THE POLICY/OPERATIONAL DICHOTOMY—A CUCKOO IN THE NEST*

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In the case of Anns v. Merton London Borough Council,¹ Lord Wilberforce, in considering the negligence liability of a local authority arising out of the exercise of its statutory powers to inspect buildings under construction, drew a distinction between the "policy" and "operational" aspects of the authority's functions and suggested that liability would more readily arise in respect of the latter. Since that time it has become common to consider the liability of public authorities generally in the tort of negligence by reference to this "policy/operational" dichotomy.

In an earlier article² it was argued that the ordinary private law principles of negligence were sufficiently flexible and sophisticated to take account of all the factors relevant to the questions (i) whether a duty of care should be imposed upon a public authority exercising statutory functions and (ii) whether that authority should be held to be in breach of duty.

It was conceded that if Lord Wilberforce's approach were any easier to understand and apply than ordinary tort principles, or more likely to take proper account of the relevant considerations, there might be something to be said for it. However, it is contended that the policy/operational concept adds nothing of substance to what is already inherent within private law principles, but rather serves only to generate unnecessary confusion and so to divert attention away from those policy factors which require consideration in a negligence action.

In order to substantiate this view it will first be necessary to trace the policy/operational dichotomy back to its origins, and then to examine its application by the courts in later cases and the observations upon it by learned commentators.

* This is a revised version of part of a paper presented to the Administrative Law Group of the Society of Public Teachers of Law at the University of Edinburgh in April 1983.
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(1) Origins: Dorset Yacht Co. Ltd. v. Home Office

As Craig has shown, the policy/operational distinction derives from a decision of the United States Supreme Court interpreting a provision of the Federal Tort Claims Act 1946 which gave immunity in respect of the exercise or performance of a discretionary function on the part of a Federal Agency. The real starting point in this country was the speech of Lord Diplock in Dorset Yacht Co. Ltd. v. Home Office. His Lordship referred to this often cited passage from Lord Blackburn’s speech in Geddis v. Proprietors of Bann Reservoir:

. . . [I]t is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently.

Lord Reid had already pointed out that this proposition was directed to the defence of statutory authority:

The reason for this is, I think, that Parliament deems it to be in the public interest that things otherwise unjustifiable should be done, and that those who do such things with due care should be immune from liability to persons who may suffer thereby. But Parliament cannot reasonably be supposed to have licensed those who do such things to act negligently in disregard of the interests of others so as to cause them needless damage.

Lord Diplock, it is respectfully submitted, quite correctly declined to treat Lord Blackburn’s statement as authority for the proposition that every negligent exercise of a statutory power that causes loss is actionable in tort. It stands only for the point that, if an authority performs an authorised act negligently, the defence of statutory authority will not be available. His Lordship supported this by the observation that the cases of which Geddis was a typical example involved private Acts of Parliament which gave powers to interfere with proprietary rights. Thus, any negligence would be actionable in accordance with ordinary tort principles, and the Geddis principle would prevent reliance on any defence of statutory authority.

4 Dalehite v. United States (1953) 346 U.S. 15.
6 (1878) 3 App. Cas. 430, 455-456.
8 Ibid., at p. 1066.
9 It is important to remember that the Geddis case involved the infliction of loss, rather than a mere failure to confer a benefit. The defendants, acting under statutory powers, erected a reservoir. The purpose was to augment the supply of water to the River Bann, and this involved sending a greater quantity of water down the River Muddock, between the reservoir and the Bann. The proprietors neglected to exercise their statutory power to cleanse the channel of the Muddock, with the result that water overflowed its banks and damaged neighbouring land, including the plaintiff’s oat crops. This was, accordingly, an omission in the context of a wider course of deficient positive conduct.
Lord Diplock continued: 10

But the analogy between "negligence" at common law and the careless exercise of statutory powers breaks down where the act or omission complained of is not of a kind which would itself give rise to a cause of action at common law if it were not authorised by the statute. To relinquish intentionally or inadvertently the custody and control of a person responsible in law for his own acts is not an act or omission which, independently of any statute, would give rise to a cause of action at common law against the custodian on the part of another person who subsequently sustained tortious damage at the hands of the person released. The instant case thus lacks a relevant characteristic which was present in the series of decisions from which the principle formulated in Geddis v. Proprietors of Bann Reservoir was derived.

