it must "fulfill it with due care and expedition" and was subject to liability in negligence if it failed to do so; but if it is merely granted

¹⁹ See generally Neil Foster, "The Merits of the Civil Action for Breach of Statutory Duty" (2011) 33 Sydney L Rev 57 at 68–70; CS Phelgan, "Breach of Statutory Duty as a Remedy against Public Authorities" (1972) 8 U Queensland LJ 158. Lord Denning famously quipped that the exercise in statutory interpretation may have been decided just as efficiently by a coin-toss: *Ex Parte Island Records Ltd*, [1978] 1 CH 122 at 134–35 (CA).

²⁰ See generally Ken Oliphant, "England and Wales" in Ken Oliphant, ed, *The Liability of Public Authorities in Comparative Perspective* (Cambridge: Intersentia, 2016) 127 at 136–37. For a statement of the current formulation of the tort of breach of statutory duty, see *X v Bedfordshire County Council*, [1995] 2 AC 633 (HL).

a power to do something, “there is no obligation upon the body to do anything at all”.²¹ Since the mandate of the defendant in *East Suffolk* was only a power the only circumstance in which the defendant could be liable is if its actions caused the initial event. The defendant in *East Suffolk* did not initially cause the damage to the plaintiff’s land (the flooding being a natural event). The fact that the deleterious effects of that event may have gone on longer than they would have due to the defendant’s carelessness did not create liability as the defendant had been under no obligation to do anything in the first place.²²

The crucial aspect of *East Suffolk* was that the plaintiffs’ claims were framed in negligence, not breach of statutory duty, and the Lords’ reasoning was not primarily concerned with interpreting the defendant’s governing statute for whether it permitted a claim in damages for its breach but were instead concerned with whether the statute allowed the imposition of a duty of care in negligence.²³ While the public authority in *East Suffolk* avoided liability, the case marked the beginning of a move away from the Diceyan position. While perhaps only in *obiter*, the House of Lords endorsed the idea that public authorities could be subject to private law obligations that had no private analogy – private citizens are under no obligation to take positive action to gratuitously protect the lands of other property owners – so long as those obligations were created by legislatively imposed duties. Furthermore, these contemplated duties could feasibly create liability for both misfeasance and nonfeasance.

²¹ *East Suffolk*, *supra* note 1 at 103, Porter LJ.

²² *Ibid* at 102, Romer LJ.

²³ One year before *East Suffolk*, the House of Lords had already acknowledged that a claim in negligence and a claim for breach of statutory duty were different torts: See *Upton*, *supra* note 16 at 168.

4.3.1 Misfeasance and Nonfeasance

It is a foundational principle of negligence law that liability usually only attaches when the defendant engages in positive acts which create a risk of harm to the plaintiff (misfeasance). Save for a handful of limited exceptions, negligence law does not impose liability on a defendant who has not created a risk of harm to the defendant for failing to undertake positive acts to protect the plaintiff from harm (misfeasance).²⁴ The origins and rationale for the distinction are uncertain,²⁵ and its application to any given case can be unclear.²⁶ For the purposes of this chapter's historical analysis, *East Suffolk* is significant because it suggested that public authorities could be subject to

²⁴ *Stovin v Wise*, [1996] AC 923 (HL) [*Stovin*]. See also Francis H Bohlen, "Moral Duty to Aid Others as a Basis of Tort Liability" (1908) 56 U Pa L Rev 217 at 219—20:

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive in action, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.

²⁵ Allen Linden & Bruce Feldthusen, *Canadian Tort Law*, 10th ed (Toronto: LexisNexis Canada, 2015) at 336—38, suggesting that the absence of liability for nonfeasance is explained by the common law's "concern for rugged individualism, self-sufficiency, and the independence of human kind"; the need to avoid infringing personal liberty through "compulsory altruism"; concerns that imposing duties to assist others would expose individuals to harm; and the "administrative problem" of selecting the individual(s) who should have assisted the plaintiff.

²⁶ Difficulties in applying the distinction can be illustrated by situations that raise a "pseudo-nonfeasance" problem: Harold F McNiece & John V Thornton, "Affirmative Duties in Tort" (1949) 58 Yale LJ 1272 as 1273:

For example, a plaintiff is run down by an automobile driven by defendant by reason of the fact that defendant fails to sound his horn and fails to apply his brakes. Superficial analysis may suggest that this is a nonfeasance—that is, that the plaintiff is complaining of the defendant's omission to sound the horn and apply the brakes. In truth, however, the plaintiff is complaining of nothing of the sort. The gravamen of his cause of action is the anti-social act of the defendant in propelling the vehicle forward so as to run the plaintiff down, and the failure to use brakes and horn is merely the reason why the act is anti-social in character.

See also Ernest J Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale LJ 247 at 253—58.

duties of care based on nonfeasance that had no private analogue and which were entirely based on the public nature of the defendant. A private person is not under a free-standing obligation to undertake flood prevention measures to protect another person's property, and most private persons would lack the resources or the legal ability to undertake such works on a large scale. The defendant in *East Suffolk* was not alleged to be liable in the same manner as a private person. It was alleged to be liable because it was a public body that had a specific legislative mandate to undertake flood prevention measures. That legislative mandate was the only ground on which the supposed liability of the defendant was based. Had the legislative mandate of defendant in *East Suffolk* been interpreted as requiring it to take some specific action in response to the flooding (a duty), as opposed to granting it the ability to undertake certain actions but leaving the decision whether to undertake them within the defendant's discretion (a power), the implication from the from the decision was that the defendant could be liable had it negligently carried out its duties, despite the fact that no private person could have been held to undertake flood prevention measures in the first place.

The nonfeasance duty contemplated by the House of Lords was the template for the duties that would be imposed by future courts: duties that required a public authority to confer a benefit on a plaintiff, with benefit being contrasted with directly injuring a plaintiff or making a plaintiff worse off.²⁷

²⁷ Donal Nolan, "The Liability of Public Authorities for Failing to Confer Benefits" (2011) 127 LQR 260 at 260—64. See also Robert Stevens, "Torts" in Louis Blom-Cooper, Gavin Drewry & Brice Dickon, eds, *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009) 629 at 640: the idea of duty to "confer a benefit" on a person encompasses the idea of protecting that person from harm. Curiously, Stevens has written in favour of *East Suffolk* from a rights-based perspective: Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 221. Since the defendant had not assumed responsibility to the plaintiff for the completion of the work, and the relevant statute did not "create a right good against [the defendant] for the careful completion of the work", the plaintiff had no infringed

East Suffolk is thus the beginning of the experiment in public authority liability that would culminate in *Anns v Merton London Borough Council*.²⁸

4.4: The *Hedley Byrne* Cause of Action

Our historical survey now detours to consider *Hedley Byrne & Co Ltd v Heller and Partners Ltd*.²⁹ While none of the parties to *Hedley Byrne* was a public authority, the case is essential to understanding modern public authority liability for two reasons. First, *Hedley Byrne* remains one of the key authorities on the recovery of pure economic loss caused by negligent action and building authority liability cases almost exclusively concern pure economic losses. Second, the *Hedley Byrne* cause of action would eventually be expanded, elaborated, and adopted as the basis for public authority liability in England, and that model of public authority liability is the one which this dissertation advocates for Canadian law.

4.4.1: Pure Economic Loss in Negligence

Tort law has traditionally restricted recovery for purely economic losses: losses sustained by a plaintiff which are not consequent on injury to the plaintiff's person or property.³⁰ Many common law jurisdictions adopted a

right that would ground a claim. Stevens' interpretation of *East Suffolk* is correct if it is assumed that the duty/power dichotomy was relevant to whether the plaintiff had a claim for breach of statutory duty (whether or not the statute created a right to the completion of the work). But another reading *East Suffolk*, which may be more accurate, is that the existence of a statutory duty would have been the basis for a duty of care in negligence, actionable regardless of whether the statute could be construed as sufficient to ground a claim for breach of statutory duty. A negligence-based analysis of statutory duty marked a departure from a Diceyan understanding of public authority liability.

²⁸ [1978] AC 728 (HL) [*Anns*].

²⁹ [1964] AC 465 (HL) [*Hedley Byrne*].

³⁰ JA Smillie, "Negligence and Economic Loss" (1982) 32 U Toronto LJ 231 at 231.

general rule that excluded the recovery of such losses.³¹ The rationales for these rules, as explained by courts and commentators, was the concern over indeterminate liability and administrative problems posed by allowing such claims. Especially in an economically complex and interconnected society, a single tortious act resulting in physical damage can produce an ever-expanding pattern of economic consequences, resulting in an endless “concatenation of resulting damage”.³² A further rationale was the belief that the protection of economic interests and the allocation and management of economic risks were properly the subject of the law of contract.³³ A person’s economic interests that are not derived from their body or physical possessions will almost universally exist because of contracts, whether existing or anticipated, and tortious interference in economic interests is therefore usually an interference with those contracts.³⁴ Since contracts are normally voluntary transactions, and since persons have the ability to adjust for possible risks via contracts, so the reasoning goes, negligence law should not disrupt these arrangements.

But the better answer is a much simpler one: the prohibition on the recovery of pure economic loss is explained by the straightforward premise that no person has a freestanding right to not suffer harm to his or her economic interests. This approach is a hallmark of corrective justice and rights-based

³¹ Russell Brown, *Pure Economic Loss in Canadian Negligence Law* (Toronto: LexisNexis Canada, 2012) at 66—70.

³² *Electrochrome Ltd v Welsh Plastics*, [1968] 2 All ER 205 at 208 (QB). See generally *Brown*, *ibid* at 70—73.

³³ See generally Joost Blom, “Tort, Contract and the Allocation of Risk” (2002) 17 SCLR (2d) 289.

³⁴ As explained in Tony Weir, *Economic Torts* (Oxford: Clarendon, 1997) at 2: “Pure economic harm and contracts are intimately connected for the simple reason that, unless you steal it, inherit it or get it as a social security handout, any money you get comes to you via a contract – and it goes via a contract too, unless you give it away or pay it out in taxes or fines”.

approaches to private law, but it also had historical acceptance in English law.³⁵

Regardless of the justification for the prohibition on the recovery of pure economic loss in tort, a significant exception to this prohibition arrived with *Hedley Byrne*.

4.4.2: *Hedley Byrne* – The Case Itself

The plaintiff in *Hedley Byrne* was an advertising firm that had been approached by one of its customers with a request to extend it a large amount of credit. In turn, the plaintiff inquired of the defendant, the customer's banker, about the customer's credit worthiness. The defendant provided a written assurance about the customer's respectability and financial reliability, in reliance on which the plaintiff extended the credit, and subsequently suffered a considerable loss when the customer went into liquidation.³⁶

The plaintiff sued in negligence, alleging that the defendant negligently provided information to it on which the plaintiff relied to its detriment. The plaintiff's losses were purely economic – the defendant had not inflicted any bodily or physical harm on the plaintiff – and the plaintiff's case failed at trial and at the Court of Appeal. On a further appeal to the House of Lords, the plaintiff failed again, but this time only because the defendant's written assurance had been prefaced by a written disclaimer of responsibility for its

³⁵ See generally *Mogul Steamship Co v McGregor Gow & Co*, [1892] AC 25 (HL); *Bradford v Pickles*, [1895] AC 587 (HL); *Allen v Flood*, [1898] AC 1 (HL).

³⁶ *Hedley Byrne*, *supra* note 29 at 466–69.

accuracy.³⁷ The House of Lords unanimously held that absent the disclaimer, the defendant would have owed the plaintiff a duty to take care not to mislead it about the creditworthiness of the customer.

The precise basis of the cause of action recognized in *Hedley Byrne* was not entirely clear and continues to be the subject of debate.³⁸ The entire duty of care analysis was technically *obiter dicta*, and each of the judges delivered separate reasons containing varying explanations for the duty. Assessed in totality, the reasons suggest that there needed to be a special relationship between the plaintiff and defendant,³⁹ itself resulting from a mixture of two preconditions: foreseeability of reliance by the plaintiff on the defendant's statement⁴⁰ and an assumption of responsibility by the defendant for the accuracy of the statement.⁴¹

³⁷ *Ibid* at 468. The letter stated: "For your private use and without responsibility on the part of this bank or its officials".

³⁸ As noted by the iconoclastic tort scholar Tony Weir: "Never has there been such a judicial jamboree as *Hedley Byrne*, where one almost has the feeling that their Lordships had been on a trip to Mount Olympus and perhaps smoked a joint on the bus. Something certainly went to their heads, presumably not the merits of the claim, which they dismissed." See Tony Weir, "Errare humanum est" in Peter Birks, ed, *The Frontiers of Liability*, vol 2 (Oxford: Oxford University Press, 1994) 103 at 105.

³⁹ *Hedley Byrne*, *supra* note 29 at 509, Lord Hodson: "...there are other circumstances in which the law imposes a duty to be careful, which is not limited to a duty to be careful to avoid personal injury or injury to property but covers a duty to avoid inflicting pecuniary loss provided that there is a *sufficiently close relationship* to give rise to a duty of care" [emphasis added]; at 539, Lord Pearce: "There is also, in my opinion, a duty of care created by *special relationships* which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded" [emphasis added].

⁴⁰ *Ibid* at 503, Lord Morris: "...if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to ... another person who, *as he knows he should, will place reliance upon it, then a duty of care will arise*" [emphasis added]; at 514, Lord Hodson.

⁴¹ *Ibid* at 486, Lord Reid: "[a] reasonable man, knowing that he is being trusted or that his skill and judgment were being relied upon..." who provides advice without qualification must "...be held to have *accepted some responsibility* for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as

4.4.3: The Principle of *Hedley Byrne*

Hedley Byrne created the tort of negligent misrepresentation, which itself constituted an exception to the rule against recovery of pure economic losses. If a special relationship existed between the plaintiff and the defendant, and the defendant negligently provided inaccurate information to the plaintiff, which the plaintiff detrimentally relied upon, the plaintiff could recover the damages sustained as a result of that detrimental reliance, regardless of whether the plaintiff's damage constituted pure economic loss.

Many jurists soon recognized that *Hedley Byrne* could be extended beyond the narrow confines of the tort of negligent misstatement to a broader range of circumstances where a defendant's careless performance of an undertaking coupled with detrimental reliance by the plaintiff resulted in damage to the latter.⁴² But this raised the question of what the precise principles underlying *Hedley Byrne* were. On this issue there are several schools of thought.

One interpretation of *Hedley Byrne* is that it does not even belong within the realm of tort law but is instead part of the law of contract. Allan Beever, the scholar most associated with this view of *Hedley Byrne*, has claimed that it is better understood as "liability for the breach of assumed obligations".⁴³ Attempting to fit *Hedley Byrne* into the law of negligence, particularly into the neighbour principle of *Donoghue*, does not work. The problem is the

the circumstances require" [emphasis added]; at 494, Lord Morris: "My Lords, it seems to me that if A assumes a responsibility to B to tender him deliberate advice, there could be liability if the advice is negligently given" [emphasis added].

⁴² See generally GHL Fridman, "The Supreme Court and the Law of Obligations" (1976) 15 *Alta L Rev* 149 at 156—57: *Hedley Byrne* introduced a "very broad, remedial and innovative principle" into the law of torts.

⁴³ Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) at 310.

inability to identify a right protected by tort law that a plaintiff has in a *Hedley Byrne* scenario. A person has no general right to not be injured by inaccurate statements, nor can a person unilaterally create a right for themselves (and a corresponding duty on a defendant) by a decision to rely on a statement.⁴⁴ In the specific context of doctrinal negligence law, the primary rights protected are those in a person’s bodily integrity and property. There cannot be an “esoteric right not to be injured in reliance on negligently made statements”,⁴⁵ and courts have been forced to imply a host of controlling mechanisms and limiting concepts on the *Hedley Byrne* action, which in turn are incompatible with negligence law as understood post-*Donoghue*.⁴⁶ On this view *Hedley Byrne* is better understood as arising from an obligation to the plaintiff that the defendant has assumed, and therefore it properly belongs in the realm of contract (or, as Beever phrases it, the law of “consents”).⁴⁷

Another interpretation of *Hedley Byrne* is that it is a kind of *sui generis* form of private law liability which does not fit within the scope of either negligence law or contract law. As argued by Donal Nolan, the *Hedley Byrne* cause of action should be understood as a unique cause of action that arises from an assumption of responsibility by the defendant to the plaintiff. “Assumption of responsibility” should be understood as a combination of role responsibility,

⁴⁴ *Ibid* at 282.

⁴⁵ *Ibid*.

⁴⁶ See generally Allan Beever, “The Basis of the Hedley Bryne Action” in Kit Barker, Ross Grantham & Warren Swain, eds, *The Law of Misstatements: 50 Years On From Hedley Byrne v Heller* (Oxford: Hart Publishing, 2015) 83 at 91–94.

⁴⁷ Beever, *supra* note 43 at 310–15. For a comment on Beever’s interpretation of *Hedley Byrne*, see JW Neyers, “A Review of *Rediscovering the Law of Negligence* by Allan Beever” (2008) 19 KLJ 413 at 417–18. Neyers points out that Beever’s treatment of *Hedley Byrne* still has room for negligence to play a role, since the assumed obligation is often to do something “with care”.

the taking on of a task, and an acceptance of a legal duty in relation to that task, which is what imports the duty to perform it reasonably.⁴⁸ As with the contractual interpretation of *Hedley Byrne*, this interpretation understands the duty as originating with the defendant's assumption of an obligation as opposed to the violation of a pre-existing right held by the plaintiff.⁴⁹

The third account sees *Hedley Byrne* as simply being a different expression of the principles underlying a rights-based understanding of negligence law.

The best articulation of this account is by Stephen Perry.⁵⁰ Perry argues that *Hedley Byrne* vindicates a pre-existing right held by the plaintiff in the protection of their personal autonomy, and the operative wrong occurs when a plaintiff assumes responsibility or gives an undertaking that causes the plaintiff to change their position and, as a result, suffers a loss.⁵¹ The loss suffered is not a loss of a chance, but is instead the “deprivation of an opportunity to follow a preferred course of action”.⁵² *Hedley Byrne* is thus proper understood as protecting plaintiffs against negligent interferences in their autonomy.

⁴⁸ See generally Donal Nolan, “Assumption of Responsibility: Four Questions” (2019) 72 *Current Leg Probs* 123 at 129—36.

⁴⁹ For a somewhat similar treatment, see Nicholas McBride & Andrew Hughes, “*Hedley Byrne* in the House of Lords: an Interpretation” (1995) 14 *Legal Stud* 376, who argue (at 389) that *Hedley Byrne* is not properly part of the law of the negligence, and should either “brought under the category of ‘obligations arising from a *breach of fiduciary duty*’ (if we can overcome our anachronistic aversion to mixing the streams of law and equity) or put into its own category” [emphasis in original].

⁵⁰ Stephen Perry, “Protected Interests and Undertakings in the Law of Negligence” (1992) 42 *UTLJ* 247.

⁵¹ *Ibid* at 271—83.

⁵² *Ibid* at 290—91. The loss in *Hedley Byrne*, on Perry's account, was the deprivation of the chance to follow what would have been the plaintiff's preferred course of action had it had accurate information: the decision not to extend the credit to the questionable customer.

A slightly different yet complementary rights-based understanding is offered by Ripstein and Stevens. Both see *Hedley Byrne* as responding to situations where a defendant makes an assumption of responsibility or gives an undertaking to the plaintiff, with the defendant's action creating a correlative right held by the plaintiff that is exclusive to that action.⁵³ Ripstein suggests that an undertaking is a mirror image of the concept of the voluntary assumption or risk:⁵⁴

[Y]ou and I can make a private bilateral agreement in which I take responsibility for a risk attendant on your conduct toward me, even through you would otherwise be responsible for it. Conversely, we can make a private arrangement in which I undertake responsibility for a risk attendant on my giving you advice, or to exercise some special skill.

For Stevens, an assumption of responsibility is a means by which rights can be voluntarily generated outside of a legally enforceable contract. *Hedley Byrne* can only be explained through the idea that an assumption of responsibility can grant plaintiffs rights they may not otherwise have had.⁵⁵

The position adopted in this dissertation is that *Hedley Byrne* is best understood as an amalgam of all three accounts. The idea that *Hedley Byrne* responds to interferences with autonomy aligns with a corrective justice

⁵³ Arthur Ripstein, *Private Wrongs* (Cambridge, Mass: Harvard University Press, 2016) at 98-101; Stevens, *supra* note 27 at 33-37.

⁵⁴ Ripstein, *ibid* at 100

⁵⁵ Stevens, *supra* note 27 at 34-35. Stevens' account explains how the defendant's disclaimer in *Hedley Byrne* was able to successfully defeat the plaintiff's claim. The law does not normally allow a defendant to escape liability via a disclaimer unless in the context of a contractual claim. Stevens correctly notes that "If a driver places a large neon sign on the roof of his car stating that he accepts no responsibility toward those he carelessly crashes into, this will not avail him against his victims even if they have read his notice". But if the plaintiff's claim is based on a right that is not independently held, but can only arise from an assumed responsibility, then if responsibility is disclaimed by the defendant, no right is created and the plaintiff's claim must fail, as it did in *Hedley Byrne*.

understanding of negligence law. As previously discussed, corrective justice draws on the idea of Kantian right, which is based on the ability of persons to determine and pursue their own purposes.⁵⁶ Distilled to its most singular form, Kantian right can be defined as the right to use one's "means" to determine and pursue one's own purposes.⁵⁷ The corresponding duty (in the Hoefeldian sense) is to avoid using one's means in a way that is inconsistent with another person's means or using another's means as one's own without consent.⁵⁸ The most common "means" persons will employ to pursue their purposes are their physical bodies and their property, with the practical result that much of private law is concerned with wrongs to bodily integrity or to private property.⁵⁹ However, a persons' available means are not limited to tangible objects – any interference with the means of another is a violation of Kantian right.⁶⁰ In the specific context of *Hedley Byrne*, there is no practical or theoretical difference between an interference with the plaintiff's autonomy (per Perry) and an interference with a plaintiff's means (per Kantian right). More importantly, though, *Hedley Byrne* is not, on this understanding, a separate form of actionable interference with a plaintiff. Perry makes this exact argument: *Donoghue* and *Hedley Byrne* can be seen as two instantiations of same idea of negligence. The former applies when the harm is to physical integrity; the latter where it is interference with personal

⁵⁶ Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 23.

⁵⁷ Ripstein, *supra* note 53 at 31–33.

⁵⁸ *Ibid* at 43–51.

⁵⁹ *Ibid* at 30.

⁶⁰ This is illustrated by explications of the law of defamation in the context of Kantian accounts of private law, in which defamation responds to the interference of the means of a person's reputation (an intangible interest). See *ibid* at 184–232.

autonomy.⁶¹ Translated into the language of Kantian right, *Donoghue* concerns interference with a person's means in the form of a physical body or physical property whereas *Hedley Byrne* concerns interference with a person's means in the form of their autonomous decision making.

However, it is important to emphasize that there is a difference between a negligent or wrongful interference in a person's autonomy (which gives rise to a private law claim) and other circumstances or actions that can have an effect on a person's autonomous choices (which do not).⁶² It is on this distinction that the contractual and *sui generis* accounts of *Hedley Byrne* make valuable contributions, as do the different right-based accounts offered by Ripstein and Stevens.

The contractual account is correct in its claim that a person has no freestanding right to be free from all possible injuries or detrimental circumstances. Extended to the context of personal autonomy, this means that no person has a freestanding right to be free from exposure to external information or stimuli that will prompt them to make decisions leading to outcomes less preferable than those that would have been achieved in the absence of such information or stimuli. What is required to explain *Hedley Byrne* is a recognizable right held by a plaintiff which imposes a correlative

⁶¹ Perry, *supra* note 50 at 289.

⁶² Suppose a stockbroker, riding the subway to work one morning, telephones a client to recommend a stock to purchase immediately on the basis that its value will rapidly increase the following day. There is little difficulty concluding that the stockbroker's actions will influence the client's decision making, and should the client detrimentally rely on this advice (by buying the stock, the value of which promptly plummets), a classic *Hedley Byrne* situation could arise. Yet should another passenger overhear the conversation and, despite being a total stranger to either individual, decide that the stock is a worthwhile investment, they similarly could be said to have their autonomous choices impacted by the stockbroker's statement, yet the law would not normally recognize a duty of care in such a situation.

duty on the defendant. WH Hohfeld's scholarship and taxonomy of legal concepts, discussed in chapter 3, assists us here.⁶³

Under the correlated concepts of right-duty, Hohfeld identifies two types of rights. First, there are *multital* rights: "one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people".⁶⁴ Multital rights are colloquially described as rights "good against the world", with the classic examples being rights to property and bodily integrity. Second, there are *paucital* rights: "either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate, rights availing respectively against a few definite persons".⁶⁵ A paucital right is a circumscribed right: it will normally exist in limited circumstances, only impose duties on a few determinate persons, and must normally be acquired by the right holder through some action or transaction.⁶⁶ The quintessential example of a paucital right is one arising from a contract, but paucital rights are not limited to the contractual context and can exist in the tort context as well.⁶⁷ This is where the advocates of a contract-based understanding of

⁶³ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1964).

⁶⁴ *Ibid* at 72.

⁶⁵ *Ibid*.

⁶⁶ For a modern commentary on Hohfeld's conception of multital and paucital rights, see generally Jack Clayton Thompson, "The Rights Network: 100 Years of the Hohfeldian Rights Analytic" (2018) 7 *Laws* 28.

⁶⁷ Hohfeld himself acknowledge this: Hohfeld, *supra* note 63 at 102:

Thus, if Y wrongfully takes possession and control of X's horse, there arises a duty in Y to return the animal to X; and, of course, X gets a correlative right. The latter is a paucital right, or right *in personam*; for there are no fundamentally similar rights against persons in general. This

Hedley Byrne overstate their case: the right engaged by *Hedley Byrne* is a paucital one, but that does not make the *Hedley Byrne* cause of action a contractual one.

Yet for the paucital right that *Hedley Byrne* protects to exist, there must be some definitive event that creates the right-duty relationship between persons.⁶⁸ And this is where the *sui generis* understanding of *Hedley Byrne*, and the accounts offered by Ripstein and Stevens, make a valuable contribution, at least through the emphasis on the defendant's assumption of responsibility to the plaintiff as the source of the parties' rights and duties. The assumption of responsibility is what gives the plaintiff a paucital right against the defendant, with the latter's correlative duty being to not carelessly carry out the assumed obligation. *Hedley Bryne* governs the situation where there is an assumption of responsibility of a kind (both factually and legally) that puts the defendant in a position to interfere with the plaintiff's autonomous choices – the plaintiff's "preferred course of action" – and is subject to a correlative duty to not carelessly do so.

Understanding *Hedley Byrne* as a tort of negligent interference with autonomy arising in the context of an assumed responsibility allows for a coherent understanding of the principle of *Hedley Byrne*. It also explains how *Hedley Byrne* can apply beyond the narrow confines of negligent misrepresentation and beyond the limited scenario of negligently inflicted economic loss.⁶⁹ This has been borne out in the development of doctrinal law

is true even though, of course, X's rights against others that they shall not convert or harm the horse while in Y's possession are rights in rem [multital].

⁶⁸ Thompson, *supra* note 66 at 37.

⁶⁹ Ripstein *supra* note 53 at 99–100: liability under *Hedley Byrne* is not conditional upon "the explicit making of a representation" but is based on an "acceptance of an undertaking with regards to a specific risk".

drawing on *Hedley Byrne*. In English law *Hedley Byrne* has taken its place alongside *Donoghue* as one of the most influential cases on the duty of care in negligence. However, the culmination of this development was still many decades in the future.

4.5: The *Anns* Experiment

The next significant shift in English negligence law was in 1977 in *Anns*, which purported to update the formulation of the duty of care found in *Donoghue*. Yet while *Anns* was technically concerned with negligence law as a whole, both the jurisprudence leading up to it and the implications that followed on and eventually undermined it were concerned with the issue of public authority liability. While never expressly stated by courts, commentators have argued that courts were becoming concerned that the traditional Diceyan treatment of public authority liability was too conservative given the massive expansion of the administrative and welfare state in England and in the Commonwealth, especially after 1945. The result was a judicial willingness to extend the tort liability of public authorities to keep the law up to date with the expanded role of the public sector in the modern welfare state.⁷⁰

⁷⁰ See generally Duncan Fairgrieve & Dan Squires, *The Negligence Liability of Public Authorities*, 2nd ed (Oxford: Oxford University Press, 2019) at 14. See also WIC Binnie, “Attitudes Towards State Liability in Tort: A Comparative Study” (1964) 22 *Fac L Rev* 88 at 88, who noted that:

In an era characterized by prodigious increase in government activities of all varieties, and by a decline in the effectiveness of political remedies and restraints on the Executive, the problem of extending adequate legal protection to the citizen who has suffered damage to person or property through the malfunctioning of the administration becomes increasingly acute.

4.5.1: *Dutton v Bognar Regis UBC* – Forerunner and Paradigm

The factual and legal issues that would be considered in *Anns* – indeed, the paradigmatic case for public authority liability in general and building authority liability in particular – first received judicial treatment in 1971 by the English Court of Appeal in *Dutton v Bognar Regis UBC*.⁷¹ *Dutton* may be considered the “patient zero” of the modern law of building authority liability. It involved the substantial controversies – and led to the emergence of many of the substantial problems – in this area of law.

In *Dutton*, the plaintiff purchased a house that had previously been constructed by a third party and approved by the building inspectors of the local authority. After residing at the house for a time, the plaintiff noticed settling and cracking of walls. Further investigation revealed that the house had been improperly built on a dump, and that the foundation was badly undermined. The plaintiff sued the builder (with whom she subsequently settled) and the local authority for negligently approving the construction. The plaintiff succeeded at trial and the decision was upheld by the English Court of Appeal, with Lord Denning MR writing the lead judgment, which was prefaced with the comment that “never before has an action of this kind been brought before our courts”.⁷² The local authority’s position on the appeal was based on orthodox negligence law principles on the duty of care, the prohibition on the recovery of economic loss, and the duty/power distinction from *East Suffolk*. In dismissing these arguments, Lord Denning focused not on the specific interactions between the plaintiff and the

⁷¹ [1972] 1 QB 373 (CA) [*Dutton*].

⁷² *Ibid* at 390.

defendant — there were none — but on the character of the defendant as a public actor and on the wider considerations of “policy” raised by the appeal.

Dealing first with *East Suffolk*, Lord Denning held that it was improper to divide a public authority’s legislative mandates into powers and duties.

There was a third category, a “middle term. It is *control*”.⁷³ In a situation like *Dutton*, where the public authority had been given the ability to enact by-laws governing constructions standards, and could require the submission of plans for approval, hire inspectors to review construction, and take proceedings to enforce compliance, the public authority has been entrusted with a control that was extensive enough to import a duty to exercise that control with reasonable care, in turn creating a duty of care in negligence.⁷⁴

While Lord Denning’s reasoning suggests that he was identifying a third category into which a public authority’s legislative mandate could fall, the idea that public authorities could have “power” over certain activities which may or may not necessitate “control” over them, does not withstand any significant scrutiny. Grants of power to public authorities are rarely detached from any purpose behind the grant of the power, and in many cases a purpose will be explicit or implicit in the grant of power. In any situation where a public authority is granted a power with respect to a certain activity, especially an activity that private persons cannot carry out, control over that activity, at least in the sense used by Lord Denning, will axiomatically exist. The result is that a public authority’s duty of care can extend beyond the specific things that it *must* do (as per *East Suffolk*) to encompass a vastly

⁷³ *Ibid* at 391 [emphasis in original]

⁷⁴ *Ibid* at 392.

broader range of activity over which it has jurisdiction or institutional competence.⁷⁵

Having paved the way for a duty of care to exist, Lord Denning rejected the argument that there was no relationship of proximity or reliance between the local authority and the plaintiff, despite the absence of interactions between them. Lord Denning held that the necessary proximity could be found upon the foreseeability of future harm to the plaintiff, since “the inspector ought to have had subsequent purchasers in mind when he was inspecting the foundations. He ought to have realised that, if he was negligent, they might suffer damage”.⁷⁶ Reliance was not needed for a duty of care to exist.⁷⁷

The argument that the plaintiff’s losses were non-recoverable pure economic losses was sidestepped by the statement that the damages resulted from “physical damage to the house” and were therefore recoverable.⁷⁸ This statement was obviously wrong, with Lord Denning famously admitting this in his later non-judicial writings.⁷⁹ The defendant in *Dutton* was not responsible for constructing the defective foundations, nor had the foundations been built properly but then physically damaged by the actions of the defendant or its servants. Had the defendant not been negligent as alleged, the defective state of the foundations would have been unchanged.

⁷⁵ See also WV Horton Rogers, “Defective Premises – The Council Will Pay” (1972) 30 Cambridge LJ 211 at 212, who notes that the descriptions of power and duty describe *why* an action is undertaken (either because it is discretionary or mandatory) whereas control describes *what* the action is.

⁷⁶ *Dutton*, *supra* note 71 at 396.

⁷⁷ *Ibid* at 395.

⁷⁸ *Ibid* at 396.

⁷⁹ Lord Denning, *The Discipline of Law* (London: Butterworths, 1979) at 264. Lord Denning had assumed that *Dutton* would be appealed to the House of Lords, and apparently felt that this granted him licence for more creative judicial reasoning.

Unfortunately though, the idea that the local authority in *Dutton* had inflicted physical damage by its negligence would have a lengthy and unfortunate career in building authority liability.

Finally, and likely tellingly, Lord Denning made it clear that the finding of liability against the local authority reflected an external policy consideration based on the public character of the defendant:⁸⁰

What are the considerations of policy here? I will take them in order. First, Mrs. Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible. Who are they? In the first place, the builder was responsible. It was he who laid the foundations so badly that the house fell down. In the second place, the council's inspector was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do so properly. In the third place, the council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet they failed to protect them. Their shoulders are broad enough to bear the loss.

Lord Denning's invocation of policy was an honest acknowledgment of an often-unacknowledged factor in building authority liability cases: the perceived desirability of spreading or transferring losses that can be attributed to government failures from individuals onto public agencies. Especially in the welfare state that characterized the decades immediately after World War Two, this would have been politically acceptable, even appropriate, and the situation of an individual faced with potentially ruinous financial loss through no fault of

⁸⁰*Dutton*, *supra* note 71 at 397-98.

their own would seem to be a perfectly justifiable case for humanitarianism or policy to dictate the outcome in cases like *Dutton*.⁸¹

Lord Denning concluded his speech in *Dutton* with the claim that the case would be an isolated one. In nearly every similar case, the builder would be “primarily liable” and will “be insured and his insurance company will pay the damages”, meaning that “it will be very rarely that the council will be sued or found liable”.⁸² The Master of the Rolls could not have been more wrong: *Dutton* inaugurated building authority liability, and the problematic ideas underlying it would inflict considerable damage on the coherence of negligence law in the process.⁸³

4.5.2: *Anns* – A Series of Bad Ideas

The facts of *Anns* were indistinguishable from *Dutton*. A building authority approved the construction of a two-storey block of flats. The foundations were later discovered to have been negligently constructed. The plaintiffs were owners of the flats who had sued for the costs of repairs to the foundations. The defendant was the building authority alleged to have

⁸¹ See Dan Priel, “The Indirect Influence of Politics on Tort Liability of Public Authorities in English Law” (2013) 47 *Law & Soc’y R* 169 at 180—81:

The more influential judges of the time quite clearly recognized that these political changes had implications not only for public law; they also required reshaping tort law to better fit the new reality of the modern welfare state which was at the heart of the post-War consensus. Their refashioning of tort law, and especially the tort of negligence, was a conscious attempt to make sure the law remained in line with the changes that were taking place outside the law. The main tool was an increasingly frequent acknowledgement of the significance of “policy” considerations.

Viewed in this context, *Dutton* was properly understood as “the political consensus on the welfare state translated into legal doctrine”.

⁸² *Dutton*, *supra* note 71 at 398.

⁸³ See generally Tony Weir, “The Answer to *Anns*” (1985) 44 *Cambridge LJ* 26.

negligently approved and inspected the foundations during the course of construction.

The material issue for the House of Lords was the existence of a duty of care.⁸⁴ Lord Wilberforce delivered the leading decision, holding that the neighbour principle laid down in *Donoghue* had now been elaborated to the point that it was unnecessary to base duties of care on pre-existing categories, and instead the existence of a duty of care could be determined by the application of a two-stage test:⁸⁵

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 or the damages to which a breach of it may give rise.

The statutory mandate of the defendant in *Anns* to enact building by-laws and conduct inspections was sufficient to satisfy the first part of the test. The inspectors should have contemplated that a failure to enforce the by-laws may “give rise to a hidden defect which in the future may cause damage to the building affecting the safety and health of owners and occupiers”.⁸⁶ Lord Wilberforce went further on this point, noting that “as the building is

⁸⁴ Unlike *Dutton*, the appeal in *Anns* was not of a trial but of a decision on the preliminary issue of whether the plaintiffs’ claims were limitation-barred.

⁸⁵ *Anns*, *supra* note 28 at 751—52.

⁸⁶ *Ibid* at 753.

intended to last, the class of owners and occupiers likely to be affected cannot be limited to those who go in immediately after construction”.⁸⁷

In dealing with the statutory context in which the defendant operated, the question of powers versus duties posed by *East Suffolk* (or control, by *Dutton*) was elided by Lord Wilberforce, who claimed that such distinctions were no longer meaningful. Even where a public authority is granted a power coupled with a discretion regarding its exercise, the public authority’s use of that power is not unfettered. If it fails to exercise it, or exercises it unreasonably, that decision is subject to judicial review under administrative law. As a public authority cannot escape responsibility for the exercise of its power at public law, it made no sense for the existence of discretion to allow such an escape in private law.

Lord Wilberforce’s reasoning on the distinction between duty, power, and (possibly) control, particularly his rejection of them as a basis for understanding whether a public authority owed a duty of care in negligence, was heavily influenced by the House of Lords’ earlier decision in *Home Office v Dorset Yacht Co.*⁸⁸ In *Dorset*, Lord Diplock held that an exercise of a discretionary statutory power could only give rise to a duty of care if that exercise was beyond the scope of discretion granted. In effect, it was a precondition to the existence of a duty of care that the impugned action be *ultra vires* at public law.⁸⁹ Under this understanding, the inquiry under

⁸⁷ *Ibid.*

⁸⁸ [1970] AC 1004 (HL) [*Dorset*]. See also Nicholas Seddon, “The Negligence Liability of Statutory Bodies: *Dutton* Reinterpreted” (1978) 9 Fed L Rev 326 at 333.

⁸⁹ *Dorset*, *ibid* at 1065—68. In English law the threshold was usually framed as a requirement that the impugned decision be *Wednesbury* unreasonable, based on the decision in *Associated Provincial Picture House Ltd v Wednesbury Corporation*, [1948] 1 KB 223 (CA), and which is generally understood as an administrative decision that is “so unreasonable that no reasonable authority could ever have come to it”.

East Suffolk, which was concerned with the nature of the public authority's mandate (whether a power or a duty), was replaced with one that looked to the way in which that mandate was carried out (the exercise of discretion). In *Anns* it was affirmed that a public authority could be liable in negligence for an *ultra vires* exercise of discretion, regardless of the original characterization of the legislative mandate in question.⁹⁰ The defendant in *Anns* had a discretion with respect to its building regulation mandate, and since that discretion was subject to a public law requirement to exercise it in a reasonable manner, a duty of care could be owed to the plaintiffs.⁹¹

Lord Wilberforce's speech only briefly addressed the issue of damages but, while not citing *Dutton*, Lord Wilberforce adopted Lord Denning's fallacy: "the relevant damage is in my opinion, physical damage" and the proper measure of it was the "expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety" of its occupants.⁹²

⁹⁰ *Anns*, *supra* note 28 at 754–55: "A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion *bona fide* exercised, before he can begin to rely upon a common law duty of care". Expressing the idea somewhat differently, Lord Wilberforce employed the distinction between "policy" and "operational" decisions or actions as governing whether a duty of care could be owed. English law, even after the repudiation of *Anns*, continued for a time to treat public law invalidity as a precondition to the existence of actionable negligence. For a summary of English law on this point see Christian Witting, *Street on Torts*, 14th ed (Oxford: Oxford University Press, 2015) at 104–108. Public law invalidity was removed as a precondition to negligence liability in *Barrett v Enfield LBC*, [2001] 2 AC 550 (HL) [*Barrett*].

⁹¹ *Anns*, *ibid*. Lord Wilberforce framed part of the finding on duty of care in his response to the argument that the defendant could not owe a duty for something it was not under an obligation to do. The defendant could not, as a matter of public law, decide to simply do nothing. It was under "a duty to give proper consideration to the question of whether to inspect or not". The grant of discretion to the defendant in deciding how and when to inspect "though great is not absolute. And because it is not absolute, the necessary premises for the proposition 'if no duty to inspect, then no duty to take care in inspection' vanishes".

⁹² *Anns*, *ibid* at 759. Lord Wilberforce would have also allowed "expenses arising from any necessary displacement".

4.5.3: Post-*Anns*: Bad Ideas Lead to Problematic Outcomes

The most obvious effect of *Anns* was the creation of a presumptive liability approach whenever a defendant caused reasonably foreseeable harm to the plaintiff. Since negligence cases are adjudicated *post-facto*, reasonable foreseeability could usually be easily satisfied, with the result that it fell to the defendant to identify policy considerations excusing liability.⁹³

For public authorities, though, *Anns* had three major consequences. First, any legislative mandate (whether framed as a power or duty) of a public authority could give rise to a duty of care. Effectively any area over which a public authority had jurisdiction or institutional competence could now give rise to liability in negligence. Public authorities were in a particularly vulnerable position since they implement more programs, occupy more land, and operate more facilities than higher levels of government, but have limited ability to make legislative decisions.⁹⁴ Coupled with this, *Anns* witnessed the apparent dissolution of the misfeasance/nonfeasance distinction, at least as it applied to public authorities. After *East Suffolk*, public authorities' liability could arise from either tortious conduct directly causing harm (traditional misfeasance) or where there was a failure to prevent harm being inflicted on plaintiffs (nonfeasance) where the public authority was under an explicit statutory duty to take action that would have prevented the harm. After *Anns*, this unique nonfeasance liability was broadened to include any

⁹³ Fairgrieve & Squires, *supra* note 70 at 72. See also Nicholas J McBride & Roderick Bagshaw, *Tort Law*, 5th ed (Harlow: Pearson, 2015) at 107.

⁹⁴ Tony Weir, "Government Liability" [1989] Pub L 40 at 47—48. Not only does the absence of legislative power mean that public authorities cannot control the scope of their activities, they lack the ability other levels of government have to control their liabilities through legislation. It is not unknown for governments to retroactively exempt themselves from tortious liability, even in situations where judicial decisions have imposed liability. See eg *Burmah Oil Co Ltd v Lord Advocate*, [1965] AC 75 (HL), which was overruled by legislation: *War Damages Act 1965* (UK), c 18.

situation where a public authority has a discretionary power to become involved. *Anns* created a meta-principle, a form of Good Samaritan public liability principle, under which a public authority is under a duty to exercise with reasonable care any discretionary powers it is granted.⁹⁵ Under this meta-principle, a public authority can be liable for the failure to prevent plaintiffs suffering harm at the hands of third parties. Such a scenario is the typical building authority liability case: the building authority's putative negligence is not that it built an allegedly shoddy building but is instead that it failed to prevent a third party from doing so.

Finally, the duty of care formulated in *Anns* did not distinguish between physical harm and pure economic loss, leaving the door open to expanded liability for the latter.⁹⁶ *Anns* also significantly blurred the boundary between tort and contract law, and was perceived as undermining the doctrines of consideration and privity of contract.⁹⁷

4.5.4: *Murphy* – The Retreat from *Anns*

Doubts about the wisdom of *Anns* did not take long to emerge. The policy considerations behind it evaporated quickly. Increased claims against public authorities raised the spectre that public funds would be diverted from

⁹⁵ See Bruce Feldthusen, “Ten Reasons to Reject Unique Duties of Care in Negligence” in Margaret I Hall, ed, *The Canadian Law of Obligations: Private Law for the 21st Century and Beyond* (Toronto: LexisNexis Canada, 2018) 25 at 27. Felthusen phrases the meta-principle as “once a public defendant begins to exercise a discretionary power, it then comes under a duty to exercise the power with reasonable care”, but since an *Anns*-based approach does not permit a public authority to simply ignore its powers, the meta-principle is phrased here as “a duty to exercise with reasonable care any discretionary power it is granted”.

⁹⁶ Brown, *supra* note 31 at 7; Fairgrieve & Squires, *supra* note 70 at 14; Witting, *supra* note 90 at 30. The subsequent decision of *Junior Books Ltd v Veitchi Co Ltd*, [1983] 1 AC 52 (HL) was seen as the most liberal approach to the recovery of economic loss post-*Anns*.

⁹⁷ Witting, *ibid.*

worthy purposes to either pay judgments or provide resources to sectors more likely to generate litigation. There were also concerns that public actors would be overly cautious in carrying out their duties, compromising service levels due to fears of liability.⁹⁸ In the particular context of building authority liability, there was a concern that plaintiffs were not always distressed homeowners but were actually their property insurers asserting subrogated claims against building authorities. Lord Denning's solemn pronouncement that building authorities had shoulders broad enough to bear Ms. Dutton's loss was superseded by Tony Weir's caustic quip that "it is hard to imagine anybody less deserving of a dip in the public trough than the insurer who profits from taking the risk that houses may collapse".⁹⁹

The doctrinal foundations underlying *Anns* took a little over a decade to erode. Criticisms of *Anns* found their way into several decisions of the House of Lords and the Judicial Committee of the Privy Council that imposed new requirements on the recognition of duties of care beyond mere foreseeability of harm.¹⁰⁰ Finally, in 1991 in *Murphy*, the House of Lords formally overruled *Anns*. The facts of *Murphy* were analogous to *Anns*: a building authority had negligently approved the construction of a house with defective foundations. When the plaintiff, a subsequent purchaser, discovered the defects as they manifested themselves and was unable to afford the repairs, the house was resold at a price well below its market value. The centrepiece of the reasons in *Murphy* was the correction of the fallacy that the damage suffered in that case was anything other than pure economic loss. While

⁹⁸ For a detailed survey of this topic, see Fairgrieve & Squires, *supra* note 70 at 143—203.

