

PUBLIC AUTHORITY IMMUNITY FROM NEGLIGENCE LIABILITY: UNCERTAIN, UNNECESSARY, AND UNJUSTIFIED

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The author argues that the scope of public authority negligence immunity is uncertain to the point of meaningless. Next, the author suggests that a proper definition of proximity renders the immunity concept superfluous. Finally the author argues that when proximity is established as it would be established in a private party action, it is wrong to immunize the public authority. The historical foundations of immunity are suspect. Immunity should not apply to basic negligence issues that lie at the heart of the courts' institutional competence. Public authority immunity should be abolished.

L'auteur soutient que la portée de l'immunité des pouvoirs publics en cas de négligence de leur part est si aléatoire qu'elle en perd sa signification. Il suggère ensuite qu'une définition plus adéquate de la notion de proximité rendrait le concept d'immunité superflu. Il soutient enfin que lorsque la proximité est prouvée de la même manière qu'elle l'aurait été dans le cadre d'un litige entre parties privées, il est erroné d'accorder l'immunité aux pouvoirs publics. Les bases historiques de l'immunité étant suspectes, elle ne devrait pas s'appliquer en cas de négligence pure et simple, situation qui réside au cœur même de la compétence institutionnelle des tribunaux. Pour l'auteur, l'immunité des pouvoirs publics devrait purement et simplement être abolie.

1. Introduction

During the period between the Supreme Court of Canada's 1989 decision in *Just v British Columbia*¹ and its 2001 decision in *Cooper v Hobart*,² the dominant issue in public authority negligence law was "common law immunity" for policy decisions. The term "common law immunity" is used here to identify immunity created by the courts on their own initiative, albeit in deference to the legislative branch. In contrast, the legislature can create tort immunity by express statutory language, or by necessary

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¹ [1989] 2 SCR 1228 [*Just*].

² 2001 SCC 79, [2001] 3 SCR 537 [*Cooper*].

implication.³ The government may also enjoy sovereign immunity.⁴ This article does not challenge such mandated immunity. These prerogatives are accepted as given. Rather, this article considers and rejects the case for judicially created common law immunity.

After the 2001 decisions in *Coopert*⁵ and *Edwards v Law Society of Upper Canada*,⁶ proximity replaced immunity as the key concept in public authority negligence law. Proximity has been an essential component of Canadian tort law, arguably since the 1932 decision in *Donoghue v Stevenson*,⁷ and certainly since the early 1970s, even prior to the decision in *Anns v Merton London Borough Council*.⁸ Proximity was a fundamental aspect of the *Anns* two-step framework for recognizing a duty of care which was adopted in Canada soon afterwards.⁹ Prior to 2001, however, proximity never assumed the prominence in Canadian negligence law generally that it enjoyed elsewhere, particularly in Australia.¹⁰ Proximity played an especially minor role in the public authority jurisprudence. It was raised only superficially in the seminal 1989 public authority decision, *Just*, where immunity was the key issue.¹¹

³ A good example of necessary implication may be found in *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 3 SCR 83 [*Syl Apps*]. The Court held that granting a minor's parents the right to sue the residential treatment facility over visiting rights would be inconsistent with the statutory treatment scheme centered on the child. Significantly, this was not viewed as an issue of immunity, but rather as an absence of necessary proximity. Another example of immunity by necessary implication would be the defence of statutory authority in private nuisance discussed *infra* in the text accompanying note 94.

⁴ This is discussed below in the text associated with notes 77-81.

⁵ *Supra* note 2.

⁶ 2001 SCC 80, [2001] 3 SCR 562 [*Edwards*].

⁷ [1932] AC 562 [*Donoghue*].

⁸ There are several examples where the Supreme Court of Canada defines proximity more broadly than simple foreseeability prior to the decision in *Anns v Merton London Borough Council*, [1977] UKHL 4, [1978] AC 728 [*Anns*]. The absence of proximity between a municipal government and a developer who relied on the validity of its by-laws was the basis of the decision in *Welbridge Holdings v Winnipeg*, [1971] SCR 957 [*Welbridge*]. In *Haig v Bamford*, [1977] 1 SCR 466 [*Haig*], proximity leading to liability for negligent misrepresentation causing economic loss was restricted to members of a known limited class.

⁹ *Anns, ibid.* *Anns* was adopted in *Kamloops v Nielsen*, [1984] 2 SCR 2 [*Kamloops*]. This two-step duty framework is often referred to as the *Anns/Kamloops* test, as it was in *Cooper, supra* note 2 at para 14. See also *BDC Ltd v Hofstrand Farms*, [1986] 1 SCR 228 [*Hofstrand Farms*]. Today it is also referred to as the *Anns/Cooper* test; see text *infra* accompanying note 60.

¹⁰ See Rande Kostal, "Currents in the Counter-Reformation: Illegality and Duty of Care in Canada and Australia" (1995) 3 Tort L Rev 100, at 104.

¹¹ *Supra* note 1.

Cooper and *Edwards* seemed to revive the proximity concept. Significantly, both were public authority negligence cases, and in both cases the claims were dismissed for want of proximity. Immunity was referred to only briefly as an alternate basis for the decisions. Since then, immunity is considered most often, if it is raised at all, as an alternative basis of decision. Immunity emerges as a policy argument raised at step two of the *Anns* framework, after the proximity question has been resolved at stage one.

Usually the immunity analysis produces the same outcome as the proximity analysis. If there is proximity, there is no immunity. If there is no proximity, immunity is an alternative reason to dismiss the action. It follows that immunity is most important when it is invoked to dismiss the action in the rare case in which the court had previously found a *prima facie* duty of care based on sufficient proximity between the parties. This is what happened at trial in *Just*,¹² and also in the 2011 Supreme Court of Canada decision in *R v Imperial Tobacco Canada*.¹³

Imperial Tobacco involved two separate actions, one brought by smokers, and one brought by tobacco companies who themselves were being sued by the smokers. In the part of the case of immediate relevance, the tobacco companies were seeking to obtain compensation from the federal government for losses they might incur as defendants in the action brought against them by smokers. The smokers alleged that the government and the tobacco companies had negligently promoted low tar cigarettes as less harmful than other cigarettes, whereas the low tar cigarettes were in fact as or more harmful than ordinary cigarettes. In turn, framing their claim in negligent misrepresentation, the tobacco companies argued that they had been negligently encouraged to promote low tar cigarettes by Health Canada. The Supreme Court found the facts as pleaded did not establish sufficient proximity between the smokers and Health Canada to found a claim in negligent misrepresentation. It held, however, that the pleadings did establish sufficient proximity between Health Canada and the tobacco companies. Proximity was defined by relying on the definition of proximity in negligent misrepresentation as applied in litigation between private parties.¹⁴ Nevertheless, the Supreme Court went on to

¹² *Just v British Columbia*, (1985), 64 BCLR 349 (BCSC) [*Just SC*]. The Supreme Court of Canada, *supra* note 1, held there was proximity, but no immunity.