This passage causes some difficulty. On the one hand, it illustrates the point just made that the Geddis principle is limited in its application, and that, it is submitted, is correct. On the other hand, there are problems in identifying precisely where the line is to be drawn between those situations which "give rise to a cause of action at common law" and those which do not. As a precise concept, the distinction is unworkable for two related reasons. First, the accidents of litigation are such that a particular situation may not have come before a court for it to determine whether a duty of care is owed. Secondly, the point that the categories of negligence are not closed has been emphasised by recent developments 11 widening the field of liability for economic loss and nervous shock, the liability of builders and the liability of occupiers of land towards trespassers. Nevertheless, at a more general level it can be said that liability in certain broad areas is reasonably settled, partly as the result of these recent developments. Thus, the negligent infliction of damage to person or property is normally actionable, and the infliction of economic loss is actionable within rather narrower, albeit less settled, limits. It might be possible to argue that the Geddis principle should apply in situations such as these but not where other kinds of interests are at stake.

Lord Diplock then made the point that in cases such as that now before him the range of interests at stake was much wider than in the Geddis-type of case. There, the only conflicting interests involved were those of the defendant authority and the plaintiff whose property rights had been infringed. Here, there were in addition the interests of the Borstal trainees involved and of other members of the community of trainees subject to the common system of control, and the general

10 At pp. 1066–1067.
public interest in the reformation of young offenders and the prevention of crime. From that point the argument developed in stages:\textsuperscript{12}

(1) These additional interests, unlike those of a person whose person or property is tortiously damaged, "do not fall within any category of property or rights recognised in English law as entitled to protection by a civil action for damages. The conflicting interests [that may be affected by decisions concerning Borstal trainees] . . . are thus of different kinds for which in law there is no common basis for comparison, [and] . . . there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest, and that to be given to another."

(2) "The material relevant to the assessment of the reformative effect upon trainees of release under supervision or of any relaxation of control while still under detention is not of a kind which can be satisfactorily elicited by the adversary procedure and rules of evidence adopted in English courts of law or of which judges (and juries) are suited by their training and experience to assess the probative value."

(3) "It is, I apprehend, for practical reasons of this kind that over the past century the public law concept of ultra vires has replaced the civil law concept of negligence as the test of the legality, and consequently of the actionability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament as to the means by which they are to achieve a particular public purpose. According to this concept Parliament has entrusted to the department or authority charged with the administration of the statute the exclusive right to determine the particular means within the limits laid down by the statute by which its purpose can best be fulfilled. It is not the function of the court, for which it would be ill-suited, to substitute its own view of the appropriate means for that of the department or authority by granting a remedy by way of a civil action at law to a private citizen adversely affected by the way in which the discretion has been exercised. Its function is confined in the first instance to deciding whether the act or omission complained of fell within the statutory limits imposed upon the department’s or authority’s discretion. Only if it did not would the court have jurisdiction to determine whether or not the act or omission, not being justified by the statute,

\textsuperscript{12} [1970] A.C. 1004, at pp. 1067-1068.
constituted an actionable infringement of the plaintiff's rights in civil law."

(4) Hence, the intentional release of a trainee, or the escape of a trainee resulting from the deliberate adoption of a relaxed system of control, would not be actionable unless the decision in question was ultra vires.

There are, however, difficulties with each of the first three stages. As to (1), the private law breach principles have never been limited to the weighing of interests that are strictly comparable. For example, the courts have regarded the "object to be attained" by the defendant's action as a relevant consideration, thereby taking into account, for example, the interest of drivers in moving about the country at a reasonable speed,\textsuperscript{13} the interests of cricketers\textsuperscript{14} and the interest in saving life.\textsuperscript{15} These factors were balanced against the various kinds of physical damage that occurred in the cases in question. It is hard to see that these are any easier to assess than the interests at stake in the \textit{Dorset Yacht} case. As to (2), this argument seems weak inasmuch as judges appear happy to adjudicate upon matters of great complexity with the guidance of specialist witnesses. They could, of course, change the adjectival rules to permit a wider range of material to be brought before the court. Indeed, the specific factual background provides a particularly unconvincing illustration, since judges by their experience and training should presumably have some awareness of the effect of Borstal training regimes, given that one of their other functions is to sentence young people to such training (or its modern equivalent).