⁹⁹ Tony Weir, *An Introduction to Tort Law*, 2d ed (Oxford: Oxford University Press, 2006) at 43.

¹⁰⁰ *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*, [1985] AC 210 (HL); *Yuen Kun Yeu v Attorney General of Hong Kong*, [1988] AC 175 (PC); *Rowling v Takaro Properties Ltd*, [1988] AC 473 (PC).

Anns had premised the duty of care on protecting against damage to physical property, which in turn was connected to the protection of health and safety,¹⁰¹ in reality the duty of care was premised on protecting against pure economic losses. Absent a relationship of reliance as under *Hedley Byrne*, such a duty of care could not exist. The recognition of such a duty in *Anns* had been an error and was officially overruled.¹⁰² *Murphy* remains the governing authority on building authority liability in English law.¹⁰³

4.5.5: Post-Script – *Caparo, Michael*, and the Return to Dicey

The overruling of *Anns* in *Murphy* not only marked the repudiation of the broad duty of care the former had imposed on building authorities; it also marked the demise of the reasonable foreseeability test for a duty of care in negligence. Almost contemporaneously with *Murphy*, the House of Lords decided *Caparo Industries v Dickman*.¹⁰⁴ Doctrinally, *Caparo* endorsed a tripartite formula for analyzing duty of care questions. A duty of care would normally require (1) reasonable foreseeability of harm to the plaintiff if the defendant was negligent, (2) a relationship of sufficient proximity between the plaintiff and the defendant, and (3) that it be “fair, just, and reasonable” to find that a duty of care was owed. Many elements of the *Caparo* test were vague and open to interpretation, and so the true effect of *Caparo* on the law of negligence was its endorsement of “incrementalism”: the idea that novel

¹⁰¹ *Anns*, *supra* note 28 at 759: “...the relevant damage is in my opinion, material physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying...”.

¹⁰² See generally *Murphy*, *supra* note 2 at 466—72.

¹⁰³ For a survey of the present-day law, see generally Fairgrieve & Squires, *supra* note 70 at 660—62.

¹⁰⁴ [1990] 2 AC 605 (HL) [*Caparo*].

categories of duty should be developed “by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 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”.¹⁰⁵ Whereas under *Anns* novel duties of care were generally presumed unless there was some reason to deny them, after *Caparo* the presumption was that a novel duty would not be recognized unless a closely-related duty had previously been recognized.¹⁰⁶

Caparo was not a public authority liability case, nor was it a case of nonfeasance, but a clear trend then developed in English negligence law that moved away from pre-*Murphy* doctrine. Only a few years after *Anns* was repudiated, the same fate befell *East Suffolk*. In *Stovin v Wise* the House of Lords considered a claim against a public authority (a highway authority) for failing to carry out a decision to exercise a statutory power, namely the removal of an embankment that allegedly acted as a sightline obstruction that contributed to an automobile accident. The claim was dismissed on the ground that the defendant’s actions did not create a duty of care.¹⁰⁷ While *Stovin* was not, on its face, inconsistent with *East Suffolk*, Lord Hoffmann, who delivered the lead judgment, was doubtful of the utility of basing duties of care on nothing more than statutory mandates.¹⁰⁸ What Lord Hoffmann was certain about was the necessity of maintaining the common law’s historical prohibition on liability for nonfeasance.¹⁰⁹ The final blow fell in

¹⁰⁵ *Ibid* at 618, citing *Sutherland Shire Council v Heyman* (1985), 60 ALR 1 at 43–44 (HCA).

¹⁰⁶ Fairgrieve & Squires, *supra* note 70 at 73.

¹⁰⁷ [1996] AC 923 (HL) [*Stovin*].

¹⁰⁸ *Ibid* at 958.

¹⁰⁹ *Ibid* at 943, Lord Hoffmann:

2004 with *Gorringe v Calderdale Metropolitan Council*.¹¹⁰ Again, the claim was against a road authority for nonfeasance – a failure to maintain the surface of a road by painting markings on it – but in *Gorringe* the legislative mandate was a duty and not a power. But this made no difference: regardless of whether the statute created a power or a duty, absent an express legislative intention to create a duty of care, the common law could not recognize a duty of care based solely on the existence of the statutory mandate.¹¹¹

While *Gorringe* had, in theory, returned the law of public authority liability to the Diceyan state in which it existed pre-*East Suffolk*, a resounding confirmation of the Diceyan approach to public authority liability was then provided by the United Kingdom Supreme Court in *Michael*.¹¹² *Michael* articulates several of the core ideas on which this dissertation relies, and provides a framework by which to understand not only the specific issue of building authority liability but public authority liability in general, so a detailed examination is warranted.

In *Michael*, the defendant police force received an emergency call from the plaintiff, who reported that a former domestic partner had threatened to kill her. As a result of the internal misrouting of the call, the police response to

There are sound reasons why omissions require different treatment from positive conduct. 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 prevent another from suffering harm from the acts of third parties ... or natural causes.

¹¹⁰ [2004] UKHL 15 [*Gorringe*].

¹¹¹ *Ibid* at paras 38–44, Lord Hoffmann. This analysis concerned the existence of a duty of care in negligence. It is possible that a statutory mandate could give rise to a claim for breach of statutory duty, so long as the elements of that tort were present.

¹¹² *Supra* note 3.

the plaintiff's house was delayed. During the intervening period the plaintiff's partner murdered her. *Michael* was thus a pure nonfeasance case: the public authority had done nothing to inflict injury on the plaintiff and liability could only have been founded on some obligation to protect the plaintiff. But there was also no question that the defendant had, from a public law perspective, failed to carry out its legislative mandate. From a private law perspective, this failure would also qualify as careless or negligent. The issue, though, was whether a duty of care had been owed.

The majority of the United Kingdom Supreme Court held that the defendant police force did not owe a duty of care to the plaintiff, and in doing so endorsed a Diceyan understanding of public authority liability. The majority was clear that the public character of the defendant could not be relied upon to decide the duty question. The fact that the defendant was a public entity could not be used to justify an immunity or exception to general common law principles,¹¹³ but neither could a duty be imposed because the defendant was a police force that was aware that the plaintiff's life was in danger.¹¹⁴ The duty had to be based on the "application of common law principles" and, on the facts, there could be no duty because a private person would not have owed a duty to protect the plaintiff.¹¹⁵

It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the

¹¹³ *Ibid* at para 116: "The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case".

¹¹⁴ See generally *ibid* at para 18.

¹¹⁵ *Ibid* at paras 114–15.

actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.

The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public.

The reference to “reliance” hints at the grounds on which the defendant could have owed a duty of care – under the *Hedley Byrne* principle:¹¹⁶

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

Had the defendant assumed a responsibility to the plaintiff, such as by providing assurances as to when help would arrive or instructing her to remain in her home, a duty of care could have arisen.¹¹⁷ This understanding of *Hedley Byrne* aligns with Perry’s conception: a duty that arises when the defendant assumes responsibility or gives an undertaking that causes the plaintiff to change their position, depriving them of an opportunity (in

¹¹⁶ *Ibid* at para 67.

¹¹⁷ *Ibid* at para 138.

Michael, the opportunity for the plaintiff to leave her house or seek other help) and, as a result, to suffer a loss.¹¹⁸

Michael “settled for a generation to come that the correct approach in determining whether a public body owed a claimant a duty of care to save them from harm is the Diceyan approach”.¹¹⁹ It should also be seen as a proper application of corrective justice ideas, particularly a corrective justice understanding of *Hedley Byrne*, to claims against public authorities.

4.6: Conclusion

English courts were both able and willing to acknowledge that the departure from Diceyan orthodoxy in *Anns* was problematic and should be repudiated. Post-*Michael*, the English law of public authority liability rests on a solid doctrinal basis that should allow for consistent, coherent outcomes in future case. Canadian law, as will be shown in the following chapters, adopted *Anns*, suffered the negative doctrinal consequences, but refused to either

¹¹⁸ Perry, *supra* note 50 at 271—83. See also *ibid* at para 100: the majority in *Michael* was clear that the *Hedley Byrne* principle extended well beyond economic loss cases: “[*Hedley Byrne*] is not a new principle. It embraces the relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient. The list is not exhaustive”.

¹¹⁹ McBride & Bagshaw, *supra* note 93 at 226—27. Of course, there were those who disagreed with the outcome in *Michael*, and a useful overview can be found in: Erika Chamberlain, “To Serve and Protect Whom? Proximity in Cases of Police Failure to Protect” (2016) 53 *Alta LR* 977. Much criticism has been directed at the majority’s refusal to consider the public character of the defendant in the duty of care analysis. One line of argument is that a prohibition on liabilities in nonfeasance loses much of its justification when applied to a public defendant, since freedom of action and personal autonomy are not normally values associated with public institutions which are created to serve specific purposes. Another line of argument is that the duty of care analysis should be more sensitive to the vulnerabilities of the plaintiff, the special powers held by the defendant, and the possible dependency of the plaintiff on the defendant.

acknowledge or deal with these consequences. The result is an increasingly dysfunctional law.

CHAPTER 5: PUBLIC AUTHORITY LIABILITY IN CANADIAN LAW

5.1: Introduction

This chapter critically reviews the development of public authority liability in Canadian law. The analysis here can be juxtaposed to that taken in chapter 4 of the counterpart in English law. But whereas it is still possible to speak of the English law of public authority liability as a singular set of legal doctrines, what this chapter will show is that Canadian law has two or more sets of legal doctrines that formally fall under the umbrella of public authority liability, doctrines that in many ways are inconsistent with each other, even at a level of first principles. This chapter's inquiry breaks new scholarly ground, since its critical analysis is not one typically found in textbooks or judicial treatments of this subject.

As discussed at the beginning of the previous chapter, Canadian law in this area drew on ideas, concepts, and principles that were first elaborated in English law and then imported to Canada. Building on the legal concepts and key judicial decisions reviewed in the previous chapter, this chapter provides a detailed review of public authority liability in general, and building authority liability in particular, as they developed in Canadian law. Canada's legal borrowing from English law did not result in a similar course of legal development. The Canadian law of public authority liability today is very different from its English counterpart. The key departure was the Canadian reception of, and continued adherence to, the decision in *Anns v Merton London Borough Council*.¹ The Supreme Court of Canada adopted and applied the duty of care test from *Anns* in a far broader fashion than had

¹ [1978] AC 728 (HL) [*Anns*].

been attempted in English law. When the problems flowing from *Anns* inevitably arose, the Supreme Court of Canada refused to officially overrule *Anns* and instead adopted a middle path wherein it would formally adhere to *Anns* but practically decline to apply its duty of care test, at least in its originally stated form. This was accomplished by reading in a new requirement of proximity into the concept of reasonably foreseeability in stage one of the *Anns* test. The effect of this judicial legerdemain was the creation of two strains of jurisprudence about the duty of care test which were inconsistent with each other.

5.2: Early Canadian Cases on Public Authority Liability

Early Canadian case law on the subject of public authority liability is sparse, at least until the middle of the 20th century. What is available reveals a consistent tendency to follow English law.² Several decisions of the Supreme Court of Canada from this period readily applied Dicey's equality principle, followed the principles laid down in *Mersey Docks Trustees v Gibbs*³ and *The Sanitary Commissioners of Gibraltar v Orfila*,⁴ and refused to recognize any unique status for public authorities as defendants.⁵ While *East Suffolk Rivers Catchment Board v Kent*⁶ does not appear to have made a major

² This is not surprisingly, given that for much of its history Canada's judges and lawyers had heavily relied on English law, given the lack of effective law reporting in Canada, and the paucity of domestic legal scholarship and education: see Jonathan de Vries, "Legal Research, Legal Reasoning and Precedent in Canada in the Digital Age" (2018) 48 Adv Q 1 at 34–40.

³ (1866), LR 1 HL 93.

⁴ (1890), 15 App Cas 400 (PC).

⁵ *City of Vancouver v McPhalen* (1911), 45 SCR 194 (defendant operated a winter amusement park ride); *Dixon v Edmonton (City)*, [1924] SCR 640 (defendant operated a public highway).

⁶ [1941] AC 74 (HL) [*East Suffolk*].

impression on Canadian courts, they generally refused to impose liability on public authorities in cases of pure nonfeasance.⁷

5.3: *Hedley Byrne* – A Path Not Taken

5.3.1: A Nascent, Diceyan Approach

*Hedley Byrne & Co Ltd v Heller and Partners Ltd*⁸ was decided in 1964 and, as with so much other English law, found its way across the Atlantic to Canadian courts and jurists. As early as the late 1960s, Canadian courts were, surprisingly, at the forefront of applying a broad understanding of *Hedley Byrne* that went beyond the tort of negligent misrepresentation and extended to any negligent interference with the autonomous choices of a plaintiff by a reliance-inducing action (whether a representation or something else). More importantly, this jurisprudence was developed in claims against public authorities.

The first decision was *Windsor Motors Ltd v Powell River (District)*, a 1969 decision of the British Columbia Court of Appeal.⁹ In that case, the plaintiff had asked a licence inspector at the defendant municipality about possible locations for a planned used car business. Having received advice from the inspector about zoning requirements, the plaintiff rented a property and then applied for and was issued a business licence for a used car business. A few months later, after having expended considerable money and resources

⁷ See eg *Beach v Township of Stanstead* (1899), 29 SCR 736, where the plaintiff had applied for and obtained a writ of *mandamus* to compel the defendant to grant him a liquor licence, but his subsequent civil action for damages for the original refusal to issue the licence was dismissed as the decision to deny it had been a discretionary one. Cases of misfeasance remained actionable: in *Riopelle v The City of Montreal* (1911), 44 SCR 579, the defendant municipality was held liable in damages resulting from its demolition of the plaintiff's building under an *ultra vires* exercise of its building regulation jurisdiction.

⁸ [1964] AC 465 (HL) [*Hedley Byrne*].

⁹ (1969), 4 DLR (3d) 155, [1969] BCJ No 410 (CA) [*Windsor Motors* cited to BCJ].

establishing the business, the plaintiff was advised by another of the defendant's officials that the zoning of the property did not allow for a used car business. The business licence was revoked and the plaintiff was required to relocate to a new property. The plaintiff then sued the defendant and succeeded at trial and on appeal, with the courts holding that the case fell within the ambit of *Hedley Byrne*.¹⁰

Windsor Motors was followed in the subsequent Ontario decision of *Gadutsis v Milne*.¹¹ The plaintiff in *Gadutsis* had asked the defendant municipality about whether a proposed restaurant was permitted under the zoning of a particular property. After receiving a positive response, the plaintiff applied for and was granted a building permit. After construction had commenced, the defendant's officials realized that the zoning did not permit the plaintiff's proposed restaurant and revoked the building permit. The plaintiff's claim for damages was allowed, with the court holding that the defendant had been negligent in issuing the building permit, and that it "must have known that the person to whom it was issued might rely on it and a duty of care was owed to such a person".¹² Once again, the circumstances fell within *Hedley Byrne*.

Several aspects of *Windsor Motors* and *Gadutsis* are noteworthy. First, the courts' application of negligence law was purely Diceyan: no special status or

¹⁰ *Ibid* at para 26:

The evidence makes it quite plain that Newman, the licence inspector, appreciated that Wear [the plaintiff] was ignorant of such matters and was trusting him as a responsible municipal official to give him reliable information, upon which he could safely act. Wear, as he was entitled to, believed him to be a party possessed of special skills in reference to such matters. He, in the circumstances, could reasonably expect Newman to exercise a degree of care by reason of his specialized knowledge.

¹¹ [1972] OJ No 2070 (HCJ) [*Gadutsis*].

¹² *Ibid* at para 12.

duty attached to the defendants by virtue of being public agencies. Instead, the defendants were treated no differently than private persons. Secondly, the courts' analysis of duty, breach, and causation were focused on the actual interactions between the plaintiffs and defendants, as opposed to a focus on the public character of the defendant or its legislative mandates. Finally, the courts treated the plaintiffs' damages as reliance-based economic losses, but the scope of the negligent, reliance-inducing action was extended beyond misleading statements to a wider range of positive acts that induced detrimental reliance.¹³

5.3.2: *Dutton's Tepid Reception*

Despite the longstanding tradition of Canadian courts following developments in English law, the decision of the English Court of Appeal in *Dutton v Bognar Regis UBC*¹⁴ failed, at least initially, to gain widespread acceptance. In the 1974 case of *McCrea v City of White Rock*,¹⁵ the British Columbia Court of Appeal considered a case where the plaintiff sued the defendant building authority for damage caused to its inventory and equipment in the collapse of the roof of the building the plaintiff leased to operate a grocery store. The roof had been negligently built but had never been inspected since the defendant's inspection regime required the builder to arrange for inspections at particular stages of construction by contacting the defendant. No inspections had ever been requested or carried out. The plaintiff claimed the failure to inspect was a breach of the duty recognized in *Dutton*. The plaintiff succeeded at trial but the decision was overturned on

¹³ On this point see GHL Fridman, "Negligent Misrepresentation" (1976) 22 McGill LJ 1 at 13, who pointed out that that *Windsor Motors* dealt with more than a misleading statement (the zoning advice) but encompassed the issuance of a business licence, an act that was "a vital link in the chain of ultimate liability".

¹⁴ [1972] 1 QB 373 (CA) [*Dutton*].

¹⁵ [1974] BCJ No 930 (CA) [*McCrea*].

appeal. While the three appeal judges authored separate opinions, there was a consensus that the defendant's inspection program did not impose a legal duty to conduct inspections,¹⁶ the defendant's failure to inspect was nonfeasance and therefore non-actionable,¹⁷ and that the policy considerations invoked by Lord Denning in *Dutton* did not necessarily apply in Canada.¹⁸

A similar approach had been used in *Neabel v Ingersoll (Town)*,¹⁹ a case that pre-dated *Dutton* by several years. In that case the plaintiff had hired a contractor to renovate his property. The contractor obtained a building permit from the defendant building authority but proceeded to carry out the work in a substandard manner. After the defective work was discovered, the plaintiff had to vacate the building and conduct extensive repairs. It was conceded that primary liability would rest with the third-party contractor, but by the time of the trial the third party was believed by all to be judgment-proof (a scenario that would consistently arise in future building authority liability cases), so the plaintiff proceeded with a claim against the building authority. It was accepted that the defendant could have required more detailed drawings to be submitted or could have issued orders to stop the construction when it became clear that the renovations were substandard. However, the plaintiff's case was dismissed. Not only was the alleged negligence nonfeasance, the putative negligence could not have actually caused the plaintiff's damages since the damage had been inflicted by the negligent contractor.²⁰

¹⁶ *Ibid* at paras 41–43, 95.

¹⁷ *Ibid* at paras 11–12.

¹⁸ *Ibid* at paras 33–35.

¹⁹ (1967), 63 DLR (2d) 484 (Ont HCJ) [*Neabel*].

²⁰ *Ibid* at 492:

As will be discussed in the following chapters, the straightforward legal propositions in *Windsor Motors*, *Gadutsis*, *McCrea*, and *Neabel* could have formed the foundation of a coherent understanding of building authority liability grounded on a Diceyan understanding. Unfortunately, *Anns* intervened.

5.4: The *Anns* Test Arrives in Canada

When *Anns* crossed the Atlantic it received an enthusiastic reception in Canadian law and became the centrepiece of a new law of public authority liability that was specifically premised on public authorities being subject to a special status in private law, a status that involved unique duties of care, specialized defences, and a wide range of policy considerations.

5.4.1: *Welbridge* – the Forerunner to *Anns*

Prior to the House of Lord’s decision in *Anns*, the Supreme Court of Canada had already begun an experiment with unique treatment of public authorities in private law in *Welbridge Holdings Ltd v Greater Winnipeg*.²¹ The plaintiff had purchased a residential property in Winnipeg with the intention of building an apartment building. The previous owner had applied for and was granted rezoning of the property to a legal use that would permit an apartment building to be constructed. After the plaintiff acquired the property, but prior to applying for a building permit, an application was launched challenging the validity of the rezoning by-law due to alleged irregularities in the public consultation process. The application was

In any event, if there was any default in the performance of his duties by the building inspector, and I am not satisfied that there was, such default was not the cause of the damage which ensued to the plaintiffs. This damage was caused by the negligence of the contractor and by the failure of the plaintiffs to replace the contractor when it became apparent that his work was being shoddily performed

²¹ [1971] SCR 957 [*Welbridge*].

successful at first instance and the rezoning by-law was voided. An appeal to the Manitoba Court of Appeal was allowed, but a further appeal to the Supreme Court of Canada resulted in the original decision being restored. While this litigation was proceeding, the plaintiff had obtained a building permit and had begun construction work. After the decision of the Supreme Court of Canada and the conclusive voiding of the rezoning by-law, the plaintiff sued Winnipeg in negligence and negligent misrepresentation. The latter claim was based on the allegation that the zoning by-law, both by its enactment and its existence (until it was quashed), was an ongoing representation to the plaintiff by the city that it could proceed with its apartment building project. The plaintiff's claim failed at trial and on appeals to the Manitoba Court of Appeal and the Supreme Court of Canada. The Court of Appeal divided on the reasons for why the claim failed, with some judges citing the lack of a duty of care and others pointing to the absence of an actionable misrepresentation. But the Supreme Court of Canada disposed of the case on far narrower grounds. The court's decision, written by Laskin J, focused on the public character of the defendant. As a municipality, the defendant had some functions that were "legislative or quasi-judicial" and some that could be characterized as "administrative", "ministerial", or "business powers", which could be grouped under the heading of the municipality's "operating level".²² A municipality could incur liability in tort or contract for the latter set of activities, but with the former it could not owe any private law duties of care.²³ Since the defendant in *Welbridge* was being

²² *Ibid* at 968.

²³ *Ibid* at 968–70. Of note, much of the reasoning on these issues was made without reference to pre-existing Canadian or English authority. The only judicial source relied upon was the decision of the United States Supreme Court in *Dalehite v United States*, 346 US 15 (1953), a case concerning federal tort claims legislation in the United States.

sued with respect to a legislative or quasi-judicial act, so long as these acts were done in good faith no claim could lie against it.

Welbridge did not go uncriticized,²⁴ but the Supreme Court of Canada had endorsed the idea that public defendants could enjoy special status in private law and that unique concepts could be created and employed when deciding cases involving them. *Welbridge* did not necessary suggest a significant change in the potential negligence liability of public authorities. Nothing in *Welbridge* disturbed the general prohibition on liability for nonfeasance and the prohibition on liability for legislative or quasi-judicial functions was a grant of immunity. The influence of *Welbridge* is illustrated in *Windsor Building Supplies Ltd v Art Harrison*,²⁵ a 1980 decision that fell within the brief liminal period between *Welbridge* and the arrival of *Anns* in Canada. In *Windsor Building*, the plaintiff suffered damage to its goods that had been stored in a building which collapsed. The plaintiff sued the defendant building authority, alleging negligence in failing to enforce its building by-laws. The case was dismissed, with the court holding that the alleged failure to enforce a by-law was non-actionable claim in nonfeasance, and since enforcement was a discretionary power it was shielded by the immunity articulate in *Welbridge*.

²⁴ See eg Fridman, *supra* note 13 at 20–21. Fridman was critical of the Supreme Court of Canada's reliance on an immunity for legislative or quasi-judicial actions. He believed that the court's decision was motivated by an unspoken concern about exposing municipalities to excess liability risks that would undermine their proper function. He argued that the case should have been disposed of via a pure *Hedley Byrne* analysis, and that the dissenting approach of Freedman JA in the Manitoba Court of Appeal might have been the correct one.

²⁵ (1980), 24 BCLR 145 (SC) [*Windsor Building*].

5.4.2: *Kamloops* – The Reception of *Anns*

Anns was adopted into Canadian law by the decision of the Supreme Court of Canada in *Kamloops v Nielsen*,²⁶ a decision which generally marks the start of the modern law of public authority liability in Canada.²⁷ In *Kamloops*, the son of a municipal councillor had built a house for his parents. Several orders related to structural concerns were issued during the course of construction, all of which were ignored by the builder. After completion, the builder's parents took possession of the house, which they later sold to the plaintiff. The plaintiff discovered the structure's defects when they manifested themselves and sued the building authority for the cost of repairs. The building authority was found negligent at trial (sharing liability with the builder), with this decision upheld on an appeal to the Supreme Court of Canada.

Kamloops (which produced a 3-2 majority) addressed several novel issues: the test for a duty of care in negligence, the misfeasance/nonfeasance distinction, and the recovery of pure economic loss. The majority decision did not necessarily produce clear answers on these issues but what was clear was a wholehearted adoption of *Anns*.

On the duty of care question, *Kamloops* formally adopted the two-step test articulated in *Anns*: the existence of a sufficiently close relationship between the plaintiff and defendant, based on the reasonable foreseeability of loss to the plaintiff if the defendant was negligent, and the absence of any policy considerations negating a duty of care.²⁸ The foreseeability analysis was to

²⁶ [1984] 2 SCR 2 [*Kamloops*].

²⁷ David Cohen, "Government Liability for Economic Loss: The Case of Regulatory Failures" (1992) 20 Can Bus LJ 215 at 218.

²⁸ *Kamloops*, *supra* note 26 at 8–11.

be informed by the legislative duties of the defendant which, in *Kamloops*, were found in the building by-laws enacted by the defendant which created a system of building inspections and imposed a duty on the defendant's officials to enforce the by-law.²⁹

As part of the duty of care analysis, the majority curtly brushed aside the misfeasance/nonfeasance distinction: "If the building inspector was under a duty to do the thing he failed to do, ... the non-feasance/misfeasance dichotomy becomes irrelevant. He is in breach of the duty and, if his breach caused the plaintiffs damage, liability must ensue."³⁰ "Duty" in this context was not the same as it had been understood under *East Suffolk*: the duty in *Kamloops* was a general duty to enforce the building by-law, a by-law which left significant discretion to the building authority as to how this was done.

The majority also purported to apply the policy/operational distinction from *Anns* and endorsed the idea that operational activities could give rise to liability if carried out carelessly. For the majority in *Kamloops* the concept of a policy decision was not a tool to address justiciability or public law validity (the way it had been understood in *Anns*) but was instead a different method or tool for assessing liability for the execution of public powers. The majority held that it was a matter of "policy" whether the defendant in *Kamloops* undertook enforcement measures against the builder or prior homeowner, but the reasonableness of this decision could still be reviewed on a negligence standard.³¹ In effect, the label of "policy" applied not to an area of activity

²⁹ *Ibid* at 12.

³⁰ *Ibid* at 21–22.

³¹ *Ibid* at 23–24: The majority faulted the defendant for failing to give "serious consideration" to taking enforcement measures, and that the failure to do so constituted a lack of reasonable care:

inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion. Where the

where judicial intervention was precluded but instead applied as a kind of immunity, conditional on the absence of bad faith, superimposed over certain public authority conduct.

On the issue of economic loss, the majority in *Kamloops* was prepared to award the plaintiff the costs of repairs to the house, but there was little comment on either the nature of the plaintiff's loss or the basis on which the recovery of pure economic loss was to be permitted. What the majority did identify was a supposed statutory grant of recovery for economic loss in the building regulation scheme before it, and it further contemplated a unique basis for recovery of pure economic loss where the defendant was a public authority or acting pursuant to statutory power:³²

The plaintiff's claim here is against a public authority for breach of a private law duty of care arising under a statute. ... If economic loss was within the purview of the statute, then it should be recoverable for breach of the private law duty arising under the statute whether or not it is recoverable for breach of a duty at common law.

While *Kamloops* was the start of the modern Canadian law of public authority liability, it was at best an introduction, and a vague one at that.

question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care.

While the majority's analysis blurs the policy/operational distinction, it is also problematic in that a failure to consider enforcement actions could not, by itself, have harmed the plaintiff. The majority specifically noted that had the defendant considered taking enforcement measures but decided against it, this would have been a "legitimate policy decision within the operational context", for which the defendant could not be faulted. For a general discussion, see Stephen Todd, "The Negligence Liability of Public Authorities: Divergences in the Common Law" (1986) 102 LQR 370 at 400–01.

³² *Kamloops*, *ibid* at 33.

5.4.3: *Just* – The Reinterpretation of *Anns*

The next significant Supreme Court of Canada decision on public authority liability was *Just v British Columbia*.³³ The issue was the liability of a public authority (the province of British Columbia) for allegedly failing to exercise reasonable care in the maintenance of public highways. The lower courts in *Just* had held that the alleged careless actions of the public authority fell within the scope of policy decisions and therefore liability could not attach, but the Supreme Court reversed and ordered a new trial.

The central issue in *Just* was the proper understanding and scope of a policy decision. Once again, the Supreme Court of Canada departed from the treatment of policy decisions that had been adopted in *Anns*, where policy had been used to enforce the boundary between public and private law, and which normally necessitated a finding of an *ultra vires* exercise of a public authority's discretion as a prerequisite to negligence liability.³⁴ Instead, the court in *Just* applied the distinction as a free-standing classification of government action that functioned as a limited immunity. The court provided a framework for government action to be divided into two categories: policy decisions, which are not generally actionable in negligence, and operational activities, which involve the implementation of policy and can give rise to liability if they are done negligently.³⁵ The court in *Just* was

³³ [1989] 2 SCR 1228 [*Just*].

³⁴ Nicholas Seddon, "The Negligence Liability of Statutory Bodies: Dutton Reinterpreted" (1978) 9 Fed L Rev 326 at 334. See also Bruce Feldthusen, "Failure to Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity" (1997) 5 Tort L Rev 17 at 20.

³⁵ *Just*, *supra* note 33 at 1242: The court adopted the definition of policy found in *Sutherland Shire Council v Heyman* (1985), 60 ALR 1 at para 39 (HCA):

The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the

clear that what was encompassed by the label of policy was a narrow immunity from what would otherwise be a general duty of care owed by a public authority: “The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion”.³⁶ The court also suggested that the actual content of policy decisions could be reviewed on a standard of reasonableness: “...a government agency in reaching a decision pertaining to inspection must act in a reasonable manner and in a *bona fide* exercise of discretion”.³⁷

Just effectively endorsed a presumptive duty of care in any situation where a public authority had jurisdiction or institutional competence over an activity, with this duty giving rise to both claims in misfeasance and nonfeasance.³⁸ The misfeasance/nonfeasance distinction was described in chapter 4, but to briefly re-summarize for the current context, the presumptive duty of care from *Just* encompassed not only a duty to refrain from positive actions that inflicted harm on the plaintiff, but could also encompass an obligation to take positive action to prevent third parties from harming the plaintiff. Also, while discrete actions or decisions of public

constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

³⁶ *Just*, *ibid* at 1242.

³⁷ *Ibid*.

³⁸ Kevin Woodhall, “Private Law Liability of Public Authorities for Negligent Inspection and Regulation” (1992) 37 McGill LJ 83 at 102–08.

authorities could be labelled policy decisions,³⁹ *Just* also contemplated that even policy decisions could be subject to review on a negligence standard.⁴⁰ With *Just* not only had *Anns* been adopted in Canadian law, it had been transformed into a something far beyond what the House of Lords had contemplated. While *Anns* had adopted a liberal test for the imposition of a duty of care, it still contemplated that a significant sphere of activities undertaken by public authorities would not give rise to duties of care on the basis that the subject matter of those activities was not properly justiciable by courts in the context of a private law claim. These matters were what fell under label of “policy” or “policy decisions” in *Anns* and its judicial progeny in English law.⁴¹ In *Just*, by contrast, the label of “policy” did not denote a limitation on judicial competence, but instead indicated a narrow area of public authority conduct where courts retained the ability to adjudicate the propriety of conduct, hence the court’s insistence that policy

³⁹ Practically speaking, the concept of policy endorsed in *Just* would apply only to initial, high level decisions, which rendered it inapplicable to most factual scenarios giving rise to negligence claims: Lewis N Klar, “The Supreme Court of Canada: Extending the Tort Liability of Public Authorities” (1990) 28 *Alta L Rev* 648 at 652–55.

⁴⁰ Larry A Reynolds & David A Hicks, “New Directions for the Civil Liability of Public Authorities in Canada” (1992) 71 *Can Bar Rev* 1 at 17–18, noting that the court’s conception of what could qualify as a policy decision was narrower than that found in *Kamloops* (or *Anns*):

[T]he effect of this shift by the Supreme Court of Canada is to allow courts to substitute their discretion for that of the public authority in areas which had not previously been reviewable by courts. Indeed, it is conceivable that the majority in *Just* could be taken as suggesting that all decisions of public authorities, even “pure policy” decisions, are subject to review by courts on the basis of ordinary negligence principles...

See also *Laurentide Motels Ltd v Beauport (City)*, [1989] 1 SCR 705 at 727, where the Supreme Court of Canada held that the absent a policy decision by a municipality as to how often to inspect and repair fire hydrants, its actions in this area were operational and could give rise to liability.

⁴¹ See generally Duncan Fairgrieve & Dan Squires, *The Negligence Liability of Public Authorities*, 2nd ed (Oxford: Oxford University Press, 2019) at 38–40.

decisions could be reviewed on a reasonableness standard, and where the product of that adjudication could result in a judicial grant of immunity.

5.4.4: After *Just* – Divergent Trends

At this point the narrative of this chapter diverges to separately follow the development of building authority liability specifically and the liability of public authorities in general. For a period of roughly 30 years (1989 to the present) these related subjects went through considerable changes that produced both alignments and misalignments between them. Cases in these two areas provided fora for judicial debates over questions of how duties of care should be determined and what interests would be protected by those duties. The following surveys will track the major legal decisions in these areas, particularly those from the Supreme Court of Canada.

5.5: Building Authority Liability in Canada Post-*Kamloops*

5.5.1 *Rothfield v Manolakos* – The Test for Building Authority Liability

Contemporaneous with *Just*, the Supreme Court of Canada decided *Rothfield v Manolakos*.⁴² The claim in *Rothfield* arose from the construction and subsequent collapse of a backyard retaining wall. The owner/builder had applied for and obtained a building permit but had failed to call for a required inspection, which resulted in serious structural defects being concealed. When the inspector eventually did attend, he did not detect the defects and was held to have been negligent for failing to do so. The building authority was held liable to both the owner/builder and a neighbour when the wall collapsed, fell onto the neighbour's property, and caused damage.

Rothfield remains the authoritative statement of the law of building authority liability in Canada. While a detailed analysis of the cause of action

⁴² [1989] 2 SCR 1259 [*Rothfield*].

from *Rothfield* will be conducted in the chapters that follow, it is useful to provide a summary of the decision and its statement of the cause of action. The lead decision was authored by La Forest J. Both the *Anns* test for a duty of care in negligence and the duty of care analysis undertaken in *Kamloops* were re-affirmed. In articulating the duty of care, La Forest J held that “the [building authority], once it made a policy decision to inspect building plans and construction, owed a duty of care to all who it is reasonable to conclude might be injured by a negligent exercise of such powers.”⁴³ The duty framed by La Forest J was broad and not limited by whether the alleged negligence constituted misfeasance or nonfeasance, nor was any distinction drawn between types of resulting damages.

The standard of care of the building authority received less comment than the duty question. The standard of care was based on the normal idea of reasonable care and not on any form of strict liability whenever approved construction deviated from building regulation. Building authorities were not responsible for detecting “every latent defect in a given project, nor every derogation from applicable standards” but would “only incur liability for such defects as it could reasonably be expected to have detected and to have ordered remedied”.⁴⁴ As will be discussed in chapter 7, this apparently straightforward idea of the standard of care was fraught with problems.

Three additional aspects of *Rothfield* were significant. First, La Forest J was clear on the justification for imposing a broad duty of care on the building authority:⁴⁵

⁴³ *Ibid* at 1266.

⁴⁴ *Ibid* at 1269.

⁴⁵ *Ibid* at 1268.

It can, I think, safely be assumed that the great majority of those who engage building contractors to undertake a project must rely on the disinterested expertise of a building inspector to ensure that it is properly done.

... The inspection of plans and the supervision of construction increases the costs of construction for everyone. But I think that most ratepayers, were they to give the matter any thought, would justify the increased expense as an investment in peace of mind: faulty construction, after all, is a danger to life and limb and may result in future expense and liability. This applies equally to owner builders and third parties. Both are justified in saying: "I pay for the provision of an inspection service, and so long as I act in good faith, I should be entitled to rely on the city to exercise reasonable care to ensure that all construction is built according to the standards set out in the by-laws."

This reasoning draws from the same policy well as Lord Denning's reasons in *Dutton*. The socialization of losses arising from faulty construction was necessary and was to be accomplished by imposing private law liability on public bodies.

Second, La Forest J's reasoning suggests that the duty of care is justified, at least in part, by a general expectation by the larger community that public institutions will carry out their mandates in a competent manner. In tort law, this has often been referred to as a "general reliance" basis for a duty of care. *General* reliance can be contrasted to *specific* reliance. The latter refers to the type of reliance exemplified by *Hedley Byrne*, where a defendant, by some kind of positive action, induces a specific plaintiff to detrimentally rely upon the defendant. In contrast, general reliance is an idea generally restricted to duty of care questions involving public authorities. General reliance allows for duties of care to arise where a public defendant is given a particular mandate, and this leads to an expectation on the part of the community that is the intended beneficiary of that the mandate that it will be

carried out in a non-careless manner.⁴⁶ General reliance is an inherently nebulous concept, since it is, by definition, not anchored in any specific event or transaction between the plaintiff and defendant.⁴⁷ As one commentator defined it:⁴⁸

We have all felt and probably expressed the sentiment that They should do something to remedy a situation that concerns us. We are not always clear about who They are, but we feel sure that someone in some position of authority must be responsible for rectifying the problem. This, in essence, is what general reliance amounts to.

General reliance was historically employed by some Australian courts and continues to be a factor in the duty of care of public authorities in New Zealand's negligence law.⁴⁹ But, aside from vague references such as that

⁴⁶ For a general discussion of the concept of general reliance see: Martin Davies, "Common Law Liability of Statutory Authorities" (1997) 27 West Aust LR 21 at 25–36.

⁴⁷ One court was prepared to find general reliance even when the identity of the relevant public authority was unknown to the plaintiff: *Pyrenees Shire Council v Day*, [1997] 1 VR 218 at 237–38 (CA). That court's decision was ultimately overruled by the High Court of Australia in *Pyrenees Shire Council v Day*, [1998] HCA 3 [*Day*], where the majority of the court disapproved of the idea of general reliance as the basis for any duty of care.

⁴⁸ Davies, *supra* note 46 at 33.

⁴⁹ See generally Rosemary Tobin, "Local Authority Liability in Tort to Owners of Defective Buildings: the New Zealand Position" (2013) 42 Comm L World Rev 151. New Zealand courts have adopted the principle that there is general reliance by society on building authorities to enforce building codes, and that they should be liable for almost any form of loss caused by negligence enforcement of building codes, whether physical damage or economic losses associated with lost property values. But this approach to building authority liability is very much the product of the supposedly unique circumstances of New Zealand's housing situation (most newly built homes were owner occupied, were often built by smaller firms with heavy state subsidies and rarely with architectural or engineering support). Tobin discusses how more recent litigation has raised the question of how changes in New Zealand's construction sector might affect building authority liability, particular in the area of commercial construction. Recent decisions from New Zealand courts have rejected any limit on building authority liability to claims with respect to residential properties, thus maintaining the very expansive scope of building authority liability in the country.

found in *Rothfield*, general reliance has not played a meaningful role in Canadian courts' duty of care decisions.⁵⁰

Finally, *Rothfield* confirmed the narrow understanding of policy decisions from *Just*. In stating the duty of care, La Forest J held that “the [building authority], once it made a policy decision to inspect building plans and construction, owed a duty of care to all who it is reasonable to conclude might be injured by a negligent exercise of such powers.”⁵¹ Practically, this means that the only possible policy decision available in the context of building regulation is the initial decision to implement some form of building regulation. Since building regulation regimes in Canada are the creation of provinces which then delegate that power (whether in a mandatory or discretionary form) to lower levels of government, effectively any action or decision taken by a building authority in the implementation of a building regulation regime will be an operational decision.⁵²

Aside from the content of the legal doctrine laid down in *Rothfield*, the decision (as in *Dutton*) reflects a certain myopia in the negligence analysis. *Rothfield* focuses almost entirely on the duty question, and the duty analysis focuses not on the actual interactions between the plaintiff and the defendant but instead on the public character of the defendant.⁵³ This focus on the duty

⁵⁰ See generally Bruce Felthusen, “Unique Duties of Care: Judicial Activism in the Supreme Court of Canada” (2016) 53 Alta LR 955 at 964–65: “The Supreme Court of Canada has never adopted general reliance expressly. *Whatever influence general reliance has, it is exercised in the shadows of public authority negligence law*”. [emphasis added]

⁵¹ *Rothfield*, *supra* note 42 at 1266.

⁵² See generally Woodhall, *supra* note 38 at 108–10. See eg *House v Patey*, [2014] NJ No 225 at paras 172–74 (Prov Ct), holding that a municipality could not have made a policy decision to simply not have any building regulation.

⁵³ *Rothfield*, *supra* note 42 at 1278–91, Cory J dissenting. In contrast to La Forest J, Cory J's dissent focused on the actual interactions between the parties, noting that while a building authority could owe a duty of care to an owner/builder, in this case the owner/builder had failed to call for inspections and was therefore the author of his own loss. He also

issue and the public nature of the defendant would later encourage a failure to consider other questions such as breach, causation, damage, and remoteness.

5.5.2: The Expansive Scope of the Duty: *Mortimer* and *Riverside*

Subsequent decisions demonstrate just how far the duty recognized in *Rothfield* could extend. Two extreme cases will serve as illustrations. Only five years after *Rothfield*, the decision of the Court of Appeal for Ontario in *Mortimer v Cameron* demonstrated the breadth of persons to whom the duty of care could be owed and the time period the duty of care could encompass.⁵⁴ In 1972, a house was constructed in the City of London. A building permit had been issued and the construction inspected and passed by the city's building inspectors. However, the inspectors failed to detect that the walls enclosing an external stairway (a staircase built on the outside of the building envelope) that accessed the second floor were not properly fastened. In 1979, the building was sold to Stingray Developments. In 1987, Stingray leased the second floor of the house to Sandra Hunt. On a July evening in 1987, Hunt, then a student at a local college, invited several individuals over to celebrate the end of exams, including the plaintiff, Mortimer, and his friend, Cameron. After becoming somewhat inebriated, Mortimer and Cameron engaged in some "good natured horseplay", during which they migrated from the second floor onto the exterior stairway with the unfortunate result that Cameron pushed Mortimer up against the outside wall of the external stairway to Hunt's apartment. The wall gave way and Mortimer fell to the ground outside, sustaining catastrophic injuries.

commented that it would not have been reasonable of the owner to rely on the building permit process as an "indication that the wall was sound" as this was the responsibility of the builder and the contractor he hired.

⁵⁴ (1994), 17 OR (3d) 1, [1994] OJ No 277 (CA) [*Mortimer* cited to OJ].

A claim by Mortimer against the city, among others, succeeded at trial and was upheld on appeal, despite the city's argument that the duty of care did not extend to "incidental third party users" of buildings it had inspected. This argument was curtly dismissed by the Court of Appeal:⁵⁵

If, as the Supreme Court of Canada has indicated, a municipality can be held to owe a duty of care to owners and owner-builders, subsequent owners and tenants, and third party neighbours, to protect their health, safety and property when carrying out its operational duties under a building by-law, there is no reason in principle why entrants in the category of the plaintiff should not be afforded like protection.

The Court of Appeal was also dismissive of the city's argument that the passage of time (15 years) between the alleged negligence and Mortimer's injury should weigh against the imposition of a duty of care. Instead, the court held that the "foreseeable consequences of the City's failure to comply with the standard of care required of it in the circumstances could have materialized at any time after the structure was built", a holding which implied that had an injury been sustained even many more years later, the city would still owe a duty of care.⁵⁶

The scope of the possible damages the *Rothfield* duty of care could encompass was shown in *Riverside Developments Bobcaygeon Ltd v Bobcaygeon (Village)*.⁵⁷ A developer undertook to build four rental buildings, with the project being financed by a mortgage that was guaranteed by several other corporations and individuals. When numerous deficiencies began to be discovered, three of the four buildings were already completed and were occupied by tenants. As

⁵⁵ *Ibid* at para 20.

⁵⁶ *Ibid* at para 18.

⁵⁷ (2004), 45 MPLR (3d)107 (Ont SCJ), *aff'd* [2005] OJ No 3326 (CA) [*Riverside*].

problems with the buildings became more widely known, tenants began to flee and the developer's financial situation became precarious, leaving it in a position where it was unable to carry out any of the necessary repairs. Eventually, the bank took possession of the buildings, completed the remedial work through a receiver and sold the buildings. It also obtained judgments against the developer on the mortgage and against the guarantors. The developer sued the building authority. The builder, as in so many other building cases, had already gone bankrupt. The case against the building authority was not based on reliance but on negligence, following *Kamloops* and *Rothfield*. The building authority was found to have negligently approved the plans for the buildings and to have negligently failed to conduct proper building inspections. It was determined that the actual cost to repair the buildings was \$1,600,000. However, when all of the other losses sustained by the developer and its guarantors as a result of the collapse of the project were added up, the building authority was faced with a judgment totalling more than \$14,000,000. What was the basis for awarding these extensive damages? Mere foreseeability:⁵⁸

It is reasonably foreseeable that by giving the approval to proceed with a project that would fall apart completely years later, the loss would all flow back to the approval of the Chief Building Official together with his neglect to inspect properly the buildings. [The plaintiff] had a small corporation. It is very common that personal guarantees be given to lenders for such projects. Further, it is most common that such projects are not constructed on a cash basis but rather are financed. If the municipality faltered on its approval, it was setting up the developer to have a house of cards that would come tumbling down when the buildings were found to be very much outside the confines of the Ontario Building Code. It is reasonable that when work orders issued requiring remedial work that cost over \$1.5 million the owner/developer would not be in a

⁵⁸ *Ibid* at para 36 (SCJ).

position to meet those requirements. If the project was financed, defects could lead to the lender of the mortgages demanding payment. When an owner is overwhelmed with such financial obligations, all flowing from the negligence of the Chief Building Official, it is also reasonable that the guarantors will be pressed hard financially. All of these problems are reasonably foreseeable as damages flowing from [the Chief Building Official's] negligence.