¹³ 2011 SCC 42, 3 SCR 45 [*Imperial Tobacco*]. See also *Adams v Borrel*, 2008 NBCA 62, 297 DLR (4th) 400, where the trial judge had also recognized proximity, but granted immunity. The Court of Appeal agreed there was proximity, but did not recognize immunity. Leave to appeal to the Supreme Court was refused, [2008] SCCA No 470.

¹⁴ The Court applied the test from *Hercules Managements v Ernst & Young*, [1997] 2 SCR 165 [*Hercules*].

hold at step two of the *Anns/Cooper* framework that the representations were made in the core policy realm and hence immune. This divergence between the outcome suggested by proximity and the outcome suggested by immunity was most unusual.

McLachlin CJC had been the trial judge whose finding of immunity in *Just* was overturned by the Supreme Court.¹⁵ She gave the reasons for the Court in *Imperial Tobacco*. She gave detailed consideration to the concept of immunity. One might have expected her decision would breathe new life into immunity as a key concept in public authority negligence law, but there is yet no evidence to suggest that this has happened.

The test for common law immunity is grounded on the distinction between the public authority's policy functions and its operational functions. It might be more accurate to speak of a policy-operational continuum than of a demarcated distinction. In Part 2, this article suggests that despite McLachlin CJC's excellent efforts in *Imperial Tobacco*, the policy/operational test upon which immunity depends remains inherently uncertain, incapable of identifying a predictable or correct decision in any legitimately contentious case.

Part 3 considers the significance of proximity. Proximity is not a bright-line concept, but a body of jurisprudence has developed that enables the courts to apply it with a good degree of certainty, especially in public authority cases.¹⁶ Most actions against public authorities concern the failure to provide, or to provide with due care, discretionary statutory benefits. Rarely do these actions succeed. The plaintiff usually, and correctly, cannot establish proximity. If the court does not find proximity, there is no need for immunity.

Sometimes, by accident or design, the courts find proximity in public authority actions where they would not have found proximity in an analogous situation involving private parties. Immunity is also irrelevant in these cases. Why would a court stretch the boundaries of ordinary negligence law only to immunize the breach of duty in the same action?

This leaves the unusual situation that arose in *Imperial Tobacco* where the Court found proximity, but held that the authority enjoyed policy immunity.¹⁷ Part 3 concludes by examining the finding of proximity in

¹⁵ *Supra* note 12.

¹⁶ For an exhaustive summary, see *Taylor v Canada (Attorney General)*, 2012 ONCA 479, 111 OR (3d) 161 [*Taylor*].

¹⁷ In the alternative, the Court would have negated the *prima facie* duty on the ground that it exposed the defendant to a risk of indeterminate liability. This finding too

Imperial Tobacco and reflecting on the powerful justification for the *prima facie* duty in that case.

Part 4 begins by challenging the pedigree of common law negligence immunity in Canada. It suggests that it is difficult to identify common law immunity's origins or its justification. Next the article suggests that *Imperial Tobacco* may be precisely the sort of case for which the government has agreed to be held liable under the *Crown Liability and Proceedings Act*.¹⁸ It questions why the court would create an immunity for a liability to which the government has already consented. It also considers that the root allegation in *Imperial Tobacco* was that the public defendant's negligence had caused personal injury and death. Unlike the gratuitous benefit cases, courts are institutionally competent to consider allegations that the authority inflicted additional harm, physical or economic.¹⁹ It will be argued that unless the legislature has invoked parliamentary supremacy expressly or by necessary implication, there should be no public authority immunity. The courts ought not to imply immunity for inflicting additional harm on a party with whom the public authority is in a proximate relationship. It follows that the article concludes that *Imperial Tobacco* was wrongly decided on this particular point. The article concludes that common law immunity no longer serves any useful purpose in public authority negligence law.

2. *Uncertain: The Policy/Operational Test has no Predictive Value*

The distinction between policy functions of government which are immune from negligence liability and operational functions which are not is notoriously difficult, if not impossible, to draw. In fact, this difficulty and the resulting uncertainty exhibited by many Supreme Court decisions²⁰ is one of the reasons why the UK courts have abandoned the policy/operational approach altogether.²¹ The policy/operational approach was

is controversial, but it is irrelevant for present purposes. It will not be discussed further here; see Lewis Klar, "Imperial Tobacco Ltd.: More Restrictions on Public Authority Tort Liability" (2012) 50 *Alta L Rev* 157 at para 49.

¹⁸ RSC 1985, c C-50; amended SC 2001, c 4, s 36.

¹⁹ There are two generally accepted justifications for public authority immunity, judicial deference to the legislative branch and institutional competence; see David Cohen and JC Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64 *Can Bar Rev* 1 at 8. The institutional competence rationale is not apparent in a case like *Imperial Tobacco*. This is developed in Part 4.

²⁰ See e.g. and in contrast to *Just*, *supra* note 1, *Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420 [*Brown*]; and *Swinamer v Nova Scotia (Attorney General)*, [1994] 1 SCR 445 [*Swinamer*].

²¹ As pointed out in *Imperial Tobacco*, *supra* note 13 at para 78, the House of Lords declared the "policy/operational distinction unworkable in difficult cases, a point

legitimized in Canada in *Just*. The shortcomings of the approach are best illustrated by contrasting the trial decision in *Just* to the Supreme Court decision in the same case.

In 1982, John Just was injured and his daughter was killed when a boulder came loose from the slopes adjoining a major highway and struck his car. In his action he alleged that the provincial Department of Highways had negligently failed to maintain the highway. The Department had discretion to inspect the slopes for dangers, but was not under a statutory duty to do so. The trial judgment was given in 1985 by McLachlin J, now McLachlin CJC. She held that the allegations fell within the policy realm of the public authority and hence were immune from negligence liability:

The number and quality of inspections as well as the frequency of scaling and other remedial measures were matters of planning and policy involving the utilization of scarce resources and the balancing of needs and priorities throughout the Province. Decisions of that nature are for the governmental authorities, not the Courts.²²

The trial decision was upheld by the Court of Appeal,²³ but overturned by the Supreme Court of Canada. Cory J (Sopinka J dissenting) gave the majority decision. He said:

The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. ... Here what was challenged was the manner in which the inspections were carried out, their frequency or infrequency and how and when trees above the rock cut should have been inspected, and the manner in which the cutting and scaling operations should have been carried out. In short, the public authority had settled on a plan which called upon it to inspect all slopes visually and then conduct further inspections of those slopes where the taking of additional safety measures was warranted. Those matters are all part and parcel of what Mason J. described as “the product of administrative direction, expert or professional opinion, technical standards or general standards of care”. They were not decisions that could be designated as policy decisions. Rather they were manifestations of the implementation of the policy decision to inspect and were operational in nature. As such, they were subject to review by the Court to determine whether the respondent had been negligent or had satisfied the appropriate standard of care.²⁴

said to be evidenced by the Canadian jurisprudence: *Stovin v Wise*, [1996] AC 923 (HL), per Lord Hoffmann.”