Lord Diplock, it is submitted, paints an excessively pessimistic picture of the way in which the ordinary principles of negligence operate. This is compounded by the observation at stage (3) that it is not the court's function to "substitute its own view" for that of the public authority. This, however, is not the court's function in the ordinary negligence case. The court does not, for example, "substitute its own view" for that of the doctor alleged to have bungled an operation. The court allows the doctor a "margin of error"\textsuperscript{16} and in practice only holds him to have been negligent if there is sufficient expert medical testimony against him. The arguments at the first two stages might lead to the conclusion that there should be complete immunity for public authorities exercising discretionary powers, since the court would seem to be in little better position to intervene under the guise of the ultra vires doctrine than under private law principles.


Behind Lord Diplock’s approach is the perfectly sensible idea of judicial deference to public authorities in such situations. The assumption underlying his analysis is that the ultra vires doctrine involves “more” deference than private law principles. It is submitted that this assumption is unfounded. It might seem at first sight that, while the common law principle is one of “unreasonableness,” the closest public law analogue is that an exercise of discretion is ultra vires if it is “so unreasonable that no reasonable authority” would act in that manner. However, that comparison fails to take account of the point that the common law principle is not simply that of “unreasonableness.” An illustration particularly relevant here is *Bolam v. Friern Hospital Management Committee,* where McNair J. held that a doctor who had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique. His Lordship referred without disapproval to a statement by Lord President Clyde in *Hunter v. Hanley*:

> In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care.

In the *Dorset Yacht* case, Lord Reid suggested that bodies exercising statutory discretions would be likely on occasion to commit errors of judgment, but Parliament could not have intended that members of the public should be entitled to sue in respect of such errors, unless the point was reached that the discretion had been exercised so carelessly or unreasonably that there had been no real exercise of that discretion. This may be compared with the general reluctance of the courts to

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17 *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. A finding of ultra vires will not automatically establish lack of reasonable care: see Craig, (1978) 94 L.Q.R. 428, 447–449; *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158. For example, it may well be more difficult to establish negligence in situations where the authority has merely failed to take account of a particular legally relevant consideration than where the decision is unreasonable in accordance with the *Wednesbury* test. There may also be problems as to causation: see Harlow, *Compensation and Government Torts* (1982), p. 92.


19 [1957] 1 W.L.R. 582.

categorise all “errors of judgment” as “negligent” in cases concerning professional men. 21

A further point which, it is submitted, has been ignored by Lord Diplock is that the onus is on the plaintiff to prove that there has been a breach of duty. The greater the range of arguments on each side and the greater the range of interests at stake, the more difficult it will be for the plaintiff to show positively that the defendant’s decision was wrongful. It cannot seriously be argued that the plaintiff’s task in establishing a case of negligence against a professional man is anything but daunting.

There is one technical difference between the two tests. The question whether government action is ultra vires is a question of law. The question whether there has been a breach of duty in negligence is a question of fact. However, as both kinds of question will today be determined by a judge, and as the latter question may turn on inferences to be drawn from primary facts which appellate courts may be willing to upset, 22 the difference is not of particular significance. Accordingly, it is submitted that Lord Diplock’s preference for the ultra vires principle in this context was based on weak grounds.

The next point is to identify when Lord Diplock thought the “ultra vires approach” should be adopted. It has already been noted that Lord Diplock did not envisage that the “new approach” he advocated would apply in every case concerning statutory powers: the Geddis principle would apparently prevail where the act or omission was such as to give rise to a cause of action at common law (presumably) by the application of existing principles. Thus, the new approach would not be needed in cases involving (1) the infliction of damage to person or property by a public authority or its employees; and (2) the infliction of economic loss where that is already recognised as actionable (e.g. under the Hedley Byrne principle). Its role would be limited to “novel situations.” Even here, the court, having found a particular exercise of discretion to be ultra vires, would still have to determine whether the common law of negligence should be extended to this novel situation. 23

Finally, it should be noted that Lord Diplock does not actually use the terms “planning” or “policy” and “operational.” Instead, he speaks of exercises of discretion and action that “falls outside the limits of . . . discretion,” such as actions of a Borstal officer contrary to his instructions. 24

22 Ibid.
24 At p. 1068.
(2) Restatement: Anns v. Merton London Borough Council

In the Anns case, Lord Wilberforce expounded the policy/operational distinction as follows:

Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this "discretion" meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions; a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion." It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose upon it a common law duty of care.