The trial decision in *Riverside* was affirmed with minimal comment by the Court of Appeal. Unlike *Rothfield*, at no point in the reasons of either the trial or appeal court is any comment offered about whether the ratepayers of Bobcaygeon “were they to give the matter any thought, would justify the increased expense” of their taxes functioning as backstop for the losses suffered by developers and their investors.

5.5.3: *Ingles v Tutkaluk* – the Duty Re-Affirmed

The last significant treatment of building authority liability by the Supreme Court of Canada was its 2000 decision in *Ingles v Tutkaluk Construction Ltd.*⁵⁹ The plaintiffs, both highly educated university professors, undertook a renovation at their home which involved lowering the floor of their basement which, in turn, required the construction of new underpinnings beneath the basement. On the advice of their contractor, the plaintiffs and their contractor began work without obtaining a building permit, despite knowing that one was required. By the time a building permit was applied for and obtained, critical parts of the foundation had already been installed and covered up. An inspector attended the day after the permit had been issued and realized the foundation was covered, which made it impossible to determine whether it had been built properly. Instead of delaying the construction, the inspector approved the foundations based on limited surface

⁵⁹ 2000 SCC 12, rev'g (1998), 38 OR (3d) 384 (CA), aff'g [1994] OJ No 1714 (Gen Div).

investigations and on the assurances given him by the builder that the foundation had been built properly. Shortly after the renovations were finished, the plaintiffs began experiencing numerous problems with their house, which were subsequently determined to be caused by the foundation that had not been properly built. The plaintiffs sued the building authority for the cost of repairs. The builder who had both constructed the faulty foundations and recommended that the plaintiffs not obtain a building permit before commencing construction had gone bankrupt. The plaintiffs succeeded at trial. On appeal, the Court of Appeal for Ontario reversed the trial decision and dismissed the claim, but on further appeal to the Supreme Court of Canada the trial decision was restored.⁶⁰

Across all levels of court, the primary focus was on the consequence of the plaintiffs' decision to commence construction without a permit. The Court of Appeal held that the plaintiffs' conduct had taken them outside the scope of any duty of care owed by the building authority.⁶¹ The Supreme Court of Canada, in contrast, held that the building authority's duty of care applied regardless of the plaintiffs' conduct, save for where the conduct was so egregious as to trigger a kind of policy-based defence that a building authority could invoke to avoid liability.⁶² Absent such egregious conduct, the plaintiffs'

⁶⁰ While the builder, Tutkaluk, did not participate in the case, it was named as a defendant and liability was eventually apportioned 80% to Tutkaluk, 14% to the building authority, and 6% to the plaintiffs as contributory negligence. Under Ontario's joint and several liability regime, the building authority was liable to pay the full value of the judgment (94% of the plaintiffs' eventual damages).

⁶¹ *Ibid* at para 25 (CA).

⁶² *Ibid* at para 39 (SCC):

To summarize, despite some ambiguity in the language used in his decision, it is clear that La Forest J. [in *Rothfield*] created a complete defence for municipalities that could be used to militate against a finding of negligence only in the rarest of circumstances, namely, when the owner-builder's conduct was such that a court could only conclude that he or she was the sole source of his or her own loss.

failure to comply with the legal requirements for construction was merely a basis for an assessment of contributory negligence. Subject to a modest deduction (6%) for contributory negligence, the defendant in *Ingles* was liable for the cost of repairing the plaintiffs' basement.

Ingles both re-affirmed the duty of care analysis in *Rothfield* and that decision's myopic analysis. The focus in *Ingles* was entirely on the duty of care question. There was no consideration of the actual interactions between the plaintiffs and the defendant, and how those could have affected the issues of breach, causation, and damage. The fact that, as a result of the plaintiffs' intentional defiance of the requirement to obtain a permit before starting construction, by the time the defendant even sent an inspector to their property the defective underpinnings had been built and covered up should have raised serious debate about whether the plaintiffs actually suffered any damages subsequent to the defendant's involvement or whether there could have been a causal connection between the defendant's conduct and any damages the plaintiffs' suffered.

5.5.4: Hedley Byrne-Based Claims against Building Authorities

At this point, the question may arise as to the fate of the pre-*Kamloops* cause of action against building authorities based on *Hedley Byrne*. Building authorities remained exposed to liability for negligent misrepresentation under *Hedley Byrne*, but this was treated as a cause of action distinct from the negligence claims recognized in *Kamloops* and *Rothfield*. A building authority's careless exercise of its building regulation mandate in the form of issuing permits or conducting inspections was actionable in negligence, whereas *Hedley Byrne* applied to situations where the alleged negligence was the provision of information or cases of pure negligent misrepresentation.⁶³

⁶³ See generally *Hewitt v Scott* (2000), 13 MPLR (3d) 57 at paras 5–7 (Ont SCJ).

This would include information such as geotechnical data about a site where a plaintiff planned to build a residence,⁶⁴ permitted uses of property under zoning by-laws,⁶⁵ the availability of municipal utilities for a planned development,⁶⁶ or the development status of properties neighbouring one a plaintiff was contemplating purchasing.⁶⁷

The key difference between a claim for negligence in building inspection and a claim in negligent misrepresentation is that the former does not require proof of reliance by the plaintiff, nor the existence of transactions between the plaintiff and the defendant. This is illustrated in *Goodwin v Jakubovskis*.⁶⁸ The plaintiff purchased a house from the defendant Jakubovskis, who had constructed the house as an owner/builder. In the course of construction, the defendant building authority's inspector had noticed numerous deficiencies with the house and ordered them remedied. Jakubovskis ignored these orders, never conducted the necessary repairs, and never took the necessary steps to obtain final approval or an occupancy permit from the building authority. A few years later Jakubovskis sold the house to the plaintiff, who discovered the defects. As part of purchasing the house, the plaintiff had made inquiries with the building authority if there were any outstanding orders or building permits. The building authority, unable to locate any records, forwarded a letter to the plaintiff advising that there were no outstanding permits, but the letter did not arrive until after the plaintiff had completed the purchase.

⁶⁴ *Harnett v Wailea Construction Ltd*, [1989] BCJ No 497 (SC).

⁶⁵ *Bell v Sarnia* (1987), 59 OR (2d) 123 (SC).

⁶⁶ *Black v Lakefield (Village)* (1998), 41 OR (3d) 741 (CA).

⁶⁷ *Coyle v Tillsonburg (Town)* (2003), 45 MPLR (3d) 221 (Ont SCJ).

⁶⁸ [1995] OJ No 2338 (Gen Div) [*Goodwin*].

The plaintiff sued both Jakubovskis and the building authority, claiming against the latter in both negligent misrepresentation for the inaccurate letter advising that there were no outstanding permits and for negligence in failing to require Jakubovskis to comply with orders to remedy the defects its inspectors identified. The claim in negligent misrepresentation was dismissed, since the alleged misrepresentation was not made until after the plaintiff purchased the house, which precluded the required element of reliance.⁶⁹ But the claim in negligence succeeded. Relying on *Kamloops*, *Rothfield*, and *Mortimer*, the trial judge held that the building authority, having identified the defects and ordered them remedied, was under a duty to follow up on that order to ensure that the repairs were carried out. Having failed to do so, the building authority was negligent.⁷⁰ This negligence did not depend on any relationship between the building authority and the specific plaintiff in *Goodwin*; rather once the building authority failed to follow up to ensure the repairs were carried out, its negligence was established. However, in transitioning from the time before the building authority's negligence and after it, nothing had changed with respect to the physical condition of the defects. Any risk of harm emanating from the defects was unchanged by the building authority's negligence. As will be discussed in chapter 9, it is difficult to articulate how this negligence, by itself, could translate into a new risk of harm that actualized into new damages. Simply put, the supposed negligence did not add anything in terms of risk to the plaintiff (or to anyone). Also, the lack of any interaction with the plaintiff contemporaneous with the building authority's supposed negligence was not an impediment to a finding of liability. Rather, the negligence existed "in the air" and only crystalized into a completed claim

⁶⁹ *Ibid* at para 27.

⁷⁰ *Ibid* at para 34.

when the plaintiff later came along and purchased the property. As will be discussed in chapters 6 and 7, articulating a duty of care and its breach arising from such negligence is exceedingly difficult.

Case law on negligent misrepresentation claims against building authorities continues to the present, although there is no meaningful body of judicial or scholarly commentary that juxtaposes these claims with building authority liability as recognized in *Rothfield*. References will be made to case law on negligent misrepresentation claims in the chapters that follow as those decisions, which turn on the actual relationship between a plaintiff and a building authority, touch on key elements of this dissertation's argument.

5.6: Public Authority Liability in Canada Post-Kamloops

5.6.1: Unique and Presumptive Public Authority Duties of Care

Kamloops not only introduced the *Anns* test into Canadian law, it inaugurated a new conception of how public authorities could be liable in negligence. *Kamloops* endorsed the idea that a duty of care could be found by a review of the legislation governing the public authority defendant. Coupled with the erasure of the misfeasance/nonfeasance distinction, the result was a new field of negligence law arising from bureaucratic or regulatory failures.

Writing in 1990, David Cohen stated:⁷¹

Given that governments are often engaged in regulatory activities which have no obvious private analogue, *Kamloops* should be, and indeed was, seen as the vehicle through which the courts could mediate claims for a range of losses generated by less than competent bureaucrats engaged in the myriad of activities designed to create and distribute economic entitlements directly, and to regulate the creation and distribution of wealth by private actors.

⁷¹ Cohen, *supra* note 27 at 219.

In short, *Kamloops* was the wholehearted adoption of the idea of public authorities having unique duties in private law. *Kamloops* created an entirely new field of negligence liability, one that clearly had no private analogue and could only ever be applied to a public actor. Proponents argued that the new form of negligence liability should be understood as responding to injuries persons sustained when they did not receive services to which they were legally entitled.⁷² Detractors argue that the creation of this new field of negligence liability was improper, and often label the new area as negligence liability flowing from a failure to confer “benefits”, with the implication being that it imposes liability for something the plaintiff never had in the first place.⁷³

Leaving aside the debate on nomenclature, one thing was shortly made clear: *Kamloops’* consequences would be felt only in the realm of public authority liability. While the *Anns* test purported to be a test for a duty of care in negligence in general, neither the test, nor the repudiation of the misfeasance/nonfeasance distinction that went alongside it, resulted in any apparent willingness to impose duties of care on private defendants to take positive actions to avoid foreseeable harms to others. Canadian law

⁷² See generally David Cohen & JC Smith, “Entitlement and the Body Politic: Rethinking Negligence in Public Law” (1986) 64 Can Bar Rev 1. In Cohen & Smith’s understanding, in a case such as *Anns*, the entitlement that the plaintiff was denied was an assurance that all construction met specific standards, with this benefit being furnished to every subsequent purchaser of an inspected and approved building.

⁷³ See eg Feldthusen, *supra* note 34; Donal Nolan, “The Liability of Public Authorities for Failing to Confer Benefits” (2011) 127 LQR 260; Bruce Feldthusen, “Bungled Police Emergency Calls and the Problems with Unique Duties of Care” (2017) 68 UNBLJ 169.

continues to refrain from imposing any kind of “Good Samaritan” duties on private persons, the breach of which sound in tort.⁷⁴ As Cohen explains:⁷⁵

Liability for failing to act, when applied to private individuals carries with its enormous implications in terms of ideas about causation and of liberal ideas of personal obligation - leaving aside the pragmatic difficulty of defining the boundaries of legal responsibility. Conversely, liability for failing to act, when applied to public bureaucracies requires only that we identify the positive social obligation articulated in the relevant legislative authority pursuant to which the bureaucracy was operating.

Canadian law now recognized presumptive duties of care owed by public authorities arising from any area over which they had jurisdiction or institutional competence. As one writer described it, Canadian law now took an approach of “presumptive liability” following on any negligent act (at least with respect to public authorities).⁷⁶

This expansive approach to public authority liability occurred contemporaneously with another development in Canadian private law, one that might strike an observer as counter-intuitive. Chapter four discussed how English law recognized the tort of breach of statutory duty as distinct from claims in negligence against public authorities. One year before

⁷⁴ Likely the best example, and most persuasive authority, on this point is *Childs v Desormeaux*, 2006 SCC 18 at para 31 [*Childs*]:

Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved.

⁷⁵ Cohen, *supra* note 27 at 220.

⁷⁶ See Bruce Feldthusen, “Winnipeg Condominium Corporation No 36 v Bird Construction Co: Who Needs a Contract Anymore?” (1995) 25 Can Bus LJ 143 at 145—46.

deciding *Kamloops*, the Supreme Court of Canada considered the question of if and how Canadian tort law would recognize claims founded on breach of statutory duties. That decision was *The Queen v Saskatchewan Wheat Pool*,⁷⁷ and the unanimous court concluded that the tort of breach of statutory duty did not exist in Canadian law. Instead, any “civil consequences of breach of statute should be subsumed into the law of negligence”, but while a breach of a statutory duty was not actionable on its own, proof of a statutory breach may be evidence of negligence, and a statutory statement of a duty or obligation may be used when setting the standard of care in a claim in negligence.⁷⁸ The *ratio* of *Wheat Pool* would be subsequently re-affirmed by the Supreme Court of Canada, and the tort of breach of statutory duty remains unrecognized in Canadian law up the present.⁷⁹

Strangely, though, discussion of *Wheat Pool* in public authority liability cases was minimal. *Kamloops* contained a single parenthetical comment on *Wheat Pool*, with Wilson J noting that the plaintiff’s claim in *Kamloops* was “against a public authority for a breach of a private law duty of care arising under a statute” and not for a “breach of statutory duty *per se*”.⁸⁰ But as Klar has noted, there is no meaningful difference between using a statute to create a private law duty of care where one would not normally exist (as happened in

⁷⁷ [1983] 1 SCR 205 [*Wheat Pool*].

⁷⁸ *Ibid* at 227–28.

⁷⁹ See eg *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 211 (“there is no private law cause of action for simple breach of statutory Canadian public law”); see also *Holland v Saskatchewan*, 2008 SCC 42 at para 9 [*Holland*]: “It is well established that mere breach of a statutory duty does not constitute negligence ... The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity. ... No parallel action lies in tort”.

⁸⁰ *Kamloops*, *supra* note 26 at 33.

Kamloops) and converting a statutory duty into a private law duty (which is prohibited by *Wheat Pool*):⁸¹

I can see no difference between a court using a statute to create a “new” common law duty of care, where none existed before and which cannot be justified by the application of common law principles to the relationship between the parties, and a court simply converting a statutory duty into a private law duty. No matter how one rationalizes it, to examine statutory provisions to determine whether these provisions place the plaintiff and the statutory actor into a relationship of proximity is to interpret a statute in order to determine whether it gives rise to a private law duty of care in addition to the imposition of public duties. The suggestion that a statute that does not expressly create a civil remedy can be interpreted to create one, is to do exactly what Dickson J. [in *Wheat Pool*] argued against. It is judicial legislation. It is the tacking of private remedies onto public law duties. If there is no factual basis for placing a plaintiff and a defendant into a relationship of proximity at common law, to place them into that relationship on the basis of statutory provisions is to create a common law duty of care out of a statutory duty. The question to test this hypothesis is a simple one. Would the court have imposed a common law duty of care on the defendant had it not been for the manner in which the court construed its statutory duties and responsibilities? If the answer to this is “no”, it is clearly the statutory duties that are responsible for the imposition of a private law duty of care.

But any possible contradictions between the new law of public authority liability post-*Kamloops* and the supposed non-existence of private law claims for breach of statutory duty was not the subject of judicial treatment. Indeed, it is fair to say the issue was simply ignored. For instance, the decisions in *Rothfield*, *Just*, and *Ingles* do not refer to *Wheat Pool*, nor do many of the

⁸¹ Lewis Klar, "The Tort Liability of the Crown: Back to *Canada v. Saskatchewan Wheat Pool*" (2007) 32 Adv Q 293 at 308.

other Supreme Court of Canada decisions on public authority liability that will be discussed in this chapter.

5.6.2: The Expansion of Public Authority Liability

Post-*Kamloops*, prospective plaintiffs could easily identify a theoretical basis for a duty of care in many circumstances. The first stage of the *Anns/Kamloops* test could easily be established. Foreseeability of the risk of harm could easily be satisfied, especially given the “planned and complicated institutional character of much of modern government activity”.⁸² Under the second stage, the narrow interpretation of policy post-*Just* meant that it would be very rare for a duty of care to be negated on policy grounds.

The duty of care of a building authority was the first of the new duties recognized, and that duty was extended to other safety codes and regimes. In *Smith v Jacklin*, an Ontario court found that a decision by a municipality to enact a fire code scheme for certain properties created a duty of care “to any such persons who might make use of such buildings”.⁸³ Another area where duties of care were imposed was with respect to the provision of fire fighting services. In *Laurentide Motels v Beauport*,⁸⁴ the Supreme Court of Canada applied the *Anns* test to impose a duty of care on a municipality for a failure to maintain municipal fire hydrants. The plaintiff’s property had caught fire

⁸² Cohen, *supra* note 27 at 216. See also *Modbury Triangle Shopping Centre Pty Ltd v Anzil*, [2000] HCA 61 at para 99, Hayne J:

In almost every case in which a plaintiff suffers damage it is foreseeable that, if reasonable care is not taken, harm may follow. The conclusion that harm was foreseeable is well-nigh inevitable. As Dixon CJ said in argument in *Chapman v Hearse*, “I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence.” Foresight of harm is not sufficient to show that a duty of care exists.

⁸³ [1994] OJ No 3225 at para 32 (Gen Div).

⁸⁴ [1989] 1 SCR 705.

and the municipal fire department was delayed in extinguishing the blaze due to a failure of the water supply from the hydrants. Lower courts would apply *Anns* to impose a duty of care with respect to matters such as to whether a fire department responded promptly enough to fire call,⁸⁵ whether a fire department competently fought a fire,⁸⁶ or whether it employed proper post-fire monitoring.⁸⁷

Another major field of liability was the maintenance of public highways. This duty of care had been acknowledged in *Just*, where the alleged negligence was in failing to maintain a system of inspection and maintenance on a provincial highway to guard against the specific risk of falling boulders. Later cases would extend the application of *Just* to highway maintenance more generally.⁸⁸

5.6.3: *Cooper v Hobart* – The Expansion Halted

After the House of Lords' decision in *Murphy v Brentwood District Council* overruled *Anns*,⁸⁹ the Supreme Court of Canada defiantly refused to follow suit and declared that it would continue to adhere to *Kamloops*.⁹⁰ Yet in 2001, only one year after its decision in *Ingles*, the court reformulated the duty of care test in *Cooper v Hobart*.⁹¹

⁸⁵ *Hatchley v Bathurst (City)* (1990), 112 NBR (2d) 99 (QB).

⁸⁶ *Hammond v Wabana (Town)* (1995), 133 Nfld & PEIR 116 (Nfld SC (TD)).

⁸⁷ *Gallagher v Burlington (City)*, [1994] OJ No 255 (Gen Div).

⁸⁸ See eg *Brown v British Columbia*, [1994] 1 SCR 420.

⁸⁹ [1991] 1 AC 398 (HL) [*Murphy*].

⁹⁰ *Canadian National Railway Co v Norsk Pacific Steamship Co*, [1992] 1 SCR 1021 [*Norsk*].

⁹¹ 2001 SCC 78 [*Cooper*].

The facts of *Cooper* are noteworthy for their parallel with cases about building authority liability. The plaintiffs in *Cooper* were investors in a company called Eron, a mortgage broker that went out of business leaving millions of dollars in unpaid debts to the plaintiffs. Unable to recover against Eron, the plaintiffs sued Hobart, the Registrar of Mortgage Brokers, the public authority legislatively charged with the regulation and oversight of licenced brokers, alleging that there had been a negligent failure to take regulatory action against Eron at an earlier date or warn investors of concerns about Eron. As with claims against building authorities, the plaintiffs in *Cooper* were suing a public authority with the jurisdictional and institutional competence to regulate the behavior of a third party who allegedly inflicted harm on the plaintiffs.

Cooper reached the Supreme Court of Canada on a pleadings motion, with the issue being whether the plaintiffs' claims disclosed a cause of action recognized in law. The court held that there was no cause of action, since the duty of care on which the plaintiffs' claims were based upon was not legally tenable.

A central element of the duty of care analysis in *Cooper* was the concept of proximity. *Anns* and its judicial progeny had often used the word "proximity" to describe a relationship giving rise to a duty of care, yet it was understood as simply being another way to describe a relationship of foreseeable harm.⁹²

⁹² See eg *Ingles*, *supra* note 59 at para 17:

The first step of the *Anns/Kamloops* test presents a relatively low threshold. A *prima facie* duty of care will be established if it can be shown that a relationship of proximity existed between the parties such that it was reasonably foreseeable that carelessness on the part of the public actor would result in injury to the other party.

This statement directly followed how Lord Wilberforce described "proximity" in *Anns*, *supra* note 1 at 751–52:

Writing for the unanimous court in *Cooper*, McLachlin CJC and Major J began by breaking the first stage of the *Anns* test into two: foreseeability of harm was no longer enough – foreseeability had to be supplemented by a “close and direct relationship of proximity or neighbourhood”.⁹³ What was meant by proximity was not clearly defined – the court readily acknowledged that “The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic”.⁹⁴ Yet the overarching idea behind the new proximity criterion rapidly became clear: duties of care had to be based on some form of relationship, transaction, or interaction between the parties. Various factors might go into assessing this relationship: the court suggested such factors as “expectations, representations, reliance, and the property or other interests involved”.⁹⁵ But the mere ability to contemplate foreseeable harm was not sufficient.

The second key element of *Cooper* was the Supreme Court of Canada’s linking of the proximity analysis with the public character of the defendant:⁹⁶

In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no

First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a relationship of sufficient 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.

See also Lewis N Klar, “Judicial Activism in Private Law” (2001) 81 Can Bar Rev 215 at 216–19.

⁹³ *Cooper*, *supra* note 91 at paras 22, 31.

⁹⁴ *Ibid* at para 35.

⁹⁵ *Ibid* at para 34.

⁹⁶ *Ibid* at para 43.

different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.

Much is elided in this single paragraph. It reads as if it was an uncontentious axiomatic statement, yet the court tacitly endorses, without comment or citation, the existence of unique duties of care owed by public authorities that sound in nonfeasance, duties which are exclusive to public authorities as they are not apparently owed by “the ordinary man or woman on the street”. As with its previous cases, the Supreme Court of Canada simply assumed that unique public duties of care could and did exist. It also assumed that those duties would arise from the relevant statute, despite the fact that Canadian law did not recognize the tort of breach of statutory duty.⁹⁷

Review of a public authority’s governing legislation was a common occurrence in prior cases, but the method of analysis used in *Cooper* was new. In *Cooper* the court reviewed the powers of the defendant to licence mortgage brokers, conduct investigations into brokers’ behavior, and conduct quasi-judicial proceedings as part of those investigations.⁹⁸ The conclusion reached was that the legislative duties of the defendant were owed to the “public as a whole”⁹⁹ and the legislation did not create a duty of care owed to persons who invested with mortgage brokers, despite the fact that losses to such persons were a reasonably foreseeable consequence of negligence on the part of the

⁹⁷ *Ibid* at para 43. The decision in *Wheat Pool* is not mentioned once in either *Cooper* or its companion case, *Edwards v Law Society of Upper Canada*, 2001 SCC 80.

⁹⁸ *Ibid* at paras 45–49.

⁹⁹ *Ibid* at para 44.

defendant.¹⁰⁰ No relationship of proximity existed, and therefore no duty of care was owed.

The statutory analysis employed by the Supreme Court of Canada in *Cooper* was as significant as its treatment of the concept of proximity. Previously, courts looking at a public authority's governing legislation when applying the *Anns* test appeared concerned only with identifying jurisdiction or institutional competence over an issue and what possibilities the legislation allowed for policy decisions to be made. But in *Cooper* jurisdiction or competence was not enough – there had to be something within the legislation that pointed to specific obligations owed to discernable individuals, the breach of which gave rise to damages. This new approach to the need for a legislative basis for a duty of care was a major departure from the law of public authority liability articulated in *Kamloops* and *Just*.¹⁰¹ The statutory analysis undertaken in *Cooper*, as compared to that in *Kamloops* and *Just*, demonstrated how demanding this new duty criterion was.¹⁰²

¹⁰⁰ *Ibid* at para 50.

¹⁰¹ See the scholarly sources reference at *infra* note 110.

¹⁰² In *Kamloops*, *supra* note 26 at 11-12, the following provisions of the *Municipal Act*, RSBC 1960, c 255 were sufficient to ground a duty of care:

714. The Council may, for the health, safety, and protection of persons and property, and subject to the *Health Act* and the *Fire Marshal Act* and the regulations made thereunder, by by-law

(a) regulate the construction, alteration, repair, or demolition of buildings and structures;

(b) require that, prior to any occupancy of a building or part thereof after construction, wrecking, or alteration of that building or part thereof, or any change in class of occupancy of any building or part thereof, an occupancy permit be obtained from the Council or the proper authorized official, which permit may be withheld until the building or part thereof complies with the health and safety requirements of the by-laws of the municipality or of any Statute.

These provisions (of 122 words) were sufficient to create a duty of care between the building authority defendant and a subsequent owner of a building within the defendant's jurisdiction. The single use of the word "may" was sufficient to identify the discretionary power that the defendant in *Kamloops* had to make a policy decision about whether to

5.6.4: Post-*Cooper* – Restriction on Unique Public Duties

Post-*Cooper* the imposition of new duties of care on public authorities based in nonfeasance was generally halted, and claims based on novel duties of care alleged owed by public authorities were routinely struck out at the pleadings stage.¹⁰³ While *Cooper* suggested that legislation could create a duty of care, courts rarely located duties of care within legislation. Even where legislation imposed a duty on a public authority, courts normally treated them as duties owed to the public at large and not to individual plaintiffs. As one appeal court commented: “it is hard to see how a public statute, empowering public actors to accomplish public goals, could alone give rise to a private duty between those public actors and a particular member of the public.”¹⁰⁴ Stated by another appeal court:¹⁰⁵

The basic proposition remains, however, that a public law duty aimed at the public good does not generally provide a sufficient basis to create proximity with individuals affected by the scheme. This is so, even if a potential claimant is a person who benefits from the proper implementation of the scheme.

Duties of care, on this understanding, can no longer be found in legislation. Instead, they must arise from the actual interactions between the individual plaintiff and the public authority. And these interactions became the

implement a building regulation scheme. In contrast, the court in *Cooper* considered dozens of provisions (nearly 2500 words) of the *Mortgage Brokers Act*, RSBC 1996, c 313, which enumerate a wide variety of investigative powers but which were insufficient to create a duty of care between the Registrar and the investors.

¹⁰³ See Russell Brown & Shannon Brochu, “Once More Unto the Breach: *James v. British Columbia* and Problems with the Duty of Care in Canadian Tort Law” (2008) 45 *Alta L Rev* 1071 at 1071—72 and the numerous cases cited.

¹⁰⁴ *Canada (Attorney General) v Walsh Estate*, 2016 NSCA 60 at para 64 [*Walsh*].

¹⁰⁵ *Wu v Vancouver*, 2019 BCCA 23 at para 56 [*Wu*].

relevant considerations for determining whether a relationship of proximity existed.

A comprehensive definition of proximity remains elusive, but specific patterns have emerged in the concept's more recent application in the test for duties of care owed by public authorities. Proximity normally requires that there be some form of transaction or interaction between plaintiff and defendant.¹⁰⁶ This relates back to *Cooper* where representations and reliance (and the lack of them) were factors that informed proximity (or its absence). But with a public authority proximity also required that the transactions or interactions go beyond those which are normally part of the implementation of a public authority's legislative mandate. Such transactions or interactions have been described as "generic and inherent in the regulatory framework and, accordingly, are not indicative of a relationship of proximity".¹⁰⁷ In *Wu*, the British Columbia Court of Appeal elaborated on this proposition in determining whether a public authority owed a duty of care to a landowner to process an application for land development permissions in a reasonable time. The fact that the individual plaintiffs had delivered an application to the defendant did not create a relationship of proximity:¹⁰⁸

While the relationship between the parties can be described as "direct and transactional", this does not materially advance the proximity analysis because such a relationship is both inherent in and an inevitable and necessary part of the regulatory framework, in which individuals apply for permission to undertake a certain activity. The same applies to virtually any licensing or permitting process. I do not think that the inevitable reality of a specific individual making an application to a regulator, and thereby entering into a direct

¹⁰⁶ *Ibid* at para 59; *R v Imperial Tobacco*, 2011 SCC 42 at para 45 [*Imperial Tobacco*].

¹⁰⁷ *Wu*, *ibid* at para 64; *Walsh*, *supra* note 104 at para 65.

¹⁰⁸ *Wu*, *ibid* at para 65.

transactional relationship with the regulator, advances the argument that proximity exists in the sense that the regulator has come under an obligation to have particular regard for the interests of the applicant beyond the regulator's obligation to fulfil his or her statutory duties.

The existence of a permitting process could provide the setting for a duty of care to arise, but something beyond the process was required:¹⁰⁹

There could be a case in which a public official negligently misrepresented certain facts that were relied on by an applicant. This is not such a case. Alternatively, a public official could act in such a way so as to assume a responsibility to have regard for the private interests of an applicant who in turn relies upon that assumption of responsibility.

5.6.5: Post-*Cooper* – A Schism in Public Authority Liability

While the Supreme Court of Canada had formally refused to follow the English example and overrule its previous adoption of the *Anns* test in *Kamloops*, the decision in *Cooper*, with its new requirement of a relationship of proximity that existed over and above reasonable foreseeability of harm, was a *de facto* repudiation of the *Anns* test. Many commentators saw *Cooper* as practically embodying the principle of the House of Lords' decision in *Caparo Industries plc v Dickman*.¹¹⁰

Yet the Supreme Court of Canada's refusal to repudiate *Anns* – subsequent decisions would employ various linguistic legerdemain to suggest that *Anns*

¹⁰⁹ *Ibid* at para 70.

¹¹⁰ [1990] 2 AC 605 (HL). For commentary on this point, see Stephen GA Pitel, "Negligence: Canada Remakes the *Anns* Test" (2002) 61 Cambridge LJ 252; Jason Neyers, "Distilling Duty: The Supreme Court of Canada Amends *Anns*" (2002) 118 LQR 221; Lewis Klar, "The Tort Liability of the Crown: Back to *Canada v Saskatchewan Wheat Pool*" (2007) 32 Adv Q 293.

and *Cooper* represented parts of a unified and coherent legal doctrine¹¹¹ – meant that the court’s pre-*Cooper* jurisprudence on public authority liability was left undisturbed. Among that jurisprudence were the court’s controlling authorities on building authority liability, stretching from *Kamloops* to *Ingles*, the latter decided only a year prior to *Cooper*. In *Cooper* itself, the court purported to claim that its prior applications of the *Anns* test were simply pre-existing “categories in which proximity had been recognized”.¹¹² Referring to *Kamloops*, the court claimed that “a municipality has been held to owe a duty to prospective purchasers of real estate to inspect housing developments without negligence”,¹¹³ and that this was a previously recognized duty of care based on a relationship of proximity. But this was inaccurate: *Kamloops* did not involve any consideration of proximity as a criterion separate from mere foreseeability of harm.¹¹⁴

The inescapable fact is that *Cooper* did substantially change the law of public authority liability in Canadian law, and many of the Supreme Court of Canada’s pre-*Cooper* decisions on public authority duties of care would be

¹¹¹ See eg *Childs*, *supra* note 74 at para 14 (*Cooper* provided a “nuance on the *Anns* test”); *Hill v Hamilton-Wentworth Regional Police Services Boards*, 2007 SCC 41 at para 116, Charron J dissenting (*Anns* was “refined” in *Cooper*); at para 23 (*Anns* was “definitively refined” in *Cooper*); *Holland*, *supra* note 79 at para 8 (*Anns* was “adopted and refined by this Court in *Cooper*”); *Imperial Tobacco*, *supra* note 106 at para 38 (the *Anns* test was “somewhat reformulated but consistently applied” since *Cooper*); *Rankin (Rankin’s Garage & Sales) v JJ*, 2018 SCC 19 at para 9 (the duty of care test is “laid out in *Anns*” which was subsequently “affirmed and explained” in *Cooper*); *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at para 13 (the “traditional foreseeability-based test from *Anns*” was “refined by this Court in *Cooper*”).

¹¹² *Supra* note 91 at para 23.

¹¹³ *Ibid* at para 36.

¹¹⁴ Russell Brown, *Pure Economic Loss in Canadian Negligence Law* (Markham, Ontario: LexisNexis Canada Inc, 2011) at 19: “...some of the so-called established categories of proximity have never actually been subjected to a proximity analysis”.

decided differently had they been litigated after *Cooper*.¹¹⁵ The result is a division within Canadian law. In many areas, public authority liability is heavily circumscribed, with public authorities facing limited or no private law liability in the exercise of their legislative mandates. But there are also several pockets of expansive liability, one of which is building authority liability,¹¹⁶ where public authorities are subject to broad exposure to negligence liability. Not only does Canadian law continue to recognize unique duties of care owed by public authorities, within those unique duties there are pockets of what might be termed “super-unique” duties.

5.6.6: A Shifting Definition of Policy Decisions

Cooper appeared to signal that the duty of care analysis for public authorities would now focus primarily on the question of proximity. But one decade after *Cooper*, the Supreme Court of Canada revitalized the policy/operational distinction in *Imperial Tobacco*.¹¹⁷ The case arose from an action by the province of British Columbia against several tobacco companies to recover the health care costs incurred in the treatment of tobacco-related illnesses. The tobacco companies subsequently brought claims for contribution and indemnity against the Government of Canada on the grounds that Canada bore liability for actions it took with respect to the regulation of the marketing and sale of tobacco products to the public and on the basis that Canada had made certain representations to the tobacco companies.

¹¹⁵ Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 185: “it is my impression that many of the pre-*Cooper* cases, in which a *prima facie* duty was found, would not survive the more rigorous proximity requirement imposed by *Cooper*.” See also Bruce Feldthusen, “Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary and Unjustified” (2013) 92 Can Bar Rev 211 at 220.

¹¹⁶ See Feldthusen, *ibid* at 222, noting that while building authority liability cannot easily be explained via a proximity analysis, it is a “unique” duty that is “well-entrenched today”.

¹¹⁷ *Supra* note 106.

Imperial Tobacco reached the Supreme Court of Canada on a pleadings motion, with the court striking out all of the contribution and indemnity claims on the basis that the impugned actions of Canada were policy decisions. In general, these actions consisted of decisions by Canada to actively market low-tar cigarettes as a safer alternative to regular cigarettes and to encourage smokers to switch to low-tar cigarettes. This was achieved through representations by Health Canada to both tobacco companies and the public about the relative safety of low-tar cigarettes and through the engineering of several strains of low-tar tobacco by Agriculture Canada which were subsequently distributed to the tobacco companies.

For the court, McLachlin CJC noted the difficulty in formulating any coherent or universal explanation of the policy/operational distinction, and ultimately her reasons did not add much to the pre-existing judicial commentary.¹¹⁸ However, the application of the distinction in *Imperial Tobacco* represented something new. The court held that both the decision of Canada to encourage smokers to switch to low-tar cigarettes and the means by which Canada implemented this decision all counted as policy decisions that could not give rise to a duty of care in negligence.¹¹⁹ This was a far

¹¹⁸ *Ibid* at para 78:

The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.

¹¹⁹ *Ibid* at paras 92—96, 102, 105, 109, 111, 116.

broader interpretation of what constitutes a policy decision than that supplied 20 years earlier in *Just*. *Just* restricted policy decisions to initial, high-level decisions about a particular issue, with every subsequent decision on that same issue constituting an operational activity. But in *Imperial Tobacco*, the label of policy was extended much further down the institutional hierarchy and much further into the actual implementation of higher level decisions.¹²⁰

There are many arguments against the use of the policy/operational distinction in negligence claims against public authorities.¹²¹ But leaving

¹²⁰ Lewis N Klar, “*R. v. Imperial Tobacco Ltd.: More Restrictions on Public Authority Tort Liability*” (2012) 60 *Alta L Rev* 157 at 168–69:

Unlike in *Just*, where the Supreme Court per Justice Cory decided that once having made the decision to inspect the hills for boulders, the “manner and quality” of the inspection system was a matter of operations which could be reviewed, the Supreme Court in *Imperial Tobacco* decided that once having made the policy decision to encourage smokers to switch to low tar cigarettes, the way that the government went about this plan was also part of the policy decision. Thus, deciding on what types of representations should be made, what types of warnings should be given, and even how the strain of tobacco should be designed and developed were core policy decisions immune from negligence law's scrutiny.

Klar suggests that one possible reason for the court's reinterpretation has to do with the Chief Justice herself. In 1985, McLachlin CJC, who was then a judge of the British Columbia Supreme Court, heard and decided *Just* at first instance: (1985), 64 BCLR 349 (SC) and dismissed the claim against the province based on a broad definition of policy decisions. That decision was subsequently overturned by the Supreme Court of Canada. As Klar notes, “The Supreme Court of Canada in *Just* disagreed with Justice McLachlin of the British Columbia Supreme Court. Chief Justice McLachlin of the Supreme Court of Canada now had the opportunity to revisit the issue. And she did so by effectively reaffirming the position that she had taken as the trial judge in *Just*” (at 167–68).

¹²¹ For critical commentary, see Paul Daly, “The Policy/Operational Distinction: A View From Administrative Law” (2015) 69 *SCLR* (2d) 17; S M Bailey & M J Bowman, “The Policy/Operational Dichotomy – A Cuckoo in the Nest” (1986) 45 *Cambridge LJ* 430; Anne Deegan, “The Public/Private Law Dichotomy and Its Relationship to the Policy/Operational Factors Distinction in Tort Law” (2001) 1 *QUTLJ* 241; Larry A Reynolds & David A Hicks, “New Directions for the Civil Liability of Public Authorities in Canada” (1992) 71 *Can Bar Rev* 1; The Honourable John Sopinka, “The Liability of Public Authorities: Drawing the Line” (1993) 1 *Tort L Rev* 123; Bruce Feldthusen, “Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary and Unjustified” (2013) 92 *Can Bar Rev* 211. For a judicial commentary, see *Stovin v Wise*, [1996] AC 923 at 951–53 (HL), Lord Hoffmann.

such arguments aside, *Imperial Tobacco*'s expansion of the definition of policy decision is equally inconsistent with the holding in *Rothfield* that the only policy decision available to a building authority is whether to implement a system of building regulation. After *Imperial Tobacco*, it would seem that the scope of policy decisions should now extend to a wider swath of decisions made by public authorities. Yet this did not occur. In its 2021 decision of *Nelson (City) v Marchi*,¹²² the Supreme Court of Canada had the opportunity to apply the broader idea of “core policy immunity” to one of the “super unique” duties of care that pre-dated *Imperial Tobacco*: the duty of a municipality that undertakes a policy of road maintenance to do so non-negligently (derived from the decision in *Just*). Instead, the court employed a narrower conception of policy decisions more consistent with that used in *Just*,¹²³ effectively creating a divergence in the application of the policy/operational distinction that follows the divergent applications of the requirement of proximity in the duty of care analysis.

5.7: The Current State of the Law: Doctrinal Instability

The current law of public authority liability is marked by doctrinal instability and uncertainty in application. Canadian courts, with the Supreme Court of Canada in the lead, have simply failed to articulate coherent and consistent doctrine in this area and have instead vacillated between different approaches, altered the practical meaning of key concepts, and decided

¹²² 2021 SCC 41 [*Nelson*].

¹²³ See generally *ibid* at paras 69–86. In general the court held that the impugned activity in *Nelson*, a municipality's system of plowing snow from municipal sidewalks and on-street parking spaces, was not a core policy decision, despite involving budgetary considerations, because it did not involve high level decision making, there was insufficient evidence that any decision had been made “involving any prospective balancing of competing objectives and policy goals”, and because the municipality's actions could be assessed on “objective criteria”. This approach is effectively the same as in *Just*, and the last consideration is effectively an acceptance of the pre-*Imperial Tobacco* idea that even where a policy decision is made, courts can still review it on a negligence standard. See *supra* note 40 and accompanying text.

similar cases in diametrically opposed ways, all while paying lip-service to the idea of a consistent jurisprudence from *Kamloops* to the present.¹²⁴ The result is that any development of public authority liability is riddled with uncertainty, since there is no coherent doctrine to draw upon, and any novel cases are decided on effectively an *ad hoc* basis, sowing uncertainty in the law and undermining the idea of *stare decisis*.¹²⁵

Two cases will serve as exemplars of this problem, both of which touch indirectly upon building authority liability. The first is the 2010 decision of the Supreme Court of Canada in *Fullowka v Pinkerton's of Canada Ltd.*¹²⁶ That case arose from a labour dispute at a mine that escalated into violence. The plaintiffs were the family members of nine replacement miners killed by a bomb planted by a striking miner. One of the defendants was the territorial government, which was sued for negligence in the exercise of its regulatory and inspection powers over mines. The government was found liable at trial for failing to exercise its regulatory powers, specifically by

¹²⁴ See Jonathan de Vries, “Before *Kamloops*: The Canadian Law of Public Authority that Might Have Been” (2019) 93 SCLR (2d) 117 at 121:

At present, it is difficult to describe the Canadian law of public authority liability in a comprehensive, coherent manner. Put another way, it is an absolute mess. It is characterized by a lack of doctrinal clarity, shifting application and definition of supposedly key concepts, changing policy justifications, and inconsistent and irreconcilable jurisprudence. It is an example of where tort law, to paraphrase Tony Weir, is held together only by the book bindings of torts treatises.

A more concise critique was referenced by Justice Brown of the Supreme Court of Canada, reflecting on his days as a law professor: “...one of my students, in completing an evaluation of the first year tort law course I taught, wrote on the form ‘This course should not be called Canadian Tort Law. It should be called Everything the Supreme Court of Canada Touches it Turns to Shit’”. See Russell Brown, “Indeterminacy in the Duty of Care Analysis” (2019) 42 Dublin ULJ 1 at 19.

¹²⁵ Bruce Feldthusen, “Please *Anns* – No More Proximity Soup” (2019) 93 SCLR (2d) 143 at 164–70.

¹²⁶ 2010 SCC 5, rev’g 2008 NWTCA 4 [*Fullowka*].

failing to shut down the mine when it became clear that the strike had turned violent and the mine was unsafe. An appeal saw this decision overturned on the grounds that the *Cooper* test did not reveal a basis for a duty of care, especially because the legislation which governed the defendant's mine inspection and regulation jurisdiction was concerned with workplace safety and accidents, not the detection and prevention of intentional criminal conduct.¹²⁷

A further appeal to the Supreme Court of Canada was dismissed, but the court disagreed with the duty of care analysis of the appeal court. The court agreed that the relevant legislation did not deal with the detection and prevention of intentional criminal conduct and noted the parallels between the duty of care alleged before it and the duties that were rejected by the court in *Cooper*.¹²⁸ However, the court went on to hold that the alleged duty of care could be imposed based on the previously recognized duty of care of building authorities:¹²⁹

[T]here is a close parallel between this case and the Court's building inspection cases, *Kamloops (City of) v. Nielsen, Rothfield v. Manolakos*, and *Ingles v. Tutkaluk Construction Ltd.* These cases are instructive because in each there were regulatory duties to inspect and enforce provisions of a building code. The purpose of the inspections was to detect, among other things, construction defects that violated those codes, whether committed by the owner-builder or third parties and the Court found a duty of care to the owner, a subsequent owner and/or third parties who suffered damage because of the construction defect. These features of building inspection schemes are similar to the mining safety scheme in issue in this case. In each of the building inspection cases, a duty of care was found to exist.

¹²⁷ See generally *ibid* at para 125 (NWTCA).

¹²⁸ *Ibid* at para 41 (SCC).

¹²⁹ *Ibid* at paras 46, 51 (SCC) [citations omitted].

...

The analysis of the duty of care on the part of building inspectors in these three decisions supports the existence of a *prima facie* duty of care on the mining inspectors in this case. The relationship between the mining inspectors and the miners is analogous to that between the building inspectors and the owner, subsequent purchaser and neighbour. Like the building inspectors, the mining inspectors have a duty to inspect and to enforce mine safety laws. As with the building inspectors, there is some discretion as to how they carry out their duties, but also like the building inspectors, once the mining inspectors embark on their inspections, it is reasonable to think they will exercise care in the way they carry them out. The mining inspectors are required by s. 42 of the [*Mining Safety Act*, RSNWT 1988, c M-13] to “order the immediate cessation of work in . . . a mine . . . the inspector considers unsafe”. Similar to the role of the building inspectors, the job of the mining inspectors includes protecting the miners from risk arising from other people’s defaults.

Whereas in *Cooper* the Supreme Court of Canada held that a statutory basis was required for a duty of care that went beyond that of the “the ordinary man or woman on the street” who would have no obligation to prevent a third party from harming the plaintiff, the absence of such a statutory basis gave no pause to the court in *Fullowka*:¹³⁰

I accept, of course, that it is not the job of mining inspectors to prevent would-be murderers. However, the fact that the inspectors’ statutory duties do not extend to the detection and prevention of crime does not seem to me to be an answer to the question of whether there is sufficient proximity between the inspectors and the miners in relation to mine safety issues, whatever the cause.