²² *Just SC*, *supra* note 12 at para 19.

²³ *Just v British Columbia* (1986), 10 BCLR (2d) 223 (CA) [*Just CA*].

²⁴ *Supra* note 1 at paras 30-31.

From 1989 until the impact of *Cooper*²⁵ became apparent after 2001, the question of immunity as determined by the policy-operational distinction became the major issue in public authority negligence law. This was unfortunate. Even accepting for the time being that the immunity approach is well-founded, the policy/operational inquiry is useless as a test to determine outcomes in legitimately contentious cases.²⁶ One need only look more closely at the two quotations from *Just* above to see that there is nothing in the definition of policy that determines which judgment was correct. Both decisions are perfectly rational on their face. Both decisions are reached by stating the test and then stating the conclusion by fiat. No link between the immunity test and the conclusion is stated, precisely because no such link can be derived from the policy/operational distinction in hard cases.²⁷

Sixteen years after her decision in *Just*, McLachlin CJC had an opportunity in *Imperial Tobacco* to clarify what qualified as a policy decision that would generate immunity.²⁸ She provided an excellent discussion of the meaning of “policy” for the purposes of public authority negligence immunity. Given the limits of language, it is doubtful one could improve upon it. She made it clear that immunity does not lie for every exercise of discretion by government.²⁹ She restricted it to “core policy” which she described in some detail. She avoided defining “operational” matters at all. In brief, she concluded that “‘core policy’ government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith.”³⁰

Unfortunately, this test, however enriched, does and can do nothing to remove the shortcomings of the policy/operational approach. Consider how the test was actually applied in *Imperial Tobacco*:

The third-party notices implicitly accept that in making the alleged representations, Health Canada was acting out of concern for the health of Canadians, pursuant to its policy of encouraging smokers to switch to low-tar cigarettes. They assert, in effect,

²⁵ *Supra* note 2.

²⁶ See *supra* note 21.

²⁷ This is not to say that the era was marked by incorrectly-decided decisions. On the contrary, most appellate decisions were consistent with the outcome that would be generated by the modern proximity approach. The decisions of the courts of first instance were far less predictable.

²⁸ *Supra* note 13 at paras 72-91.

²⁹ *Anns*, *supra* note 8, might be taken to have included all discretionary government decisions within the scope of immunity.

³⁰ *Supra* note 13 at para 90.

that Health Canada had a policy to warn the public about the hazardous effects of smoking, and to encourage healthier smoking habits among Canadians.³¹

Arguably, the outcome was determined by the manner in which the issue was phrased. Once one says “... pursuant to its *policy* of encouraging smokers to *switch to low tar cigarettes* ...” (emphasis added) the conclusion that switching to low tar cigarettes was a policy decision follows naturally.

Note the different formulation in the second sentence, however: “... a policy to ... *encourage healthier smoking habits* among Canadians” (emphasis added). If one emphasizes the second sentence, the policy at issue was harm reduction. That policy was then operationalized via low tar cigarettes. This is the uncertainty dilemma in *Just* all over again.³² And it always will be in hard cases.

McLachlin CJC offered little explanation for why she felt it was “plain and obvious” that the representations were core government policy. Unless every high level government decision is to be immunized for that reason alone, there is nothing in her reasons that is inconsistent with the conclusion that switching to low tar cigarettes was an operational decision.³³ “Harm reduction” does sound like a core government policy. It exists at a high level of generality and suggests considerable complexity. It is an end in itself, and a patently appropriate end for Health Canada to pursue. It involves choices among different strategies for dealing with the risks of smoking. Taken in isolation, “switching to low tar cigarettes” is an unlikely high level government policy. Governments are not in the tobacco business. Promoting low tar cigarettes was not an end in itself – it was a specific means of achieving the high level policy.³⁴

The point is not to demonstrate that Cory J misapplied the definition of policy in *Just*, or that McLachlin CJC misapplied the definition of policy in *Imperial Tobacco*. The point is that absent a rare degree of precision in legislation or high level decision-making, applying the

³¹ *Ibid* at para 94.

³² See also Klar, *supra* note 17, who is skeptical that the decision clarifies the difficult immunity concept.

³³ *Supra* note 13 at para 95. The only specific factor that she identifies is that the decisions were made at the highest levels of government. One could obtain relative certainty by immunizing all high level decisions by public authorities, but there is no indication McLachlin CJC would wish to cast the protective wall this far. Among other problems, this would allow the authority to immunize any decision whatsoever on its own management level initiative. This is unacceptable.

³⁴ See Peter Hogg and Patrick Monahan, *Liability of the Crown*, 3d ed, (Toronto: Carswell, 2000) at 186.

policy/operational distinction to determine whether a decision is worthy of immunity is a slippery exercise at best. At worst, it is a disguise for other bases of decision. Surely immunizing Health Canada from promoting a course of action that it actually knew was harmful, perhaps fatal, requires more and better justification from the court than what was provided in *Imperial Tobacco*. As it reads, the scope of immunity is overly vague and overly broad.³⁵ Fortunately, there is a better way.

3. Unnecessary: A Proper Finding on Proximity Renders Immunity Irrelevant

Immunity emerged as a leading issue in public authority jurisprudence in *Anns*, as did the requirement that a finding of proximity between the parties was necessary to ground a *prima facie* duty of care.³⁶ It was not immediately clear whether Lord Wilberforce's "proximity" meant anything different than foreseeability. In Canada today it is accepted that outside the "direct act – physical harm" paradigm, proximity includes foreseeability but much more.³⁷ In this part, I suggest that the richer definition of proximity adopted by the Canadian courts after *Anns* has rendered it unnecessary for the courts to consider immunity at all. I do so while acknowledging that proximity has no precise meaning in Canadian negligence law.³⁸ Nevertheless, the numerous modern judicial applications of the proximity concept in public authority negligence cases do provide a good if imperfect sense of what is and is not a proximate relationship

³⁵ Klar, *supra* note 17 makes an interesting observation at n75:

It is interesting to note the nature of the allegations made in the third party claims against the government in pursuit of its policy. The government's conduct involved publishing tables showing the tar and nicotine yields of cigarette brands and putting out press releases containing representations or advice to smokers. The third party claims alleged that the government was aware of the negative health consequence to smokers who switched, for example, if they smoked more cigarettes. The many activities conducted by the government in terms of their co-operation with and support for tobacco growers and cigarette manufacturers were described. In other words, not only the policy to encourage smokers to switch was considered protected, but all the activities and programs identified in the third party claims to implement this policy were also immune.

³⁶ *Supra* note 8. In *Just*, the Supreme Court seemed to equate foreseeability with proximity.