One point of difficulty is that it is unclear in what kind of case Lord Wilberforce intended this dichotomy to be applicable. We have already noted that Lord Diplock’s application of essentially the same idea was limited to "novel cases." Lord Wilberforce interpreted Lord Diplock’s speech as stating

that the accepted principles which are applicable to powers conferred by a private Act of Parliament, as laid down in Geddis v. Bann Reservoir Proprietors, cannot automatically be applied to public statutes which confer a large measure of discretion upon public authorities.

However, the line of distinction drawn by Lord Diplock was based on the nature of the interests of the plaintiff affected and not on whether the statute was public or private, or whether it conferred a "discretion" or a "large measure of discretion." Nevertheless, Lord Diplock did not seem to object to this transformation as he concurred with Lord Wilberforce’s speech in the Anns case itself. The result seems to be that the policy/operational dichotomy is to be regarded as relevant to all cases concerning the exercise of discretionary powers.

On the other hand, it has been suggested that its relevance might be limited by reference to a restricted interpretation of the concept of

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26 At p. 754.
27 (1878) 3 App. Cas. 430.
29 It may be inferred from the passage just cited from Lord Wilberforce’s speech that he would equate a public statute conferring a power of the Geddis type with a private statute conferring such a power. It would be the extent of the discretion conferred that his Lordship would regard as crucial, not whether it happened to be incorporated in a public or private Act. Cf. Fellowes v. Rother D.C., below, p. 444.
discretion. Aronson and Whitmore\textsuperscript{31} suggest that there are three possible meanings of the term in this context. First,

it may indicate that the official has a power to choose between two or more alternatives. . . . Alternatively, it may be used to indicate that an expert's or professional's sense of judgment is called for . . . . Or, it may be used to indicate the power given to an official to formulate policy, to balance competing public interests by criteria which a court is not equipped to evaluate in terms of "reasonableness."

They argue that only in this third sense is it necessary, in the context of a negligence action, to pay regard to the fact that a discretion is being exercised.

What possible reason, for example, can there be for exempting a government doctor from the need to observe a duty of care when performing an operation in a public hospital even though the statute merely empowered (rather than forced) him to operate?\textsuperscript{32}

While one would readily agree that there could be no legitimate reason for such exemption in the factual illustration given, it is less clear that the three categories identified are really as sharply distinguishable as suggested. What, after all, is the difference between the two situations of an official choosing between alternatives and an expert or professional using his sense of judgment? Possibly the former might suggest a wider range of legitimate conclusions and a lesser likelihood of the possibility of review by precise and established criteria, but any such distinction would be purely one of degree. More importantly, since it is this kind of exercise of discretion which is alleged to fall outside the bounds of justiciability, how does one recognise a "power given to an official to formulate policy, to balance competing interests by criteria which a court is not equipped to evaluate in terms of 'reasonableness'?" Aronson and Whitmore appear to advance as a touchstone that the decision be essentially political—\textit{i.e.} that it involve considerations of "expense, political viability and the competing demands of other governmental projects."\textsuperscript{33} Particular cases\textsuperscript{34} are explained as involving "economic" or "manpower" considerations. Yet, having advanced this guidance, they appear almost immediately to resile from it:

It should not be enough for a public defendant to show that he had had to consider "manpower" and other "economy" factors. Private defendants do likewise. For the "policy" considerations to exonerate a public defendant, they should either be so "political"

\textsuperscript{31} Public Torts and Contracts, p. 69ff.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid., at p. 70, n.13.
\textsuperscript{34} E.g. Sheppard v. Glossop Corporation [1921] 3 K.B. 132.
as to warrant the court declining to interfere, and/or on such a large scale as to transcend the court’s capacity to give a decision on the merits.\(^{35}\)

Once the argument reaches this stage the suspicion develops that the "non-justiciable" range of issues in fact occupies a distinctly narrow band on the spectrum of possibilities. It is not difficult to accept the inappropriateness of allowing the courts to be used as an appeal tribunal against the results of a General Election—thus an unemployed person’s claim for damages against the Prime Minister or Chancellor of the Exchequer on the grounds of their negligent handling of the economy is unlikely to be entertained. Remarkably few claims, however, are of this sort and certainly it would be quite unnecessary to invent a "policy/operational" dichotomy in order to deal with them.