¹³⁰ *Ibid* at para 52.

While the Supreme Court of Canada disagreed with the finding of the Court of Appeal for the Northwest Territories that no duty of care was owed by the territorial government, it still dismissed the appeal since it also held that the trial court had erred in the finding that the territorial government breached the standard of care and in the finding of causation. The result is that the duty of care analysis in *Fullowka* may technically be *obiter* (since the case against the territorial government was dismissed) but its reasoning effectively recognized a further pocket of unique duties of care for public authorities, one that cannot be reconciled with other jurisprudence on public authority liability.¹³¹

Fullowka illustrates the fundamental problem in the duty of care jurisprudence in Canada's law of public authority liability. Every legislative mandate or competence imposed on a public authority is unique, meaning that in almost every claim against a public authority based upon its mandates or competences a full duty of care analysis is undertaken.¹³² And in every duty of care analysis there are two competing approaches: that from *Kamloops*, *Just*, and *Fullowka* in which simple foreseeability of harm coupled with a related legislative mandate or competence is sufficient for a duty of care; and that from *Cooper* and the cases following it where a relationship of proximity is required. These approaches are mutually contradictory, but courts continue to insist that they represent a unified, coherent doctrine. The result? Outcomes are *ad hoc* and the reasons for them are misleading.¹³³

¹³¹ See generally Bruce Feldthusen, "Ten Reasons to Reject Unique Duties of Care in Negligence" in Margaret I. Hall, ed., *The Canadian Law of Obligations: Private Law for the 21st Century and Beyond* (Toronto: LexisNexis Canada, 2018) 25 at 28, who further notes that *Fullowka* could be extended to a larger range of public authority activity.

¹³² Feldthusen, *supra* note 125 at 164; Joost Blom, "Do We Really Need the *Anns* Test for Duty of Care in Negligence?" (2016) 53 *Alta L Rev* 895 at 905.

¹³³ *Ibid* at 169.

This is demonstrated by the second exemplar case: *Vlanich v Typhair*.¹³⁴ The plaintiffs had been injured in an automobile accident with a taxi and had sued the taxi driver and the taxi company. In the course of litigation it was discovered that the taxi's liability insurance only had limits of \$200,000. At the time, the taxi was operating under a licence issued by the local municipality pursuant to a taxi licencing by-law the municipality had enacted that required that every licenced taxi be insured to minimum limits of \$1,000,000. The plaintiffs then sued the municipality, alleging that it had been negligent in failing to obtain sufficient proof of the required insurance limits at the time the taxi licence had been renewed, and that this negligence had caused them damages in the form of being deprived of access to sufficient insurance limits to compensate them for their damages. At trial a duty of care was found, but the case was dismissed on the basis that the municipality had not breached the standard of care. An appeal to the Court of Appeal for Ontario was dismissed, with the court holding that no duty of care existed. The plaintiffs alleged that the duty of care owed to them was analogous to that recognized in *Kamloops*, *Mortimer*, and *Ingles* for building authorities. At first glance it is difficult to see a meaningful difference between those cases and *Vlanich*. In both the municipality had made a decision to create and enforce a scheme of licences and inspections, it was foreseeable that the failure to enforce that scheme would cause harm, and the plaintiffs were within the class of persons who could readily be expected to suffer if the scheme was not properly enforced. Yet in disposing of the appeal, the Court of Appeal for Ontario rejected the plaintiffs' analogy:¹³⁵

Proximity between a public authority and an individual member of the public may arise in circumstances in which the

¹³⁴ 2016 ONCA 517 [*Vlanich*].

¹³⁵ *Ibid* at paras 31–32.

public authority assumes responsibility for ensuring compliance with a standard that is intended to avoid or to reduce a risk of physical damage or harm.

In the inspection cases, the public authority is directly implicated in the risk of physical damage or harm because it has invited the injured party to rely on an inspection, and it has assumed responsibility for avoiding the risk. If the public authority fails to inspect as required by the legislated standard, the physical damage or harm will occur. The plaintiff relies on the public authority to take steps to avoid the risk through reasonable inspection and the authority's obligation to do so is what creates a relationship of proximity with the injured party.

This reasoning was borderline mendacious. The duty of care of building authorities had *never* heretofore been explained or justified by a building authority's assumption of responsibility to a private person for ensuring compliance with building regulation. Reliance by the plaintiff on the building authority has never been a necessary component of the duty of care.¹³⁶ Yet some reason was needed to explain why the unique duty imposed on building authorities could not be extended to the licencing of taxi cabs. Perhaps inadvertently, the Court of Appeal hit upon at least part of what would be a better basis for the duty of care of a building authority, a topic to be discussed in the following chapter, namely the presence (or absence) of the plaintiff's reliance on some action of the defendant.

¹³⁶ See eg *Dha v Ozdoba*, [1990] BCJ No 768 at paras 22–25 (SC), where the plaintiff succeeded in a claim against a building authority for negligently failing to detect deficiencies in plans and drawings submitted for the purpose of obtaining a building permit. This was despite the fact that the plaintiff never met with the building authority's employees, and was not even aware that the plans submitted with the permit would be subject to any review by the building authority (the permit process having been conducted through intermediaries).

5.8: Conclusion: Unstable and Unsustainable Doctrine

This chapter has tracked the development of building authority and public authority liability in Canadian law. Unlike English law, which abandoned the experiment with unique duties of care for public authorities and instead re-anchored public authority liability on a sound doctrinal basis in *Michael v Chief Constable of South Wales Police*¹³⁷, Canadian law remains wedded to the recognition of unique duties of care. Leaving aside the absence of any judicial justification for these unique duties, Canadian courts, with the Supreme Court of Canada in the lead, have created an increasingly contradictory and confusing jurisprudence. Unlike *Michael*, which fixed the *Hedley Byrne* relationship as the basis for the relevant duty of care, Canadian law conducts a buffet-style duty of care analysis. Foreseeability alone may be sufficient, while a distinct requirement of proximity may sometimes be imposed. Legislative analysis often plays a role, but the actual legislative language required for a duty of care shifts from case to case. Finally, the concept of a policy decision may also be thrown into the mix, although it might be a narrow or broad understanding of policy.

The following three chapters seek to undo the jurisprudential mess in the specific context of building authority liability. Building authority liability was the first unique duty of care recognized and, as cases like *Fullowka* and *Vlanich* illustrate, its continued existence based on an expansive application of the *Anns* test is one of the main causes of doctrinal confusion in public authority liability after *Cooper*. The goal of this dissertation is to posit a more principled and more coherent understanding of building authority liability, but an indirect outcome of that enterprise may well be a hint of how

¹³⁷ [2015] UKSC 2 [*Michael*]. See chapter 4 for a detailed discussion of *Michael*.

the broader mess that is the Canadian law of public authority liability may be cleaned up.

CHAPTER 6: THE DUTY OF CARE

6.1: Introduction

The purpose of this chapter and the two that follow is to provide a focused critique of the current understanding of the elements of the cause of action in negligence for building authority liability in Canadian law and to posit an alternative understanding of building authority liability in general, and each of the elements of the cause of action in negligence for that liability, based on corrective justice. This analysis is divided into the constituent elements of the cause of action in negligence: duty of care, standard of care, causation, damage, and remoteness, with the latter three elements being dealt with together. However, the analysis of the elements is not strictly compartmentalized, since the elements themselves are not hermetically sealed off from each other, and many of the concepts, principles, and ideas that this dissertation will discuss apply to more than one element.

These chapters will employ a similar framework: the current judicial articulation of each element of the cause of action will be summarized, followed by a critique of that articulation. As will be shown, even without recourse to corrective justice as an analytical lens, the current Canadian law in this area is incoherent. This summary and critique will be followed by a statement of the corrective justice understanding of each element of the cause of action, and a proposal for a new understanding of each element in the particular context of building authority liability. A common theme running through each chapter is that many of the flaws, contradictions, and dilemmas posed by the current law of building authority liability as stated by the Supreme Court of Canada have been exposed and grappled with by lower courts, with solutions that sometimes hint at the better articulation of the law advocated by this dissertation. Thus each chapter will include significant discussions of lower court decisions.

This chapter concerns the first element of the cause of action in negligence, the existence of a duty of care: the relationship between the plaintiff and the defendant that the law of negligence requires before liability is possible. As will have been seen from chapter 5, the duty of care issue, both when it will exist and why, has tended to dominate judicial treatment of public authority liability in general and building authority liability in particular.

6.2: The Duty of Care – The Current Formulation

The Supreme Court of Canada’s most recent statement of the duty of care of a building authority is found in *Ingles v Tutkaluk Construction Ltd*: a building authority will “owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of their inspection powers”.¹ The doctrinal basis for the duty of care is the *Anns* test, with its first step requiring only bare foreseeability of harm:

The first step of the *Anns/Kamloops* test presents a relatively low threshold. A *prima facie* duty of care will be established if it can be shown that a relationship of proximity existed between the parties such that it was reasonably foreseeable that carelessness on the part of the public actor would result in injury to the other party.²

This foreseeability analysis incorporates neither any consideration of whether the impugned conduct is nonfeasance or misfeasance nor any additional requirement of a “sufficiently close relationship” to satisfy a further requirement of proximity that the court adopted in other contexts after *Cooper v Hobart*.³ For a building authority, foreseeability alone equates

¹ 2000 SCC 12 at para 23 [*Ingles*].

² *Ibid* at para 17.

³ 2001 SCC 79 at para 14 [*Cooper*].

to proximity – there is no need for any interactions between a putative plaintiff and a building authority for the duty to exist.

While the second step of the *Anns* test requires consideration of countervailing policy considerations that would limit or negate a duty of care, the existence of such considerations has been significantly limited. Where, as in Ontario, the existence of a building inspection program is mandated by provincial legislation, that enactment constitutes the only possible policy decision, with all actions taken by the building authority (at the municipal level of government) being operational and therefore subject to negligence law.⁴ In situations where an inspection program is not mandated but optional, the decision to adopt the program is the only available policy decision, with any action taken in the implementation of that program being operational.⁵

The scope of all those who “might be injured” by the negligence of building authorities is broad, not just in terms of who is owed the duty but also what interests the duty protects and how long the duty exists. The duty extends to owners (both initial and subsequent) of defective buildings, including both those who purchase or acquire an interest in defective buildings⁶ or, as in

⁴ *Ingles*, *supra* note 1 at para 23:

The province has made the policy decision that the municipalities appoint inspectors who will inspect construction projects and enforce the provisions of the Act. Therefore, municipalities owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of their inspection powers

⁵ *Ibid* at para 17: “It is clear, however, that once a government agency makes a policy decision to inspect, in certain circumstances, it owes a duty of care to all who may be injured by the negligent implementation of that policy”.

⁶ See eg *Kamloops v Nielsen*, [1984] 2 SCR 2; *Faucher v Friesen*, [1985] BCJ No 650 (SC); *Gornergrat Developments Ltd v Markham (Town)*, 2014 ONSC 4383.

Ingles, an owner who acts as their own builder.⁷ It also extends to neighbouring property owners when their property is adversely affected by defective construction.⁸ It also applies to any person who is present on the property.⁹ No distinction is drawn depending on whether the property is a residence or non-residential.¹⁰ A flash of judicial honesty on this point is found in *Cook v Bowen Island Realty*, in which Owen-Flood J commented that the duty was owed not just to “users of dwellings and land” but to the “public in general”.¹¹

The interests protected by the duty of care – the losses for which breaches of the duty of care afford a remedy in damages – are also extensive. As will be fully discussed in chapter 8, damages flowing from a breach of the duty include losses associated with physical property, in the form of repair costs or loss of value, and those associated with bodily integrity, in the form of damages for personal injury. The duty also protects wider financial interests, in the form of investments in buildings, their expected development value, and the profits that can be earned from them.

Finally, the duty of care has few temporal limitations. Numerous cases have held that a building authority’s duty of care remains actionable through

⁷ For a further example, see *Grewal v Saanich (Regional District)*, [1989] BCJ No 1383 (CA).

⁸ See eg *Rothfield v Manolakos*, [1989] 2 SCR 1259 [*Rothfield*]; *Condominium Corp No 9813678 v Statesman Corp*, 2009 ABQB 493.

⁹ See eg *Mortimer v Cameron* (1994), 17 OR (3d) 1, [1994] OJ No 277 (CA) [*Mortimer*]; *Musselman v 875667 Ontario (cob Cities Bistro)*, 2010 ONSC 3177, aff’d 2012 ONCA 41; *Smith v Jacklin*, [1994] OJ No 3225 (Gen Div).

¹⁰ See eg *Essex Condominium Corp No 43 v LaSalle (Town)*, [2009] OJ No 5745 (SCJ) (condominium building); *Hospitality Investments Ltd v Everett Lord Building Constructions Ltd*, [1996] 3 SCR 605, rev’g (1995), 166 NBR (2d) 241 (CA), aff’g (1993), 143 NBR (2d) 258 (QB) (motel); *HL&M Shoppers Ltd v Town of Berwick*, [1997] NSJ No 652 (SC (TD)) (commercial building).

¹¹ (1997), 39 BCLR (3d) 12 at para 82 (SC).

successive ownership of buildings,¹² potentially extending years beyond the points in time that the building authority took any actions with respect to any building under its regulatory jurisdiction. No case law has suggested any limit on the future existence of the duty of care. The only limit may be that imposed by limitations legislation.¹³

6.3: Flaws in the Duty of Care

The flaws in the current articulation of the duty of care of a building authority can be grouped under two headings: doctrinal content and external justifications. Before proceeding to these topics, it will be of assistance to explain one of the goals of this dissertation's critiques of these flaws.

6.3.1: Coherent Legal Doctrine

A recurring theme throughout the previously chapters is the incoherent nature of the current Canadian law of public authority liability in general and the topic of building authority liability in particular. This dissertation's goals include positing a more coherent legal doctrine in these areas. As such, it will be useful to provide a definition of what is meant by a coherent legal

¹² See eg *Mortimer*, *supra* note 9 at para 18 (where the loss occurred 15 years after the relevant conduct of the building authority, with the court further holding that the duty of care could extend to "any time after the structure was built"); *Musselman*, *supra* note 9 (where 14 years passed between the inspection of a staircase at a restaurant and a fall that injured the plaintiff).

¹³ Normally, civil claims are subject to limitation periods, which prevent a claim from being commenced after a prescribed period of time has elapsed from the time that the act or omission the claim is based upon occurred. To avoid the unfairness that could result from a plaintiff losing a claim of which they are unaware, limitations legislation and courts often employ the idea of "discoverability", which prevents a limitation period from commencing until the facts on which the claim is based were known or ought to have been known to the plaintiff by the exercise of reasonable diligence. In Ontario, the current limitation period applicable to building authority liability cases is two years from the date the claim was discovered. The current limitations legislation in Ontario also provides for a 15 year ultimate limitation period, which runs from the date that the act or omission the claim is based upon occurred, and runs regardless of whether the claim has been discovered. See generally *Limitations Act, 2002*, SO 2002, c 24, Sch B.

doctrine. A useful three-fold definition of coherence, as applied to a specific legal doctrine, has been posited by Neyers, and will be employed here:¹⁴

1. A coherent legal doctrine should not contain unexplained contradictions.
2. A coherent legal doctrine should explain how its central features are connected to each other and are mutually supportive of each other. It should explain how a doctrine's starting point, the outer limits of its application, its effects, and the remedies it creates, are mutually interrelated.
3. A coherent legal doctrine should be able to fit within the larger area of law it is supposed to inhabit.

In general, coherence means that a legal doctrine is not simply a collection of legal concepts and ideas, but is instead a set of ideas unified in a manner that allows its structure and rules to be easily apprehended and applied to specific situations.¹⁵ Coherence is not simply a matter of apprehending legal doctrine in the abstract – coherence serves additional purposes:¹⁶

[C]oherence renders the law both *intelligible* and *accessible*. Since a coherent system is intelligible, people can also be reasonably sure when their actions will contravene the law, make plausible arguments on how the law should develop to meet future demands, and thereby structure their relations with others in a more certain fashion. Thus, coherence also provides *predictive* value. Beyond these virtues, coherence also serves to justify the operation of law with the public. Since rules are coherently related to 'principle' (and courts justify their decisions in written judgements for all to see),

¹⁴ Jason W Neyers, "A Coherent Law of Estoppel" (2003) 2 J Obligations & Remedies 25 at 26-29.

¹⁵ Jason W Neyers, "Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation" (2000) 50 U Toronto LJ 173 at 177.

¹⁶ *Ibid* at 177-78 [emphasis in original].

persons involved in disputes can see that a decision was rendered for legal reasons and not because of sympathy, political expedience, subjective moral assumption, or arbitrary mechanism (e.g., flipping a coin in despair). Thus, coherence has *justificatory* value and demonstrates that the state's imposition of coercion is justified on some plane higher than brute force.

Finally, and most importantly for this dissertation's project, coherence has a corrective function. Accepting coherence as a requirement for legal doctrine provides a standpoint from where we are not compelled to accept existing legal doctrine as we find it, but have a basis to challenge and critique it, including calling for wholesale change.¹⁷

6.3.2: Doctrinal Flaw – Foreseeability is Insufficient for a Duty

The current understanding of the duty of care is based on the *Anns* test, the first step of which provides that a *prima facie* duty of care exists solely when there is foreseeability of harm to the plaintiff resulting from defendant's carelessness. The idea of foreseeability as employed in *Anns* drew directly on the "neighbour principle" employed by Lord Atkin in *Donoghue v Stevenson*:¹⁸

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 contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.

¹⁷ *Ibid* at 178.

¹⁸ [1932] AC 562 at 580 (HL) [*Donoghue*].

Context is everything: Lord Atkin was describing a duty of care as being based upon a relationship between the parties in which foreseeability of harm played a part, but was not determinative. As Ripstein argues, foreseeability in *Donoghue* does not play a “positive role”. Foreseeability does not create a duty of care, rather it acts a “formal constraint”. Lord Atkin conceived of foreseeability as restricting the scope of who could qualify as one’s neighbour. Foreseeability is used to identify the boundaries of that which the law can require a defendant to take account of. It is “a necessary condition of a duty in negligence rather than its moral core”.¹⁹

The decision in *Palsgraf v Long Island Railway Co*²⁰ is often referred to in scholarly discussions of the duty of care, especially for the proposition that duty of care is primarily a relational idea.²¹ In that case, the defendant’s employees, in the course of helping a passenger onto a train, caused him to drop a package containing fireworks. The fireworks exploded, causing a set of scales some distance away to fall over, injuring the plaintiff. The issue was whether the plaintiff was owed a duty of care by the defendant.

For the majority, Cardozo J held that no duty of care existed since the wrong committed by the defendant was to the passenger and not the plaintiff. The plaintiff could only sue for a wrong done to her – she could not sue as the “vicarious beneficiary of a breach of duty to another”.²² Actionable negligence

¹⁹ Arthur Ripstein, *Private Wrongs* (Cambridge Mass: Harvard University Press, 2016) at 89–90.

²⁰ 162 NE 99 (NY CA 1928) [*Palsgraf*]. See also Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) at 125, who describes the majority judgment in *Palsgraf* as vying with Lord Atkin’s speech in *Donoghue* as “the greatest single judgment in the history of the law of negligence”.

²¹ The reasoning in *Palgraf* has found favour with the Supreme Court of Canada: *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at para 18; *Bazley v Curry*, [1999] 2 SCR 534 at para 30.

²² *Palsgraf*, *supra* note 20 at 100.

had to be premised on a relationship between plaintiff and defendant since “[n]egligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all”.²³ As with Lord Atkin in *Donoghue*, Cardozo J identified a role for foreseeability of harm in the duty analysis, but it was clearly a subordinate one. A duty of care – indeed the entire idea of negligence – is a relational idea:²⁴

What the plaintiff must show is "a wrong" to herself, i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but not "a wrong" to any one. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.

Foreseeability – the “risk reasonably to be perceived” – does not function to create the duty of care, rather it serves to define its scope.²⁵

Cardozo J’s reasoning in *Palsgraf* is regularly cited as exemplifying a corrective justice understanding of negligence. The defendant’s wrongful act and the injury to the plaintiff are “intrinsically united in a single juridical

²³ *Ibid* at 101

²⁴ *Ibid* at 100. Of additional importance is that Cardozo J understood that there needed to be reasonable foreseeability of an interference with the plaintiff’s right, not simply a possibility of harm.

²⁵ See generally Tim Kaye, “The Identity Criterion: Resuscitating a Cardozian, Relational Approach to Duty of Care in Negligence” (2021) 49 Hofstra L Rev 945 at 971.

relationship”.²⁶ The wrongfulness of the defendant’s actions flows from the risk of harm resulting from them, but as Weinrib points out “risk is not intelligible in abstraction from a set of perils and a set of persons imperilled”.²⁷ Put more concisely by Cardozo J, “risk imports relation”.²⁸ A duty of care can only exist when “the plaintiff’s injury is within the risk that renders the defendant’s act wrongful”.²⁹

The approach to the duty of care from *Donoghue* and *Palsgraf* is far different than that used in *Kamloops*, *Rothfield*, and *Ingles*. The latter cases are closer in spirit to the dissent of Andrews J in *Palsgraf*, whose reasoning is regularly juxtaposed to Cardozo J’s. Holding that a duty of care was owed to the plaintiff in *Palsgraf*, Andrews J conceived of negligence in non-relational way: “every one owes to the world at large the duty of refraining from those acts that may unreasonably threatened the safety of others”,³⁰ and this duty is “imposed on each one of us to protect society from unreasonable danger, not to protect A, B, or C alone”.³¹ However, liability then had to be limited by the idea of a proximate cause³² which Andrews J explained as follows:³³

[W]hen injuries do result from our wrongful act, we are liable for the consequences. It does not matter that they are unusual, unforeseen, and unforeseeable. But there is one

²⁶ Ernest J Weinrib, *The Idea of Private Law*, revised ed (Oxford: Oxford University Press, 2012) at 160.

²⁷ *Ibid.*

²⁸ *Palsgraf*, *supra* note 20 at 100.

²⁹ Weinrib, *supra* note 26 at 160.

³⁰ *Palsgraf*, *supra* note 20 at 103.

³¹ *Ibid.*

³² See generally Weinrib, *supra* note 26 at 165, suggesting that Cardozo J’s use of “proximate cause” parallels the concept of duty of care: both “subsume the particularity of the actual injury under the generality of risk”.

³³ *Palsgraf*, *supra* note 20 at 103.

limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

What we do mean by the word “proximate” is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.

Lord Denning would agree.³⁴ This reasoning is a classic example of a policy-based understanding of negligence law, one that directly aligns with the approach to duty of care taken in *Dutton v Bognar Regis UBC*,³⁵ later in *Anns*, and which eventually became instantiated in current articulations of the duty of care in Canadian building authority liability. This reasoning suffers from all the same problems. First, the recognition of duties owed to public (ie everyone) renders the duty of care concept redundant and empty. Any person who suffers loss that can be causally traced (factually) to the carelessness of another is owed a duty of care. The decision as to recovery or non-recovery is then based on arbitrary policy considerations. These policy considerations are arbitrary because the choice of any particular policy consideration is not related to the actual wrongfulness of the defendant’s act. The result is a judgment that is “completely empty”, one that “adopts a principle that is effectively meaningless and insists that cases be decided in terms of unstated policy”.³⁶

³⁴ *Lamb v Camden London Borough Council*, [1981] QB 626 at 636 (CA): “The truth is that all these three – duty, remoteness, and causation – are all devices by which the courts limit the range of liability for negligence or nuisance. ... All these devices are useful in their way. But ultimately it is a *question of policy* for the judges to decide”. [emphasis added].

³⁵ [1972] 1 QB 373 (CA) [*Dutton*].

³⁶ *Beever*, *supra* note 20 at 125–28.

Arbitrariness has been a hallmark of duty of care cases in Canadian public authority liability. Weinrib argues that the Supreme Court of Canada's approach to the duty of care in negligence post-*Kamloops* represented a disintegration of the very idea of a duty of care as found in *Donoghue*. The *Anns* approach to the duty of care pulls foreseeability of harm out of its context in *Donoghue* and enshrines it as a freestanding basis for a duty to exist. But since it is easy for any damage to be foreseeable (especially when assessed in hindsight during a lawsuit) a duty of care is practically presumed. At this point, the duty of care inquiry runs up against the general consensus that indeterminate liabilities cannot be imposed, and so recourse must be made to some limiting concepts, whether in the form of policy considerations or ideas like proximity or proximate cause, which negate a duty of care despite the existence of foreseeability. But these concepts cannot be applied in a coherent, consistent way because they are not part of a "unified juridical conception" and are based on different, often contradictory normative considerations.³⁷ The duty of care test in Canada, according to Weinrib, has become:³⁸

³⁷ Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 55–61. At the time Weinrib had written that part of this particular volume (circa 2005), *Cooper* had already been decided although the full scope of its effect on the duty of care test may not have been entirely clear. Weinrib offered preliminary comments on *Cooper* (at 68-69), holding out some hope that it might signal a positive development in Canadian negligence law, but he did not fully endorse the concept of proximity as used in *Cooper* (or as it would be used in later Supreme Court of Canada decisions on the duty of care):

Cooper v. Hobart contains a welcome emphasis on the relational nature of the considerations that govern the first stage. Perhaps this attention to the relational aspect of the duty issue will be further strengthened if the second stage does indeed atrophy, and the reasoning about duty is effectively confined to the examination of what is foreseeable and proximate. For the moment, however, the Court has not yet developed a fully adequate view of what it means for considerations to be relational. Instead of being understood as a coherent and integrated whole, the first stage is seen as an amalgam of foreseeability plus proximity, with proximity itself embodying a collection of specific indicia that vary with the particular relationship in question. Perhaps its newly announced sensitivity to the relational quality of the first stage will eventually lead

[a] ramshackle enquiry, composed of mutually alien parts that labor to contain the spectre of unlimited liability that it itself let loose, is hardly conducive to the elaboration of coherent and principled justifications for liability. The test represents the high point of the disintegration of duty. It conceives of the notion of duty as internally fragmented between and within its stages. It conceives of the duties themselves as particular species each of which represents its own specific considerations of policy and proximity. All that remains of Lord Atkin's notion of a general conception [*Donoghue*] is the comprehensive verbal umbrella that applies to, but does not coherently unify, these different duties.

In summary, the duty of care test from *Kamloops* is untenable because it is, by its very nature, unable to produce coherent outcomes. It is incoherent because the principle relied upon to impose liability, namely that defendants should be liable for all reasonably foreseeable harm resulting from their acts or omissions, is disconnected from the limitations imposed on that principle, which consist of policy considerations external to the parties.³⁹

The criticisms of a foreseeability-based approach to the duty of care in negligence land with full force on the current Canadian law of building authority liability. The criticisms of the current state of legal doctrine in this

the Court to two salutary realizations. The first is that proximity cannot capture what is normatively significant about the relationship between the parties so long as it is regarded simply as something that is added to an expansive notion of foreseeability from the outside in order to restrict it. Rather (if these terms are to be used) proximity should be understood to reveal the restricted meaning that foreseeability itself has in the negligence context, that is, that foreseeability is a way of inquiring into the risks by reference to which the defendant's action is characterized as negligent. The second is that the relational quality that the Court now highlights has to be expressed in normative categories that are themselves relational. Accordingly, behind the particular duties must stand a general conception of duty governed by the correlativity of right and duty, that is, by a normative framework whose elements are intrinsically related to each other.

³⁸ *Ibid* at 63.

³⁹ See generally Neyers, *supra* note 14 at 27, referring to the incoherent nature of the *Anns* test for a duty of care.

area were canvassed in previous chapters and need only be summarized here. First, building authority liability results from the application of a supposedly universal test for duty of care. This test employs a misinterpretation of the concept of foreseeability from *Donoghue*, and is not universal since, aside from building authority liability and a few other pockets of pre-*Cooper* jurisprudence, Canadian negligence law employs a different duty of care analysis, with different understandings of proximity and policy. Second, building authority liability allows plaintiffs to claim in nonfeasance, despite Canadian law's continued adherence to the idea that nonfeasance is not actionable in negligence. Third, Canadian law's official position is that public authorities are subject to the law of negligence "in the same way as private defendants", yet building authority liability is a unique duty of care that has no application to private defendants, nor is there any analogous duty to which private defendants are subject. Finally, most importantly, and likely unsurprising given the prior three faults, building authority liability cannot be coherently reconciled to the current Canadian law of public authority liability, which itself is riven with the inconsistencies and arbitrary outcomes, which Weinrib and others correctly predicted.

6.3.3: Flaws in External Policy Justifications

As a further line of critique, it is useful to note that the current Canadian law of building authority liability is a failure even when measured by its own supposed policy justifications. Recall that in *Rothfield*, La Forest J justified building authority liability by claiming that municipal taxpayers "would justify the increased expense as an investment in peace of mind" and would also be entitled to claim that they should be "entitled to rely on the [building authority] to exercise reasonable care to ensure that all construction is built

according to the standards set out in the by-laws.”⁴⁰ No legal authority or empirical evidence was cited by La Forest J for this proposition, and many have argued that it is simply wrong. Aronson argues that no one in the building industry ever sees building authorities as playing a consumer protection role,⁴¹ and Woodhall notes that participants in the building industry have other means to protect their interests aside from reliance on building authorities.⁴² Even the jurisprudence suggests that many individuals see building regulation as little more than regulatory annoyance.⁴³

Regardless of the wisdom of socializing losses arising from faulty construction – a socialization which, under the current law gives no consideration to the character or vulnerability of plaintiffs or their ability to insure against or absorb such losses – it bears noting that many Canadian jurisdictions already have government funded and administered insurance schemes for new construction. Yet often these insurance schemes become plaintiffs in building authority liability cases, suing to recover their subrogated interests. In at least one case a building authority argued that this was contrary to public policy since both the building authority and the warranty program “are

⁴⁰ *Rothfield*, *supra* note 8 at 1268.

⁴¹ Mark Aronson, “Local Government Liability for Substandard Buildings” (1992) 15 UNSWLJ 389 at 389.

⁴² Kevin M Woodhall, “Private Law Liability of Public Authorities for Negligent Inspection and Regulation” (1992) 37 McGill LJ 83 at 131–34.

⁴³ For example, in *Rothfield* the plaintiff was an owner-builder who failed to call for a required inspection. In *Ingles* the plaintiffs (both highly education professionals) were fully aware of the necessity of obtaining a building permit prior to commencing construction but who, on the advice of their contractor, commenced construction without a permit as their contractor claimed that obtaining one would involve additional delays. See also Woodhall, *ibid* at 131, who notes that in *Rothfield*, like in other cases, the evidence seemed to suggest that the individual homeowner saw building regulation solely as a matter between the building authority and the builders.

public authorities and they should not be able to sue each other because it makes no sense to allow one publicly funded body to ‘pick the pocket’ of another”,⁴⁴ but that argument failed.⁴⁵

A further flaw in the policy rationale for building authority liability is that there is no justification offered by courts for why the particular activity of building regulation requires loss socialization when there are other public activities where the public has just as much (as possibly more) reason to believe that their tax dollars should purchase reasonably competent government action. To paraphrase La Forest J, the average person, were they to give the matter thought, would probably say “I pay for the provision of...public health programs,⁴⁶ police services,⁴⁷ government regulation of professionals,⁴⁸ and other services, and am entitled to expect that I will receive

⁴⁴ *Ontario New Home Warranty Program v Stratum Realty Development Corp*, 2005 CanLII 1055 at para 8 (Ont SCJ).

⁴⁵ A comparable situation can be observed in New Zealand. In *Hamlin v Invercargill City Council*, [1996] 1 NZLR 513 (PC) [*Hamlin*], the Privy Council had declined to overrule *Anns* in New Zealand law, holding that the particular economic and social circumstances surrounding residential housing construction in New Zealand weighed in favour of building authorities remaining subject to the duty of care from *Anns*. After *Hamlin*, though, a debate arose over whether a duty of care should be restricted to residential construction, or whether it should also apply to larger multi-tenant residential constructions, or to commercial construction. The latter classes of owners, so one argument went, were not in an economically vulnerable position, and were better able to protect their interests. Ultimately however, New Zealand courts would extend the duty of care confirmed in *Hamlin* to all types of construction. See generally Rosemary Tobin, “Local Authority Liability in Tort to Owners of Defective Buildings: the New Zealand Position” (2013) 42 *Comm L World Rev* 151.

⁴⁶ Several decisions have held that a provincial government does not have a duty of care to individual members of the public to take reasonable care to prevent them from acquiring an infectious disease despite the creation of specific programs and policies targeted at that disease: *Williams v Canada (Attorney-General)*, 2009 ONCA 378 (SARS); *Eliopoulos Estate v Ontario (Minister of Health and Long-Term Care)* (2006), 82 OR (3d) 321 (CA) (West Nile Viruses).

⁴⁷ *Wellington v Ontario*, 2011 ONCA 274 (while police services may owe a duty of care to a particular suspect under investigation, police do not owe a duty of care to victims of crime to investigate crime and arrest suspects).

⁴⁸ See *Cooper*, *supra* note 3; *Edwards v Law Society of Upper Canada*, 2001 SCC 80.

the benefit of those services being reasonably carried out”, yet negligence law does not impose a duty of care in such situations. These rationales are ultimately incoherent. They do not explain the starting and stopping points for liability, and they do not allow building authority liability to fit within either the larger field of public authority liability, or under the broader umbrella of negligence law.⁴⁹

6.4: The Alternative: A Corrective Justice-Based Duty of Care

6.4.1: Corrective Justice’s Idea of a Duty of Care

Corrective justice recognizes the existence of a duty of care as the basis for negligence liability, but the corrective justice formulation of the duty of care is different. As stated by Weinrib:⁵⁰

When negligence law is conceived in terms of the correlativity of right and duty, the issue of the duty of care is composed of two constituents. First, the interest of the plaintiff that is protected against the defendant’s conduct must have the status of a right as against the defendant. Second, the duty breached must be correlative to that right.

The correlative ideas of “right” and “duty” in this context are defined by Weinrib as follows:⁵¹

A right *implies* correlativity because a right always entails the existence of a corresponding duty. A right *is required by* correlativity, because (along with its corresponding duty) it is the only normative concept that has the correlative structural inherent in a regime of liability. Thus the notions of right and

⁴⁹ See generally Neyers, *supra* 14 note at 26–27.

⁵⁰ Weinrib, *supra* note 37 at 49–50.

⁵¹ *Ibid* at 50 [emphasis in original].

correlative duty together form a unified general conception of the duty of care.

Thus the search for a duty of care is a search for a right the plaintiff has which the defendant has a correlative duty to avoid infringing. So what is the right engaged in building authority liability?

6.4.2: The First False Trail: Rights in Property

Since many building authority cases involve plaintiffs complaining about defects in buildings, rights in property may be the first conception of right that springs to mind as underlying the duty of care. Yet a right in property can neither explain nor justify building authority liability. First, both property and attendant rights in it must be defined. Definitions of property or property rights in the abstract are often slippery. In general, property is understood as the right to possess, use, lend, alienate, consume, or destroy external objects both tangible and intangible, but property rights are often circumscribed, contingent, and/or defeasible, depending on the given legal and social context in which they are exercised.⁵²

Corrective justice, however, draws upon Kantian thought which provides a more precise explanation of rights in property. The Kantian idea of property is more minimalist. Instead of attempting to provide a physical or metaphysical description of what property is, how it is acquired, and what effects are attendant upon it, Kantian thought focuses on property as a normative idea, one that is part of the relations between persons.⁵³ Recall from chapter 3 that private law, under a Kantian understanding, protects

⁵² See generally Roger Scruton, *The Palgrave Macmillan Dictionary of Political Thought*, 3rd ed (Houndmills: Palgrave Macmillan, 2007) *sub verbo* “property”.

⁵³ See generally Ripstein, *supra* note 19 at 40–43; Arthur Ripstein, *Force and Freedom* (Cambridge, Mass: Harvard University Press, 2009) at 86–106.

bodily integrity and the “external objects of the will”.⁵⁴ Property rights fall under the latter category, but for Kant protection of one’s body and the external objects of one’s will are part of the same normative idea: the ability of moral agents to set and pursue their purposes.⁵⁵ Setting one’s purposes is not exclusively a mental act; people often dream or wish for many things or outcomes that are never acted on. It is instead the real world action of pursuing a purpose, which must be done through one’s “means”: your body and the physical objects in space you control.⁵⁶ It is in the real world interaction of purposes and means that private law applies and enforces a simple moral imperative: in a world of free, moral agents capable of setting and pursuing their purposes, no person can be in charge of another. This moral imperative imposes itself whenever any person pursues their purposes “in a way that is inconsistent with some other person’s entitlement to do so”.⁵⁷ Private law, in the form of tort law, deals with means in three ways: it protects the means every person has, it precludes one person from using the means of another person without that person’s consent, and it restricts everyone’s use of their means to those ways that are consistent with everyone else having the full use of their means.⁵⁸ This moral imperative is also

⁵⁴ Weinrib, *supra* note 26 at 128.

⁵⁵ Ripstein, *supra* note 53 at 91:

Your body is your person, and it constrains others because it is that through which you act, your capacity to set and pursue purposes, and any interference with your body interferes with that capacity. Your property constrains others because it comprises the external means that you use in setting and pursuing purposes; if someone interferes with your property, he thereby interferes with your purposiveness.

⁵⁶ Ripstein, *supra* note 19 at 33. Ripstein provides an additional definition: “Your means are just those things about which you are entitled to decide the ends for which they will be used” (at 9).

⁵⁷ *Ibid* at 30.

⁵⁸ *Ibid* at 9.

entirely negative. It protects a person's ability to use their means to pursue their purposes but places no obligation on others to use their means to assist those purposes. Also, there is no guarantee that a person's pursuit of their purposes will result in those purposes being obtained, nor is there any assurance that a person's means will always be preserved or that that the context those means will be employed in remains the same through time.⁵⁹

In Kantian thought, property and rights in property cannot be understood as a form of relation between a person and an external object. Rather, it can only be understood as a relationship between persons who are free to set their purposes (as discussed above).⁶⁰ Thus "a property right is an entitlement to constrain the conduct of others with respect to an object by excluding them from that object".⁶¹ With respect to a person's rights in property,⁶² there are two general categories of private wrongs. First, there is the intentional use by one person of the property belonging to another for their own purpose without authorization. If I have a book in my library and you steal it from me to read it, you have taken one of my means and appropriated it to yourself for your own purpose. Second, one person can damage the property of another, which constitutes a use of one's means in a way incompatible with the other's use of theirs. So if you use your means to acquire a cup of coffee for your own purposes (taste or stimulation), but

⁵⁹ *Ibid* at 33–38.

⁶⁰ Ripstein, *supra* note 53 at 92–93.

⁶¹ *Ibid* at 94.

⁶² While it need not detain the reader in light of this dissertation's subject matter, it is important to note that Kantian thought does deal with the questions of how property is initially acquired, and how ownership and possession interact: Ripstein, *supra* note 53 at 86–106.

carelessly spill the coffee on my book, you have deprived me of the purposes I might pursue with it (education, enjoyment, or distraction).⁶³

Does such an understanding of property rights reflect outcomes in building authority liability? *Kamloops* is a paradigmatic building authority liability case. The plaintiff sought damages reflecting the cost of repairing a house he purchased that was later discovered to have defective foundations. Was there a violation of the “not in charge” imperative with respect to the plaintiff’s purchase and ownership of the house as a means?⁶⁴ The defective construction occurred prior to the plaintiff having ownership or possession of the house. At all times that the house was the plaintiff’s means, it was in same state it was when it was acquired and was never appropriated nor damaged by another person. The supposed wrongful conduct of the building authority, the failure to exercise its powers to require repair work on the house during its original construction, occurred prior to the plaintiff’s ownership of the house. In short, from a Kantian/corrective justice perspective, the plaintiff in *Kamloops* never suffered an actionable wrong by the building authority since no action by it infringed his right in property.⁶⁵

⁶³ Ripstein, *supra* note 19 at 43–51.

⁶⁴ Building authority cases almost exclusively concern breach of property rights by damage as opposed to breach by use without authorization.

⁶⁵ Courts and scholars have considered (and rejected) the argument that a single building can be understood as being composed of multiple, distinct forms of separate property. On this reasoning, sometimes called the “complex structure” theory, a person who acquires a property with defects (defective foundations, for instance) can be said to have only incurred a purely economic loss with respect to the defects, but if those defects cause damage to other elements of the property (the defective foundations cause walls to crack or collapse), that damage is actionable in the same manner as negligently inflicted property damage. The complex structure theory was rejected in English law in *Murphy v Brentwood District Council*, [1991] 1 AC 398 at 478 (HL) [*Murphy*]:

The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent.

6.4.3: A Second False Trail: Bodily Integrity

Kantian right's understanding of interferences in bodily integrity are the same as those for interference in property rights: unauthorized use and damaging. These are not descriptions of different kinds of bodily injury – they are different ways in which a person's means can be interfered with by others. In the context of bodily injury, unauthorized use of means occurs when one person intentionally asserts control over another person's body (which the other person is "in charge of").⁶⁶ The obvious examples are trespasses to the person in the form of battery or assault. Damaging occurs when one person uses their means in such a way as to damage the means of another. An obvious example would be a person who carelessly drives their car (an exercise of means) and collides with another person, injuring the latter's body and impairing his or her bodily means.⁶⁷

To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to "other property".

This rejection of the complex structure theory was adopted by the Supreme of Canada in *Winnipeg Condominium Corporation No 36 v Bird Construction Co*, [1995] 1 SCR 85 at para 15. For further discussion, see Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 26–30. Stevens notes that while the complex structure theory has been correctly rejected, there will be cases where it is unclear whether what is complained of is an economic loss or damage to other property since the law does recognize some divisibility to a single person's property. Some cases will be clear ("If I buy a car I own a car, not four wheels, a roof rack, and a miscellaneous collection of bolts. If I buy two cars, I have the right to two separate things") whereas some will be less so ("If I buy a barrel of apples, and one of them spoils the whole barrel, did I have one right (to the barrel of apples) and consequently suffered only economic loss or many rights (to each apple) and consequently suffered property damage?")

⁶⁶ Ripstein, *supra* note 19 at 29–52.

⁶⁷ *Ibid* at 46–51.

Recall the facts of *Mortimer*. The building authority improperly approved the construction of a wall. A decade and a half later, the plaintiff was a guest of the current occupier of the residence, and he was injured when that wall gave way when he was pushed into it. Clearly the plaintiff was injured, but was there a violation of his right to bodily integrity by the carelessness of the building authority? It is difficult to see how. The building authority did not use the plaintiff's body in an unauthorized way. The interference with the plaintiff's bodily integrity was the result of a defectively built wall and the act of the occupier in inviting the plaintiff into the apartment. Both these acts could be considered purposive action by a person that wrongfully interfered with the means of the plaintiff, but these were not actions of the building authority. There was no purposive action by the building authority that was required for the interference to occur. The wrongful act was completed before or unconnected with anything done by the building authority. Rather, the building authority was alleged to have been under an obligation to do something to assist the plaintiff to avoid the consequences of the wrongful acts of others. The building authority did not wrongfully do anything *to* the plaintiff, what the building authority allegedly did was fail to do something *for* the plaintiff.⁶⁸ Simply put, the building authority did not engage in any wrongful conduct with respect to the plaintiff's bodily integrity.

6.4.4: A Better Trail: A Wrong Based on Expectations?

One might object that the plaintiff in *Kamloops* did suffer a wrong at the point of the purchase of the house. The plaintiff was sold a house with defects which, at least partially, could be attributed to the wrongful failure of the building authority to carry out its mandate. Even if there was no interaction between the plaintiff and the building authority, surely it is

⁶⁸ Ripstein, *supra* note 53 at 55.

understandable that the plaintiff expected the building authority to do its job, or least make a reasonable effort to do it? And if it had, he would not have ended up in possession of a damaged house.

Again, we have shades of La Forest J's reasoning in *Rothfield*: we can assumed that "the great majority of those who engage building contractors to undertake a project must rely on the disinterested expertise of a building inspector to ensure that it is properly done" and that a plaintiff should be entitled to "rely on the city to exercise reasonable care to ensure that all construction is built according to the standards".⁶⁹ There are several problematic aspects to this reasoning.

First, it purports to ground a duty of care in general reliance. As previously discussed, *Rothfield* was one of the rare Canadian cases that flirted with the idea of general reliance as a basis for a duty of care, but general reliance never received acceptance in Canadian law. One major problem with general reliance as a basis for a duty of care is one of proof. Even if there was some truth to the proposition that the "greater majority" of people have engaged in some form of reliance on building regulation schemes, how this translates into individual negligence cases, which are not decided on a society-wide basis but are instead decided in favour of individuated plaintiffs and defendants, is unclear. Siebrasse explains the difficulties inherent in such an inquiry:⁷⁰

In the case of specific reliance, the claimant was acting one way, and then changed her behaviour in reliance of a specific acceptance of responsibility by the defendant. In the case of general reliance, everyone in society will have been acting in a particular way – buying houses, eating oysters - in an area subject to some state regulation. It may be that people would

⁶⁹ *Supra* note 8 at 1268.

⁷⁰ Norman Siebrasse, "Liability of Public Authorities and Duties of Affirmative Action" (2007) 57 UNBLJ 84 at 91-92.

have acted otherwise but for the state regulation. But when the state activity is pervasive and everyone's behaviour is uniform, it will be very difficult to know when this is so. Thus it is difficult to establish reliance. It is also difficult to determine whether the reliance was reasonable. In cases of general reliance responsibility is not usually accepted expressly, but rather by a pattern of activity, for example by a practice of conducting building inspections. It will often be very difficult to determine the precise extent of the responsibility implicitly accepted by a pattern of practice.

An acknowledgement of these problems, let alone any attempt to grapple with them, is noticeably absent from reported decisions on building authority liability.