³⁷ See e.g. *Hercules*, *supra* note 14; *Hofstrand Farms*, *supra* note 9; *Haig*, *supra* note 8; *Canadian National Railway v Norsk Pacific Steamship*, [1992] 1 SCR 1021 (in which the judges disagree over with what to enrich foreseeability); *Childs v Desormeaux*, 2006 SCC 18 at para 12, 1 SCR 643; and *Cooper*, *supra* note 2.

³⁸ See Ernest J Weinrib, "The Disintegration of Duty" (2006) 31 *Advoc Q* 212, especially at n50, 238, and 244-45.

between a citizen and the government.³⁹ The proximity requirement is considerably more certain than the policy-operational approach.

Consider *Just* again.⁴⁰ A rational argument can be made that McLachlin J at trial was correct to dismiss the claim and that Cory J was incorrect to send it back for trial. This argument does not depend on immunity, however. Rather it depends on proximity, or rather the absence of proximity between *Just* and the Department of Highways. Had this case emerged after *Cooper*, one suspects the claim would have been dismissed because the plaintiff failed to establish proximity.

*Cooper*⁴¹ re-vitalized the proximity concept in Canada, but did not originate it. The need to find proximity was acknowledged by Cory J in *Just*, relying on *Anns*.⁴² In effect, Cory J concluded that foreseeability alone was sufficient to justify imposing a *prima facie* duty of care to maintain a safe highway for the benefit of users.⁴³ Today, foreseeability is insufficient to establish proximity for the purpose of imposing affirmative obligations to benefit the plaintiff. Cory J seems to have embraced a concept of “general reliance” whereby citizens are entitled expect the best services from their government and entitled to sue if they don’t get them. Again, modern Canadian law requires much more, including a nexus between the individual plaintiff and the regulator.⁴⁴ It is difficult to imagine a modern court reaching the same conclusion as Cory J did.⁴⁵ The action in *Just* should have been dismissed for want of proximity. There would have been no *prima facie* duty, hence nothing to immunize, and perhaps no reason to discuss immunity at all. Litigants would have been spared the inherent uncertainty of the policy/operational distinction, an uncertainty that encouraged litigation and made motions to dismiss more difficult. Canadians, including judges, would also have been spared the

³⁹ See the case summary in *Taylor*, *supra* note 16.

⁴⁰ *Supra* note 1.

⁴¹ *Supra* note 2.

⁴² *Supra* note 8.

⁴³ *Supra* note 1 at para 12.

⁴⁴ See *Taylor*, *supra* note 16 at para 80. The duty of a public authority to maintain a highway is an exceptional one in the overall jurisprudence governing public authority negligence. *Just*, *supra* note 1 was cited as an authority for the highway maintenance line of authority in *Cooper*, *supra* note 2 at para 46.

⁴⁵ Shortly after its decision in *Just*, the Supreme Court dismissed two actions dealing with facts virtually identical to those in *Just*. They did so employing the policy-immunity distinction, but the true basis of the decision must have been something else, perhaps an intuitive concern with the absence of proximity. See *Brown*, *supra* note 20; and *Swinamer*, *supra* note 20. These cases also support the contention that policy immunity is too elusive a concept to resolve concrete disputes.

legitimate discomfort of having to immunize the same laws they impose on citizens.⁴⁶

Switching the emphasis from immunity to proximity ought not to result in many different outcomes overall. Proximity is a different route to the same end. The truly difficult public authority negligence cases turn on allegations that the authority failed to provide, or was negligent in providing, a discretionary statutory benefit.⁴⁷ Often these are in the safety and health area – failures to warn about shortcomings in medical devices,⁴⁸ or failure to protect citizens from illness and disease,⁴⁹ for example. Often the benefits in question are economic, such as allegations of negligent professional regulation.⁵⁰ These are cases where it makes no sense to speak of a duty to take reasonable care – careless gift-giving is not actionable. These are cases where the courts lack institutional competence. These are, if you like, “policy” decisions, but defined clearly as cases involving a failure to provide a benefit. We could immunize them on that ground. Or we could rely on proximity to accomplish the same end. These cases typically fail on proximity grounds, because the plaintiff enjoys no closer relationship to the defendant than any other member of the general public or a member of the entire class subject to regulation.⁵¹ This was the fate of

⁴⁶ AV Dicey, *The Law of the Constitution* (London: McMillan & Co 1885) at 178.

⁴⁷ Although not often mentioned in the case law, many such claims should fail because simple nonfeasance should not be actionable in tort law; see Peter Benson, “Misfeasance as an Organizing Normative Idea in Private Law” (2010) 60 UTLJ 731. At note 1 Benson explains that misrepresentations are not generally thought of as nonfeasance. The case for refusing to allow recovery in claims based on the failure to convey, or negligence in conveying, statutory public benefits is considered by Cohen and Smith, *supra* note 19 at 21; and Bruce Feldthusen, “Failure to Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity” (1997) 5 Tort L Rev 17 [Feldthusen, “Failure”].

⁴⁸ See e.g. *Attis v Canada (Minister of Health)*, 2008 ONCA 660, 93 OR (3d) 35, leave to appeal refused [2008] SCCA No 491; *Drady v Canada (Minister of Health)*, 2008 ONCA 659, 270 OAC 1, leave to appeal refused [2008] SCCA No 492.

⁴⁹ See e.g. *Eliopoulos v Ontario (Minister of Health & Long-Term Care)* (2006), 82 OR (3d) 321 (CA); *Laroz Estate v Ontario*, 2009 ONCA 373, 95 OR (3d) 764; *R v Abarquez*, 2009 ONCA 374, 189 CRR (2d) 131, leave refused [2009] SCCA No 297; *Williams v Ontario*, [2009] OJ No 181 (Ont Sup Ct) (QL).

⁵⁰ Both *Cooper*, *supra* note 2 and *Edwards*, *supra* note 6 were such cases.

⁵¹ See *Taylor*, *supra* note 16 at para 80. These cases must be distinguished from those where an employee of the authority initiates direct contact with the plaintiff that would be regarded as proximate according to private defendant negligence law. A municipal employee who negligently advises a citizen about a zoning matter would be an example. Liability is routinely imposed in such cases, usually on the basis of vicarious liability. Immunity is not even raised for such low level actions. See Part 4 where a similar argument is advanced for *Imperial Tobacco*.

the smokers' misrepresentation claim in *Imperial Tobacco*. In the absence of proximity, there is no need for immunity.