Second, it is important to emphasize the actual expectation being endorsed in *Rothfield*: not only is it that the building authority exercised reasonable care, but the supposed end point of that exercise of reasonable care is not the prevention of harm to the plaintiff, but to a more specific outcome: a properly constructed building. It may seem a fine distinction, but it further reinforces the insidious idea that the wrong in building authority liability is a form of physical property damage, and that the duty of care of a building authority is akin to form of construction warranty.⁷¹ It assumes that, for plaintiffs in cases like *Kamloops*, the mere existence of the defects in the house was wrongful or, put another way, there is no scenario under which the plaintiff could have purchased the defective house without a wrong having been committed against him.

Aside from being doctrinally problematic, this idea also suffers from the additional defects of being factually and legally false. The mere existence of

⁷¹ This point was elaborated upon by Lord Keith in *Murphy*, *surpa* note 65 at 480–81 (HL), who argued that such a duty of care would be the equivalent of an “indefinitely transmissible warranty of quality”.

construction defects does not equate to any fault or wrongdoing by a building authority. Building authority schemes are not (at least officially) designed to function as insurance schemes for construction. While some building regulation functions are carried out before construction commences (usually at the permit stage where plans are reviewed), the actual review and enforcement of building regulation on actual construction is entirely retrospective. Also, there is nothing wrongful inherent in transactions involving property that is defective, damaged, or compromised. Such transactions happened all the time. The possible wrongfulness in such transactions arises when there has been a failure to disclose relevant information.

At the same time, the idea of expectations brings us closer to a sounder idea of building authority liability and provides a lens through which to understand the flaws in the current law. A handful of cases have engaged with this idea of expectations. What follows is a review of four building authority liability cases which may be considered outliers. All are trial decisions where the judges grappled with the flaws in duty of care analysis imposed by the Supreme Court of Canada, and did so by considering the plaintiff's expectations or knowledge.

*444601 BC Ltd v Ashcroft (Village)*⁷² illustrates the problems inherent in any argument that defects in property must result in a wrong to a subsequent owner. The case concerned a commercial building built in 1981. During its construction, inspectors from the defendant municipality noted the absence of required fire separations in certain walls of the building. The fire separations were never installed, but the municipality approved the construction of the building anyway. Shortly after construction had been

⁷² [1998] BCJ No 1965 (SC) [*Ashcroft*].

completed, the building was extensively damaged by a fire. It was left in a severely dilapidated condition, and ownership passed to the municipality due to unpaid property taxes. The municipality proceeded to list the building for sale and eventually sold it to the plaintiff in 1993. The plaintiff agreed to purchase the property after only a cursory visual inspection, but one which permitted the plaintiff to see the absence of fire separations.⁷³ The purchase agreement included a specific provision that no guarantees or representations were being made about the building's condition or fitness for any use. The purchase price was \$75,000 (whereas at the date of purchase the building assessed value for tax purposes was \$171,500 and its replacement value was \$748,000). After taking possession of the building and starting renovations, the plaintiff discovered that the fire separations that had been required in the original construction of the building had never been installed and sued the municipality for the costs of installing them.

The plaintiff in *Ashcroft* sued the municipality for breach of contract on the grounds of fraudulent concealment, in negligent misrepresentation in relation to information provided about the building prior to the sale, and for negligent exercise of its building regulation jurisdiction (per *Kamloops* and *Rothfield*). The claims for breach of contract and negligent misrepresentation were dismissed on the basis that there had been no fraudulent concealment nor any actionable representation by the municipality about the condition of the building.⁷⁴ But with respect to the building authority liability claim, the court held that the failure to ensure the necessary fire separations were

⁷³ *Ibid* at paras 46–47. The court held that the absence of the fire separations was a patent defect, since it was obvious to any observer that the drywall that constituted the fire separation did not reach from floor to ceiling (as required by the building regulations). However, the court went on to hold that the legal requirement that the fire separations exist was a latent defect, given that it was imposed by law and would not necessarily have been known to the plaintiff.

⁷⁴ *Ibid* at paras 43–62.

installed meant that the municipality was “in breach of a duty which [it] owed to subsequent purchasers such as this plaintiff”.⁷⁵ It is difficult to see how the plaintiff in *Ashcroft* was wronged by the actions of the building authority. The plaintiff consciously purchased a heavily damaged building in the knowledge that no assurances were being made about its conditions or fitness for use. The claim against the building authority looks like an attempt to obtain a windfall on top of a bargain as opposed to the undoing of a wrong. Evidentially the court thought so as well, since it went on to hold that the “surrounding circumstances” meant that the plaintiff had “suspended” the duty of care it was owed and could not recover from the municipality.⁷⁶ While the outcome may seem correct, the reasoning was minimal and unsatisfactory.

Ashcroft was applied in *Day v Central Okanagan (Regional District)*.⁷⁷ *Day* was about a house built upon sand (more accurately uncompacted fill). The house had originally been constructed and approved by the defendant building authority in 1971 and the plaintiffs purchased it in 1974. The plaintiffs later sold the house to a third party. After experiencing foundation damage due to settlement, the third party sued the plaintiffs. The plaintiffs settled the claim by repurchasing the house for its value less the costs of necessary repairs. But during the proceedings the plaintiffs also discovered the existence of the uncompacted fill and its contribution to the foundation issues, and so when they agreed to repurchase the house they did so in the full knowledge of the defects in the house.

⁷⁵ *Ibid* at para 67.

⁷⁶ *Ibid* at para 74. What was meant by “suspension” was not elaborated on by the court.

⁷⁷ 2000 BCSC 1134 [*Day*].

After repurchasing the house the plaintiffs sued the building authority for negligently approving the original construction. Their case was dismissed. The court in *Day* framed the duty of care as being based on a “failure to warn” which was owed to “unsuspecting purchasers”.⁷⁸ As in *Ashcroft*, the court was faced with a plaintiff who could point to historical carelessness by the building authority in approving the original construction, but who was not practically out of pocket on the transaction. As in *Ashcroft*, the court equivocated on the issue but reached the proper result:⁷⁹

In light of the finding of fact that I made above, that the plaintiffs knew or ought to have known of the true cause of the settlement of the house in 1992, well before their repurchase of the house in 1994, the plaintiffs’ claim for failure to warn cannot stand. Whether characterized as negating any duty of care that the defendants may have owed to the plaintiffs or as negating any causal connection between the alleged failure of the defendants to warn the plaintiffs and any damage sustained by the Days, I find that the plaintiffs’ knowledge operates to prevent them from recovering damages from the defendants.

...

The plaintiffs’ knowledge of the true cause of the settlement of the house before their repurchase operates to negate any duty to warn that the defendants may have owed to the plaintiffs. Without a duty being owed to the plaintiffs, there obviously cannot be a finding of negligence against the defendants for breach of a duty.

⁷⁸ *Ibid* at para 118. See also paras 59, 70.

⁷⁹ *Ibid* at paras 117, 119. For a contrary case, see *Breen v The Corporation of the Township of Lake of Bays*, 2021 ONSC 533 [*Breen*]. In that case, the plaintiffs purchased a vacation property with obvious defects (for which the plaintiffs obtained a lower purchase price) and were aware that the building authority had not completed inspections of the property. The plaintiffs (on the advice of their lawyer) did not obtain a final inspection but purchased the house. Years later structural problems were discovered, and the plaintiffs were successful in suing the building authority for failing to detect them through inspections.

The next case is *Lyons v Grainger*,⁸⁰ in which the plaintiff homebuyer sued the vendor/builder of the home and the local building authority for defects in a recently constructed home. While the claim against the vendor/builder succeeded, the claim against the building authority was dismissed, with one of the grounds for doing so being that the defects complained of would “easily have been observed by a reasonably vigilant purchaser inspecting the house he was considering buying”.⁸¹

The final case is *Iacolucci v Fernbrook Homes (Brooklin) Ltd.*⁸² The plaintiff had purchased a home from Fernbrook, which had built it. Prior to the sale closing, Fernbrook had requested an occupancy inspection from the defendant building authority. The inspector had noted the absence of a required railing on the house’s porch. The sale closed five days later. The railing was never installed, but the plaintiff was told that a further inspection was required before an occupancy permit would be issued. The plaintiff did not request that inspection and moved into the house. Some time later the plaintiff fell off the porch, sustaining injury, and proceeded to sue Fernbrook and the building authority. The plaintiff succeeded against Fernbrook but the case was dismissed against the building authority.

From one perspective, *Iacolucci* appears similar to *Mortimer*: the building authority was aware that a safety feature required by building regulations

⁸⁰ [1994] OJ No 1825 (Gen Div) [*Lyons*].

⁸¹ *Ibid* at para 103. For a contrary result see *Chapeskie v Lake of Bays (Township)*, [1999] OJ No 2773 (SCJ), where the court held that a plaintiff who purchased a property would have been able to see the subject defects on a visual inspection (in that case, the absence of basement insulation) but would not be able to appreciate the significance of the condition (that it was a breach of building regulations). Under this reasoning, a plaintiff would have to appreciate the factual existence of a physical defect *and* that it was a breach of some building regulation before the duty of care would be negated. See also *Cumiford v Power River (District)*, 2001 BCSC at paras 91–93, for similar reasoning.

⁸² [2006] OJ No 5669 (SCJ) [*Iacolucci*].

(the railing) was not present but took no further action to ensure it was installed. But the court held that the plaintiff's awareness that the railing was missing was what led her claim to fail:⁸³

[the plaintiff] was aware that there was no railing in place at the time. [The building authority] had a duty simply to report that there was no railing there, [so] nothing would have changed. It would not have altered the situation in any way, since [the plaintiff] was aware of this already. The duty that would have effectively prevented this accident would have been that the Town prohibited occupation of the premises. Without such a duty, there could be no causal connection with the damage.

The courts in *Ashcroft*, *Day*, *Lyons*, and *Iacolucci* do not posit a single, coherent statement of legal doctrine. What they do is grapple with a fundamental flaw in the duty of care laid down in *Kamloops*, *Rothfield* and *Ingles*, namely that the actual interaction between the eventual plaintiff and the building authority is irrelevant – all a plaintiff must do is identify carelessness of the part of a building authority and the existence of a physical defect. The duty of care does not depend on a correlative relationship of duty and right or a relationship of wrong and injury between plaintiff and defendant. What emerges instead is an inchoate idea of a duty of care which appears to arise solely from a building authority's interaction with a particular building (not a person), with any carelessness by the building authority attaching as a kind of *in rem* right that can later crystalize into an actionable tort when it is mixed with some kind of injury or disappointment suffered by a future plaintiff drawn from an almost indeterminate class of persons.

The incoherent nature of the current understanding of the duty of care is illustrated by the broad scenario these cases illustrate. The current law

⁸³ *Ibid* at para 22.

contemplates that a plaintiff could purchase a building knowing both that it contains defects and that those defects were related to carelessness by a building authority, could adjust their behavior in light of their knowledge of these defects (usually by adjusting the purchase price for that building to account for the presence of those defects), but still have a presumptive claim against the building authority for the costs of the defects (either repair or resulting injury). This is an obviously absurd outcome, but the current law does not provide either an acknowledgement that it is an absurd outcome or a doctrinal basis for why a duty of care would not exist in such situations. Hence, the need for the courts in *Ashcroft* and *Day* to engage in vague or arbitrary reasoning to justify the correct outcome. The current law illustrates Cardozo J's dictum that "negligence in the abstract, apart from things related, is surely not a tort, *if indeed it is understandable at all*".⁸⁴ These cases also illustrate, albeit indirectly, one of this dissertation's core claims, namely that the private law liability of building authorities is properly understood as arising from interactions between the building authority and a private person that can affect the latter's ability to make informed decisions about some contemplated action with respect to a building. The common theme of these decisions is that the knowledge of the plaintiff is the lynchpin factor in determining whether a wrong has occurred. In *Ashcroft* the plaintiff knew it was purchasing a burnt-out building; in *Day* the plaintiffs were not "unsuspecting purchasers"; in *Lyons* the plaintiff knew that certain features were not present in the house being purchased, and in *Iacolucci* the plaintiff knew there was no railing on her porch. In all these cases, the courts implicitly recognized that whether the plaintiffs were wronged was not a question of whether the building authority had acted

⁸⁴ *Palsgraf*, *supra* note 20 at 101 [emphasis added].

carelessly at some point in the past but was instead a question of the plaintiff's knowledge and the capacity to act on that knowledge in their actions with respect to the building at issue (purchasing it or living in it). Put another way, the issue was whether the plaintiffs suffered a "deprivation of an opportunity to follow a preferred course of action".⁸⁵

Building authority liability must be understood as responding to wrongs to a plaintiff's autonomy, not to a plaintiff's property or bodily integrity. Among the many building authority liability cases cited in this dissertation, in none did the building authority or its servants physically destroy property or inflict bodily injury upon plaintiffs. Building regulation regimes do not create or alter physical property. Building permits create no rights but simply grant a privilege to construct a building, with the plan review and inspection processes that accompany construction being the means to ensure that the construction complies with building regulation.⁸⁶ The pre-*Kamloops* cases on building authority recognized the possible private law implication of implementing such a scheme is that individual actions taken under that scheme, such as approving plans, issuing a permit, or passing inspections, could constitute a communication of information that created a duty of care under *Hedley Byrne*.⁸⁷ The ultimate question in such cases, as found in

⁸⁵ Stephen Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 UTLJ 247 at 290—91.

⁸⁶ *Toronto (City) v Williams* (1912), 8 DLR 299 (Ont CA).

⁸⁷ See esp *Gadutsis v Milne*, [1972] OJ No 2070 (HCJ); *Windsor Motors Ltd v Powell River (District)* (1969), 4 DLR (3d) 155, [1969] BCJ No 410 (CA). In both cases the courts treated the negligent act of providing inaccurate information and the negligent issuances of a permit or licence as being the same wrongful act. See also *Pawella v Winnipeg (City)*, [1984] 5 WWR 113 (Man QB), an early post-*Kamloops* case where the court considered a claim by a home-builder that the defendant building authority had negligently issued a building permit despite having knowledge of unstable soil conditions that would negatively affect the house. While the case was dismissed, in framing the duty of care the court treated the provision (or failure to provide) of information and the issuance (or refusal) to issue a permit as being part of the same (potentially) wrongful act (at 141):

Laskin J's *obiter* in *Welbridge Holdings Ltd v Greater Winnipeg*, was whether the information communicated "involved an assumption of responsibility to the plaintiff" for the accuracy of it.⁸⁸

6.4.5: Assumption of Responsibility

We have now arrived at the corrective justice understanding of a duty of care in building authority liability. This was reviewed in chapter 4, but to briefly summarize: corrective justice recognizes a correlative relationship of right and duty between a plaintiff's right in their personal autonomy and a duty on a defendant to not negligently interfere with it by misleading the plaintiff. The duty is created by the defendant's assumption of responsibility to the plaintiff, and the correlated right is a paucital right held by the plaintiff. The most obvious instantiation of this idea in legal doctrine is through the cause of action recognized in *Hedley Byrne v Heller*.⁸⁹

Applying this corrective justice account to building authority liability is assisted by the continued existence and application by Canadian courts of the law of negligent misrepresentation to claims against building authorities and related public authorities. It is also assisted by recent changes in the law of negligent misrepresentation, particularly the decision of the Supreme Court of Canada in *Deloitte & Touche v Livent Inc.*⁹⁰ *Livent* is noteworthy for two reasons. First, the court articulated a new basis for the duty of care in

On the test laid out in *Anns*, I conclude that if the city of St. Vital or its inspectors knew or ought to have known at the time the building permit was issued that the property was not suitable for its intended purpose, it was under a private law duty of care to either prohibit the construction by denying the permit or, at the very least, to communicate the knowledge it had or ought to have had to the Wilsons.

⁸⁸ [1970] SCR 957 at 971.

⁸⁹ [1964] AC 465 (HL) [*Hedley Byrne*].

⁹⁰ 2017 SCC 64 [*Livent*].

negligent misrepresentation:⁹¹ a duty will arise when a defendant gives an undertaking in circumstances that grant the plaintiff a right to rely on the undertaking. These events, the giving of an undertaking and the creation of a right of reliance, were described by the majority in *Livent* as “corollary rights and obligations”, a statement that was only a little short of a direct adoption of a corrective justice understanding of the duty of care as a single normative unit based on correlativity.⁹² The second significant point in *Livent* was that the concept of negligent misrepresentation and the concept of negligent performance of a service were merged into a single category of negligence.⁹³ In many ways this was a long-overdue recognition of the full scope of the tort recognized *Hedley Byrne*, but it does ease the application of that tort to a wider range of situations.

Livent was further developed by the Supreme Court of Canada’s decision in *1688782 Ontario Inc v Maple Leaf Foods Inc*.⁹⁴ For the purpose of the duty of care inquiry in cases of negligent misrepresentation or negligent performance of a service, *Maple Leaf* drove home two key points. First, the injuries to which these torts respond are injuries to a plaintiff’s autonomy:⁹⁵

In other words, it is the *intended effect of the defendant’s undertaking upon the plaintiff’s autonomy* that brings the defendant into a relationship of proximity, and therefore of

⁹¹ While the majority in *Livent* refused to expressly say so, the decision was a repudiation of the court’s earlier decision in *Hercules Management Ltd v Ernst & Young*, [1997] 2 SCR 165, where the court had articulated a duty of care test in negligent misrepresentation that followed the approach of *Anns/Kamloops*: a *prima facie* duty of care would exist whenever there was “reasonably foreseeable reliance” and no policy considerations limited or vitiated the duty.

⁹² *Livent*, *supra* note 90 at para 30. The majority cited Weinrib’s scholarship on this point.

⁹³ *Ibid* at para 30.

⁹⁴ 2020 SCC 35 [*Maple Leaf*].

⁹⁵ *Ibid* at para 34 [emphasis added], citing Ernest J Weinrib, “The Disintegration of Duty” (2006) 31 *Advo Q* 212 at 230.

duty, with the plaintiff. Where that effect works to the plaintiff's detriment, it is a wrong to the plaintiff. Having deliberately solicited the plaintiff's reliance as a reasonable response, the defendant cannot in justice disclaim responsibility for any economic loss that the plaintiff can show was caused by such reliance. The plaintiff's pre-reliance circumstance has become "an entitlement that runs against the defendant".

Second, the duty of care in such cases cannot exist at large but only exists within the specific scope of the plaintiff's undertaking:⁹⁶

[I]t is not enough to show that a defendant made an undertaking. Again, an undertaking of responsibility, where it induces foreseeable and reasonable reliance, is formative of a *relationship* of proximity between two parties. We must therefore consider whether this undertaking, if made, was made *to [the plaintiffs]*, and *for what purpose*. Reliance on the part of the franchisees which falls outside the scope and purpose of that representation is neither foreseeable nor reasonable and therefore does not connote a proximate relationship.

To see how *Livent* could be applied to building authority liability, we can consider the recent decision of the Court of Appeal for Ontario in *Charlesfort Developments Limited v Ottawa (City)*.⁹⁷ The case arose from a municipal rezoning process.⁹⁸ The plaintiff developer owned a parcel of land it wished to develop into a condominium project, which required the plaintiff to

⁹⁶ *Ibid* at para 38 [emphasis in original].

⁹⁷ 2021 ONCA 410 [*Charlesfort*]

⁹⁸ Municipal control over zoning is very similar to building regulation and follows a similar pattern across Canada. Municipalities and other public bodies, via provincial legislation, are given a jurisdiction to control the permitted uses of land within their jurisdiction. The creation, implementation, amendment, and enforcement of zoning is done by municipal legislation and municipal officials. For reasons not entirely clear (likely because a coherent reason does not exist), this area of public authority activity was not absorbed by the *Kamloops* duty of care.

obtain a zoning amendment. Immediately adjacent to the plaintiff's property (on land owed by a third party) was a municipal infrastructure easement. During the rezoning process, a municipal employee erroneously told a representative of the plaintiff that the easement contained a large sewer. The error was only discovered a few years later, after the rezoning process had been completed and the plaintiff was in the midst of developing a site plan. It turned out that the easement contained a large municipal water main. The presence of a water main prevented the plaintiff from pursuing its original design intentions. The plaintiff sued the municipality in negligent misrepresentation, claiming for the costs associated with having to redo the design work to accommodate the water main, and for lost value in the eventual project as it could no longer be built in the manner initially planned. The plaintiff succeeded at trial, but the Court of Appeal reversed.

The issue for the Court of Appeal was the scope of the undertaking the municipality had supposedly given to the plaintiff about the nature of the easement during the rezoning process. The trial judge held that the municipality had "implicitly" given an undertaking about the accuracy of the information provided, referring to the jurisdictional mandate and competence of the municipality on matters of zoning, the municipality's knowledge of what the plaintiff intended to do with the site, and the foreseeable nature of the losses the plaintiff eventually suffered.⁹⁹ But this holding, the Court of Appeal reasoned, failed to consider the central duty of care requirement: "whether the City manifested an intention to induce, or deliberately solicited, Charlesfort's reliance, as well as the purpose and scope of any such undertaking".¹⁰⁰ Following a Diceyan approach, the court rejected the idea

⁹⁹ *Charlesfort*, *supra* note 97 at paras 18–22, 43–46.

¹⁰⁰ *Ibid* at para 47.

that the legislative scheme, on its own, created a duty of care. The re-zoning process provided the setting in which interactions *could* take place – the process informs “the respective positions and knowledge of the parties during the rezoning process”¹⁰¹ – but it did not mean that the required undertaking or assumption of responsibility occurred.¹⁰² The court ultimately held that nothing in the rezoning process fell within the scope of:¹⁰³

[A]ny representations or undertakings whose purpose or scope included assuring [the Plaintiff] that its condominium project as planned would be viable or protecting [the Plaintiff] from pure economic loss, such that [the Plaintiff] was induced to rely and suffered economic detriment as a consequence.

6.5: A Corrective Justice Account of the Duty of Care in Action

Let us return to the beginning and consider what would have happened in *Kamloops* had the corrective justice account of a duty of care posited here been applied. To assist, we can supplement the prior discussions of *Kamloops*

¹⁰¹ *Ibid* at para 48.

¹⁰² *Ibid* at para 59:

As the trial judge also found, the parties met and communicated with one another, and the City shared comments it received from the circulation process. In my view, this was done not to induce Charlesfort to rely on the City’s undertaking to review its rezoning application and anything resulting from the process as assurance about its economic interests or that it could proceed with its development as planned. Rather, this was done to further the purpose of the City fulfilling its statutory obligations and acting in accordance with the public interest. Sharing and receiving information as was the City’s practice may be seen to increase transparency among various interested parties and allowed the City to determine the best way to protect and advance the public interest within the planning and zoning framework. There were no interactions between the parties that went beyond regular interactions required to process a rezoning application.

¹⁰³ *Ibid* at para 60.

with a few more relevant facts.¹⁰⁴ Prior to purchasing the house in question, the plaintiff visited it three times, twice in the company of a building contractor. It does not appear he ever made any inquiry or request to the building authority about either the history of the house or the permit status of it. Clearly, he was not aware that a stop work order had been issued against the house, nor that an occupancy permit had never been issued. The current owners never provided this information to him. Under the corrective justice account posited here, no duty of care would have been owed because there was never any undertaking by the defendant to provide information or advice about the condition of the building. The necessary correlative relationship simply did not exist.

Kamloops can be contrasted with the earlier case of *Grand Restaurant of Canada Ltd v Toronto (City)*.¹⁰⁵ The plaintiff in that case purchased a commercial property from a third party. Prior to purchase, the plaintiff had inquired of the building authority whether there were any outstanding building regulation issues with the property. The plaintiff was told that there were none, but there were actually a number of outstanding orders and issues with the property. The plaintiff proceeded to complete the transaction, took possession, discovered serious safety issues with the property, rescinded the transaction, vacated the premises, and sued the building authority. The plaintiff sued in both negligence and negligent misrepresentation. The negligence claim was premised on the failure of the building authority to carry out its mandate to properly inspect the property and ensure compliance with building regulations. The court rejected the claim in negligence, but since the building authority had carelessly provided inaccurate information

¹⁰⁴ These further details are found in the decision of the British Columbia Court of Appeal: *Nielsen v Kamloops (City)* (1981), 31 BCLR 311 (CA).

¹⁰⁵ (1981), 32 OR (2d) 757 (HCJ) [*Grand Restaurant*].

to the plaintiff, which contributed to the plaintiff buying the property when it would not have otherwise done so, the building authority was liable under *Hedley Byrne*. The reasoning behind this conclusion followed the corrective justice understanding of building authority liability posited in this dissertation:¹⁰⁶

The thrust of the plaintiff's argument founded on negligent misstatement is not that the plaintiff was entitled to a building free of building code violations, but that it was entitled to have such information as the plaintiff requested and the defendant possessed, on the status of [the property], and including work orders or violations. The plaintiff desired this information in order to determine the economic viability of the purchase and to make a decision with regard to closing.

Such reasoning is also compatible with approach the Supreme Court of Canada would take nearly four decades later in *Livent*.

The facts of *Ingles*, discussed in chapter 5, can be used to show how the duty of care analysis will be specific to the individual interactions between plaintiffs and building authorities. The plaintiffs in *Ingles* knew of the legal requirement to obtain a building permit prior to starting construction but proceeded to flout the law and started construction, only seeking a permit after the foundation underpinnings (the eventual source of the plaintiffs' complaint) had been completed (negligently) and covered up. When the inspector attended, it was not possible to inspect the underpinnings, and while the inspector passed the inspection based on surface observations and consultation with the builder, the inspection report specifically noted that he was unable to see the underpinnings. Thus by the time that the building authority could have assumed responsibility to the plaintiffs (for anything), it

¹⁰⁶ *Ibid* at para 36.

is likely that any undertaking could not reasonably have encompassed the condition of the underpinnings, and whatever duty of care might have existed could not encompass any representation about the condition of the underpinnings.¹⁰⁷ Framed as a question of autonomy, the plaintiffs' ability to make informed choices and follow a preferred course of action was not interfered with, since they had already followed a course of action by having the underpinnings built and covered up.¹⁰⁸

Applying the new duty of care to *Rothfield* illustrates how the duty will often be owed to a more limited class of persons.¹⁰⁹ In that case, the building authority was held liable to two plaintiffs: the owner/builder of the wall which collapsed and the neighbour whose property was damaged by the collapsing wall. As in *Ingles*, the owner/builder in *Rothfield* had flouted the inspection regime. But suppose he had not: had the inspector attended as required, was able to properly review the construction and approved it, those facts could ground a duty of care. The acts of inspecting and approving the work would be an assumption of responsibility (that the wall was properly constructed). Alternatively phrased, such acts would be an interference with the owner/builder's autonomous choices, particularly to repair or rebuild the wall. And the eventual collapse of the wall could give rise to a compensable

¹⁰⁷ The trial judge in *Ingles*, *supra* note 1, at para 55 (Gen Div), while allowing the claim, conceded that reliance by the plaintiffs on the building authority was a far-fetched assertion: "It is equally difficult to accept that the Plaintiff could have believed that the building inspector, on whom he claims he relied, could have carried out an inspection of the renovations after they had been covered up and were no longer visible or accessible."

¹⁰⁸ See also *ibid* at para 46 (SCC). One of the eventual findings in *Ingles* was that the building inspector had the power to order construction halted and to require the plaintiffs to hire an engineer to certify that the underpinnings were properly built. But none of these steps could be seen as the building inspector doing something that would have reasonably caused the plaintiffs to place reliance upon the building inspector with respect to the quality of the foundation.

¹⁰⁹ *Supra* note 8.

loss. But no such interactions would exist between the building authority and the neighbour. Of course, the neighbour would have a claim against the owner/builder, who in turn would have a claim over against the building authority both for his own damages and for contribution to any liability owed to the neighbour. But the duty of care would remain exclusively between the building authority and the owner/builder.

Finally, consider *Mortimer*. The outcome here is straightforward: there would have been no duty of care since there were no interactions between the plaintiff and the building authority, no assumption of responsibility by the latter nor any reliance by the former. There was no wrong committed by the defendant against the plaintiff. As with the neighbour in *Rothfield*, the only relationship between the plaintiff and the building authority in *Mortimer* flows from the ability to retrospectively link a chain of events together. As Weinrib explains, such a connection is purely historical – the connection is not in any way normative – and cannot form the basis of negligence liability:¹¹⁰

The connection is merely historical, because the element of fault required for the defendant's liability to the plaintiff is satisfied by the fact that the defendant's negligence is the historical antecedent of the plaintiff's injury. ... the injury suffered can be the basis of the plaintiff's recovery even though the wrong was relative to a third party rather than the defendant. Unanswered is the question of why the merely historical connection between the defendant's negligent act and the plaintiff's injury should justify liability on the basis of fault. It is no answer to say that this negligence caused the injury; that answer, by transforming cause into the determinant of the plaintiff's recovery, should also apply to causally effective action that is innocent (and thus as nonculpable relative to the victim as the defendant's conduct

¹¹⁰ Weinrib, *supra* note 37 at 46–47.

in *Palsgraf*). Negligence liability would then collapse into strict liability.

Given the tragic facts of *Mortimer*, it bears emphasizing that the lack of a duty of care owed by the building authority to the plaintiff does not mean that no person owed him a duty with respect to the safety of the premises. Quite the contrary: the owner/occupier, by inviting the plaintiff onto the premises, assumed certain responsibilities to him, including with respect to the safety of the premises. If they were careless in discharging that duty (as they were ultimately held to be) they would be liable in negligence for any resulting injury.¹¹¹

This dissertation's argument does not preclude the possibility of a building authority being liable in a situation where the plaintiff sustains bodily injury as a result of a building defect. It is entirely possible for a defendant to assume responsibility to a plaintiff in a way that could give rise to a claim for bodily injury. It is simply that such cases are rare. One example is *Sharp v Avery*, a 1938 decision of the English Court of Appeal, in which the first speech opens with the line "This case involves considerations which will probably never arise again in any case of personal injuries".¹¹² The plaintiff was the passenger on the pillion seat of a third party's motorcycle. The defendant was riding his own motorcycle, and had verbally agreed to act as "pilot" for the other motorcycle as the defendant was familiar with the road

¹¹¹ One aspect of *Mortimer*, not discussed in detail in judicial reasons, was the actual enforceability of the judgment the plaintiff obtained. The plaintiff in *Mortimer* was rendered quadriplegic as a result of his fall, with his total damages assessed in excess of \$5,500,000. While only 40% liability was assessed against the building authority, with the balance against the builder/owner, the owner had insufficient limits to satisfy its share of the judgment. Under Ontario's joint and several liability rule this resulted in the building authority paying over 80% of the damages.

¹¹² [1938] 4 All ER 85 at 86 [*Sharp*].

and route being taken.¹¹³ When the group reached a bend in a road, the defendant steered in the opposite direction, riding onto a rough section of ground. The defendant had no difficulty controlling his motorbike on this ground, but when the plaintiff's motorcycle followed, it lost control, crashed, and the plaintiff was injured. It was agreed that absent the defendant's undertaking, there would have been no duty owed by the defendant to a motorist behind him arising from his choice of maneuver.¹¹⁴ But here the defendant had assumed a responsibility to the plaintiff by taking steps that interfered with the plaintiff's autonomous choices.¹¹⁵

I think that, in the exceptional circumstances of this case, although there was no contractual relationship between the parties, yet, on the general principle that, when one person by his conduct invites another to rely upon his skill to do something which he otherwise might not do, after that, he may owe a duty to the person whom he has invited to place reliance upon him, and may be liable if he fails in the skill which he represented that he possessed, and in reliance of which the other man altered his course of conduct.

It is conceivable that analogous circumstances could arise between a building authority and a plaintiff.¹¹⁶

¹¹³ *Ibid* at 87: “[o]n the very evening of the accident [the defendant] made a statement to the [plaintiff] in the presence of Kerwood to the effect that on their journey between London and Southend there was an understanding, amounting to an arrangement, that the man who knew the road—that is to say, the defendant—should go on in advance, and that the others should follow.”

¹¹⁴ *Ibid* at 89: “In the ordinary course of events, I should be inclined to say that, because a motorist in front of you leaves the road and goes into a private drive, or goes on to a patch which is not upon the highway—assuming that he does that in such a way as not to embarrass you while he is on the highway—there is no duty upon him to have regard to the fact that you may be following him.”

¹¹⁵ *Ibid* at 90.

¹¹⁶ One example would be the hypothetical variation on the facts of *Rothfield* discussed above, where the inspector assumed responsibility to the owner/builder by inspecting and

6.6: Conclusion

This chapter has posited a corrective justice understanding of the duty of care element in building authority liability and discussed how it is superior to the current articulation of doctrine. While duty of care is only one element of a cause of action in negligence, the duty question tends to be at the forefront of discussions of negligence. Many of the ideas, arguments, and criticisms employed in this chapter's analysis of duty of care will be echoed in the following chapters on the other elements of the cause of action in negligence.

approving the wall, and the wall, when it collapsed, inflicting personal injury on the owner/builder.

CHAPTER 7: THE STANDARD OF CARE

7.1: Introduction

This chapter analyzes the standard of care element of the cause of action in negligence as it applies to building authority liability in Canadian law. While the duty of care is a question of whether a particular sort of relationship exists between persons, the standard of care is a question of the conduct expected of a person.¹ Conduct that violates a standard of care is careless conduct. While the existence of a duty of care is a predominately legal issue, often being resolved in isolation from the other elements of the cause of action in negligence, determining the content of standard of care and its breach is a predominately factual inquiry that is often the main area of dispute in civil litigation.²

Judicial discussion of building authority liability tends to allocate more attention to the duty of care than to its breach, resulting in smaller pool of available judicial reasoning to analyze and incorporate into legal doctrine. However, many of the problems in the current formulation of the duty of care are also found in the analysis of the standard of care.

7.2: Standard of Care – The Current Formulation

The current formulation of the standard of care of a building authority is normally premised on the standard of care of an individual building

¹ *Stewart v Pettie*, [1995] 1 SCR 131 at para 32.

² Allen Linden & Bruce Feldthusen, *Canadian Tort Law*, 10th ed (Toronto: LexisNexis Canada, 2015) at 141: “No court in a negligence suit can escape a decision about whether or not the defendant’s conduct breached the standard of care fixed by law. Every single case that comes across a lawyer’s desk involves a determination of this, that is, whether the conduct was negligent. The bulk of legal talent and judicial resources is expended on this matter”. See also Erika Chamberlain & Stephen GA Pitel, eds, *Fridman’s The Law of Torts in Canada*, 4th ed, (Toronto: Thomson Reuters, 2020) at 459–62.

inspector. The most authoritative statement of the standard of care comes from the Supreme Court of Canada's decision in *Ingles v Tutkaluk*:³

[T]o avoid liability the city must show that its inspectors exercised the standard of care that would be expected of an ordinary, reasonable and prudent inspector in the same circumstances. The measure of what constitutes a reasonable inspection will vary depending on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury ... For example, a more thorough inspection may be required once an inspector is put on notice of the possibility that a construction project may be defective. In addition, a municipal inspector may be required to exercise greater care when the work being inspected is integral to the structure of the house and could result in serious harm if it is defective. While in some circumstances a more thorough inspection will be required to meet the standard of care, municipalities will not be held to a standard where they are required to act as insurers for the renovation work. The city was not required to discover every latent defect in the renovations at the appellant's home. It was, however, required to conduct a reasonable inspection in light of all of the circumstances.

The court treats the standard of care of a building inspector as being a matter of a professional service. In negligence claims arising from the provision of professional services, which involve the provision of specialized skills or knowledge, a court will often be required to have expert evidence before it to determine the standard of care, and the standard of care is based on a narrower comparator class. Whereas in typical negligence claims, the standard of care is based on the mythical "reasonable person in similar

³ 2000 SCC 12 at para 40 [*Ingles*].

circumstances”⁴ in professional negligence cases it is based on an “ordinary skilled [person] exercising and professing to have that skill”.⁵ However, lower courts have been inconsistent in treating the standard of care for building authorities as a truly professional one. Some courts require or entertain expert opinion evidence on the standard of care,⁶ but on other occasions the standard of care issue is decided without expert evidence.⁷

The current account of the standard of care contains an additional ambiguity in terms of what is practically expected of building authorities when confronted with building defects. As has been emphasized previously, building authorities do not undertake construction, nor do they normally inflict physical damages on structures as part of their building regulation activities. Their relationship to defects is fundamentally reactive: if a defect or deviation from building regulation is discovered, building authorities normally have the power to require compliance, with that power backed up by a variety of legal sanctions for non-compliance. But compliance is about requiring someone else to remedy the defect, normally the builder or owner of the property in question.⁸ Some building regulation schemes give building

⁴ Linden & Feldthusen, *ibid*, at 152—58. Adapting Lord Green’s famous dictum that the reasonable person was the equivalent of the “man on the Clapham omnibus”, Linden & Feldthusen suggest the more Canadian concept of the “person on the Younge Street subway”.

⁵ *Whitehouse v Jordan*, [1981] 1 WLR 246 at 258 (HL).

⁶ See eg *Wood v Hungerford (Township)* (2006), 3 MPLR (4th) 38 at para 50 (Ont SCJ), var’d (2006) 24 MPLR (4th) 45 (Ont CA).

⁷ See eg *Kirby v Coquitlam (City)*, [1996] BCJ 600 at para 17 (SC).

⁸ An exemplar provision can be found in Ontario’s *Building Code Act, 1992*, SO 1992, c 23. Under section 12 building inspectors may issue an “order to comply” whenever any non-compliance with Ontario’s *Building Code* is discovered. This requires the owner, or whomever is responsible for the non-compliance, to comply with the *Building Code*. If the order is not complied with, section 14 grants an inspector the power to issue a stop work order, requiring all construction activities to cease. Section 36 makes it an offence to fail to

authorities an extraordinary power to undertake remedial work on their own, usually with the pre-conditions that the owner has failed to comply with previous orders and a delay in remedial work poses a hazard to others.⁹

The current law on the standard of care acknowledges but does not totally align with the reactive nature of a building authority's role, at least the role contemplated by building regulation. In *Ingles*, the Supreme Court of Canada held that the building authority "will not be expected to discover every latent defect in a project, or every derogation from the building code standards; it will be liable for those defects that it could reasonably be expected to have detected and to have ordered remedied".¹⁰ This appears to contemplate a reactive role, but as was discussed in chapter 6, the duty of care is often understood as being concerned with the absence of defects from eventual construction, not the question of who is responsible for identifying any defects or who is ultimately responsible for repairing them.

This disconnection between the duty of care and the standard of care may explain why there are relatively few cases where a court undertakes a detailed standard of care analysis that specifically looks to the building authority's regulatory role and powers. Some cases contain only a cursory analysis. For example, in *Musselman v 875667 Ontario Inc*,¹¹ the plaintiff was injured when she fell down a staircase at the defendant's restaurant that

comply with an order issued under the statute, with possible penalties including fines up to \$100,000 for individuals and up to \$1,500,000 for corporations.

⁹ *Ibid*, ss 15.9, 15.10, granting building inspectors the power to issue unsafe building orders, requiring the owner to undertake specified repairs to remove the unsafe condition. If that order is not complied with, the building authority can undertake remedial work on its own (including demolition of a building) with any costs incurred constituting a priority lien on the property.

¹⁰ *Supra* note 3 at para 20.

¹¹ 2010 ONSC 3177 [*Musselman*].

had been built over 10 years previously and did not comply with building regulation. The building authority was found liable, with the court holding that the inspections during construction should have revealed the defective staircase, and should have resulted in orders to comply and a refused of final approval of construction.¹² Without directly saying so, the court presumes that either the staircase would have been repaired or the restaurant would never have been allowed to operate, thus preventing the plaintiff's fall years later. Other cases appear to adopt a standard of care more consistent with a duty of care based on warranty of construction, or on some obligation to guarantee construction or provide direct supervision of builders. So in *Tokarz v Selwyn (Township)*,¹³ the building authority was found negligent in the manner it inspected and approved the installation of solar panels on the plaintiff's barn by a third party. The third party was careless in how it installed the solar panels, but the carelessness of the building authority was its failure to properly inspect and issue orders to comply as this would have forced the third party to repair the deficiencies.¹⁴ In *Chapeskie v Lake of Bays (Township)*,¹⁵ the court held that one aspect of the standard of care of the defendant building authority was to "stress to the applicant [owner] the importance of the inspections", because the applicant "exhibited no evidence of knowing building procedures or of her duty as an applicant to see that proper standards were met".¹⁶

¹² *Ibid* at para 47.

¹³ 2010 ONCA 246 [*Tokarz*].

¹⁴ *Ibid* at paras 34. See also para 39: "it is clear that [the contractor] would have been made aware of the existence of the need to comply, had such an order been given, to ensure the building was safe". The contractor was, of course, under such a duty under both common law and the building regulations.

¹⁵ (1999), 3 MPLR (3d) 233 (Ont SCJ).

¹⁶ *Ibid* at para 56.

A detailed discussion of the standard of care of a building authority is found in the 2022 decision of the Court of Appeal for Ontario in *Breen v Lake of Bays*.¹⁷ In 1999, the plaintiffs purchased a cottage that had been built between 1989 and 1991. The builder of the cottage had failed to call for all the required inspections of the construction, including a final inspection, and after several years the defendant building authority had decided to treat the project as completed. The plaintiffs purchased the cottage through a power of sale proceedings, and were aware that there was no record of a final inspection having been conducted. After using the cottage for over 10 years the plaintiffs became aware of significant structural problems dating back to the original construction. They successfully sued the defendant building authority for the cost of repairs.

On appeal, one of the issues raised was the standard of care required of the building authority. The trial court had proceeded on the basis that the existence of any deviation from applicable building regulations was sufficient to ground a finding of liability against the building authority.¹⁸ The Court of Appeal held that this was an overly onerous standard, one that effectively imposed liability without fault for deviation from a legislative standard.¹⁹ Following on the Supreme Court of Canada's decisions in *Ingles* and *Rothfield v Manalagos*,²⁰ the Court of Appeal held that the building authority was only held to a standard of reasonable care, which had to be assessed in light of the

¹⁷ 2022 ONCA 626 [*Breen*].

¹⁸ *Ibid* at para 62: “This error is most apparent in the trial judge’s discussion of the insulation, where he writes ‘[i]f the *Code* mandates a certain way of construction and the construction does not adhere to that mandate, as far as I am concerned, subject to compelling evidence otherwise, failure to comply is enough [to establish tortious liability]’”.

¹⁹ *Ibid* at para 69.

²⁰ [1989] 2 SCR 1259 [*Rothfield*].

purpose of building regulation schemes: “to protect the health and safety of the public”.²¹ Thus the building authority had not been negligent in failing to identify a lack of sufficient headspace over a stairway (12 cms) or that gaps between insulation were not “reasonably uniform” as these features did not fall within the scope of health and safety.²² In contrast, the building authority had been negligent in failing to identify structural issues with numerous beams and joists and in failing to identify an improperly insulated crawlspace and an absence of roof ventilation.²³ These latter issues were properly related to health and safety considerations.

In *Breen*, the standard of care analysis was framed as being the obligation the building authority had with respect to the physical construction of the cottage. From a practical perspective, this might seem understandable, but from the perspective of negligence law, this standard of care is atypical since it is not understood as flowing from any duty owed by the building authority to the plaintiff. The plaintiff is, simply put, not in the frame when standard of care is being considered. The court in *Breen* readily acknowledged this. In restating how the building authority owed a duty to the public at large, it commented that:²⁴

This duty was especially applicable to the Breens. As subsequent purchasers, they had “no say in the actual construction of a building that proves defective. It is therefore reasonable that they should be entitled to rely on the municipality to show reasonable care in inspection of the progress of the construction”.

²¹ *Breen*, *supra* note 17 at paras 64–67.

²² *Ibid* at para 67.

²³ *Ibid* at paras 53, 55–57.

²⁴ *Ibid* at para 40, quoting *Rothfield*, *supra* note 20 at 1267.

Whether the Breens, or other plaintiffs in their situation, could be said to “rely” upon a building authority, and what obligations that reliance might impose on a building authority, will be discussed later. But as a first step, it is important to deal with the supposed rationale behind the current standard of care in Canadian law and see whether it stands up to scrutiny.

7.3: Flaws in the Standard of Care

As with the duty of care, the flaws in the current articulation of the standard of care can be grouped under the headings of doctrinal content and external justifications.

7.3.1: Doctrinal Content – A Breach of Duty Cannot Exist “In the Air”

Chapter 6 discussed how a duty of care in negligence could only be understood as a relational idea. The standard of care flowing from the duty of care is similarly comprehensible only in a relational context. Yet the standard of care in building authority liability is usually shorn of any relational attributes, which has interfered with courts’ ability to articulate coherent legal doctrine on the standard of care.

While the standard of care is a distinct element within the cause of action for common law claims in negligence, its determination is neither an abstract question of law nor is it isolated from the other elements of negligence. First of all, whether given conduct is negligent is a contextual question. The authoritative statement of what constitutes negligence is found in the Supreme Court of Canada’s decision in *Ryan v Victoria*:²⁵

²⁵ [1999] 1 SCR 201 at para 27 [*Ryan*].

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury.

The standard employed is an objective standard of care based on the legal creation of an ordinary reasonable person, but that reasonable person is placed into the circumstances of the individual defendant at the relevant time. Thus the test of reasonable care is sometimes referred to as an objective/subjective test, with the subjective component being a variety of contextual factors that a court will consider when setting the standard of care. Key among these contextual factors is the possible risk(s) that flow from the defendant's actions. Risk is a key idea for the standard of care. The breach of the standard of care occurs at the point that an unreasonable risk of harm is created. The breach is not contingent on whether the risk actualizes and causes harm – breach of the standard of care and causation of harm are distinct elements of the cause of action in negligence. But what is a “risk” as it is used for the standard of care? Weinrib provides the following answer:²⁶

The standard of care is breached by action that creates a risk that no reasonable person would impose upon others. Presupposed is the existence of a certain level of risk to which the defendant can expose the plaintiff without committing a wrong, even if injury should result. The defendant is liable only for injuries that materialize from risks above that level. The focus on risk is significant for corrective justice because risk is a relational concept that connects doing and suffering. As used in negligence law, risk refers to the potential for

²⁶ Ernest J Weinrib, *The Idea of Private Law*, revised ed (Oxford: Oxford University Press, 2012) at 147.

harm that is present in an act. Through the notion of risk, what one person does can be regarded from the standpoint of what another person might suffer. Risk thus links the active and passive aspects of injurious conduct.

A risk of harm is not intelligible without reference to a particular set of perils and person(s) imperiled.²⁷ Anglo-Canadian negligence law has traditionally held that for conduct to breach a standard of care it must create a real or substantial risk of injury to the plaintiff, contrasted to a risk of harm that, while still foreseeable, is only fanciful or far-fetched.²⁸ The creation of a foreseeable risk of harm alone is not enough because risk is an unavoidable and intrinsic part of everyday life. Weinrib explains how a fault-based conception of negligence law – a conception based on autonomous actors with moral agency – requires something more than the creation of a foreseeable risk of harm for a standard of care to be breached. Since risk is an “unavoidable concomitant of human action”, an obligation to not create risk is not compatible with the “moral possibility of action” which underlies the whole idea of a duty of care.²⁹ But risk is often something that is within the control of, or at least can be affected by, the actor, and to the extent the actor can control or affect the risk created, they can be under an obligation to do so to avoid harm to others.³⁰ To summarize:³¹

²⁷ Weinrib, *ibid* at 160.

²⁸ See generally Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) at 96–103. Beever notes that there is also a tendency to treat the creation of a “small” risk as a breach of the standard of care unless the defendant “had a good reason not to have eliminated the risk”.

²⁹ Weinrib, *supra* note 26 at 151–52.

³⁰ *Ibid* at 152.

³¹ *Ibid*.

[T]he plaintiff cannot demand that the law regard as wrongful the creation of all risk; such a judgment of wrongfulness would render action by the defendant impermissible, thus denying to the defendant the status of agent. Similarly, the defendant cannot claim immunity from regarding risks that could have been modulated; that claim would ignore the effect of one's actions on other agents and would treat them as non-existent. When combined, these two considerations constitute a standard of care in which doer and suffered rank equally as self-determining agents in judgments in the level of permissible risk creation.

The implementation of these competing demands with respect to risk, the determination of the standard of care in any given case, is not an abstract question, nor does it lend itself to a single determinative answer. Weinrib notes that a risk analysis does not “lead to an apodictically certain benchmark of liability”,³² but instead provides a “normative framework to which particular legal determinations concerning doing and suffering must conform”.³³ It is ultimately up to the trier of fact in any given case to carry out the specific assessment of whether conduct was reasonable.³⁴

Another way of phrasing this idea is to say that whether any given conduct breaches the standard of care cannot be determined without reference to the duty of care that exists between the plaintiff and defendant. Perry provides a useful explanation of this interdependency. We can conceive of the tort of negligence reflecting a “complex duty” – the duty not to harm other persons by acting negligently towards them – composed of a primary duty to not cause harm, and a secondary duty that is embedded within the primary duty

³² Ernest J. Weinrib, “Right and Advantage in Private Law” (1989) 10 *Cardozo L Rev* 1283 at 1306.

³³ *Ibid.*

³⁴ *Ibid.*

to exercise a standard of reasonable care.³⁵ But duty of care and standard of care cannot morally exist on their own. A duty of care, without qualification, would necessitate absolute liability for any harm caused, and a standard of care cannot exist in a vacuum but must be “morally derived” from the complex duty.³⁶

It is worth returning briefly to *Palsgraf v Long Island Railway Co*³⁷. While *Palsgraf* is normally associated with the subject of the duty of care, it has something to tell us about the standard of care as well, especially if we accept links between duty of care and standard of care. In *Palsgraf*, Cardozo J noted that the “risk reasonably to be perceived defines the duty to be obeyed, and risk imports *relation*”³⁸ and that “[n]egligence, like risk, is thus a term of *relation*”.³⁹ Oberdiek argues that these observations are directly applicable to the understanding of whether conduct is careless (whether the standard of care is breached), since reasonable foreseeability of harm informs both duty of care and standard of care. The result: “Risk as such is relational, and as negligence is the imposition of an unjustified risk, negligence too is relational”.⁴⁰

³⁵ Stephen Perry, “Torts, Rights, and Risk” in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014) 38 at 53.

³⁶ *Ibid.*

³⁷ 162 NE 99 (NY CA 1928) [*Palsgraf*].

³⁸ *Ibid* at 100 [emphasis added].

³⁹ *Ibid* at 101 [emphasis added].

⁴⁰ John Oberdiek, “The Wrong in Negligence” (2021) 41 Oxford J Leg Stud 1174 at 1183. Oberdiek (see fn 26) argues that when Cardozo J refers to the relational quality of negligence, he is referring to a breach of a duty of care. See also Perry, *supra* note 35 at 44, for a similar reading of *Palsgraf*.

A further observation in *Palsgraf* was that “proof of negligence in the air, so to speak, will not do”,⁴¹ and that “negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all”.⁴² This observation applies just as much to duty of care as to standard of care: whether or not conduct is careless cannot be determined without reference to whom the duty of care is owed. At a more general level, Canadian negligence law acknowledges this. In 1999 in *Dobson v Dobson*, the Supreme Court of Canada invoked *Palsgraf* and acknowledged this integration of duty of care and standard of care:⁴³

[T]here can be no such duty owed to the public at large. As a matter of tort law, a duty of care must always be owed by one person to another. Negligence cannot exist in the abstract. There must be a specific duty owed to a foreseeable plaintiff, which is breached, in order for negligence to arise. A “general duty of care” does not exist.

If general duties of care cannot exist, then general standards of care cannot exist either. But the current Canadian law of building authority liability assumes that they do. Return to the standard of care analysis in *Breen*. The standard of care was that of the “ordinary, reasonably prudent building inspector”,⁴⁴ and the breaches of that standard occurred when the cottage had been approved and inspected by the defendant building authority. The person(s) to whom the duty was owed and then breached – the eventual plaintiffs – were purchasers of the cottage who were two steps removed from the original owner/builder, only came on the scene years later, had some information about the prior history of the cottage, and were aware that no

⁴¹ *Supra* note 37 at 99.

⁴² *Ibid* at 101.

⁴³ [1999] 2 SCR 753 at para 59.

⁴⁴ *Breen*, *supra* note 17 at para 58.

final inspection had been conducted.⁴⁵ But the same standard of care (and breach) would have existed:

1. Had the plaintiffs been the original builder of the cottage;⁴⁶
2. Had the plaintiffs owed neighbouring property which was damaged when the cottage failed structurally with its debris entering on the plaintiffs' property;⁴⁷
3. Had the plaintiffs been visitors at the cottage and been injured when a structurally defective floor gave way;⁴⁸ or even,
4. Had the plaintiffs purchased the cottage in the full knowledge of the defects in it and accordingly bargained for a reduced price.⁴⁹

Even if a duty of care can exist in all of the above scenarios, the scope and content of that duty surely cannot be the same.⁵⁰ Yet that is what Canadian law in the area continues to do: as occurred in *Breen*, the building authority

⁴⁵ *Ibid* at para 9:

The Breens purchased the cottage in 1999 on a power of sale from George and Helen Norton, the parents of Mr. Norton [the original owner/builder]. Before closing, they were aware of water damage in the garage but were advised that a burst pipe was the cause. They also obtained a home inspection report, which noted some minor cracks in the foundation and decay in the structural elements. It further attributed some water infiltration to drainage issues at the rear of the cottage, which the Breens remedied. Finally, their real estate lawyer warned that no records existed of a final inspection by the municipality, and a fire had occurred in the building department in 1996. Nonetheless, the lawyer was "inclined to leave things" as they were and avoid the \$150 fee. The Breens agreed.

⁴⁶ This was the scenario in *Ingles*, *supra* note 3.

⁴⁷ This was the scenario in *Rothfield*, *supra* note 20.

⁴⁸ This was the scenario in *Mortimer v Cameron* (1994), 17 OR (3d) 1 (CA).

⁴⁹ See above, chapter 6.4.4. for a discussion of this scenario.

⁵⁰ It bears noting that no court appears to have endorsed the idea that a building authority's careless exercise of its building regulation power creates an *in rem* right that attaches to the building and is transmitted automatically with any conveyance of title to the building to a new owner.

had a duty owed the public – in other words, a “general duty of care”, which is not supposed to exist – which was breached without reference to a particular plaintiff. Instead, the breach was considered with respect to the physical state of the cottage. The breach occurred when the construction of the cottage was approved, and then simply existed “in the air” until it crystalized at some point in the future in favour of someone who happened to suffer adverse consequences in relation to the building’s defects.

The point being made is not that a building authority’s compliance with some norm of conduct or behavioural rule can only be determined in light of its relationship to an external person. To the contrary, such compliance determinations are made all the time when building authorities and other public authorities are subject to judicial review of their actions at public law. Courts can and do make decisions about whether public actors have acted within their jurisdiction, have complied with procedural requirements, or carried out task they are required to do, all in the absence of an antecedent relationship similar to a duty of care.⁵¹ In the same manner, courts can determine whether a person has violated mandatory or public legal norms, such as those imposed by criminal law, which are not premised on a breach of an obligation to someone else.⁵² But negligence is different, as it is a relational idea. It concerns not just whether conduct is “wrong” but whether it “wrongs” someone.⁵³ And it is impossible to answer the question of

⁵¹ Of course, judicial review proceedings are normally commenced by someone other than the public authority who is the subject of them, and different proceedings will have different standing requirements.

⁵² Perry, *supra* note 35 at 41: “Laws making it an offence to litter or jay-walk, for example, create mandatory legal norms which impose duties not to litter or jay-walk. But such duties are not ordinarily thought to be owed to anyone, or, at the very least, they are not thought to be owed to other citizens”.

⁵³ An insightful and detailed elaboration of this idea can be found in John Oberdiek, “It’s Something Personal: On the Relationship of Duty and Civil Wrongs” in John Oberdiek, ed, *Civil Wrongs and Justice in Private Law* (Oxford: Oxford University Press, 2020) 302.

whether conduct is negligent – whether the risk resulting from an action is unreasonable – without reference to the person(s) subject to that risk.⁵⁴ Just

Oberdiek’s analysis focuses primarily on the duty of care, but his comments also concern the standard of care (at 319–320):

If duties are nonrelational, then careless conduct or negligent risk imposition consists in failing to live up to the demands of some impersonal value, whatever it is. If that impersonal value is social wealth, as it is according to law-and-economics, then careless conduct consists in failing to promote or abide by maximally cost-effective precautions. To fail in that way is wrong, no doubt. But crucially, such a failure does not wrong anyone. It is instead, in Cardozo’s words, “wrongful because unsocial.” The only moral standing anyone has to demand better treatment on this picture is therefore derivative. It is not that it is impossible to mistreat individuals on this approach, but rather that what mistreatment consists in will be a function of how one should behave vis-à-vis some impersonal value, not a matter of how one should relate to other individuals directly. For that reason, the only “claims” that the violation of a nonrelational duty can support are simulacra of the real thing. No one has actual claims that derive from actually being wronged, for no one can be wronged by the violation of a nonrelational duty.

Relational duties, on the other hand, support a direct justificatory relationship that in turn makes possible the actual wronging of people. That is, only a moral system constituted by relational duties recognizes that people who are mistreated are themselves wronged and thus that they have authentic claims. Such an approach recognizes that one does not file suit to correct an inefficient impersonal state of affairs any more than one demands to be treated properly because doing so makes the world go best. Claims are direct and unmediated, and wrongs are relational. The relational conception of duty is the only one, then, that recognizes that people can make demands of one another directly, both prospectively and retrospectively. A personalized conception of duty is the only one that recognizes that persons are sources of claims.

⁵⁴ The need for a relational context is particularly so in Anglo-Canadian law, which has tended to eschew the use of any kind of costs-benefit analysis when deciding whether a particular risk is unreasonable, preferring instead to use more normative value judgments to answer this question: see generally Weinrib, *supra* note 26 at 147–52; Beever, *supra* note 28 at 96–103. In American negligence law, the “Hand Formula” has considerable influence. This derives from the judgment of Learned Hand J in *United States v Carroll Towing*, 159 F2d 169 (US 2nd Cir 1947), in which he held that a defendant’s conduct was negligent if the conduct creates a risk where the probability of the risk actualizing multiplied by the severity of loss suffered if the risk actualizes is greater than the burden of eliminating the risk. The Hand Formula is sometimes expressed by equation $B < PL$, where B is the burden of eliminating the risk, P is the probability of the risk actualizing, and L the severity of the loss. In contrast, according to Weinrib, Anglo-Canadian negligence law “generally reflects not a

as the duty of care in the Canadian law of building authority liability has been left in an incoherent state, the standard of care embedded in that duty has suffered the same fate.

7.3.2: A Flawed Understanding of Building Regulation

Having identified the flaws in the doctrinal basis of the standard of care in the current Canadian law of building authority liability, a brief detour will be made to identify the flaws in the supposed policy-based or external justifications behind the standard of care. The Canadian law of building authority liability has, since its beginning, been framed as a private law duty that flows from the responsibility a building authority owes to the public at large to enforce building regulations. In *Rothfield*, La Forest J endorsed the assumption that those subject to building regulation would, as a matter of course, fail to comply with those regulations.⁵⁵

It is to be expected that contractors, in the normal course of events, will fail to observe certain aspects of the building by-laws. That is why municipalities employ building inspectors. Their role is to detect such negligent omissions before they translate into dangers to health and safety.

Of note, La Forest J did not specify whether this regular non-compliance would result from innocent mistakes, carelessness, or intentional flouting (or all three), but this reasoning does follow a historic trend of conceiving of regulatory compliance as being based on a criminal law model of deterrence: some people will not comply with regulation and therefore measures must be taken to compel them to do so, usually in the form of punishments to deter

comparison with the cost of taking precautions but a casuistic judgment concerning the magnitude of the risk.” Similarly, Beever sees the analysis as “casuistic rather than formulaic. It relies on judgment rather than measurement”.

⁵⁵ *Rothfield*, *supra* note 20 at 1271.

future violations.⁵⁶ To employ the language used by May and Wood,⁵⁷ *Rothfield* portrays building authorities as the “cops” charged with policing and remedying the offences of builders for the protection of individuals.⁵⁸

The problem is that theories of regulatory compliance based entirely on negative motivations (the fear of being caught and punished) have been challenged and displaced by theories that incorporate consideration of affirmative motivations for compliance. The latter conceive of regulatory compliance as being influenced by an actual desire on the part of the regulated entity to comply with regulation, and can encompass a sense of reciprocity or cooperation between the regulatory authority and the regulated entity.⁵⁹

The role of affirmative motivations in building regulation has been borne out by social science research. Studies have indicated that building regulation systems tend to be least effective when they are based on a philosophy of strict enforcement. Strict enforcement of building regulation has consistently been shown to lead to delays in construction, which in turns leads to increased costs and increased development uncertainty, all of which can have a negative impact on both the building industry and the locality in

⁵⁶ Peter J May, “Compliance Motivations: Affirmative and Negative Bases” (2004) 38 *Law & Soc’y Rev* 41 at 42–43.

⁵⁷ Peter J May & Robert S Wood, “At the Regulatory Front Lines: Inspectors’ Enforcement Styles and Regulatory Compliance” (2003) 13 *J Public Administration Research & Theory* 117 at 118.

⁵⁸ Kevin M Woodhall, “Private Law Liability of Public Authorities for Negligent Inspection and Regulation” (1992) 37 *McGill LJ* 83 at 131, who notes that *Rothfield* has the effect of making the “police” liable for the conduct of the “offenders”.

⁵⁹ May, *supra* note 56 at 42–43.

question.⁶⁰ Studies of motivations on the part of builders have suggested that fear of regulatory punishments are a far lower source of concern than the possibility of damage to their reputations resulting from shoddy work.⁶¹

A further problem with the perception of building regulation as a law enforcement enterprise is that it simply has no correlation to the reality of building regulation regimes as they are implemented. Unlike criminal law, building regulation is not about prohibiting activities that are socially undesirable – the purpose of building regulation is facilitating an activity that is socially desirable. At the risk of oversimplification, construction of new homes is not the moral equivalent of the construction of drug labs. Building regulation is not primarily about preventing harms but about identifying and fixing problems.⁶² May and Wood note that building authorities are “coping agencies”: their effectiveness depends on how well their agents can cope with different situations.⁶³ Building authorities have to balance an enforcement role with a facilitation role. Neither is mutually exclusive and both can lead to compliance. In their 2003 study on building regulation enforcement styles, May and Wood noted that building inspectors tended to avoid strict enforcement styles. Building code violations were not seen as intentional non-compliance but rather as problems to be solved. Stricter enforcement was usually reserved for repeat offenders or more blatant non-compliance.⁶⁴ A 2006 study of building regulation in England

⁶⁰ Raymond J Burnby et al, “Building Code Enforcement Burdens and Central City Decline” (2000) 66 *APA Journal* 143 at 145–46.

⁶¹ May, *supra* note 56 at 55.

⁶² *Ibid* at 49.

⁶³ May & Wood, *supra* note 57 at 118–19.

⁶⁴ *Ibid* at 134–35.

and Wales revealed similar findings: most building code violations were the result of ignorance on the part of builders as opposed to intentional flouting of the regulatory scheme.⁶⁵ In this context, the function of building regulation enforcement is less about policing than education. As May and Wood suggest, building inspectors need to act less as “cops” and more as “consultants”.⁶⁶

A common theme in such studies is the difficulty of comprehensive building regulation enforcement, given the limited resources of building authorities, the staggered and intermittent nature of typical building inspections and the sheer complexity of both building regulations and building projects. The result is that effective enforcement likely requires a certain level of trust between building authorities and participants in the building industry, none of which is facilitated by draconian enforcement styles.⁶⁷ In short, the policy justification offered by the Supreme Court of Canada for building authority liability is incorrect and counterproductive.

7.4: A Corrective Justice Account of the Standard of Care

We have already identified a corrective justice-based understanding of building authority liability, based on a correlative relationship between a plaintiff’s right in their personal autonomy and a duty on a defendant to not negligently interfere with it by misleading the plaintiff. This duty arises in a situation where a defendant assumes responsibility or gives an undertaking upon which a plaintiff relies with the result that the defendant can be said to

⁶⁵ Bousmaha Baiche, Nicholas Walliman & Raymond Ogden, “Compliance with Building Regulations in England and Wales” (2006) 24 Structured Survey 279.

⁶⁶ May & Wood, *supra* note 57 at 118.

⁶⁷ *Ibid* at 121—27. See also Baiche, Walliman & Ogden, *supra* note 65 at 296.

have interfered with the autonomy of the plaintiff by affecting the plaintiff's ability to make informed decisions. Chapter 6 reviewed how and when the duty of care arises in building regulation. The issue for this chapter is how to assess whether a defendant has breached the standard of care flowing from this duty.

7.4.1: The Standard of Care in Assumption of Responsibility

As discussed in chapter 4, the right-duty relationship that exists in an assumption of responsibility situation is based on a paucital right, a “unique right residing in a person (or group of persons) and availing against a single person (or single group of persons)”.⁶⁸ The existence of a paucital right is what allows for a defendant to be subject to a duty that would not otherwise be imposed by the law of negligence, such as a duty to undertake to provide services, information, advice, or assistance to a plaintiff. Since paucital rights are the product of a right-creating interaction between the plaintiff and defendant, both the duty of care and the accompanying standard of care in an assumption of responsibility context are fact-specific and can be variable in both scope and content.⁶⁹

Nolan discusses three ways in which defendants can, by their actions, calibrate their obligations when they assume responsibility to a plaintiff.

⁶⁸ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1964) at 72.

⁶⁹ Stephen Perry, “Protected Interests and Undertakings in the Law of Negligence” (1992) 42 UTLJ 247 at 281:

Generally speaking the court should thus be able to determine the appropriate standard of care in a *Hedley Byrne*-type case by reference to the content of the undertaking. ... A person who undertakes to perform a service, and who has knowledge of why the service is required, will ordinarily make a representation, either explicit or implicit, of the extent to which he or she is capable of meeting the other's needs. It is this representation that determines the appropriate standard of care.

First, the defendant can make it clear for whom the responsibility is being undertaken. Nolan gives the following example, one that will be readily applicable to building authority liability:

Suppose that B asks A, an expert on white goods [major appliances], which dishwasher B should buy, and A replies that B should buy a model manufactured by Bosch. In so doing, A is taking on the task of advising B about a dishwasher purchase, and any duty of care is so limited. If B subsequently passes on A's advice to C, C is owed no duty by A, as A did not take on the task for C, but for B.

Second, the defendant can limit the scope of the responsibility being assumed. Building on his major appliances scenario, Nolan adds: "And if B buys shares in Bosch as a result of A's advice, A's duty to B does not extend to the investment decision, since A did not take on the task of giving B investment advice." Finally, the defendant can specifically state the level of care or skill they hold themselves out as possessing. Examples include how a medical practitioner's standard of care will be adjusted depending on the qualifications or expertise they represent themselves as having, or the way in which the standard of care is changed in the context of gratuitous agency and bailment.⁷⁰

The result is that the standard of care applicable to an assumption of responsibility can be highly variable. It is often the case that the conditions or qualifications the defendant puts on their assumption of responsibility will result in a lower standard of care.⁷¹ Conversely, in the right circumstances,

⁷⁰ See generally Donal Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 *Current Leg Probs* 123 at 137–38.

⁷¹ Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 124.

defendants can bind themselves to a more stringent standard of care, including one approaching the level of strict liability:⁷²

The right generated by a voluntary undertaking is one which can commonly be unintentionally infringed, even though the party giving the undertaking has not been personally negligent. In principle, just as such a voluntary undertaking can be disclaimed, the content of the duty undertaken could be fixed expressly by the party assuming responsibility, as it sometimes is in a contract. It is perfectly possible, both legally and morally, to bind oneself by an undertaking to achieve a result which, in fact, it is impossible to achieve.

Absent circumstances that dictate the standard of care, the law of negligence imposes a standard of reasonable care, not perfection.⁷³ As with negligence in general, whether the standard of care is breached where there is an assumption of responsibility is an objective determination, one that is not contingent on the subjective belief or honesty of the defendant:⁷⁴

Although the representor's subjective belief in the accuracy of the representations and his moral blameworthiness, or lack thereof, are highly relevant when considering whether or not a misrepresentation was fraudulently made, they serve little, if any, purpose in an inquiry into negligence. As noted above, the applicable standard of care is that of the objective reasonable person. The representor's belief in the truth of his or her representations is irrelevant to that standard of care.

⁷² *Ibid* at 115.

⁷³ *Ibid*, although Stevens notes that “where the duty has been voluntarily assumed by the defendant, the law is, inevitably, less concerned with preserving his interest in liberty of action than where the right the claimant relied upon is one good against anyone regardless of consent”.

⁷⁴ *Queen v Cognos*, [1993] 1 SCR 87 at 154 [*Cognos*].

However, the standard of care is informed by the context in which the undertaking is made: “The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care *as the circumstances require* to ensure that representations made are accurate and not misleading”.⁷⁵ Once again, we cannot have negligence in the air. The obligations attached to an undertaking are not assessed by looking at the undertaking in a vacuum, but involve consideration of who made the undertaking, to whom, and in which circumstances. Consider *Phillips v William Whiteley Ltd.*⁷⁶ The plaintiff had gone to the defendant’s department store to get her ears pierced, a procedure carried out by a jeweller working for the defendant. The jeweller pierced the plaintiff’s ears, which subsequently became infected and developed an abscess. It was held that while the jeweller may not have carried out the procedure with the level of skill and precautions that a “fellow of the Royal College of Surgeons would use”, the level of care used was sufficient for a jeweller. Had the plaintiff wished to have the procedure conducted to a higher standard, she should have sought out a provider who would have undertaken to provide that higher standard. The plaintiff’s claim was dismissed.

This contextual analysis can result in a blurring of the line between the determination of scope of the duty assumed (the duty of care step) and whether the defendant breached their undertaking (the standard of care). In *A v Ministry of Defence*,⁷⁷ the infant plaintiff was a child of a British Army soldier serving in Germany who had suffered brain damage at birth due to a negligent medical treatment. The defendant ministry had arrangements in

⁷⁵ *Ibid* at 154 [emphasis added].

⁷⁶ [1938] 1 All ER 566 (KB).

⁷⁷ [2005] QB 183 (CA).

place by which medical care for service personnel in Germany was provided via agreements with German hospitals. The negligent care leading to the plaintiff's injury had occurred at a German hospital and was provided by German medical professionals for whom the defendant was not vicariously liable. The plaintiff's claim against the defendant for failing to ensure that reasonable medical care was provided was dismissed. The duty assumed by the defendant was to arrange for appropriate access to medical services in Germany. It did not assume responsibility for, or warrant, the quality of the medical care provided.

7.4.2: The Standard of Care in Building Authority Liability Cases

As with the duty of care, this dissertation's argument on the standard of care is assisted by the existence of a body of jurisprudence dealing with claims in negligent misrepresentation against building authorities arising from their jurisdiction over matters that are related to building regulation, such as zoning and land use; or cases where a building authority is not sued for how it conducted building inspection but instead how it provided information about building regulation.

In *Sharda v Kitimat (District)*,⁷⁸ the plaintiff sued the defendant building authority for negligent misrepresentation arising from an inspection conducted of the plaintiff's home renovation project. The project involved replacing the siding on the plaintiff's house, which the plaintiff was attaching using drywall screws. By the time of the first inspection of the work much of the siding had been installed. One of the defendant's building inspectors conducted the first inspection. The inspector noted the use of drywall screws, and verbally advised the plaintiff that he did not know if they were a

⁷⁸ 2012 BCSC 2096 [*Sharda*].

permissible means of attaching the siding. The inspector completed a written inspection report which identified some deficiencies that needed correction, but no mention was made of the drywall screws. Several days later, after researching the issue further, the inspector concluded that the drywall screws were not compliant with building regulations. The plaintiff was advised that the screws needed to be replaced. He refused to do so, resulting in the defendant not approving the final construction.

The plaintiff in *Sharda* argued that initial inspection and written report constituted a representation that the drywalls screws were permitted by building regulation, and that he relied upon that representation to his detriment, and that the building authority's liability for that representation was not attenuated or negated by the subsequent actions of the inspector. The plaintiff's claim was dismissed on the grounds that there had been no representation by the defendant's inspector that the drywall screws were compliant with building regulations. To the contrary, the plaintiff had been put on notice during the first inspection that their use may be questionable.⁷⁹ This analysis may seem straightforward, but the key point is that the court did not assess the standard of care question in the abstract as suggested by *Ingles* and its antecedents.⁸⁰ Under *Ingles*, the standard of care analysis demands that the inspector's actions be assessed in light of the standard of a reasonable and prudent building inspector, with this standard being applied

⁷⁹ *Ibid* at para 17–18.

⁸⁰ *Ibid*. Curiously, the court in *Sharda* cited *Ingles*, but applied its statement of the standard of care as applicable to a reliance-inducing representation:

Once he called for the inspection it was reasonable for [the plaintiff] to rely on the information given to him by [the defendant's inspector]. As set out in the *Ingles* decision [the inspector] owed a duty of care to [the plaintiff] to conduct his inspection to the standard of an ordinary, reasonable and prudent inspector.

to the inspector's interaction with existing or potential defects in construction, and not to any interaction between the inspector and the plaintiff. Applying *Ingles* to *Sharda*, it is conceivable that the inspector may have been negligent in not realizing that the drywall screws were not acceptable at the first inspection. Alternatively, a reasonable and prudent building inspector would be permitted some time to review the applicable regulations before coming to a conclusion. The point is that this analysis was not carried out in *Sharda*, nor did such an understanding of the standard of care have anything to do with the ultimate finding on liability. What was relevant was the actual circumstances and content of the interactions between the defendant and the plaintiff. Simply put, the actions by the inspector in conducting the initial inspection and preparing the written report, and the subsequent actions of the inspector in determining the non-acceptability of the drywall screws, did not constitute carelessness towards the plaintiff.

The context-specific analysis of the standard of care is illustrated in *392980 Ontario Ltd v City of Welland*.⁸¹ In that case, the plaintiff was a developer seeking to purchase a large parcel of land owned by a third party for the purpose of building apartment buildings. After the plaintiff began the process of purchasing the land, an in-house lawyer with the defendant municipality wrote a letter to the plaintiff. The primary purpose of the letter was to advise the plaintiff of certain land-use restrictions on the land, but the letter also described the lot as having both a certain size (1.8 acres) and a residential zoning that permitted apartment buildings. The plaintiff relied on this representation with respect to zoning when purchasing the lot. After the transaction closed, it was determined that the defendant's lawyer was

⁸¹ (1984), 45 OR (2d) 165 (HCJ) [392980].

unaware that the lot was in fact larger, and that this additional land included a portion with a restricted zoning that would not allow for an apartment building.

The plaintiff sued in negligent misrepresentation, claiming that it detrimentally relied upon the representation with respect to zoning when it decided to purchase the land. The defendant argued that there was no negligence since the actual representation the lawyer made was not inaccurate: the zoning of the smaller portion of land had been correctly described. The court rejected this argument, holding that in the context the statement was made the interpretation placed on it by the plaintiff – that the entire parcel it was contemplating purchasing was zoned for apartment buildings – was a reasonable one:⁸²

The essence of the *Hedley Byrne* principle is that a person who knows that he is being trusted and relied upon must use due care not to make a representation that he knows or ought to know will mislead the person to whom the representation is made as to the facts to which the representation relates. Although a statement that is true and accurate when the words are given their ordinary meaning will not usually contain a misrepresentation of the facts stated therein, a misrepresentation can occur when the representer knows that the representee will give another meaning to the words used in the representation. Or, a statement that is true about a particular person or thing, but not of another person or thing having the same name or general description, can be misleading if the representer knows that the representee will take the statement as referring to the other person or thing.

⁸² *Ibid* at 170.

While 392980 concerns a case where the standard of care imposed may appear more onerous, the opposite occurred in *Upchurch v Ottawa (City)*.⁸³ The plaintiff in that case wanted to build a deck at his rental property but was uncertain if he required a building permit. He went to the defendant's building department, and spoke with a building official who told him that "he did not need a building permit if the deck was less than 24" from the adjacent grade".⁸⁴ The plaintiff proceeded to build a deck which was more than 24" from the adjacent grade, but he also constructed planters around the new deck. The upper level of the planters was less than 24" beneath the surface of the deck, and the plaintiff proceeded on the assumption that his intention to build the planters meant that no building permit was required for the deck. When the defendant became aware of the work, it issued orders requiring the plaintiff to stop work and obtain a building permit. The plaintiff refused to do so, and the defendant responded by laying charges against the plaintiff for breaching building regulations. Subsequent judicial review proceedings were decided in the plaintiff's favour, and the plaintiff then sued the defendant.

The plaintiff in *Upchurch* alleged that the defendant negligently provided incorrect information to him about the necessity of obtaining a building permit.⁸⁵ The court accepted that a building authority could be liable for negligently providing inaccurate information to a ratepayer.⁸⁶ But in the circumstances in which the representation was made in *Upchurch* – a

⁸³ 2013 ONSC 3375 [*Upchurch*].

⁸⁴ *Ibid* at para 4.

⁸⁵ *Ibid* at paras 13, 40.

⁸⁶ *Ibid* at para 51.

representation made in response to a “cursory verbal inquiry”⁸⁷ – the defendant’s representation that “if a deck is being built and there is less than a 2 foot drop from the deck surface to the adjacent grade,”⁸⁸ while open to interpretation, was not a negligent statement. This was despite the eventual finding by another court that the defendant’s interpretation of the regulation (that the planters did not count as the adjacent grade) was not correct.⁸⁹ Implicit in this is the idea that had a more formal inquiry been made, and a more formal or detailed response been provided, the standard of care analysis would have been different.

7.5: Conclusion: The Standard of Care and Corrective Justice

A corrective justice understanding of the standard of care in building authority liability requires a significant departure from existing law. In particular, the standard of care articulated in *Rothfield* and *Ingles* of a reasonable and prudent inspector will not be of much use. This is not because it is legally or normatively wrong, but instead because it is a standard that will rarely have direct relevance to the issue of whether a building authority has breached its standard of care. One of the essential themes of this chapter and the preceding one on duty of care is that the existence of private law

⁸⁷ *Ibid* at para 55.

⁸⁸ *Ibid* at para 51.

⁸⁹ For a similar case, see *Ansep Corp v Mississauga (City)* (1994), 22 MPLR (2d) 240 (Ont Gen Div), in which the plaintiff sued the defendant building authority for negligent misrepresentation arising from information provided to the plaintiff about the fees associated with obtaining a building permit. The plaintiff had requested information from the defendant’s municipal clerk (who was not a building official nor part of the defendant’s building department) about the costs associated with obtaining a building permit. The clerk advised the plaintiff of the administrative fees that had to be paid to apply for a building permit, but when the plaintiff later applied for the permit it was advised that the construction it wanted to undertake would also attract levies for other municipal services. The plaintiff’s claim was dismissed, in part, as the plaintiff knew it had made the inquiry of an employee not directly responsible for building regulation.

rights against a building authority should be both contingent in existence and variable in content.

Yet it does not follow that past events that gave rise to building authority liability, as found in reported decisions, would necessarily have different outcomes if this dissertation's position was adopted. Many could have similar outcomes, but rather reach them through a different, more coherent legal analysis. To consider one example, in *White v Bracebridge*,⁹⁰ the plaintiff purchased a house owned by one defendant, G, who was in process of undertaking substantial renovations at the house. G had obtained a building permit from the defendant building authority, Bracebridge. At the time the agreement of purchase and sale was signed, the construction had not been completed, but the plaintiff insisted upon and obtained a condition that G would complete the construction and have it approved by the building authority. The work was completed, the building authority conducted a final inspection approving the construction, and the plaintiff took occupancy. Subsequently he discovered numerous defects in the construction. It was also discovered that G had previously undertaken different renovation work, which was also deficient, but which was not part of the building permit he later obtained. The plaintiff sued for the cost of repairs.⁹¹

The court held the building authority liable in negligence for failing to detect and order remedied several deficiencies in the permitted construction. The court declined to find liability for the work G had done that was outside the scope of the permit. For the deficiencies giving rise to liability, the court

⁹⁰ 2020 ONSC 3060 [*White*].

⁹¹ While the plaintiff sued both G and the building authority, by the time the case went to trial G had left the jurisdiction.

applied the standard of care of a reasonable and prudent building inspector.⁹² A breach of the standard of care was found based on an analysis of the way in which the defendant's employees inspected the construction. As discussed above, this approach does not consider the position, knowledge, or status of the plaintiff. But there were subsequent events in which the plaintiff and the building authority could be construed as being in a transactional relationship: the building authority approved the construction, which was announced through the action of clearing the building permit, which was publicized to the plaintiff.⁹³ If we shift the question of breach to this interaction, we see the possibility of a relationship in which a legal wrong may exist in the context of the single normative relationship demanded by corrective justice. The building authority communicated information to the plaintiff, namely that the construction complied with building regulations. This communication or undertaking was accomplished via its actions in approving the construction and clearing the permit. That transaction was the right-creating event for a paucital right which, at its simplest, granted the plaintiff a right to receive accurate information about the condition of the home and imposed a correlative duty on the building authority to provide accurate information about the work it had permitted and inspected. That duty was (presumably) breached by the defendant carelessly providing inaccurate information. This communication harmed the plaintiff by interfering in his autonomous choice of whether to complete the purchase of the home or bargain for lower price that took into account the deficiencies and the cost of repairing them. Whether the building authority was careless

⁹² *White*, *supra* note 90 at para 144.

⁹³ The report of *White* does not fully detail the involvement of the plaintiff and the building authority, since the court's findings on liability did not involve that issue. As such, it should be acknowledged that whether the building authority actually represented or undertook anything to the plaintiff may be an open question.

in inspecting the construction is secondary and, ultimately, not determinative of either the existence of a duty of care or its breach.⁹⁴

We see some hints of such an approach in how the court in *White* dealt with the second set of deficiencies, those which had resulted from earlier construction by G that was not covered by the building permit. The court held that the building authority was not liable for these deficiencies because they were not covered by the permit, and that the plaintiff had been “operating under a mistaken assumption that the building permit covered all of [G’s] construction – old and new.”⁹⁵ Employing the revised analysis, the building authority should not be liable for the non-permitted deficiencies as it never gave any undertaking to the plaintiff via its building permit and inspections about those parts of the construction, since no duty of care ever came into existence with respect to those other deficiencies.

By way of conclusion, the superiority of a corrective justice account is shown by considering how the outcome in *White* should not, in principle, have changed based on the circumstances of the plaintiff. Had the plaintiff in *White* acted akin to the plaintiffs in *Breen*, and not bothered to make inquiries of the building authority, liability would still have resulted. Liability would still, in principle, have resulted, had the plaintiff personally inspected the construction and seen the deficiencies before purchasing the property, and adjusted his purchase price downwards to account for them. It may be argued that the latter type of case is an extreme hypothetical, and

⁹⁴ Consider again the reasoning in *Grand Restaurant of Canada Ltd v Toronto (City)* (1981), 32 OR (2d) 757 (HCJ): “The thrust of the plaintiff’s argument founded on negligent misstatement is not that the plaintiff was entitled to a building free of building code violations, but that it was entitled to have such information as the plaintiff requested and the defendant possessed, on the status of [the] premises”.

⁹⁵ *White*, *supra* note 90 at para 187.

that a court actually called upon to hear such a case would not find liability. That may be accurate, but the problem is that the current legal doctrine not only fails to explain why such a result would be unjust, it actually dictates the unjust result as a correct one. That is the flaw this dissertation seeks to correct.

CHAPTER 8 – CAUSATION AND DAMAGE

8.1: Introduction

This chapter concerns the last two elements of the cause of action in negligence: causation and remoteness, which can also be understood as *factual* causation (causation) and *legal* causation (the absence of remoteness). Both elements are connected to the concept of damage, the losses suffered by the defendant that are recoverable in law. Factual causation concerns the existence of a link between the defendant's damages and the plaintiff's breach of duty; legal causation considers whether the damages suffered should be recognized by law as recoverable from the plaintiff. This chapter will focus almost entirely on causation and the interplay between causation and damage. As will be discussed, this dissertation's proposed cause of action, particularly its understanding of factual causation and damage, leaves remoteness as a subject which is both difficult to discuss in a meaningful way and which likely does not need to be reviewed in detail at this time.

An analysis of the causation element involves asking two questions: first, what constitutes the existence of a situation where the defendant's wrongful conduct causes damage to the plaintiff; second, what circumstances fall within the scope of the damages that are legally recoverable. In this chapter, these two questions will be analysed in tandem. In the current Canadian law of building authority liability, as will be argued, an incomplete and incoherent understanding of damages in building authority liability cases has undermined a proper and coherent understanding of how and when a building authority can cause damage to a plaintiff. In the same way, the absence of any meaningful analysis of how a building authority can cause harm to a plaintiff has led to problematic and unjustifiable awards of damages.

Two further introductory points can be made. First, this chapter will focus almost exclusively on the issues of causation and damage as applied to building authority liability for pure economic losses. The determination of causation and damage in cases for bodily injury or direct property damage do not pose any particular controversy that this dissertation needs to address, as the primary issue with such claims is the existence of an antecedent duty of care. As discussed in chapter 6, cases where a breach of a duty of care will sound in damages for bodily injury or property damage will normally be very rare but, in those cases where such duties do exist, the existence and quantification of damages will be straightforward and can be understood in the same manner as negligently caused bodily injury and property damage more generally.

Second, this chapter will generally approach its subjects by looking at them in reverse order. The question of what damages are recoverable will usually be addressed first, as the answer to this question simplifies the review of causation.

8.2: Causation, Damage, and Remoteness – General Principles

While the application and interpretation of the concepts of causation, damage, and remoteness have been the subject of substantial judicial and scholarly commentary, there is a consensus on the general definition of these concepts in negligence law.

8.2.1: Factual Causation

It is not enough for a plaintiff to prove that a particular defendant owed them a duty of care and that the defendant breached the standard of care. The plaintiff must also prove that the defendant's breach caused the plaintiff to

suffer the damages claimed.¹ The idea of a breach of duty causing damage is “an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former”.² The generally accepted test for causation in Anglo-Canadian law is the “but for test”:³

The “but for” test asks: would the damage of which the claimant complains have occurred “but for” the negligence (or other wrongdoing) of the defendant? Or to put it more accurately, can the claimant adduce evidence to show that it is more likely than not, more than 50 per cent probable, that “but for” the defendant’s wrongdoing the relevant damage would not have occurred. In other words, if the damage would have occurred in any event the defendant’s conduct is not a “but for” cause.

Causation in negligence law is not concerned with identifying every possible causal antecedent to a particular event, nor is it concerned with identifying the sequential occurrence of physical phenomena in the same way as a scientific inquiry.⁴ While it is a primarily factual inquiry, its purpose has a normative

¹ See generally Allen Linden & Bruce Feldthusen, *Canadian Tort Law*, 10th ed (Toronto: LexisNexis Canada, 2015) at 125; Erika Chamberlain & Stephen GA Pitel, eds, *Fridman’s The Law of Torts in Canada*, 4th ed, (Toronto: Thomson Reuters, 2020) at 503–05.

² *Snell v Farrell*, [1990] 2 SCR 311 at 326 [*Snell*].

³ MA Jones et al, *Clerk & Lindsell on Torts*, 23rd ed (London: Sweet & Maxwell, 2020) at §2-09. See also Linden & Feldthusen, *supra* note 1 at 125–26. The “but for” test has been repeatedly endorsed by the Supreme Court of Canada as the test for causation in negligence law: *Snell*, *ibid*; *Resurface Corp v Hanke*, 2007 SCC 7; *Clements v Clements*, 2012 SCC 32 [*Clements*].

⁴ See generally *Snell*, *supra* note 2 at 328 (“ordinary common sense” is to be employed as opposed to “abstract metaphysical theory”), 330 (causation is determined using a “robust and pragmatic” treatment of the facts); *Clements*, *ibid* at para 9.

criterion: whether the causal event was of such significance that it should justify attributing legal responsibility to the defendant.⁵

8.2.2: Damage and Damages

When discussing negligence law, a distinction is drawn between the concept of “damage” and that of “damages”. The difference is not simply a matter of singular versus plural. “Damage” has been defined as a “head of loss for which compensation will be awarded”, while “damages” can be defined as “the amount of money that is paid by a tortfeasor for inflicting the various items of damage”.⁶ Another way of defining the two concepts is that damage refers to the harm necessary to complete the cause of action in negligence – the existence of damage is a required element of the tort of negligence, and absent proof of damage a claim in negligence will fail⁷ – while damages refers

⁵ Jones et al, *supra* note 3 at §2-09: “It is sometimes said that the law seeks the *causa causans* (effective factor) rather than the *causa sine qua non* (factor(s) without which damage could not have occurred).” See also *Henville v Walker* (2001), 206 CLR 459 at para 97 (HCA):

The common law concept of causation recognises that conduct that infringes a legal norm may be causally connected with the sustaining of loss or damage even though other factors may have contributed to the loss or damage. Every event is the product of a number of conditions that have combined to produce the event. Some philosophers draw a distinction between a *condition* that is necessary only and a *cause* that is both necessary and sufficient to produce the event. The common law has avoided the technical controversies inherent in the logic of causation. Unlike science and philosophy, the common law is not concerned to discover universal connections between phenomena so as to enable predictions to be made. The common law concept of causation looks backward because its function is to determine whether a person should be held responsible for some past act or omission. Out of the many conditions that combine to produce loss or damage to a person, the common law is concerned with determining only whether some breach of a legal norm was so significant that, as a matter of common sense, it should be regarded as a cause of damage.

⁶ *Vile v Von Wendt* (1979), 26 OR (2d) 513 at 517 (Div Ct) [*Vile*].

⁷ Linden & Feldthusen, *supra* note 1 at 120-21.

to the harms that the law will permit recovery for once the cause of action is completed.⁸

Damage, as used in the law of negligence, has often been a difficult concept to identify in the abstract. It is usually accepted that damage is not the same as “loss”, the latter being defined as a person being “worse off” in one situation as opposed to another situation. Yet damage is not co-terminus with the idea of some consequence that is wrongful or unlawful in a normative sense, since at least some kind of loss or harm must be sustained for a cause of action in negligence to be complete.⁹ As Nolan states, damage “falls between *damnum* and *injuria*, between ‘loss’ or ‘harm’ and ‘wrongfulness’”.¹⁰ As will be discussed below, a rights-based account of negligence solves much of this definitional conundrum.

Damages, in contrast, are somewhat easier to define. They are the monetary expression of the losses sustained by the plaintiff as a result of the defendant’s wrongful act. In cases involving private law claims, damages are expressed as a monetary value of a plaintiff’s current and future pecuniary losses or as the monetary equivalent of the plaintiff’s non-pecuniary losses.¹¹ The general principle governing the quantification of a plaintiff’s damages is expressed in the maxim *restitutio ad integrum*: “restoration to the original condition”.¹² Damages are the amount of money required, inasmuch as

⁸ Donal Nolan, “Damages in the English Law of Negligence” (2013) 4 JETL 259 at 262.

⁹ *Ibid* at 266.

¹⁰ *Ibid*.

¹¹ See generally *Broome v Cassell & Co*, [1972] AC 1027 at 1070–72 (HL).