Private defendant proximity does not resolve all public authority negligence cases. There are at least two lines of authority, the duty to maintain highways⁵² and the duty a municipality owes to homeowners to inspect residential housing with due care,⁵³ that impose liability in the absence of what usually qualifies as proximity in private party negligence law. There may have been a time when these decisions could have been challenged as wrongly decided or even as impermissible intrusions by the courts on matters within the exclusive control of the legislatures, but these unique public authority duties are well-entrenched today. The police cases may also stretch the meaning of standard private party proximity.⁵⁴ There are individual cases like the Supreme Court decisions in *Just*⁵⁵ or *Fallowka*⁵⁶ where the finding of proximity is questionable. This important shift away from traditional sovereign immunity and deference to the legislative branch should not happen by accident or stealth. The courts should acknowledge that they are creating new unique public duties of care, and develop criteria for doing so explicitly. That is a topic for another day.⁵⁷ For present purposes it suffices to say that immunity has no role to play in the unique public duty cases. When a court stretches the limits of the law to impose a duty, it is unlikely to undo the effort with a finding of immunity.⁵⁸

The final scenario arises when the court does find proximity, but dismisses the action on the basis of policy immunity. *Imperial Tobacco* provides an excellent vehicle with which to explore such a case, the only type of case where immunity really matters anymore, the case where proximity is trumped by policy.⁵⁹ The full argument for abolishing

⁵² This line of authority was approved in *Cooper*, *supra* note 2 at para 36.

⁵³ This line of authority was approved in *Cooper*, *ibid* at para 36, and relied on in *Fallowka v Pinkertons of Canada*, 2010 SCC 5 at paras 46-51, 1 SCR 132 [*Fallowka*].

⁵⁴ See e.g. *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487 (Gen Div); *Hill v Hamilton Wentworth Regional Police Services Board* (2005), 76 OR (3d) 481 (CA); and the action for nervous shock in *Odhavji Estate v Woodhouse*, 2003 SCC 69, 3 SCR 263.

⁵⁵ *Supra* note 1.

⁵⁶ *Supra* note 53.

⁵⁷ For a criticism of *Fallowka's* finding of proximity between the private parties and then extending this expanded definition to the public defendant see Bruce Feldthusen "Simplifying Canadian Negligence Actions against Public Authorities – or Maybe Not" (2012) 20 Tort L Rev 176.

⁵⁸ Significantly, policy immunity was not discussed in *Fallowka*, *supra* note 53.

⁵⁹ As noted earlier, such cases are extremely rare. The conclusions reached in this article suggest that this is not a coincidence.

immunity depends on both the strength of the proximity concept discussed immediately below, and on the weakness of the case in support of immunity discussed in the next section.

The Court in *Imperial Tobacco* held that the plaintiffs' claims did not fall within a settled category of negligence law (negligent misrepresentation in general, for example). They required a more specific analysis. The Court pointed out that there was no precedent for holding a government liable for negligent misrepresentations made to an industry. It followed that a full two-step *Anns/Cooper* analysis was necessary to determine whether the general requirements of negligence law were met. The clearest formulation of this two-step process is as follows:

First, is there a "sufficient relationship of proximity or neighbourhood" such that, in the reasonable contemplation of the Registrar, carelessness on his part might be likely to cause damage to the latter; and if so, are there considerations that ought to negative, reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which it may give rise?⁶⁰

McLachlin CJC outlined three possible ways in which a proximate relationship may arise in the case of a statutory public authority: 1) the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care;⁶¹ 2) proximity arises when the government through its interactions enters into a special relationship with the plaintiff sufficient to establish the necessary proximity; and 3) where proximity is based both on interactions between the parties and the government's statutory duties. The tobacco companies' claim was of the second type.⁶²

What was particularly significant was that in order to find sufficient proximity based on interactions between the parties, the Court adopted without any further justification the same test for proximity that applies between two private parties in a negligent misrepresentation action to recover economic loss. The Court relied on its decision in *Hercules Management v Ernst & Young* which requires the defendant to foresee that

⁶⁰ *Imperial Tobacco*, *supra* note 13 at para 38. The issue of what constitutes a novel duty of care requiring a full proximity analysis rather than reliance on precedent is a vexing one. Government representation to industry seems to be a rather narrow category. Perhaps every public authority action is a novel claim?

⁶¹ It would be interesting to learn more about how the statute might create the proximate relationship, and how to reconcile this with the holding in *Canada v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 which precludes a court from implying a statutory cause of action.

⁶² *Supra* note 13 at paras 44-46.

the plaintiff will rely on its representation, and that such reliance would be reasonable in the particular circumstances.⁶³

There is a widely-held view that the foreseeable reasonable reliance test from *Hercules* is the wrong proximity test for negligent misrepresentation. It fails to include the additional requirement that the defendant had assumed responsibility for the consequences of the plaintiff's reliance, or to have actually induced, invited or intended the plaintiff to rely.⁶⁴ That failure was responsible for the *Hercules* court having to override the *prima facie* duty of care at step two of the *Anns* framework. The foreseeability test created a potential for indeterminate liability that would not have arisen with the preferred approach. The *Hercules* failure was not operative in *Imperial Tobacco*. The pleaded facts strongly support the conclusion that the defendant's conduct met an even more demanding test, that the defendant intended that the plaintiffs rely on its representations about low tar cigarettes. Government immunity was not necessary to correct an error in the proximity analysis.

Whatever the differences between public and private defendants, they do not rest in the relationship between the defendant and the plaintiff. The only recognition of any difference between the government defendant in *Imperial Tobacco* and the shareholders' action against a corporate accounting firm in *Hercules* was about what constitutes reasonable reliance in the particular circumstances.⁶⁵ Direct financial interest, professional skill or knowledge, and advice provided in the course of business deliberately or in response to a specific request, were identified as the relevant *indicia* of reasonable reliance in the private sphere.⁶⁶ The pleaded facts in *Imperial Tobacco* went well beyond this. It was alleged that the regulator enjoyed significant regulatory power over the defendants, and that the regulator went well-beyond the duties specified in its governing statute, assuming roles "as designer, developer, promoter and licensor of tobacco strains."⁶⁷

Where this leaves us at the conclusion of the step one proximity analysis is with a finding of proximity on precisely the same basis as such a finding would be made in an analogous action between private parties. If

⁶³ *Supra* note 14.

⁶⁴ See Stephen R Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 UTLJ 247 at 289; Bruce Feldthusen, "Liability for Pure Economic Loss: Yes, But Why?" (1998) 28 UWA L Rev 84; Allan Beever, *Rediscovering the Law of Negligence* (London: Hart Publishing, 2007), especially at 282-84; and Peter Benson, "The Problem with Pure Economic Loss (2009) 60 SCL Rev 823 at 864-65.

⁶⁵ *Supra* note 13 at para 55.

⁶⁶ *Ibid.*

⁶⁷ *Ibid* at paras 53 and 54.

anything, the pleaded facts suggest the government intended to induce reliance on its representations and did induce the plaintiffs to rely to their detriment, a threshold considerably more demanding than the minimum requirement of foreseeable reasonable reliance from *Hercules*. A finding of proximity means that there was sufficient "... closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other."⁶⁸ This is a meaningful obligation based on the fundamental principles of negligence law. It is not an obligation that should be excused without a compelling reason to do so. The next section concludes that there is no compelling justification for a finding of immunity once proximity has been properly established.