¹² *Black’s Law Dictionary*, 10th ed, *sub verbo* “restitutio ad integrum”.

possible, to put the plaintiff into the place they would have been had the wrong not been committed.¹³

In many cases, the identification of the damage suffered and the quantification of damages are uncontroversial. For instance, if the defendant negligently damages the plaintiff's automobile, the measure of damages is the pecuniary value of the steps necessary to accomplish, as much as is possible, the restoration of the previous existing situation, which would be the cost to effect repairs to the automobile or, if the damage is too severe, the cost of obtaining a replacement.¹⁴ In the context of negligently caused bodily injury, there are generally recognized heads of damages that are awarded to compensate the plaintiff for the injuries sustained.¹⁵

Such a degree of consensus or clarity is lacking when it comes to pure economic losses. As reviewed in chapter 4, pure economic losses are monetary harms sustained by a plaintiff which are not consequent on injury to the plaintiff's bodily integrity or property. The identification and quantification of damages in case of pure economic loss are complicated by several factors. One is the necessity to distinguish between pure economic losses that are recoverable as opposed to those that are not. Another is the fact that pure economic losses usually result from a plaintiff's contractual relationships with the defendant or with third parties, and thus a distinction must be drawn between contractual entitlements to damages and those that

¹³ *Barber v Molson Sport & Entertainment Inc*, 2010 ONCA 570 at para 86; *2105582 Ontario Ltd v 375445 Ontario Ltd*, 2017 ONCA 980 at para 58.

¹⁴ For a general review and a list of example cases, see CED 4th (online) *Damages* "Damages in Tort: Damages to Chattels" (IV.17) at §542–54.

¹⁵ See generally *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229, where the Supreme Court of Canada identified the following heads of damage in bodily injury claims: pecuniary loss occurring before trial, non-pecuniary loss (pain and suffering), loss of earning capacity, and cost of future medical care.

are recoverable in tort. The first factor will be the subject of further discussion, but at present Canadian law, at least at a higher level, has established a conclusive answer to the second factor.

While damages in tort are intended to undo the consequences of the defendant's wrong, damages for breach of contract are intended to ensure plaintiffs receive what they are entitled to under their contracts. Put another way, the purpose of the remedy for a breach of contract is not to return the plaintiff to the *status quo ante* that existed before the contract (as the remedy in tort does) but is instead to put the plaintiff in the position they would have been had the contract been performed. The general principle was explained by the United Kingdom Supreme Court as follows:¹⁶

The compensatory nature of damages for breach of contract, and the nature of the loss for which they are designed to compensate, were explained by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*. As his Lordship stated, a contract is the source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to “substituted or secondary obligations” on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law:

“The contract, however, is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the

¹⁶ *Morris-Garner v One Step (Support) Ltd*, [2018] UKSC 20 at paras 34–35 [citations omitted]

other party for the loss sustained by him in consequence of the breach ...”

Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. Their function is confined to enforcing either the primary obligation to perform, or the contract breaker’s secondary obligation to pay damages as a substitute for performance

Distinguishing between damages in tort and contract in the context of a case for pure economic loss was at the heart of the decision of the Supreme Court of Canada in *BG Checo International Ltd v British Columbia Hydro and Power Authority*.¹⁷ The case involved a plaintiff who contracted with the defendant to install electrical transmission equipment. After the project commenced, a dispute arose over whether the defendant was supposed to have undertaken certain preparatory work by having the land where the plaintiff was to install the transmission equipment cleared beforehand. The plaintiff had to complete the preparatory work on its own. The plaintiff sued the defendant both in contract and in negligent misrepresentation arising from pre-contractual interactions in which the plaintiff claimed the defendant gave it assurances that the preparatory work would be done by the defendant.

One of the issues the Supreme Court of Canada considered was the different measures of damages that would result from the plaintiff’s claims in contract

¹⁷ [1993] 1 SCR 12 [*BG Checo*].

and tort. In tort, the proper measure of damages – compensatory damages – should be understood as “reliance damages”: the damages suffered because the plaintiff determinedly relied on the defendant’s conduct. In *BG Checo*, had the representation not been made, the plaintiff would have entered into the contract for a higher price to account for having to do the preparatory work on its own. Thus, the reliance damages were the difference in price, and any additional costs unnecessarily incurred by the plaintiff in reliance on that representation.¹⁸ In contrast, the damages in contract – the “expectation damages” – were the amount that fulfilled the plaintiff’s contractual expectation: that the site be cleared beforehand.¹⁹

8.2.3: Legal Causation/Remoteness

Negligence law does not automatically hold defendants liable for all damages caused by their negligence. Damages will not be recoverable if they are so unrelated to the wrongful conduct that it would not be fair to hold the defendant liable. The general principles of legal causation/remoteness can be summarized as follows: damages will not be too remote if they are within the “foresight of the reasonable man” at the time the wrong was committed.²⁰ Remoteness is not an inquiry into statistical probability of particular outcomes occurring; rather it is concerned with whether a risk of damages occurring was a “real risk” that would “occur to the mind of the reasonable

¹⁸ *Ibid* at 40–42. The extra reliance damages were not specified, as the case was remitted to trial on the issue of damages, but the majority’s *obiter* comments were that these could include “having to devote resources to that extra work that might have prevented [the plaintiff] from meeting its original schedule, thereby resulting in [the plaintiff] incurring acceleration costs in order to meet the contractual completion date”.

¹⁹ *Ibid* at 42: “On the claim for breach of contract [the plaintiff] is to be put in the position it would be in had the work site been cleared properly, and is therefore to be reimbursed for all expenses incurred as a result of the breach of contract, whether expected or not”.

²⁰ *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para 12 [*Mustapha*], citing *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co*, [1961] AC 388 at 424 (PC).

man in the position of the defendan[t] ... and which he would not brush aside as far-fetched”.²¹

While the general principles and ideas behind of remoteness have been present in Anglo-Canadian law for over half a century, it is a topic that remains unsettled in its understanding and application.²² A useful synopsis is provided by Beever: the remoteness inquiry requires the court to make a twofold determination. First, the court has to identify and describe both the defendant’s negligence and the plaintiff’s damage. Second, the court must determine whether the damage was foreseeable from the perspective of the defendant’s negligence. The problem is that there are often numerous ways to describe the negligence or the damage, and choice of description will often determine whether or not the damage was too remote. The result: “There is no rule. Judgment is required.”²³

8.2.4: Remoteness as a Future Issue

It is beyond the scope of this dissertation to delve further into the concept of remoteness. Remoteness is a component of a cause of action in negligence, and so is identified and summarized here. Remoteness has not been a subject of significant judicial commentary in building authority liability cases, and it has not had any significant limiting effect on building authority liability. The likely reason for this is because the current law casts the duty of care, based

²¹ *Ibid* at para 13, citing *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co*, [1967] AC 617 at 643 (PC).

²² For a discussion of the history of remoteness jurisprudence see Linden & Feldthusen, *supra* note 1 at 381–403; see also Chamberlain & Pitel, *supra* note 1 at 529–36.

²³ Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) at 140–41. See also Linden & Feldthusen, *ibid* at 402: “In sum, it is hard to escape the conclusion that the best we can ever do in truly novel situations is to rely on the common sense of the judge and jury. It is not conceding defeat to admit that these judgments lie ‘in the realm of values and what you choose depends on what you want’. It is merely being realistic”.

on simple foreseeability, so broadly as to preclude the argument that losses suffered by the breach of that duty were too remote. Since the current duty is cast so broadly in time, space, and possible damage, there is little room for a remoteness inquiry. However, if this dissertation's proposed cause of action, particularly its proposed duty of care based on an assumption of responsibility, is adopted, then there would be an appreciable narrowing of the scope of possible duties of care owed by building authorities to plaintiffs, which would also open up the field of possible questions of remoteness in future cases. However, these scenarios are hypothetical, and would also be contingent on the specific circumstances of future cases, since the duty of care and remoteness issues would be informed by the specific assumption of responsibility in a given case. As such, it is not possible to offer meaningful comment on the possible application of remoteness to future cases decided using this dissertation's proposed cause of action. Detailed analysis would need to be the subject of future judicial and scholarly commentary.

8.3: The Canadian Law of Pure Economic Loss

A review of the Canadian law of pure economic loss provides a framework for this dissertation's review and critique of the treatment of damages in the overwhelming majority of building authority liability cases. It will show how Canadian private law has developed an incoherent and contradictory treatment of private and public defendants, but will also reveal how one strain of recent jurisprudence could, if accepted as a more universally-applicable approach, remedy the law's defects. This is the recently developed law on negligent misrepresentation or performance of an undertaking.

As discussed in chapter 5, Canadian law generally followed the English lead of restricting recovery of pure economic loss in negligence. Prior to *Kamloops*

*v Nielsen*²⁴, Canadian law had recognized a few narrow situations in which recovery of pure economic loss would be permitted.²⁵ But *Kamloops* tacitly endorsed the possibility of a new and broader basis for the recovery of pure economic loss, at least in claims against public authorities, although the decision left uncertainty in its wake on this issue.²⁶ Post-*Kamloops*, the Supreme Court of Canada began a process of attempting to reform, clarify, and simplify the law on the recovery of pure economic loss. This process has reached the point where, at least in some contexts, it may be said that pure economic loss is a recognized head of damage that is recoverable when there is a duty and a corresponding right with respect to those losses. But just as with the post-*Kamloops* jurisprudence on the duty of care, the court's efforts in this area would mostly ignore public authority liability, leading to an increasingly incoherent private law.

8.3.1: Pure Economic Loss: The Feldthusen Categories

In its 1992 decision in *Canadian National Railway Co v Norsk Pacific Steamship Co*,²⁷ the Supreme Court of Canada began its reformation of the treatment of pure economic loss claims in negligence. The case produced a divided decision, but it was the dissent of La Forest J that became the effective lead decision in the case.²⁸ In his dissent, La Forest J cited a 1991

²⁴ [1984] 2 SCR 2 [*Kamloops*].

²⁵ See generally Bruce Feldthusen, “*City of Kamloops v. Nielsen*: A Comment on the Supreme Court's Modest Clarification of Colonial Tort Law” (1985) 30 McGill LJ 539 at 548.

²⁶ See generally Norman Siebrasse, “Liability of Public Authorities and Duties of Affirmative Action” (2007) 57 UNBLJ 84 at 96–97.

²⁷ [1992] 1 SCR 1021 [*Norsk*].

²⁸ See generally Russell Brown, *Pure Economic Loss in Canadian Negligence Law* (Toronto: LexisNexis Canada, 2012) at 80.

article by Bruce Feldthusen,²⁹ in which he distinguished five categories where Canadian courts had recognized and allowed the recovery of pure economic loss:³⁰

1. The independent liability of statutory public authorities;
2. Negligent misrepresentation;
3. Negligent performance of a service;
4. Negligent supply of shoddy goods or structures; and,
5. Relational economic loss.³¹

These categories would become a generally accepted judicial framework for understanding economic loss claims in Canadian law.³²

The Feldthusen categories speak not only to the types of pure economic losses that can be recovered but also the circumstances in which a duty of care will exist that allows these losses to be recovered. Discussions of duty of care and damages are often inextricably linked in Canadian courts' reasoning in pure economic loss cases. As such, while the duty of care was reviewed in chapters 5 and 6, the following section contains some additional discussion of the duty of care to allow for a complete picture of the current Canadian law of pure economic loss to be presented, and to allow this dissertation's position to be properly juxtaposed to the existing law.

²⁹ Bruce Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1991) 17 Can Bus LJ 356.

³⁰ *Norsk*, *supra* note 27 at 1049.

³¹ "Relational economic loss" describes cases where the defendant tortiously injures a third party, and in turn, because of some relationship which exists between the plaintiff and the third party (often contractual), the plaintiff suffers pure economic loss: Feldthusen, *supra* note 29 at 373.

³² See eg *D'Amato v Badger*, [1996] 2 SCR 1071 at para 30 [*D'Amato*]; *Martel Building Ltd v Canada*, 2000 SCC 60 at para 38; *Design Services Ltd v Canada*, 2008 SCC 22 at para 3.

Upon a close reading of the Feldthusen categories, one characteristic stands out in this taxonomy: categories 2–5 describe relationships or events that could only meaningfully occur in the context of a relationship between a plaintiff and a defendant. In categories 2, 3, and 4, at least one person must make a representation, perform a service, or supply something, and at least one person must be the recipient of that action in order for the scenario to exist. The same relationality is implicit in relational economic loss. Category 1, in contrast, the independent liability of statutory public authorities, does not describe a relationship – it simply describes a putative defendant, one whose potential liability is contingent upon a particular characteristic (its public nature) without any reference to the relationship of that defendant with any given plaintiff. The adjective “independent” in category 1 was apparently employed because claims against public authorities involved “unique public duty issues”, which included duties for which “there is no private party analogy”.³³ Public authority liability for economic loss was also contingent on whether the action attracted immunity as a legislative action or via classification as a policy decision.³⁴

³³ Feldthusen, *supra* note 29 at 358.

³⁴ *Ibid* at 358–62. See particularly 362:

The point has been to demonstrate that the unique issues of immunity and special standard posed in public authority cases have nothing whatsoever to do with whether the loss is economic or physical. The Supreme Court moves freely, as it should, from physical damage cases [to] economic loss cases ... If the act or omission in question is not immune, and if the statutory power pertains to economic protection, the duty extends to economic loss. It would be incoherent to hold otherwise and no court has ever done so.

It bears noting that Feldthusen repudiated this view, instead adopting the position that unique duties of care should not be imposed on public authorities: Bruce Feldthusen, “Bungled Police Emergency Calls and the Problems with Unique Duties of Care” (2017) 68 UNBLJ 169; See Bruce Feldthusen, “Ten Reasons to Reject Unique Duties of Care in Negligence” in Margaret I Hall, ed, *The Canadian Law of Obligations: Private Law for the 21st Century and Beyond* (Toronto: LexisNexis Canada, 2018) 25.

To borrow the language of corrective justice, categories 2–5 can conceivably be understood as arising from a single normative relationship of doing and suffering, wrongdoer and victim, based on transactional equality, whereas no such unity is implicit in category 1.³⁵ To the contrary, the “independent liability of statutory public authorities” implies an understanding of liability that is entirely one-sided, in that it is understood solely through the circumstances or characteristics of one party to the relationship of doing and suffering. As stated by Weinrib, the justifications for correlative relationships – the “justificatory considerations” – must be equally applicable to both parties. Such “transactional equality” does not exist in a conception of liability that arises solely from the public character of the defendant.³⁶

Weinrib also makes the further point that coherent understandings of private law relationships, particularly the understanding of right and duty as correlative concepts, are undermined by improperly considering only one side of the relationship in isolation:³⁷

The alternative to thinking of right and duty as forming an articulated unity is to regard them as analytical reflexes of each other. When right is considered as an analytical reflex of duty, the entire justificatory weight of the relationship rests on the reason for considering the defendant to be under a duty; right is then immediately attributed to anyone who would benefit from the performance of that duty. The relationship is composed of right and duty, but the right is merely the analytical shadow of the duty and occupies no space of its own.

³⁵ Ernest J Weinrib, *The Idea of Private Law*, revised ed (Oxford: Oxford University Press, 2012) at 120–26.

³⁶ *Ibid* at 120–21.

³⁷ *Ibid* at 124.

This critique is readily applicable to the current Canadian law on the duty of care of building authorities. As shown in chapters 5 and 6, a one-sided analysis contributed to an increasingly incoherent legal doctrine. The same one-sidedness is present in Canadian law's treatment of causation and damages in building authority liability cases and, as will be shown, has produced similarly incoherent results.

8.3.2: Public Authority Liability and Pure Economic loss

The Supreme Court of Canada regularly claimed that it wished for the law of pure economic loss to be developed in a coherent manner.³⁸ While the court's more recent jurisprudence has succeeded in both clarifying the law of pure economic loss and moving it onto a firmer foundation of a rights-based tort theory, the treatment of the independent liability of statutory public authorities has been neglected. Perhaps no better illustration of this neglect is found in *Pure Economic Loss in Canadian Negligence Law*. Written in 2011 by Brown J prior to his judicial appointment, it is a treatise surveying the current Canadian law of pure economic loss based on Feldthusen's categories. Yet the almost 500-page work specifically excludes any discussion of the category of the independent liability of statutory public authorities, on the basis that "the basis for public authority liability is completely different from that which underlies the liability of a private party".³⁹ It is a category that simply cannot be made to fit into the broader jurisprudence of pure economic loss.

³⁸ See eg *Norsk*, *supra* note 27 at 1152–53; *D'Amato*, *supra* note 32 at para 28.

³⁹ Brown, *supra* note 28 at ix. Brown goes on to note that other treatises treat the liability of public authorities as separate from their analysis of pure economic loss.

The following two sections will demonstrate this disconnection. In doing so, they will also lay out the framework that will be used later in this chapter to propose a corrective justice-based understanding of causation and damages in building authority liability. As discussed in prior chapters, one of the central arguments of this dissertation is that public authorities, including building authorities, should not be subject to unique duties of care. Following a Diceyan understanding of private law, public authorities should be subject to the same duties of care as private persons. The necessary concomitant of that position, which is addressed in this chapter, is that the separate category of claims for pure economic loss against public authorities in general, and building authorities in particular, should be erased. Instead, claims against building authorities should be understood under other categories of pure economic loss: negligent representation, negligent performance of a service, both of which are now increasingly understood in Canadian law as forming a single category as loss arising from a negligently failure to fulfill an undertaking or an assumption of responsibility. There remains also the category of negligent supply of shoddy structures or goods,⁴⁰ where Canadian law still contemplates recovery despite an absence of any undertaking or assumption of responsibility. But even if this category of recovery could apply to building authorities (and this dissertation will argue it should not) there remains a disconnection between how Canadian law treats private defendants and building authorities under that category.

⁴⁰ The category of relational economic loss is not applicable to any common scenario of building authority liability.

8.3.3: Negligent Misrepresentation/Performance of a Service

Chapter 6 reviewed how the Supreme Court of Canada's decisions in *Deloitte & Touche v Livent Inc*⁴¹ and *1688782 Ontario Inc v Maple Leaf Foods Inc*⁴² articulated a new understanding of the negligent performance of a service and negligent misrepresentation, which were merged into single category of a negligent breach of an undertaking or assumption of responsibility by the defendant to the plaintiff that affected the plaintiff's autonomous decision making.⁴³ Chapter 6 was concerned with the duty of care – the focus here is on the causation of damage and the assessment of damages.

The Supreme Court of Canada's repudiation in *Livent* of its earlier decision in *Hercules Managements Ltd v Ernst & Young*,⁴⁴ was a twofold benefit. First, the rejection of *Hercules'* test for a duty of care in negligent misrepresentation, which was based on an *Anns*-inspired concept of “reasonably foreseeable reliance”, was a welcome correction of problematic legal doctrine. Second, the emphasis in *Livent* of the concept of “assumption of responsibility” over “reliance” as the duty-defining concept was a service to legal heuristics. Reliance, as employed in negligent misrepresentation cases, it often employed in two senses. First, it can describe the subjective, cognitive state of a person: information received from a particular source is perceived as being more likely to be accurate than what a person believes themselves or has received from other sources. This is properly understood as the plaintiff's role in the right-creating act, and is the point in time that

⁴¹ 2017 SCC 64 [*Livent*].

⁴² 2020 SCC 35 [*Maple Leaf*].

⁴³ Throughout this chapter, references to a duty of care arising from an undertaking or from an assumption of responsibility should be read interchangeably.

⁴⁴ [1997] 2 SCR 165 [*Hercules*].

the interference with the plaintiff's autonomy occurs as result of the defendant's assumption of responsibility.⁴⁵ The second understanding of reliance is what is also referred to as "detrimental" reliance: the plaintiff takes action informed by or in response to the new cognitive state – the plaintiff does something "in reliance on" the defendant's conduct.⁴⁶

In an assumption of responsibility case, it is not necessary for the plaintiff to detrimentally rely on the defendant's undertaking for a duty of care to exist.⁴⁷ Reliance is more properly used in the detrimental sense to refer to the mechanism of causation: a plaintiff must have suffered damage in reliance on the defendant's undertaking in order for the plaintiff to have an actionable claim, but since the reliance has to be on the defendant's undertaking, by definition the reliance must occur after the undertaking has been given.⁴⁸ The plaintiff's reliance thus crystalizes the plaintiff's claim, and establishes both the point in time and space where causation of damage occurs and the two contrasting states of affairs that determine the plaintiff's

⁴⁵ So, when Cassidy tells Sundance "are you crazy? The fall will probably kill ya" immediately after having been told that Sundance can't swim, there was arguably an assumption of responsibility by the former (the comparative likelihood of instantaneous death on impact with the water as opposed to the more protracted and/or embarrassing death by drowning) which constituted an interference with the autonomous decision making of the latter (the weighting of odds of survival and possible forms of death to be suffered). The duty of care is formed whilst the duo are still sheltering in cover on the cliff top, and 10 seconds later...

⁴⁶ ...detrimental reliance occurs when Sundance charges to the edge of the cliff and jumps whilst screaming a scatological profanity.

⁴⁷ See Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 14–15; See generally Donal Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 *Current Leg Probs* 123 at 155–58.

⁴⁸ Nolan, *ibid.*

damages, namely its pre- and post-reliance circumstances. As explained in *Maple Leaf*:⁴⁹

When a defendant undertakes to represent a state of affairs or to otherwise do something, it assumes the task of doing so reasonably, thereby manifesting an intention to induce the plaintiff's reliance upon the defendant's exercise of reasonable care in carrying out the task. And where the inducement has that intended effect – that is, where the plaintiff reasonably relies, it alters its position, possibly foregoing alternative and more beneficial courses of action that were available at the time of the inducement. That is, the plaintiff may show that the defendant's inducement caused the plaintiff to relinquish its pre-reliance position and suffer economic detriment as a consequence.

Reliance works as both the marker of when the damage occurred and a reference point for assessing the damages recoverable. In the former role, reliance completes the cause of action by establishing a causal link between the defendant's breach of duty and the existence of damage in the form of an infringed right. In the latter, reliance provides the answer to the remedial question: what is the plaintiff entitled to by way of compensation in damages. Causation limits the plaintiff's damages to those that would not have been suffered "but for" the defendant's negligence. In a case where a defendant negligently breaches an undertaking to the plaintiff, the court must start with the plaintiff's pre-reliance position, and then compare two present-day outcomes: what actually occurred as a result of the plaintiff's reliance and what hypothetically would have occurred had the plaintiff not relied. The

⁴⁹ *Supra* note 42 at para 33. The court's reasoning here also shows how reliance is often used to describe both the duty relationship and the mechanism of causation.

comparison of those two outcomes is what determines the plaintiff's entitlement to damages on a reliance measure.⁵⁰

While an assumption of responsibility can occur in a wide variety of contexts, if we limit our focus to cases involving assumptions of responsibility that result in reliance by the plaintiff in decision-making concerning contracts in general (entering into, negotiating, and performing) and property transactions in particular (buying, selling, building, or modifying), we can identify two general categories of hypothetical, pre-reliance outcomes that courts will need to consider when assessing a plaintiff's damages. The first scenario is when the plaintiff would have avoided entirely the transaction they entered into as a result of their detrimental reliance. The leading case here is *Rainbow Industrial Caterers v CNR*.⁵¹ In that case, the plaintiff entered into a contract to provide services to the defendant (supplying food to railway crews), having detrimentally relied on information negligently provided by the defendant (the volume of food that would be required). The plaintiff terminated the contract after suffering losses. The trial decision, ultimately affirmed by a further appeal to the Supreme Court of Canada, was that but for the negligent misrepresentation, the plaintiff would not have entered into the contract at all, and therefore the proper measure of its damages was to bring it back to its pre-contract position by awarding it all of its operating losses.

The second scenario is that from *BG Checo*,⁵² discussed above, where it was found that but for the negligent misrepresentation, the plaintiff would have

⁵⁰ See generally Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 3rd ed (Toronto: Irwin Law, 2014) at 65–69.

⁵¹ [1991] 3 SCR 3 [*Rainbow*].

⁵² *Supra* note 17.

still entered into the transaction at issue, but would have done so under different terms (often a difference in price charged or paid). The damage in such cases is the difference in value, plus any other damages suffered in reliance on the misrepresentation, measured by comparing the transaction or contract that was entered into and the one that would have been entered into had the plaintiff not been misled. However, what remains consistent across both scenarios is that the damages recovered in tort are limited to reliance damages. In *Rainbow*, the plaintiff was denied recovery for the profits it claimed it would have received had it avoided the subject contract and entered into different, more profitable ones. In *BG Checo*, the plaintiff could only recover its expectation damages via a claim for breach of contract.

One form of transaction that has received considerable judicial treatment is a negligent assumption of responsibility that induces a plaintiff to enter into a contract for the purchase of real property, a scenario with direct parallels to many building authority liability cases in which plaintiffs allegedly suffer damage when purchasing a property with existing defects. In cases involving private parties, the default measure of reliance damages is the difference in price the plaintiff paid for the property and the actual market value of the property.⁵³ A recent and useful example is *Bowman v Martineau*.⁵⁴ In that case, the plaintiff sued his real estate agent and broker for the costs to repair the mould and water damage in their recently purchased home on the basis that the defendants negligently failed to properly review information about

⁵³ See eg *Avrom Evenchick (Trustee of) v Ottawa (City)* (1998), 111 OAC 132 at para 12 (CA), and the cases cited therein. The market-value approach results in the same damages whether the plaintiff would have proceeded with the transaction in a modified form or would have avoided the transaction. In the latter scenario, the plaintiff will either have resold the property, or will still be in possession of the property, with the result that the property's current value must be credited to the plaintiff to avoid over-compensation.

⁵⁴ 2020 ONCA 330 [*Bowman*].

the property which should have identified pre-existing water problems and failed to advise the plaintiff prior to entering into the transaction. The plaintiff succeeded at trial and was awarded the costs of repairs.⁵⁵ The Court of Appeal reversed, holding the trial court had improperly awarded the plaintiff his expectation damages, not his reliance damages.

The Court of Appeal's analysis was prefaced by a comment about the need to remember the link between the mechanism of causation and the damages recoverable: "in professional negligence cases involving real property, like the present, careful attention must be paid to the causal link between the injury suffered and the act of negligence".⁵⁶ If the negligence actually caused the defects complained of, damages should be quantified as they would for wrongs committed to physical property.⁵⁷ But the measure of damages will be different if the negligent act did not cause the defects, but instead caused the plaintiff to enter into a contract they would otherwise have avoided. *Bowman* fell into the later category:⁵⁸

The respondents' loss consisted of entering into a transaction to purchase a house damaged by water and mould. The appellants' negligent provision of professional services caused the respondents to enter into a transaction that they would not have otherwise undertaken. But the appellants did not

⁵⁵ *Ibid* at para 22. The trial court had rejected a diminution in value approach since there was no evidence that "damages calculated on a diminution in value basis would permit [the plaintiffs] to obtain a home similar to the one they purchased that is free of mould and water damage".

⁵⁶ *Ibid* at para 12.

⁵⁷ *Ibid* at para 13. In the context of professional advisors involved in property transactions, what was needed was either direct infliction of physical damage or negligence that "caused the plaintiff to lose the right to recover for that defect", with an example being a lawyer who negligently fails to commence an action within the necessary limitation period that would have entitled a plaintiff to an award of damages in contract that would have been quantified on the expectation measure.

⁵⁸ *Ibid* at paras 23–24 [emphasis added; citations omitted].

cause the water and mould damage to the property. In other words, even if the appellants had not been negligent, the respondents would still not have received a water and mould-free property; they would merely have avoided this bargain.

...

As the appellants' wrong did not cause the property defect, the respondents are *not entitled to demand what they could never have had even if the appellants had not been negligent, namely, a house free of mould and water damage*. They are only entitled to damages to compensate them for entering into a bad transaction they would have otherwise avoided. These damages will include their overpayment for the defective property, namely, its diminution in value.

This reasoning appears, on its face, to be readily applicable to many fact patterns in building authority liability cases. The plaintiff's usual complaint is that property was purchased/constructed that contained unwanted defects. The building authority is not responsible for the construction of homes, nor does its liability arise from the infliction of physical damage to the property. Enforcement activity by building authorities does not involve the authority assuming a responsibility to repair the defects, nor do enforcement measures grant new rights and remedies to property owners (current or prospective).

But in building authority liability cases, the default rule for the quantification of damages is the cost of repairs, with no consideration given to the actual harm that plaintiffs have suffered. This started with *Kamloops* itself, where the damages were "the cost to the plaintiff of having his home restored to the condition it should have been in if properly constructed plus certain expenses he could incur while this was being done".⁵⁹ A more recent example is *Cumiford v Power River (District)*⁶⁰ in which the plaintiff

⁵⁹ *Kamloops*, *supra* note 24 at 27.

⁶⁰ 2001 BCSC 960 [*Cumiford*].

successfully sued the defendant building authority for failing to properly inspect the construction of a house the plaintiff eventually purchased. In assessing damages, the court held that the proper measure of damages was the repairs necessary to bring the house to “a safe and habitable level”.⁶¹ It bears noting that in both *Kamloops* and *Cumiford*, the repairs on which the damage awards were assessed had not been undertaken, and the damages were therefore awarded on a prospective basis. The plaintiffs had not actually undertaken repairs and were under no obligation to use the damages awarded to undertake them. In short, the quantification of damages remains wedded to the fallacy from *Dutton v Bognar Regis UBC*⁶² that building authority negligence is the equivalent of the physical infliction of damage to property.

8.3.4: Negligent Supply of Shoddy Goods or Structures

The primary issue under this category is whether and to what extent the eventual owner of deficient goods or structures can claim against the original manufacturer/builder of the property despite a lack of contractual privity. While *Kamloops* had dealt with the liability of a public authority, the Supreme Court of Canada’s reasoning in that case suggested the builder of a shoddy residence could be liable in negligence to a subsequent owner of the residence despite the lack of a contract.

⁶¹ *Ibid* at para 102. For similar cases, see generally *Ingles v Tutkaluk Construction*, 2000 SCC 12 [*Ingles*]; *Breen v Lake of Bays (Township)*, 2022 ONCA 626 [*Breen*]; *White v The Corporation of the Town of Bracebridge*, 2020 ONSC 3060 [*White*]; *Petruzzi v Coveny*, [1991] OJ No 1678 (Gen Div); *Goodwin v Jakubovskis*, [1995] OJ No 2338 (Gen Div).

⁶² [1972] 1 QB 373 (CA) [*Dutton*].

The Supreme Court of Canada had the opportunity to address this category in *Winnipeg Condominium Corporation No 36 v Bird Construction Co.*⁶³ The defendant in that case had constructed a high-rise condominium building which was eventually sold to the plaintiff. A decade and a half after the building was completed, there was a major failure of the exterior cladding of the building, some of which fell to the ground. No one was injured, and no external property was damaged, but the cladding required immediate, expensive repairs. The plaintiff had no contract with the builder but sued it in negligence for the cost of repair.

By the time *Winnipeg Condominium* reached the Supreme Court of Canada, the House of Lords had already decided *Murphy v Brentwood District Council*⁶⁴ and *D & F Estates Ltd v Church Commissioners for England*,⁶⁵ which had collectively rejected the fallacy from *Dutton* that would have allowed the plaintiff in *Winnipeg Condominium* to frame their claim as one for direct property damage. Writing for the majority in *Winnipeg Condominium*, La Forest J was prepared to follow the English approach, but only so far as to acknowledge that what the plaintiff was suing for was pure economic loss.⁶⁶ However, La Forest J was unwilling to adopt the Lords' broad exclusionary rule in *Murphy*. Drawing on the Supreme Court of Canada's prior decision in *Kamloops*, La Forest J held that foreseeability of harm was more important than contractual privity.⁶⁷

⁶³ [1995] 1 SCR 85 [*Winnipeg Condominium*].

⁶⁴ [1991] 1 AC 398 (HL) [*Murphy*].

⁶⁵ [1988] 2 All ER 992 (HL).

⁶⁶ *Supra* note 63 at paras 14–15.

⁶⁷ *Ibid* at para 35.

In my view, it is reasonably foreseeable to contractors that, if they design or construct a building negligently and if that building contains latent defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest themselves. A lack of contractual privity between the contractor and the inhabitants at the time the defect becomes manifest does not make the potential for injury any less foreseeable.

A duty of care in negligence could therefore be imposed, but with specific limits and only with respect to a limited class of damages:⁶⁸

[W]here a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain defects resulting from that negligence which *pose a real and substantial danger to the occupants of the building*, the reasonable cost of *repairing the defects and putting the building back into a non-dangerous state* are recoverable in tort by the occupants.

Thus the duty only extends to conditions that represented “a real and substantial danger” as opposed to those conditions that were either “merely shoddy”⁶⁹ or fell under the heading of “quality of workmanship and fitness for purpose”.⁷⁰ As with his prior reasoning in *Rothfield*, La Forest J pointed to policy considerations underlying the imposition of a duty of care for dangerous defects: the “degree of danger to persons and other property created by the negligent construction of a building is a cornerstone of the policy analysis that must take place in determining whether the cost of repair of the building is

⁶⁸ *Ibid* at para 21 [emphasis added].

⁶⁹ *Ibid* at para 12.

⁷⁰ *Ibid* at para 42.

recoverable in tort”.⁷¹ A further rationale was that since a builder could be liable in tort where a building failure manifests itself in such a way as to cause personal injury or property damage, it made sense to impose a parallel duty on the builder where the dangerous defect was discovered before it manifested itself and the owner undertook repairs to fix it.⁷²

Winnipeg Condominium adopts a policy-driven middle ground between an absolute exclusion for recovery in the negligent provision of defective property and a highly permissive recovery rule. The decision came in for both praise⁷³ and criticism,⁷⁴ but it left many unanswered questions and difficulties for courts called upon to apply its *ratio*. One significant question was how to determine whether a defect met the threshold of a “real and substantial danger”, which raised the subsidiary issues of the actual quality

⁷¹ *Ibid* at para 12. See also para 37:

Apart from the logical force of holding contractors liable for the cost of repair of dangerous defects, there is also a strong underlying policy justification for imposing liability in these cases. Under the law as developed in *D & F Estates* and *Murphy*, the plaintiff who moves quickly and responsibly to fix a defect before it causes injury to persons or damage to property must do so at his or her own expense. By contrast, the plaintiff who, either intentionally or through neglect, allows a defect to develop into an accident may benefit at law from the costly and potentially tragic consequences. In my view, this legal doctrine is difficult to justify because it serves to encourage, rather than discourage, reckless and hazardous behaviour. Maintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive for plaintiffs to mitigate potential losses and tends to encourage economically inefficient behaviour.

⁷² *Ibid* at para 36.

⁷³ See eg Carl F. Stychin, “Dangerous Liaisons: New Developments in the Law of Defective Premises” (1996) 16 *Legal Stud* 387 at 406-09, noting that *Winnipeg Condominium* “seems to have struck a credible balance” between competing doctrinal demands.

⁷⁴ Bruce Feldthusen, “*Winnipeg Condominium Corporation No. Bird Construction Co.: Who Needs Contract Anymore*” (1995) 25 *Can Bus LJ* 143. While Feldthusen generally agrees with the outcome in *Winnipeg Condominium*, he criticizes La Forest J’s reasoning with respect to behaviour modification on builders and the court’s failure to consider more fully the issue of risk allocation via contract.

or degree of the risk needed and what the level of imminence had to be attached to the risk. A further issue was the measure of damages, which *Winnipeg Condominium* had set at the costs needed to put the property “back into a non-dangerous state”.⁷⁵ But many forms of property, if found to be defective, can be put into a non-dangerous state by simply discarding it or taking measures to prevent third party contact with the property.⁷⁶ That issue was addressed in *Winnipeg Condominium*, where La Forest J addressed the argument in the specific context of a residence, and rejected the idea that the proper measure of damage will always be based on the prevention of harm as opposed to repair:⁷⁷

The weakness of the argument is that it is based upon an unrealistic view of the choice faced by home owners in deciding whether to repair a dangerous defect in their home. In fact, a choice to “discard” a home instead of repairing the dangerous defect is no choice at all: most home owners buy a home as a long term investment and few home owners, upon discovering a dangerous defect in the home, will choose to abandon or sell the building rather than to repair the defect. Indeed, in most cases, the cost of fixing a defect in a house or building, within the reasonable life of that house or building, will be far outweighed by the cost of replacing the house or buying a new one.

Winnipeg Condominium remained the authoritative statement of the law for this category of economic loss until 2020, when it was reconsidered by the Supreme Court of Canada in *Maple Leaf*.⁷⁸ The plaintiffs in that case (a class action) were the franchises of a fast-food restaurant that were supplied with

⁷⁵ *Winnipeg Condominium*, *supra* note 63 at para 42–43.

⁷⁶ A detailed discussion of these issues can be found at Brown, *supra* note 28 at 163–97.

⁷⁷ *Supra* note 63 at para 40.

⁷⁸ *Supra* note 42.

meat products ordered by its franchisor from the defendant. The defendant issued a recall of its meat products due to a listeria outbreak at its production facility. The plaintiffs, who had no privity of contract with the defendant, sued for loss of business income caused by the recall and for reputational harms allegedly resulting from the plaintiffs' association with the defendant's products.

One of the claims advanced in *Maple Leaf* was for pure economic loss resulting from the provision of dangerous products: the contaminated meat. This claim was rejected by the Supreme Court of Canada, which took the opportunity to refine and narrow the scope of *Winnipeg Condominium*. First the majority posited a new understanding of the duty of care in *Winnipeg Condominium*. While in *Winnipeg Condominium* the duty had been founded on policy considerations, in *Maple Leaf* this was shifted to a rights-based understanding. The majority began with a nod to corrective justice, holding that its review of *Winnipeg Condominium* should begin by “carefully reviewing the liability rule that it established, with attention to the nature of the legal right and correlative duty of care on which it is founded”.⁷⁹ The majority went on to note that the liability rule in *Winnipeg Condominium* “may appear curious” since it appears to respond to a future danger to the “plaintiff’s rights” as opposed to an actual interference with those rights.⁸⁰ Yet the liability rule in *Winnipeg Condominium* was not “negligence in the air”, nor was it based on a “right to be free from the prospect of damages”, neither of which is actionable in tort.⁸¹ Instead, it was understood as arising from the defendant’s infringement of the plaintiff’s right to bodily integrity.

⁷⁹ *Ibid* at para 41.

⁸⁰ *Ibid* at para 44.

⁸¹ *Ibid*.

Where defective property poses an imminent risk of serious physical injury to plaintiffs or their property, the economic loss incurred to avert the danger is “analogized to physical injury to the plaintiff’s person or property”.⁸² The result of this new emphasis on the right of plaintiffs to bodily integrity is likely to be a stricter requirement of immediacy and severity of the dangerous defect before it is actionable in negligence.

The second significant aspect of the majority’s decision in *Maple Leaf* was in how the damages in a defect property case were to be assessed. Whereas *La Forest J* had been hesitant to follow the reasoning of the House of Lords in *Murphy*, the majority in *Maple Leaf* accepted Lord Kieth of Kinkel’s statement that:⁸³

[I]t is difficult to draw a distinction in principle between an article which is useless or valueless and one which suffers from a defect which would render it dangerous in use but which is discovered by the purchaser in time to avert any possibility of injury. The purchaser may incur expense in putting right the defect, or, more probably, discard the article.

In *Maple Leaf*, the proper measure of damages was not to “preserve the plaintiff’s continued use of a product” but rather the “averting a real and substantial danger of personal injury or damage to other property”.⁸⁴ For the plaintiffs in *Maple Leaf*, they were able to avert any danger by simply discarding the tainted meat, and therefore had no claim under *Winnipeg Condominium*.⁸⁵ Emphasizing further their rights-based approach, the

⁸² *Ibid* at para 45.

⁸³ *Ibid* at para 50, citing *Murphy*, *supra* note 64 at 465.

⁸⁴ *Ibid* at para 49.

⁸⁵ *Ibid* at para 50

majority noted that “If the danger can be removed without repair, the right is no less vindicated.”⁸⁶

In *obiter*, the majority addressed La Forest’s comments about the scenario of a private residence with dangerous defects. The majority agreed that “few homeowners or owners of other kinds of building structures can reasonably remove the real and substantial danger posed by a defect by walking away from the building structure”,⁸⁷ but it was also clear that this was not a universal rule for residential property. Instead, this was a practical observation because “most homeowners” when faced with dangerously defective homes, will usually be “shown to be effectively bereft of reasonable options” other than effecting repairs.⁸⁸ The implication is that where a property owner has reasonable alternatives to undertaking repairs, the disposal measure of damages may apply.

Finally, the majority reiterated that any damages awarded had to be limited to the dangerous defect in issue:⁸⁹

It must be remembered that, because the right protected by this liability rule is that in the physical integrity of person or property, recovery is confined to the cost of removing a real and substantial danger *to that right* – by, where possible, discarding it. Conversely, it does not extend to the diminution or loss of *other interests* that the appellant invokes here, such as business goodwill, business reputation, sales, profits, capital value or replacement of [the meat].

⁸⁶ *Ibid* at para 54.

⁸⁷ *Ibid* at para 51.

⁸⁸ *Ibid* at para 53.

⁸⁹ *Ibid* at para 55 [emphasis in original].

Winnipeg Condominium, as reinterpreted in *Maple Leaf*, would, to the uninitiated, appear directly applicable to building authority liability claims. Such claims also involve non-contractual claims for pure economic loss brought by a person who ends up in possession of property with some form of deficiency. Also, it would seem intuitive that if the actual builder of the property can only be liable in negligence for the cost of repairing a limited set of defects, then the building authority, whose role is secondary to that of the builder, can bear no greater liability.

Surprisingly though, *Winnipeg Condominium* has had virtually no limiting effect on building authority liability or the damages recoverable. While there are many cases where building authorities have been found liable for defects that could be termed dangerous,⁹⁰ many other cases have allowed recovery for property features that cannot possibly fit under the heading of a real and substantial danger of personal injury or damage to other property. In *Reid v North Vancouver (District)*, the court held that the building authority's negligent failure to notice adverse soil conditions made it liable to pay damages for, amongst other things, the cost of repairing the plaintiff's inground pool.⁹¹ In *Petruzzi v Coveny*, the court awarded damages for such things as vinyl flooring, cabinetry, countertops, and a fireplace.⁹² In *Tokarz v Selwyn (Township)*, the Court of Appeal for Ontario upheld a finding that a negligent building authority's liability was extended to paying for repairs to a solar panel array on the plaintiff's barn.⁹³

⁹⁰ There are, for example, several cases where the building authority was liable for foundations or key structural elements of a residence: *Kamloops*, *supra* note 2426; *Ingles*, *supra* note 61.

⁹¹ [1993] BCJ No 3134 (SC) [*Reid*].

⁹² [1991] OJ No 1678 (Gen Div).

⁹³ 2022 ONCA 246 [*Tokarz*].

Courts also routinely award damages that go beyond the repair of defects and instead compensate a wider scope of interests that the Supreme Court of Canada in *Maple Leaf* has specifically held were non-recoverable. In chapter 5 there was a detailed review of *Riverside Developments Bobcaygeon Ltd v Bobcaygeon (Village)*,⁹⁴ where defects with repair costs of \$1,600,000 ballooned into a judgment of over \$14,000,000 against the building authority to cover a wide variety of financial losses. Another inexplicable trend in building authority liability cases is the awarding of non-pecuniary damages for pain and suffering to disappointed owners, despite the lack of any infliction of physical injury on them by building authorities.⁹⁵ In the 2020 decision in *White*, the plaintiff was awarded \$5,000 in non-pecuniary damages for pain and suffering on the basis that the plaintiff had “a serious and prolonged mental disturbance above ordinary emotional upset and stress” resulting from having to live in an unfinished home for several years.⁹⁶

Finally, cases after *Maple Leaf* demonstrate that the Supreme Court of Canada’s comments about the quantification of damages in claims for economic loss arising from defective buildings is not being applied. The key case here is *Breen*, discussed at length in chapter 7. In that case, the plaintiffs purchased the subject property as a vacation property, not a

⁹⁴ (2004), 45 MPLR (3d) (Ont SCJ), aff’d [2005] OJ No 3326 (CA) [*Riverside*].

⁹⁵ See eg *Wood v Hungerford (Township)* (2006), 3 MPLR (4th) 38 (Ont SCJ), var’d (2006), 24 MPLR (4th) 45 (Ont CA) [*Wood*]; *Faucher v Friesen*, [1985] BCJ No 650 (SC) [*Faucher*].

⁹⁶ *Supra* note 61 at paras 232–42. In fairness, some courts have rejected claims for non-pecuniary damages in building authority liability cases: see *Selkirk and District Planning Area Board v Faires*, 2006 MBQB 300 at para 80:

I was directed to no other authority supporting the proposition that a municipality may be found liable to compensate an individual for the “frustration and worry” of dealing with it or any other authority which has recognized these heads of damage. I am therefore not satisfied that there is a legal basis for such an award of damages in these circumstances.”

primary residence. Upon discovering the defects in the property, the plaintiffs simply stopped using it.⁹⁷ In the words of the majority in *Maple Leaf*, the plaintiffs were not “bereft of reasonable options” – they were not forced to live in the cottage to carry on a normal life. They had removed their property from the cottage, and presumably an end of their occupancy would remove any threat to their rights to bodily integrity. However, they were still entitled to damages to repair the defects.⁹⁸

8.4: A Corrective Justice Account of Damage and Causation

There are two aspects of corrective justice to be reviewed at this point. First, there is the general understanding of the causation of damage in corrective justice.⁹⁹ Second, there is specific understanding of damage in the context of claims arising from an assumption of responsibility.

8.4.1: Damage, Gain, and Loss in Corrective Justice

Allan Beever has persuasively argued that much of the historical dilemma raised by pure economic loss, particularly the concern over indeterminate

⁹⁷ As noted in reasons of the trial court, 2021 ONSC 533 at para 20, “The plaintiffs stopped occupying the Cottage in 2013. They removed the contents of the Cottage and turned off the heat and drained the water from the plumbing in 2014”.

⁹⁸ The damage award in *Breen* included \$15,000 in non-pecuniary damages for “emotional and mental distress”. Principled jurists may draw some comfort from the fact that the trial court in *Breen* rejected the plaintiffs’ damages claim for new cabinetry.