4. *Unjustified: Why Should Courts Immunize Proximate Defendants Who Cause Additional Harm?*

In this section I want to go further than to criticize common law immunity as uncertain or unnecessary. I want to argue that it is wrong for the courts to immunize conduct that would be actionable if committed by a private citizen. I question the historical pedigree of common law immunity, and criticize the over-reliance on American legislation which differs fundamentally from Canadian Crown liability legislation. Rather, I suggest that the courts have a duty to recognize the established rights of private citizens in tort. If the government feels immunity is necessary, the government enjoys a range of options with which to immunize itself.

The origins of common law negligence immunity in Canada are somewhat unclear. It has been suggested that negligence immunity was first developed in the Supreme Court's 1971 decision in *Welbridge Holdings Ltd v Winnipeg*.⁶⁹ This was an action by a developer alleging it had suffered economic loss in reliance on the city's representation that a particular by-law had been lawfully passed. It turned out that the by-law was invalid because there had been inadequate notice before it was passed. This was fertile ground for a discussion of immunity, legislative immunity for example. In fact, the Court did not mention immunity. In modern terms, the *Welbridge* decision is better explained by a lack of proximity between the parties.⁷⁰ As suggested earlier, no further reference to immunity is necessary in such a case.

⁶⁸ *Supra* note 13 at para 42.

⁶⁹ *Supra* note 8.

⁷⁰ Laskin J referred to the absence of a special relationship or private nexus between the parties. *Supra* note 8 at 967. It was not until 2004 that the Supreme Court of Canada discussed similar issues related to municipal by-laws in immunity terms. See *Enterprises Sibeca v Frelighsburg (Municipality)*, 2004 SCC 61, 3 SCR 304.

The 1976 House of Lords decision in *Anns* has been very influential. It brought the policy/operational test to the forefront in the Commonwealth. Yet *Anns* said virtually nothing to justify negligence immunity. Lord Wilberforce simply declared by fiat that "... statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this 'discretion,' meaning that the decision is one for the authority or body to make, and not for the courts."⁷¹

Common law negligence immunity was first adopted by the Supreme Court of Canada in 1980 in *Barratt v North Vancouver*.⁷² The court applied *Anns* to immunize a municipality from a challenge to its municipal road inspection policy. Four years later, the relatively wide scope of immunity *Barratt* had imported from *Anns* was dismissed as unhelpful *dicta* by the Supreme Court.⁷³ When the Supreme Court refused to recognize immunity for government highway inspection in *Just*⁷⁴ one might have expected that common law immunity was on the verge of disappearing altogether as a force in Canadian negligence law. We know differently today, but it is difficult to explain why immunity survived as it did.

The United States *Federal Tort Claims Act* has been highly influential in infusing Commonwealth jurisdictions with policy immunity. Because of sovereign immunity, the government is only liable in tort to the extent that it consents to be held liable. This statute outlines the circumstances under which the federal government of the US consents to liability. It specifies that immunity remains for "the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government."⁷⁵

Almost all the substantive discussion about immunity and about the policy-operational continuum in the Commonwealth case law is derived from American jurisprudence interpreting the *Federal Tort Claims Act*.⁷⁶ But nowhere did the Supreme Court of Canada ever acknowledge that the US decisions were dealing with an immunity derived from US constitutional history and then imposed by US legislation. Nor did the Supreme Court acknowledge that the historical role of government in the US was significantly different from that in Canada. In fact, there is no

71 [1978] AC 728 at 754. See also *Home Office v Dorset Yacht*, [1970] UKHL 2.

72 [1980] 2 SCR 418 [*Barratt*].

73 See *Kamloops*, *supra* note 9 at para 15.

74 *Supra* note 1.

75 28 USCA S2680.

76 See e.g. *Barratt*, *supra* note 72; *Just*, *supra* note 1, and *Imperial Tobacco*, *supra* note 13. This was also true of influential foreign decisions including *Anns*, *supra* note 8; and *Sutherland Shire Council v Heyman* (1985), 60 ALR 1 [*Heyman*].

equivalent provision in Canadian Crown Liability legislation. The Canadian legislation is much more permissive. Our courts have adopted on their own initiative a much broader immunity than our legislatures.

Common law negligence immunity such as that recognized in *Imperial Tobacco* is different from sovereign immunity, also known as Crown immunity. Common law immunity applies to all statutory public authorities. Sovereign immunity applies only to the Crown and Crown agents. Sovereign immunity rests in the maxim “the King can do no wrong.”⁷⁷ One could argue for lesser immunity for administrative actors who are not Crown agents on the ground that they are further removed from core government, and further beyond the control of citizens through the political process. Surely no one would argue that non-governmental statutory public authorities should enjoy greater immunity than the Crown itself.

Sovereign immunity is based on the modern iteration of the separation of powers that existed historically between the Crown (today the government), and the courts. Sovereign immunity is really a jurisdictional question. One cannot sue the Crown for damages unless the Crown consents to the jurisdiction of the courts to entertain the suit. Crown liability statutes by which the Crown consents to be held liable have been adopted by the federal government of Canada and all ten provinces. Typically, common law tort actions against the Crown are permitted only for vicarious liability, not for the independent wrongdoing of the government.⁷⁸ Section 3 (b) (i) is the relevant section of the federal *Crown Liability and Proceedings Act* in which the Crown consents to assume liability for “a tort committed by a servant of the Crown.”⁷⁹ This is a strikingly broader acceptance of governmental responsibility for ordinary torts than is found in the US *Federal Tort Claims Act*, although admittedly it is often abrogated in the enabling legislation of the authority.⁸⁰

⁷⁷ See generally Allen Linden and Bruce Feldthusen, *Canadian Tort Law* (Markham, ON: LexisNexis Canada, 2011) at 662-65.

⁷⁸ *Ibid* at p 664.

⁷⁹ *Supra* note 18.

⁸⁰ See e.g. s 9 of the *Law Society Act*, RSO 1990, c L9 relied on in *Edwards*, *supra* note 6:

No action or other proceedings for damages shall be instituted against the Treasurer or any benchler, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation or a rule, or for any neglect or default in the performance or exercise in good faith of any such duty or power.

It is impossible to tell from the reasons for judgment in *Imperial Tobacco* why one or the other of the parties did not rely on this section. It would have been helpful to have had the benefit of argument and resolution before us. As one judge has observed, the significance of the distinction between vicarious and direct liability imbedded in the statute seems to have gradually and inexplicably disappeared.⁸¹ It is therefore necessary to speculate about the outcome had the plaintiffs sued the officers of Health Canada who had made the relevant misrepresentations, and sought to hold the government vicariously liable for their torts under the Act.

In *London Drugs v Kuehne & Nagel*, the leading Supreme Court decision on point in private party litigation, the majority observed that there is no general rule that an employee cannot be sued for a tort committed in the course of carrying out the very services for which the plaintiff had contracted with his or her employer.⁸² This is a close, albeit imperfect analogy that suggests that the Health Canada employees' duty of care to the tobacco companies would not be negated simply because they were effecting government policy, core or otherwise.

Parliamentary supremacy would allow the legislature to expressly exempt itself from liability, vicarious or direct. Parliament could also expressly exempt its employees from liability. In such cases section 3 of the *Crown Liability and Proceedings Act* or similar sections in the provincial statutes would not apply. The implied exemption recognized by the Supreme Court in the *Syl Apps* decision when the duty sought to be imposed would have interfered with an overarching statutory or public duty could also have precluded a claim against the employees of Health Canada had it been supported by the facts.⁸³ Beyond that, however, Parliament has consented to be held vicariously liable for torts committed by its servants.

The misrepresentations in *Imperial Tobacco* were committed by employees of Health Canada. They were *prima facie* tortious based on a clear finding of proximity. The government has consented to be held vicariously liable for the acts of its employees under the *Crown Liability and Proceedings Act*. What possible justification is there for the courts

⁸¹ *Williams v Canada (Attorney General)* (2005), 76 OR (3d) 763 at para 42 (Sup Ct).

⁸² [1992] 3 SCR 299 at para 177 [*London Drugs*].

⁸³ See *supra* note 3. The *London Drugs* analogy to *Imperial Tobacco* breaks down here. The courts are obliged to support the overarching public duty on the grounds of parliamentary supremacy. There is no comparable general obligation to prioritize a private employers' contractual duty.

immunizing the government from independently established bases of tort liability that the government has consented to assume? The courts' job should be to protect citizens from injury inflicted by government employees committing wrongs that would be actionable if committed by any other citizen. Courts should require the government to immunize itself if it wishes to do so, and to face the political consequences of doing so. Immunizing the government from obligations to which it has consented goes well beyond the bounds of respectful deference.

Assuming there could be any justification for broader immunity than that accorded by sovereign immunity and parliamentary supremacy, what would be that justification and would it apply in cases like *Imperial Tobacco*? According to David Cohen and JC Smith there are two standard justifications for public authority immunity in negligence.⁸⁴ The first is deference to the legislative branch, a position frequently stated but not really justified in leading decisions such as *Anns*, *Just* and *Barratt*. Nowhere is it explained why the delegation of powers and duties to subordinate statutory bodies thereby precludes the court from applying standard negligence law to the benefit of injured private citizens.

In support of the deference rationale Cohen and Smith refer to the traditional administrative law of judicial review. Under that view it was permissible to for the courts to judicially review the scope of administrative powers, but not the grounds on which the powers were or were not exercised. Originally this was a purely jurisdictional question based on parliamentary supremacy. It was not a self-imposed judicial constraint. Today, that traditional view has all but been eradicated from Canadian administrative law, replaced by the vexing question of "standard of review."⁸⁵ In essence this allows more substantive judicial review the greater the court's institutional competence in comparison to the public authority's. The more the matter involves issues with which the judiciary typically deals, the less deference is extended to the public authority.

Interestingly, Cohen and Smith's second justification for immunity is institutional competence. As they have said, "The state is likely to be involved in polycentric disputes. ... The traditional bilateral dispute-resolution process carried on in courts is ill-suited to deal adequately with legislative and many bureaucratic activities ..." To similar effect is the argument that courts should confine themselves to

... adjudication of facts based on discernible objective standards of law. In the context of tort actions ... these objective standards are notably lacking when the question is

⁸⁴ *Supra* note 19 at 8.

⁸⁵ See *Dunsmuir v New Brunswick* 2008 SCC 9, 1 SCR 190.

not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political or economic decisions.⁸⁶

The other side of the coin is equally important. The courts should not prevent themselves from adjudicating on matters that fall precisely within their own area of institutional competence. These ideas are mentioned briefly in *Just*⁸⁷ and *Sutherland Shire Council v Heyman*.⁸⁸ They are probably what the House of Lords had in mind when adopting a “justiciability” test to determine whether the courts should entertain or immunize the claim.⁸⁹

Immunity in *Imperial Tobacco* cannot be justified on institutional competence grounds. There was no dispute, polycentric or other, over budget allocation. There was no dispute, polycentric or other, over the suitability of harm reduction generally for smokers. The court defined its task as looking for traditional bilateral proximity between the parties as defined in ordinary private party negligence law.

Dealing only with matters that would be tortious if committed by private citizens should in and of itself preclude a court from wandering into the realm of social, political or economic policy questions. Private law duties of care are typically based either on acts that cause foreseeable harm to persons or property, or, as in *Imperial Tobacco*, on the defendant’s intending, inviting or inducing the plaintiff to act to its detriment. These are the “meat and potatoes” of standard negligence law. If these cannot be established, there is no *prima facie* duty, and the court should not turn at all to the policy questions raised at branch two of the *Anns/Cooper* approach. And even if the courts do turn to branch two, those policy questions are supposedly limited to whether a *prima facie* duty ought to be negated. It is the inappropriate search for unique obligations owed by public authorities to private citizens, not standard private party duties, that allow judicial intrusions into the governmental realm.

The allegation in *Imperial Tobacco* was unusual, based as it was on the alleged infliction of additional harm. It was not based on the failure to provide or to maintain a gratuitous statutory benefit. The circumstances

⁸⁶ *Blessing v United States*, 447 FS 1160 at 1170 quoted with approval by Cory J in *Just*, *supra* note 1.

⁸⁷ *Supra* note 1.

⁸⁸ *Supra* note 76.

⁸⁹ See *Stovin v Wise*, *supra* note 21; *Barrett v Enfield London Borough Council*, [2001] 2 AC 550 at 571. This test was referred to without enthusiasm by McLachlin CJC in *Imperial Tobacco*, *supra* note 13 at para 79.

under which a private party owes a duty to provide a gratuitous benefit are rare indeed, and not uniquely problematic for government defendants. The distinction between causing additional harm and failing to prevent it is also relevant to the institutional competence justification for immunity. It is incoherent to speak of a duty to act with reasonable care in providing statutory benefits. One can criticize the allocation of statutory benefits on political or social grounds, or on equitable grounds. One cannot assess political priorities with the “Hand formula.”⁹⁰

When the allegation is, as in *Imperial Tobacco*, that the authority acted unreasonably to inflict additional harm, however, the action falls within the paradigmatic case of private party negligence.⁹¹ A court is institutionally competent to assess whether it was negligent to promote low tar cigarettes that increased the risk of illness and death. Whether or not the decision to promote low tar cigarettes was reasonable is a classic standard of care issue in negligence law. This was not a case of competing budgetary priorities. There is nothing in the reasons for judgment to suggest that Health Canada had to decide between several alternatives, each of which would cause harm to some group or another. In fact, there was nothing in the reasons for judgment to suggest that Health Canada had to decide to harm anyone.

It may also be significant that the allegation in *Imperial Tobacco* was that the negligent misrepresentation about the properties of low tar cigarettes exposed the plaintiffs to the risk of liability for personal injury and death. True, the tobacco companies’ claim was apparently treated as one for economic loss, arguably an interest of a lower order than physical damage.⁹² Nevertheless, at its core this claim is about a decision that caused an increase in illness and death.