⁹⁹ Causation, as a requirement of the tort of negligence, and its doctrinal expression in the “but for” test pose no problems for corrective justice, since causation of the plaintiff’s injury by the defendant’s wrongdoing is an essential part of corrective justice. See generally Ernest J Weinrib, “Causation and Wrongdoing” (1987) 63 Chicago-Kent L Rev 407 at 414:

Tort litigation operates through and upon the relationship of plaintiff and defendant. Causation is the element in this relationship that functions to particularize the former as the victim of the latter’s wrongdoing. The bilateral nature of tort litigation requires our asking not only “Why can this plaintiff recover from *this* defendant?” but also “Why can *this* plaintiff recover from *this* defendant?” [emphasis in original]

liability, have resulted from an overemphasis on the remedy being considered over the antecedent rights that would ground a remedy. The proper approach to pure economic loss cases, Beever argues, is to initially ask whether the plaintiff has a primary right that has been violated by the defendant's conduct. This is not the same as asking whether the plaintiff sustained a loss. And the inquiry into the existence of a primary right also informs what the possible forms of damage are that may be recoverable, since an award of damages is one of the means by which the law vindicates an infringement of the right.¹⁰⁰ As an aside, understanding damage as an infringement of a right goes some way to resolving the definitional ambiguities around the concept of damage, discussed above.¹⁰¹

Corrective justice understands tort liability as arising from a correlative relationship between the plaintiff and defendant. This correlativity encompasses not only the rights and duties owed, it also encompasses the remedy awarded to undo the wrong:¹⁰²

From the standpoint of corrective justice, the two parties are equals, and justice consists in vindicating their equality. The doer's unjust treatment of the sufferer disturbs this equality, leaving the doer with a gain and the sufferer with an equivalent loss. To reestablish the initial equality, corrective justice requires the doer to repair the loss by returning the gain to the sufferer. Thus, a single operation eliminates both gain and loss.

¹⁰⁰ Beever, *supra* note 23 at 232–39.

¹⁰¹ See generally Nolan, “Damages in the English Law of Negligence”, *supra* note 8 at 267-69, for an overview and critical commentary.

¹⁰² Ernest J. Weinrib, “The Gains and Losses of Corrective Justice” (1994) 44 Duke LJ 277 at 280.

The use of monetary damages is accepted by corrective justice as the primary means by which wrongs are rectified. Damages “translate the doing and suffering of wrong into quantitative terms”.¹⁰³

So what constitutes the “gain” the doer (the defendant) must return to the sufferer (the plaintiff)? Weinrib identifies two types of gains and losses. First, there are “material” gains and loss, which are “variants from each litigant's antecedent resources”. Second, there are “normative” gains and losses, which are the “discrepancies between what the parties have and what they should have according to the norm governing their interaction.”¹⁰⁴

Private law is only concerned with normative gains and losses. Indeed, it is not possible to construct a private law based solely on the material gains and losses of individual persons. Material resources are not equally distributed throughout society, and absent some normative framework that identifies who is entitled to what, we are unable to identify whether any person has experienced a material loss or gain that can be attributed to another person.¹⁰⁵ Also, we impose liability for wrongful conduct that does not result in material gain to the wrongdoer,¹⁰⁶ and we do not excuse a wrongdoer from responsibility because their action results in a net material gain to the victim.¹⁰⁷

¹⁰³ *Ibid* at 288.

¹⁰⁴ *Ibid* at 282–83.

¹⁰⁵ *Ibid* at 282–86.

¹⁰⁶ *Ibid* at 286.

¹⁰⁷ The famous example was given in Ernest J. Weinrib, “Right and Advantage in Private Law” (1989) 10 *Cardozo L Rev* 1283 at 1283:

Suppose that as Smith is travelling to the airport to catch a plane, she is negligently injured by Jones's careless driving. The incident causes Smith to miss her plane. In the course of its flight to Smith's desired destination, however, the plane crashes, killing everyone on board. It is as certain as

Two key implications flow from this normative understanding of gain and loss. First, the mere experience by a plaintiff of a negative change in their circumstances does not mean that they have suffered a wrong. There is no right to not suffer damage.¹⁰⁸ Second, in order for any damages to be recoverable, they have to be located within an infringed right: “[T]he fact that one person’s actions have made another worse off can never in itself be basis for restoring the *status quo ante*. The injury must be fitted into the normative structure of right and correlative duty”.¹⁰⁹

8.4.2: Corrective Justice, Damage, and Building Authorities

In 1993, a judge of the British Columbia Supreme Court, in granting judgment against a building authority, offered the following comment on the meaning of “pure economic loss” in Canadian law, at least as it applied to building authorities:¹¹⁰

At this moment and in this country, however, two things seem clear. First, that it involves loss suffered without precipitating physical injury to persons or things and, secondly, that

anything can be that Smith too would have died in the crash, had she not been injured by Jones. Can she recover in tort for the injuries Jones inflicted on her?

The paradox of this situation is that Smith has benefited from Jones's tortious conduct. Although Jones did not so intend it, his negligence has resulted in a net gain to Smith. Had it not been for Jones's negligence Smith would have reached the plane on time with limbs intact, only to die shortly thereafter. It would seem that Smith has no basis for complaint, since she owes her life to Jones's carelessness. Yet Jones has violated her rights

¹⁰⁸ Robert Stevens, “Rights and Other Things” in D Nolan and A Robertson, eds, *Rights and Private Law* (Oxford: Oxford University Press, 2012) 115 at 119: “D commits a civil wrong in relation to C whenever he breaches a duty to C not to do x. It is consequently meaningless to talk of a right not to be caused loss. If loss is suffered, it is a consequence of a breach of a duty, it cannot go to the definition of what D is under a duty to do or not to do”.

¹⁰⁹ Weinrib, *supra* note 35 at 132.

¹¹⁰ Reid, *supra* note 91 at para 52.

Municipal building inspectors are able to bring it into existence by not doing their job properly.

Three decades of jurisprudence has added minimal clarity. The distinction between tort and contract measures of damages has been blurred or disregarded and the development of the law of pure economic loss has resulted in increasing incoherence in how the law treats private and public defendants for what are essentially the same wrongs and losses.

The solution is twofold. First, we should disregard the idea that there is a distinct category of pure economic loss recoverable against public authorities which rests on a different basis than claims against private persons. Such an idea is offensive to a Diceyan understanding of private law, which is still (technically) the stated orthodoxy in Canadian law.¹¹¹ Second, a corrective justice understanding of causation and damages should be embraced, a step which is facilitated by the corrective justice-inspired legal doctrine laid down in *Livent* and *Maple Leaf*.

Of the remaining categories recognized post-*Maple Leaf*, there is no principled basis nor need to try to shoehorn claims against building authorities into the category of negligent supply of defective property. Beaver is of assistance here. The problem with the imposition of liability on building authorities in favour of plaintiffs who acquired defective buildings (as was done in English law between *Anns* and *Murphy* in English law, and as allowed after *Kamloops* in Canadian law) is that there was no identifiable right a plaintiff could hold justifying the recovery of damages. If a plaintiff purchases property with pre-existing defects, the only recognizable right the plaintiff has is the right of ownership in the property, regardless of its defective condition. Under the *Anns* or *Kamloops* approach, liability could

¹¹¹ *Nelson (City) v Marchi*, 2021 SCC 41 at para 41.

only be explained by the assumption that the plaintiff had a right not just to the property, but to that property retaining a particular value or marketability. The latter right does not exist in any branch of private law.¹¹²

The proper place for building authority liability is under the category of negligent performance of an undertaking or assumed responsibility. Chapter 6 already discussed how a duty of care arises under this category via an assumption of responsibility. The issue here is how damages and causation are understood under an assumption of responsibility.

It is easy task to outline a corrective justice basis for understanding causation and damages in building authority liability cases since Canadian law post-*Livent* has moved towards a corrective justice, rights-based understanding of the law in this area. Both *Livent* and *Maple Leaf* emphasized the primacy of the plaintiff's rights, both in establishing the defendant's duty of care and setting the scope of the remedies the plaintiff could be entitled to for its breach. The majority in *Maple Leaf* specifically drew upon Weinrib's corrective justice scholarship on these points:¹¹³

[B]y making the representation the defendant has offered the plaintiff information that purports to be reliable for the purpose of a particular kind of transaction, and that the plaintiff, by detrimentally acting on this information, has accepted it as reliable for the purpose for which it was offered. Therefore, to the extent of the plaintiff's detrimental reliance, tort law views the plaintiff's pre-existing economic situation as an entitlement that runs against the defendant. The basis of the entitlement - the invitation to rely for a particular (kind of) purpose - also defines the scope of the duty correlative to it. Accordingly, detrimental reliance that falls outside the purpose for which the representation was made does not lead

¹¹² Beever, *supra* note 23 at 250–51.

¹¹³ Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 54–55.

to liability even if the reliance that the representation in fact occasions is reasonably foreseeable.

This is merely another way of explaining the basis for reliance damages (as opposed to expectation damages) that are the proper measure of damages in tort.

8.5: The Corrective Justice Account of Damages and Causation Applied

We have now reviewed the corrective justice account of causation and damages in building authority liability. Causation occurs at the point in time that the plaintiff shifts their conduct in reliance on the defendant's undertaking. The proper measure of damages is the plaintiff's reliance damages, namely the damages required to return the plaintiff to their pre-reliance circumstances. Finally, not all negative consequences the plaintiff may have experienced are recoverable as damages. Rather, only those damages that are properly within the scope of the defendant's undertaking are recoverable.

So what outcomes would this new framework produce when compared to existing Canadian cases on building authority liability? The following section provides a selected survey of reported Canadian building authority liability cases, particularly the approach to damages taken within them. They serve as examples that both align and do not align with a corrective justice account of causation and damages.

This survey is based on a threefold division of building authority liability cases. The division is based on what interest the plaintiff has in the subject

property¹¹⁴ at the point in time that the building authority's negligent breach of its undertaking causes the plaintiff's reliance-induced change in behaviour. Thus, the timing of when the defects occurred is actually secondary to the questions of causation or damages. These three types of cases are:

- Future Interest Cases: In these cases, at the point of causation the plaintiff has no current interest in the subject property, but subsequently acquires one as a result of the causal event. The most common fact pattern in these cases is where a plaintiff purchases a property with pre-existing deficiencies and then sues the building authority.
- Present Interest Cases: These cases involve plaintiffs who at the point of causation already have a pre-existing interest in the subject property. The key fact in these cases is the defects that will eventually be complained of will actually be pre-existing in property in which the plaintiff has an interest prior to the point of causation. Since building authorities do not carry out construction – someone else does – they are not the party that physically creates the defects. As such any defects in a given property will always be antecedent to the existence of any duty of care by a building authority. The most common fact pattern here is a plaintiff who undertakes renovation or new construction on a property they already own.
- No Interest Cases: Plaintiffs in these cases never have an interest in the property, and would only be owed a duty of care in limited circumstances.

¹¹⁴ This could also be described as whether the plaintiff had a “right” in the subject property, but to avoid confusion the term “interest” will be used.

These categories are not hermetically sealed off from each other, and it is possible for a given case to fall into more than one category. However, they do effectively cover most reported building authority liability cases.

8.5.1: Future Interest Cases

Many of the cases cited in this dissertation have a consistent fact pattern. A house is constructed by a third party, inspected by a building authority, and eventually changes ownership until it is acquired by the plaintiff, who discovers defects within the house and sues the building authority.¹¹⁵ Under the current law of building authority liability, the duty of care, breach, and causation, would all have been determined when the building authority inspected the construction, long before the plaintiff entered the picture. Under a corrective justice understanding of building authority liability, in contrast, the actionable duty of care would have had to arise from some assumption of responsibility by the building authority to the plaintiff prior to the point in time that the plaintiff acquires an interest in the house, and the breach of that duty causes damage to the plaintiff when the plaintiff detrimentally relies on the undertaking to shift their behaviour. The pre-reliance position, and the hypothetical non-reliance trajectory, become the baseline for the assessment of the plaintiff's damages.

Reported future interest cases are inconsistent in their alignment with a corrective justice account when it comes to assessment of causation and damages.¹¹⁶ *Breen* provides a usable set of details. In *Breen*, the plaintiffs

¹¹⁵ See eg *Kamloops*, *supra* note 24, *Wood*, *supra* note 95; *Faucher*, *supra* note 95; *Cumiford*, *supra* note 60; *Dutton*, *supra* note 62. See also *Theriault v Lanthier*, 2010 ONSC 655; *Petrie v Groome*, [1991] BCJ No 776 (SC) [*Petrie*].

¹¹⁶ The following discussion of reported cases are focused on their assessment of damages. The absence of discussion of duty, breach, and the timing of causation in these cases should not be taken as an endorsement of the treatment of those questions in these cases.

purchased the cottage in 1999 for approximately \$700,000. The eventual damage award for repairs was approximately \$300,000, assessed as of 2021. If we assume that there was an assumption of responsibility by the building authority to the plaintiffs at the time of purchase regarding the quality of the cottage, the proper remedy is an award of reliance damages that would put the plaintiffs back in their pre-reliance situation. As discussed above, there are generally two possible outcomes in reliance-induced transactions: the plaintiff would have entered the transaction on different terms to account for the proper information or would have avoided the transaction entirely. The decision between them is factual, based on the circumstances of each individual case.

The first scenario will often be straightforward. Just as in *BG Checo*, it can be readily inferred that the plaintiff would have adjusted the contract to account for the unanticipated costs. Applied to the facts in *Breen*, the plaintiffs would have presumably lowered their purchase price to fully cover the costs of repairs, which would result in the same award of damages (\$300,000). Yet while the dollar value of the damages in this outcome may be the same, the importance lies in the different way it was reached. In the actual decision in *Breen*, the award was expectation damages, giving the plaintiffs what they thought they had purchased: a cottage free of defects. What they should have been given is an award of damages to put them into the position they would have been but for the building authority's (assumed) wrong. There is nothing wrong in principle with a plaintiff receiving a properly assessed award of reliance damages that happens to achieve the same result or be the same monetary value as damages that would have been reached on an expectation measure. The assessment of damages in negligence is not based on fixed formulae or quanta – damages are an objective assessment of what monetary value is required to return the particular plaintiff to their pre-loss condition without under compensation or

a windfall.¹¹⁷ And the circumstances of some cases may dictate the repair costs are the only reasonable means to get the plaintiff back to their pre-loss circumstances.

Such was the case in *Petrie*.¹¹⁸ In that case, the plaintiffs were the fourth successive purchaser of house that had been improperly built on unstable soil. When problems began to manifest themselves, the plaintiffs began undertaking repairs at their own expense. In the course of the repairs, the full extent of the soil problem was discovered. When the case against the building authority went to trial, the plaintiffs had paid half of the \$130,000 needed to fully repair the house. The trial court accepted that the plaintiffs were “caught between a rock and a hard place, since any thoughts of possible sale and relocation must await the remaining repairs” and that the “repair costs are threatening the plaintiffs with financial ruin.”¹¹⁹ On these facts, the calculation of reliance damages as the cost of repairs was appropriate. A reliance measure based on undoing the plaintiffs purchase of the home entirely was not realistically possible, since the plaintiffs retained ownership of the subject home and were limited in their ability to sell it.

The situation was different in *Wood*.¹²⁰ The subject house had been built in 1978, at which time it was inspected and negligently approved by the defendant building authority. The plaintiff purchased the house in 1996. Shortly after moving in, the house experienced a foundation failure and was declared uninhabitable. The plaintiff defaulted on the mortgage and the

¹¹⁷ *Krangle (Guardian ad litem of) v Brisco*, 2002 SCC 9 at para 22.

¹¹⁸ *Supra* note 115.

¹¹⁹ *Ibid* at paras 1,4.

¹²⁰ *Supra* note 95.

property was sold pursuant to a power of sale. In calculating damages, the trial court accepted that the costs to repair the house would exceed the costs of demolishing and fully rebuilding it. However, the trial court rejected the plaintiff's claim that she should be awarded "the cost of purchasing a lot and constructing a similar house" as this would "not be justified on a restitutionary analysis and would leave the plaintiff in a better position than she would have been in, had the house been free of latent structural problems".¹²¹ Instead, the proper measure of the plaintiff's damages was undoing her purchase of the house. This was calculated as the purchase price of the house, less the value of the property.¹²² The plaintiff was also awarded damages to cover her relocation expenses and temporary accommodations.¹²³

The reliance damage assessment in *Wood* corresponds to a corrective justice account of damages,¹²⁴ and its analysis draws us back to the damages question in *Breen*. Recall that in *Breen*, the plaintiffs had been using the cottage as a vacation property and had ceased occupying it after discovering the defects. Neither the trial nor the appeal decision in *Breen* make any comment about the plaintiff's intentions regarding repair or re-occupancy of the home. There was certainly no suggestion that the plaintiffs in *Breen* were in an analogous situation to those in *Petrie*, who were practically forced to continue occupying their defective property. If, as may have been readily

¹²¹ *Ibid* at para 59.

¹²² *Ibid* at para 60. Since the house was condemned and would need to be demolished prior to anything else being done with the property, the value of the property was calculated by taking the market value of the property as a vacant lot, and then adjusting downwards to account for the costs of demolition.

¹²³ *Ibid* at para 62.

¹²⁴ There was an award of non-pecuniary damages in *Wood*, which, of course, cannot be justified on a corrective justice account unless the undertaking sued on included some form of assurance or guarantee of the plaintiff's emotional or psychological well-being.

inferred, the plaintiffs in *Breen* could not be said to have been compelled to continue to occupy the cottage, then the calculation of damages should be more in line with the method used in *Wood*. The damages would be a refund of the purchase value of the cottage, less the residual value in the cottage, plus the transaction costs incurred.

It is at this point that reliance and expectation measures of damages start to produce divergent outcomes. In *Breen*, the only way that damages based on avoiding the contract could be certain to be assessed at the same value as the cost to repair the defects is if the purchase of the cottage and the assessment of the plaintiffs' damages occurred simultaneously.¹²⁵ But this is not what happened in *Breen* – it is exceedingly unlikely that it would ever occur in a real-world situation. The plaintiffs in *Breen* had owned and used their property for upwards of 14 years, during which time the residual value of the cottage and its property would have shifted. And it would be the residual value of the cottage that would control the calculation of damages, not the value of repairing its defects. It is, of course, entirely possible that the value of the cottage would have gone down over the years, with a commensurate increase in the monetary value of a reliance damage award. But the residual value could have just as easily gone up, reducing the reliance damage award,

¹²⁵ If the cottage free of defects would sell for \$700,000 on the open market at a single point in time, it will presumably sell at the same point in time for \$400,000 if it is known that \$300,000 worth of repairs are required.

feasibly to *de minimus*.¹²⁶ This analysis was not done, though, as the courts in *Breen* simply defaulted to an improper expectation measure of damages.¹²⁷

While the above cases illustrate the determination of damages in future interest cases, two further future interest cases can be reviewed that deal more specifically with causation. The first is *Biskey v Chatham-Kent (Municipality)*.¹²⁸ The plaintiffs had purchased a vacant plot of land with the intention of building their “dream home”. They had purchased the property from a third party, who had originally purchased it from the local municipality (which was also the building authority). The plaintiffs applied to the defendant building authority for a permit to construct their planned home. Before getting the building permit, the plaintiffs received information from both their contractor and the building authority that the property had previously been used as a dump during the building authority’s ownership.

¹²⁶ Courts have held that when a plaintiff enters into a transaction for property, based on the defendant’s detrimental reliance, but ends up paying less for the property than its actual market value, whether because the plaintiff purchased it for less than market value or because the market value increased between the purchase and trial, no damages are recoverable regardless of negligence: *Morton v Spearn*, 2009 CanLII 9387 at paras 24-25 (Ont SCJ); *San-Co Holdings Ltd v Kerr*, 2009 BCSC 1747 at paras 44-45.

¹²⁷ It is important to reemphasize that assessments of damages is both objective and individualized to the facts of the particular case. In *Wood*, *supra* note 95, the trial court had assessed the plaintiff’s damages based on the plaintiff’s purchase price (\$89,900) which was reduced by the residual value of the land (\$8,475, being the value of property as a vacant lot, \$25,350, minus the cost of demolishing the house, \$16,875) for a total award of \$81,425. But the property had actually been sold prior to the trial, when the plaintiff defaulted on her mortgage, for \$47,000. The trial court refused to accept that sum as probative, since “There was no evidence before the Court as to how the property was marketed, what level of disclosure of the structural problems was made to the purchaser or any other relevant information” (at para 61 (SJC)). On appeal to the Court of Appeal for Ontario, the award of damages at trial was varied to reflect the value obtained on the power of sale proceeding, on the basis that the trial judge inappropriately disregarded that amount. The proper award of damages was the plaintiff’s purchase price of the house (\$89,900) less the adjusted real value of the house (\$40,000, based on the \$47,000 obtained on the power of sale in 2004 being adjusted to 1996, the year the plaintiff purchased the house).

¹²⁸ 2012 ONCA 802, rev’g 2011 ONSC 413 [*Biskey*].

The result was that the plaintiffs' planned home would both cost more to build, and would be worth less due to the stigma attached to the property because of its prior use. Before commencing construction, the plaintiffs sued the building authority for the increased costs the plaintiffs would incur to build their home and for the diminution in value of the eventual home due to its prior use.

The plaintiffs in *Biskey* succeeded at first instance, with the trial court holding that the building authority had negligently misled the plaintiffs as to the condition of the property prior to their purchase.¹²⁹ The trial court awarded damages on an expectation measure: the extra costs the plaintiffs would incur in building their planned home, the costs of remediating the environmental condition of the property, and the loss in expected value of the finished home due to the stigma associated with the property.

The trial decision in *Biskey* was overturned on appeal. The Court of Appeal held that once the plaintiffs were aware of the alleged wrong of the municipality (the failure to disclose the prior use of the land) any subsequent cost the plaintiffs incurred in going forward with their plans could not be caused by the municipality. This was framed (properly) as a matter of causation:¹³⁰

When [the plaintiffs] proceed with construction in the knowledge that they were building on a dump site and that they would incur added costs, any causal link with the alleged

¹²⁹ The trial court in *Biskey* framed the defendant's duty of care as being that of a building authority from *Ingles* (*ibid* at paras 9–10 (SCJ)). On appeal, the Court of Appeal (*ibid* at para 11 (CA)) noted that "The precise basis upon which the trial judge found a duty of care is unclear to us. It appears to rest, in part, on the proposition that in its capacity as owner and vendor, Chatham-Kent owed a duty to the Biskys as subsequent purchasers and in part upon Chatham-Kent's responsibilities in relation to building permits."

¹³⁰ *Ibid* at para 19.

negligence of [the building authority] was broken. Simply put, from that point forward, the [plaintiffs] were on their own. They had no legally enforceable right to require [the building authority] to reimburse them for the risk they decided to run in constructing a home on the site they knew to be contaminated on account of its former use as a dump.

The only damages the plaintiffs could recover, on the facts found at trial, was the diminution in value of the property in its vacant, pre-construction state, accounting for the discovery of the prior use as a dump.¹³¹ The Court of Appeal went on to note that: “We fail to see how the negligence of [the building authority], as found by the trial judge, could possibly give rise to the equivalent of a *promise or contract-like duty* to provide the [the plaintiffs] with the full cost and value of their dream home on this site as if it had never been used as a dump”.¹³² Without expressly saying so, the Court of Appeal endorsed the idea that building authority liability can only arise when there is some form of reliance by a plaintiff, and that the proper measure of damages was reliance damages. The outcome in *Biskey* is entirely consistent with a corrective justice conception of building authority liability.

A somewhat different case is *Grewal v Saanich (Regional District)*.¹³³ In that case, the defendant building authority had issued a building permit to the plaintiff to build a new house on land which the building authority was held to have known had soil instability issues that would render the construction of the plaintiff’s house impossible unless there were additional foundation measures taken. Unlike the plaintiffs in *Biskey*, the plaintiffs in *Grewal* built

¹³¹ *Ibid*, which amounted to a recovery of no damages since the plaintiffs had received an offer from the vendor to refund the full purchase price.

¹³² *Ibid* at para 21 [emphasis added].

¹³³ [1989] BCJ No 1383 (CA) [*Grewal*].

their home and occupied it for a time before discovering the soil instability issues when their home experienced foundation damage. The plaintiffs succeeded in their claims, and were awarded damages for the costs of the current and future repairs that would be required to maintain their house's stability.¹³⁴ As in *Petrie*, such an award is not inconsistent with a reliance measure of damages. Having built and occupied their home, which was only later found to need additional work to be usable, the plaintiffs could legitimately be seen to be burdened with the costs of the repairs as a direct result of their reliance. However, the plaintiffs in *Grewal* were also awarded further damages to account for the diminution in value of their home, on the reasoning that their home (even after repairs) would be worth less due to the stigma associated with the soil instability. This was an inappropriate award of expectation damages: the plaintiffs had never owned a home built on stable soil and had no right to a home with a particular value. Such damages could only be based on what was rejected in *Biskey* as being a "promise or contract-like duty to provide the [the plaintiffs] with the full cost and value"¹³⁵ of the home the plaintiffs hoped to have.

8.5.2: Present Interest Cases

The major difference between future and present interest cases is the plaintiffs in the latter cases will normally have suffered *physical* damage to their property (usually inflicted by a third party) prior to the point where any *reliance* damage could be caused by a building authority. Sometimes, as will be discussed, the duty of care does not even exist at the time that physical damage occurs.

¹³⁴ *Ibid* at para 37.

¹³⁵ *Biskey*, *supra* note 128 at para 21.

Let us return to *Ingles*.¹³⁶ Recall that the plaintiffs started basement renovations at their home which required the construction of new underpinnings beneath the basement. The plaintiffs began work without obtaining a building permit, and by the time a building permit was obtained and a building inspector attended, the defective underpinnings had already been built and covered up. The supposed negligence of the building authority was the failure to properly inspect and determine that the underpinnings had been improperly built. But by the time the inspector arrived, the plaintiffs' pre-existing situation that ran as an entitlement against the defendant (to paraphrase Weinrib),¹³⁷ was a partially renovated house with improperly-built underpinnings. Had the inspector done the job he was held negligent for not doing, the defective underpinnings would still be there. They would simply have been identified earlier, and still require repairs, which would have to be paid for by the plaintiffs or their contractor. Now it is conceivable that by approving the underpinnings and allowing work to continue, the plaintiffs would have incurred new reliance damages, perhaps in the form of wasted work that would need to be redone after the underpinnings were repaired, but there was no suggestion that such damages had been inflicted. Across three levels of court in *Ingles* the plaintiffs' damages were simply treated as the cost to repair the underpinnings that the plaintiffs would have been stuck with regardless of how negligent the building authority was.¹³⁸ In this, *Ingles* is a further instance of the fallacy from *Dutton* leading to incoherent outcomes.

¹³⁶ *Supra* note 61

¹³⁷ Weinrib, *supra* note 113 at 54–55.

¹³⁸ The only real discussion of damages was at the trial level: *Ingles v Tutkaluk*, [1994] OJ No 1714 at para 58 (Gen Div), where the damages were described as the “amount paid by the Plaintiff for repair work.”

A similarly problematic outcome occurred in *Schmidt v DeJong Brothers*.¹³⁹ In that case, the plaintiff retained a contractor to build a new manure tank at his farm. The contractor proceeded to apply for and obtain a building permit from the local building authority. A building permit was issued and the contractor proceeded to build the manure tank. The only inspection conducted was a final inspection when the tank was substantially finished. It turned out that tank was poorly constructed, and rapidly began experiencing problems and would have a far shorter working lifespan than that for which the plaintiff had contracted. The court held the contractor and building authority jointly and severally liable for the plaintiff's damages, which were based on two-thirds of the value of a replacement tank.

The court in *Schmidt* found that there were two occasions when the building authority was negligent. The first was negligence in issuing a building permit to the contractor without requiring or reviewing detailed plans for the tank. The second was negligence in conducting the final inspection.¹⁴⁰ Upon closer review, neither act of negligence can properly be said to have caused damage to the plaintiff. Even if the building permit was issued in a manner that fell below regulatory requirements, the act of issuing the permit could only have caused damage if it constituted an undertaking or a representation that what the plaintiff was seeking to construct could actually be built, when in fact the proposed work was legally impermissible¹⁴¹ or could not be physically constructed (or would have to be built in a significantly different

¹³⁹ [1996] OJ No 2308 (Gen Div) [*Schmidt*].

¹⁴⁰ *Ibid* at para 39.

¹⁴¹ See eg *Northrup, Graham and Graham Realty Ltd v City of Fredericton* (1979), 27 NBR (2d) 373 (QB), where a building authority was held liable for negligently issuing a building permit for an apartment development on land that was not properly zoned for it. The plaintiff in that case was entitled to recovery of the costs thrown away on construction and the cost to restore the site for purposes of re-sale.

manner that what was being proposed).¹⁴² But neither situation existed: there was no suggestion that the proposed manure tank could not be built properly, nor that it was prohibited by building regulations. When the permit was issued, no work had been done on the tank, let alone any negligent work, nor could it be said that negligent work was certain to follow on the issuance of the permit. Even if the issuance of the permit could be labelled “negligent”, it did not induce detrimental reliance on the part of the plaintiff and did not cause any damage.¹⁴³

The second occasion of negligence in *Schmidt*, the failure to conduct a proper final inspection, runs into the same problem discussed with *Ingles*. A proper final inspection in *Schmidt* would have allegedly identified the deficiencies in the tank, leaving the plaintiff in the exact same situation it found itself in with a negligent final inspection. The plaintiff would have still had the exact same manure tank, in the same substandard condition with a shortened lifespan.

Schmidt is emblematic of the trend in Canadian building authority liability to treat the building inspection regime as a kind of warranty or insurance policy for the quality of work. This can be further seen in the court’s use of

¹⁴² This the type of scenario considered in *Grewal*, *supra* note 133 and *Biskey*, *supra* note 128.

¹⁴³ See generally *Harris v Hartwell*, [1992] BCJ No 2194 at para 16 (SC):

In my view, the plaintiffs clearly were owed a duty of care by this defendant to exercise reasonable care in ensuring that the plaintiffs’ planned construction complied with the by-laws and regulations that the defendant had enacted and undertaken to enforce through its Building Department. *This duty was not abrogated by the concurrent duty upon the plaintiffs to comply with the building by-law which they are, of course, also deemed to be aware of.* [emphasis added]

an expectation measure of damages, which was designed to award the plaintiff the expected benefit of his contract with the contractor.¹⁴⁴

Present interest cases are most likely to have different outcomes under the corrective justice-based cause of action posited by this dissertation. In many of these cases, with *Ingles* and *Schmidt* being prime examples, the plaintiffs will have often not suffered any compensable damages regardless of negligence on the part of the building authority.

8.5.3: No Interest Cases

No interest cases include situations like those found in *Mortimer v Cameron*,¹⁴⁵ where the plaintiff was a visitor at a property where he was injured, or in *Rothfield v Manolakos*, where one plaintiff was the neighbour of the primary plaintiff, whose property sustained damage when the retaining wall collapsed and partially fell onto his property.¹⁴⁶ As discussed in chapter 6, it will be exceedingly rare that plaintiffs in no interest cases will be owed duties of care, given the need for an assumption of responsibility to the plaintiff by the building authority.

Yet in the rare cases where a duty of care exists, the determination of causation and damages poses no problem. The losses in such cases do not concern quantification of damages associated with defects in property that has been the subject of building regulation, but instead concern damages

¹⁴⁴ Along with the *Dutton* fallacy of treating building authority negligence as the infliction of physical damage to property, judicial confusion is also likely a product of the practical reality that claims against building authorities are often asserted alongside claims against contractors, tradespersons, and prior owners, who are often exposed to concurrent claims in tort and contract, perhaps leading to a failure to appreciate the distinction between the proper measure of damages in tort and contract.

¹⁴⁵ (1994), 17 OR (3d) 1 (CA) [*Mortimer*].

¹⁴⁶ [1989] 2 SCR 1259 [*Rothfield*].

inflicted on other persons or property. These losses do not raise any of the classification or quantification issues raised by cases of pure economic loss. Instead, they concern the quantification of losses arising from the violation of primary rights to bodily integrity and property, which can be assessed by the existing law of damages for personal injury and property damage.

Consider *Mortimer*, with the facts altered in such a way as to create a duty of care. Instead of being invited over to a friend's party at the subject property, let us assume that the plaintiff was a tradesperson retained to do interior renovations in the upper floor accessed by the exterior staircase. Given that this hypothetical work would involve moving heavy objects, and having inspected the property and becoming concerned about the structural integrity of the exterior staircase, the plaintiff proceeds to City Hall to speak to a building official. He asks the official if the exterior staircase has been built in accordance with building regulations, since he will be moving heavy objects up and down it. He receives a positive reply, returns to the house, and while carrying a heavy object up the stairs he falls awkwardly into the staircase's exterior wall, which gives way, causing the plaintiff to fall to the ground sustaining catastrophic injury. The damages recoverable would be the same that were actually awarded in *Mortimer*.

Numerous variations on this hypothetical scenario could exist. The key point is that the main issue in such a case will be the existence of a duty of care. In the cases where a duty does exist and is breached, there is an extensive and robust jurisprudence on the assessment of causation and damages in case of bodily injury and property damage, which can be brought to bear in a manner consistent with corrective justice.

8.6: Conclusion

Causation and the recovery of pure economic loss are subjects which have, independently, generated a Brobdingnagian volume of judicial and academic commentary. Many of the discrete issues discussed in this chapter could warrant monograph-length treatments in their own right. As such, many of the propositions in this chapter have had to be approached more as sketches than comprehensive treatments. However, this chapter does set out a workable framework for the analysis of causation and damages in building authority liability cases, and to whatever extent it does not provide comprehensive answers, it has aimed to provide both a principled foundation from which to work and to guide further judicial and scholarly reflection.

CHAPTER 9: CONCLUSION

9.1: The Proposed Cause of Action

This dissertation's central argument is doctrinal: the current legal doctrine on the negligence liability of building authorities should be disregarded, and the negligence liability of building authorities should instead be grounded on the idea of an assumption of responsibility. Practically, this can be accomplished in Canadian law by having building authority liability absorbed by the emerging category of a negligent breach of an undertaking or assumption of responsibility. In many respects, the core of this dissertation's argument is embodied in the test for the existence of a duty of care. As has been shown, the current test for a duty of care, which is based on the existence of a reasonably foreseeable risk of harm, is both inadequate to explain or justify the existence of a duty of care and cannot be reconciled to other approaches to duty of care in Canadian negligence law.

The duty of care test posited by this dissertation – that the existence of a duty of care be based on an assumption of responsibility by a building authority to an individual plaintiff – is both inspired by the idea of corrective justice and also illustrates the promise of that theory as applied to private law. An assumption of responsibility model for a duty of care allows us to conceive of the elements of a private law wrong (in this case, negligence) as part of single normative unit based on correlativity of duty/right, breach/injury, and gain/loss. As discussed in chapter 6, the duty of care is created by the intersection of the defendant's undertaking and the right of the plaintiff in their own autonomy. Chapter 7 reviewed how the content of that undertaking is what determines the standard of care to which the defendant will be held. In contrast, under the current model, with a duty based on a reasonably foreseeable risk of harm and a standard of care based on a reasonably prudent building inspector, the elements of the cause of

action do not relate to or justify each other, nor do they relate to the circumstances of the plaintiff.

A similar pattern emerged in chapter 8's review of causation and damages. The corrective justice account is able to maintain internal coherence among the elements of the cause of action: as the duty of care arises from the interaction between the defendant's undertaking and the plaintiff's right to autonomy, the wrongful interference in that autonomy and the remedy necessary to undo the interference (in the form of a remedy that undoes the detrimental reliance) are understood as part of that same normative unit. In contrast, the current law's understanding of causation and damages is unmoored from any duty of care relationship between the parties, which likely explains why damages in building authority cases having resembled a kind of free-for-all of compensation for any disappointed expectation a plaintiff may be able to demonstrate. While it is hoped that the previous chapters have convinced the reader of the wisdom of this dissertation's argument, it will be useful to bring this work to a conclusion by addressing two general objections that might be raised.

9.2: Criticism: Corrective Justice as Political Choice

Chapter 3 reviewed how corrective justice asserts that it possible to base private law on an "immanent moral rationality", which is apolitical in character and method. Some critics of corrective justice and the rights-based theories of tort law it has inspired argue that this is misleading, and that in many instances the supposedly apolitical theory is simply a stalking horse for

libertarian or right-wing political agendas.¹ Such criticisms are likely unfounded, but in the context of this dissertation they also miss the point.

Corrective justice, as understood and applied in this dissertation, is not a political program, nor is it premised on its application to all possible interpersonal interactions between private persons or between private persons and the state. Corrective justice, as used here, is a modality with which to understand private law, and what it is applied to in this dissertation is a private law phenomenon: the negligence liability of building authorities. The argument that the remedies that arise from the careless exercise of building regulation, when articulated as a private law matter, should correspond to corrective justice does not carry with it the implication that private law is the only possible means by which the consequences of such carelessness could or should be addressed, nor does it prohibit those consequences from being addressed via other means. In fact, there are numerous instances where disputes that would historically have been purely

¹ Dan Priel is the foremost exponent of this line of criticism, and the best source for the details of it: Dan Priel, “Torts, Rights and Right-Wing Ideology” (2011) 19 Torts LJ 1; Dan Priel, “Private Law: Commutative or Distributive” (2014) 77 Mod L Rev 306 at 329:

Beever's politics are difficult to mistake – the desire to protect the individual from the overpowering collective; the belief that the foundations of political community are based on natural law; the view that private law should largely reflect those natural laws; the view that respect for ‘traditional’ private law is necessary (and perhaps sufficient) for a well-functioning society; the narrow and inegalitarian understanding of distributive justice; the concern that modern private law has been infiltrated by ‘alien’ public concerns, which in turn is but one manifestation of a more general encroachment of our freedoms by the state; the claim that people tend to over-rely on the state; the insinuation that seemingly innocuous Western welfare states already take us down the road to serfdom; even an opposition to the idea that people have any moral duty to rescue strangers – these are all familiar libertarian themes.

See also Michael L Rustad, “Torts as Public Wrongs” (2011) 38 Pepp L Rev 433 at 464, who quips that corrective justice, as a tort theory, “is an ideal fit with eighteenth century” experiences of society but lacks relevance to the social setting of the modern world.

private law matters have been transferred by society to public law processes, often as a result of a political choice based on political considerations.² Two examples from the Province of Ontario are workplace injuries, where private law rights have been extinguished by legislation in favour of a government-administered compensation scheme,³ and motor vehicle accidents, where plaintiffs' tort rights have been restricted by legislation in exchange for entitlement to monetary benefits payable regardless of fault.⁴

9.3: Criticism: Overemphasis on Coherence over Flexibility

Much of this dissertation has been dedicated to critiquing the inconsistencies and incoherence both within the Canadian law of building authority liability, and as between building authority liability and other areas of negligence law in general and public authority liability in particular. A critic may argue that this emphasis on consistency and coherence is misplaced, especially where the defendant is a public authority. Despite Canadian law's technical adherence to the Diceyan idea that a public body should only be exposed to tort liability in the same manner as a private person, we should, so this argument goes, be willing to treat public authority defendants differently and, when faced with deserving plaintiffs, we should be willing to bend legal doctrine to ensure compensation. A more general criticism would be that

² Chapter 4 discussed how critics of the decision in *Michael v Chief Constable of South Wales Police*, [2015] UKSC 2, have argued that public defendants should not be treated as the equivalent of non-public defendants in private law, since public defendants do not have similar freedom of action, are endowed with special powers and mandates, and are often tasked with serving vulnerable or dependent persons. Even if the propositions underlying this argument are factually correct, the argument itself still falls into the error of assuming that private law is the only means by which these unique public activities can be subject to external scrutiny or give rise to compensation if carried out carelessly.

³ *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A.

⁴ See generally *Meyer v Bright* (1993), 15 OR (3d) 129 (CA); *Insurance Act*, RSO 1990, c I.8, especially Part VI, Automobile Insurance.

remedial flexibility is simply a higher value than consistency in legal reasoning.

It may be that decisions may be just or morally correct (on some measure) despite being arbitrary or inconsistent with previous decisions.⁵ But the common law cannot function on the basis of arbitrary decisions or inconsistent treatment.⁶ There is no need to delve into any new normative or metaphysical inquiry here. As a purely practical matter, the common law, which is premised on both the content of law and the normative force of that law being derived from prior judicial decisions, cannot function effectively (or at all) if coherence and consistency with and between decisions is neglected. Frederick Schauer, in his landmark article on judicial precedent, made a very salient observation:⁷

An argument from precedent seems at first to look backward. The traditional perspective on precedent ... has therefore focused on the use of yesterday's precedents in today's

⁵ See the commentary offered by Justice Antonin Scalia in “The Rule of Law as the Law of Rules” (1989) 56 U Chi L Rev 1175 at 1175–76, who tells the story of “Louis IX of France” who was known to dispense justice and decide his subjects’ disputes in ways that “were regarded as eminently just and good”, despite an apparent lack of legal training.

⁶ For a general account and an excellent source of scholarly citations, see Jeremy Waldron, “*Stare Decisis* and the Rule of Law: A Layered Approach” (2012) 111 Mich L Rev 1. A different approach to the subject is Dworkin’s theory of “law as integrity” Ronald Dworkin, *Law’s Empire* (Cambridge, Mass: Belknap Press, 1986). See also *ibid* at 1178, noting that a “correct” or “perfect” outcome in an individual case is insufficient:

To achieve what is, from the standpoint of the substantive policies involved, the “perfect” answer is nice-but it is just one of a number of competing values. And one of the most substantial of those competing values, which often contradicts the search for perfection, is the appearance of equal treatment. As a motivating force of the human spirit, that value cannot be overestimated. Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions – no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.

⁷ Frederick Schauer, “Precedent” (1987) 39 Stan L Rev 571 at 572–73.

decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decision makers. Today is not only yesterday's tomorrow, it is also tomorrow's yesterday.

When there is a failure of coherence in a common law system based on judicial precedent, not simply the substantive content of law, but the who process of law itself becomes dysfunctional:⁸

Without coherence, a body of law becomes increasingly technical and confusing as it retreats into conventionalism and arbitrary distinction to justify the increasingly disparate holdings of the cases. With this dissonance, the lawyer can no longer properly advise his or her clients as to the probable outcome of litigation or how to order their affairs. Thus, 'testing' litigation increases, as do claims of malpractice or misrepresentation. Judges exasperated with the increasing complexity and incoherence of the cases either come to strange conclusions that run counter to intuition but conform to the 'law' as conventionally understood; reinterpret clear language with statements like 'although the law says x, it really means y or sometimes z'; or resort to 'policy', 'Equity' or overtly historicist arguments to justify a remedy given to those whom they think are deserving. Soon litigants, litigators, and commentators lose faith in that body of law's ability to properly justify its outcomes, often retreating into other disciplines for understanding. Then, finally, because the law shows no sign of correcting itself, legislation is passed to remedy the worst failings of the system, often by giving the judiciary even wider remedies designed to do 'justice' in the circumstances.

Such a description is readily applicable to the law of building authority liability that began with *Dutton v Bognar Regis UBC*⁹ and which continues to be followed in Canada. This dissertation has often had occasion to critique

⁸ Jason W Neyers, "Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation" (2000) 50 U Toronto LJ 173 at 178-79.

⁹ [1972] 1 QB 373 (CA) [*Dutton*].

the decision of Lord Denning in *Dutton*. Taken in isolation, few would doubt that Ms Dutton was a deserving plaintiff, and fewer still would be overly troubled by the outcome. But it was a bad decision. Years later, Lord Denning admitted that he assumed that the defendant (backed by an insurance company) would have appealed the case to the House of Lords.¹⁰ Perhaps he felt that gave him more licence to render a decision that aligned more with conscience than with sound doctrine. But the decision stood, and it became part of the legal yesterday of a very long, drawn out, and problematic legal tomorrow which this dissertation has reviewed at length. It is an example of the consequences of bending legal doctrine to suit individual cases. Some may argue that the consequences are worth it. The position in this dissertation is that they are not.

¹⁰ Lord Denning, *The Discipline of Law* (London: Butterworths, 1979) at 264.

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Curriculum Vitae

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2005-2006: Master of Laws
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Thesis Title: Public Policy in Canadian Private International
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2002-2005 Juris Doctor
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Recipient of Miller Thomson LLP Award in Labour Law (2004)
Recipient of Stringer, Brisbin, Humphrey Award in Labour Law
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1998-2002: Bachelor of Arts
Calvin College (Grand Rapids, Michigan)

Publications

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Conference Papers & Presentations

Speaker: “Current Issues in Municipal Liability” – Association of Ontario Road Supervisors (Wingham, Ontario – September 30, 2022)

Panelist: “Building Inspection Coast to Coast” – Canadian Defence Lawyers (London, Ontario – November 24, 2021)

Panelist on Written Advocacy – Middlesex Law Association Personal Injury Update (London, Ontario – December 2020)

Speaker: “Risk Management Regional Seminar: Are You Prepared to Defend a Claim?” – Frank Cowan Company (London, Ontario – October 24, 2019)

Speaker: “Challenges in Negligence Claims Against Municipal Building Authorities” – Society of Public Insurance Administrators of Ontario 2019 Annual Conference (Muskoka, Ontario – May 27, 2019)

Speaker: “Municipal Liability Claims & Risk Management: The Changing Landscape” – Insurance Institute of Canada (London, Ontario – October 12, 2017)

Speaker: “Working With Municipalities in the Claims World” – Ontario Insurance Adjusters Association 2015 London Claims Association Tradeshow and Provincial Seminars (London, Ontario – March 12, 2015)

Speaker and Panelist on Municipal Highway Liability – The Canadian Institute’s Provincial/Municipal Government Liability Conference (Toronto, Ontario – February 27, 2014)

Speaker: Association of Ontario Road Supervisors Annual Joint Association Meeting (Woodstock, Ontario – October 18, 2013)

Author (with G.J. Van Berkel): “Building Inspection and Building Code Claims – A Brief Overview” – Paper presented to the Canadian Institute’s Provincial/Municipal Government Liability Conference (Toronto, Ontario – February 2012)

Author and Presenter: “The Law of Costs – A Brief Overview” – Paper presented to the Middlesex Law Association “Straight From the Bench” Conference (London, Ontario – April 2009)

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