It is doubtful that the courts would immunize direct trespass to persons or property without an express assertion of sovereign immunity.⁹³ In *Imperial Tobacco*, however, the harm was inflicted indirectly, not directly.

⁹⁰ This refers to Justice Hand’s description of how to balance the risk of foreseeable injury against the cost of prevention when assessing whether the conduct in issue was reasonable; see *US v Carroll Towing*, 159 F 2d 169 (2d Cir CA 1947). The folly of attempting to apply this formula to the distribution of discretionary benefits is discussed in by Feldthusen, “Failure,” *supra* note 47.

⁹¹ Benson, *supra* note 47.

⁹² The argument that recovery should not depend on whether the loss is purely economic is developed below.

⁹³ Consider for example the interesting case of *Burmah Oil Company Ltd v Lord Advocate*, [1965] AC 75. The British government destroyed certain oil fields in Burma as part of its WW2 strategy. Clearly this was a policy decision of national importance. The House of Lords held that the destruction was lawful, but that the government must compensate the plaintiff because the costs of achieving a general public benefit should be

The rule for indirect infliction of a private nuisance may provide an instructive comparison. Liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance was the “inevitable result” or consequence of exercising that authority.⁹⁴ Consider how *Imperial Tobacco* would have been decided under the nuisance rule. Imagine a highly unusual degree of specificity in the legislation: “The Authority shall advise tobacco companies to promote low tar cigarettes.” In that case the authority should be immune. This is the parliamentary supremacy justification for immunity. It might be more palatable to refer to it as the defence of statutory authority. But if the statute says “The Authority shall advise tobacco companies about harm reduction strategies,” promoting low tar cigarettes would not be the inevitable result and the authority would not be immunized. *A priori* more general statutory language permitting the public authority to “adopt measures in the interest of public health” ought not to be sufficient to immunize conduct leading to a relationship that supports a *prima face* duty of care.

Although the general argument above does not depend on this, it is worth emphasizing what actually happened in *Imperial Tobacco*. The Supreme Court found that Health Canada’s interactions with the tobacco companies “... went beyond its role as regulator.”⁹⁵ These interactions were “... not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada *apart from its statutory duties*.”⁹⁶ It “... assumed duties *separate and apart from its governing statute*.”⁹⁷ Was the Court saying these actions were *ultra vires*? True, *ultra vires* conduct is not in itself tortious,⁹⁸ but it should be relevant to whether the defendant ought to be granted immunity.⁹⁹ Whether strictly *ultra vires* or not, is this the type of frolic that ought to be immunized from liability for causing illness and death?

Finally, personal injury and property damage may be of a higher order than economic loss, but the immunity analysis should not depend on this

shared among members of the public. The requirement to compensate was overturned by the *War Damage Act 1965*(UK), c 18.

⁹⁴ *Per* Major J in *Ryan v Victoria City*, [1999] 1 SCR 201. There are some similarities between this test and the *Syl Apps* approach to the duty issue, *supra* note 3.

⁹⁵ *Supra* note 13 at para 51.

⁹⁶ *Ibid* at para 50 [emphasis added].

⁹⁷ *Ibid* at para 53 [emphasis added].

⁹⁸ Kenneth Culp Davis’ famous statement that “(i)nvailidity is not the test of fault and it should not be the test of liability,” 3 Administrative Law Treatise, 1958 at 487 was quoted in *Welbridge*, *supra* note 8.

⁹⁹ *C.f. Roncarelli v Duplessis*, [1959] SCR 121.

distinction.¹⁰⁰ The law governing the recovery of economic loss generally and in negligent misrepresentation in particular is well-developed. Unless the recovery principles are demonstrably incorrect in private party negligence law, there is no reason why they should not be applied against statutory public authority defendants.¹⁰¹ In particular, the reliance losses allegedly induced by Health Canada in *Imperial Tobacco* are of a sort to have been recognized frequently by the Supreme Court of Canada.¹⁰² They have been identified as legally protected interests by leading theorists.¹⁰³ There is no case to be made for immunizing such claims on the ground that they are claims for economic loss alone.

5. Conclusion

Legislatures and government agents enjoy a degree of sovereign immunity that they have defined themselves by statute. The government is entitled to create immunity expressly in the enabling legislation. The courts will infer an intention to create immunity by necessary implication where liability would directly contradict the statutory mandate. There is no reason for the courts to recognize still greater immunity on their own initiative. The policy/operational distinction is too uncertain in difficult cases. Proximity is now the dominant consideration in public authority negligence law. The typical public authority negligence action involves claims based on the failure to receive gratuitous statutory benefits. There is no common law right to receive gratuitous benefits unless induced detrimental reliance is involved. The absence of proximity defeats virtually all such claims. Immunity is unnecessary.

¹⁰⁰ There is no primary right to economic security as there is to personal security or property rights. There are several decisions holding that economic interests are of a lower order than personal injury. See e.g. *Martel Building v Canada*, 2000 SCC 60, 2 SCR 860; *M v Stewart*, 2003 BCSC 1292 at paras 30, 71-74, 229 DLR (4th) 342, affd 2004 BCCA 458, 245 DLR (4th) 162..

¹⁰¹ Generally, relational economic loss is not recoverable in negligence by a private party; see *Bow Valley Husky (Bermuda) v Saint John Shipbuilding*, [1997] 3 SCR 1210. Defective product/structure economic loss is recoverable in Canada, although not elsewhere in the common law jurisdictions; see *Winnipeg Condominium Corporation No. 36 v Bird Construction*, [1995] 1 SCR 85. In my opinion, the rule elsewhere is to be preferred. See John Palmer, "Bird: A Confusion Between Property Rules and Liability Rules" (1995) 3 Tort L Rev 240. Legislation has been introduced in many Canadian jurisdictions to shield municipalities from liability for negligent building inspections.

¹⁰² *Hercules*, *supra* note 14; *Haig*, *supra* note 8; *Queen v Cognos*, [1993] 1 SCR 87; *Fletcher v Manitoba Public Insurance Co*, [1990] 3 SCR 191.

¹⁰³ Perry, *supra* note 64, sees these as interferences with the plaintiff's autonomy rights; see also Benson, *supra* note 64 at 864-65 and Beaver, *supra* note 64, especially at 282-84.

Where proximity does exist, there will be a very close and significant relationship between the plaintiff and the authority. The allegation will often concern an infliction of additional harm. It is no coincidence that immunity has only rarely been invoked to trump proximity in such cases. Immunity ought not to be granted. A better approach that balances the rights and interests of the public authorities with that of ordinary citizens would be to respect the legislature's right to create immunity, and to abandon judicially created immunity altogether. Where private party proximity exists the legislatures may be less likely to assert immunity than the courts have been to imply it.