In any event there is little in Lord Wilberforce’s judgment to suggest that he understood the concept of discretion in any restrictive sense. As Aronson and Whitmore accept, his judgment is ambiguous, and could be read as "flitting between the first and third meanings of the term ‘discretion’ without any apparent awareness of the differences."\(^{36}\) Thus the observation that "public authorities have to strike a balance between the claims of efficiency and thrift . . . : whether they get the balance right can only be decided through the ballot box, not in the courts" seems to have in mind the third kind of discretion, whereas the comment that "many ‘operational’ powers or duties have in them some element of ‘discretion’ " seems to reflect the first.\(^{37}\)

Indeed, the view that the "policy" aspect of the dichotomy covers all kinds of discretion is supported by the very nature of Lord Wilberforce’s approach: there is to be no simple, rigid exclusion from the court’s purview of whatever are deemed to be policy matters. Rather, his distinction is "probably" one of degree—"the more ‘operational’ a power or duty may be, the easier it is to superimpose on it a common law duty of care."\(^{38}\)

This leads on to a related difficulty concerning the precise role to be played by the policy/operational dichotomy in a particular case. Lord Wilberforce appeared to intend that the consideration of the dichotomy should be an additional element to the matters normally considered as relevant to the establishment of a duty of care in an ordinary private law case of negligence. Thus he endorsed the general

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\(^{36}\) Ibid., at p. 70.


\(^{38}\) Ibid. Aronson and Whitmore, however, conclude (op. cit., p. 73): “Perhaps these doubts over Lord Wilberforce’s intended meaning . . . are overstated. An early indication that ‘discretion’ is used merely as the equivalent of non-justiciable ‘policy’ would certainly be welcome. That was clearly Lord Wilberforce’s primary meaning.” This view has received the support of Hodgson J. in Sasin v. Commonwealth (1984) 68 F.L.R. 404, 420.
approach of Lord Atkin in Donoghue v. Stevenson but added that the council's duty could not "be based on the 'neighbourhood' principle alone or on merely any such factual relationship as 'control' as suggested by the Court of Appeal."  

There is a danger, however, that such an apparently portentous statement of principle will come to be regarded as the primary, or even the sole, criterion of liability in such cases, thus obscuring the relevance of the many other factors affecting liability. There are indications of this in the judgment of Lord Wilberforce in the Anns case itself, where insufficient consideration was given to such fundamental questions as the nature of the interest the plaintiff was seeking to protect and whether the defendant authority's conduct consisted in the infliction of loss or the failure to confer a benefit. Clearly his Lordship was concerned at the possibility of a public authority being held liable for action taken in the bona fide exercise of a discretion granted by statute; but, as has been argued elsewhere, the range of mechanisms comprising the private law principles of negligence already provides full protection for the legitimate interests of public authorities. In particular, the principles governing breach of duty are likely to be appropriate for that purpose. But, according to Lord Wilberforce, consideration of the policy/operational dichotomy is a preliminary to the establishment of a duty of care. If, therefore, the plaintiff seeks to bring an action in respect of harm arising out of a policy decision taken by a public authority, he must first demonstrate that the decision was ultra vires—for example, that it was so unreasonable that no reasonable authority could have made it. Thus, in such a case, the duty of care is only shown to exist once the circumstances demonstrating its breach have been established. While it may be going too far to say this "leaves the plaintiff in a logical limbo," it is certainly cumbersome and unattractive analytically. This is perhaps to be expected of an approach that seeks to take account of the public law dimension of such negligence claims at a stroke, and a

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41 An early illustration of this danger occurred in Meade v. Haringey London Borough Council [1979] 1 W.L.R. 637, a breach of statutory duty case. Lord Denning M.R. cited the decisions of the House of Lords in Anns and Dorset Yacht in support of the proposition that if a public authority acted ultra vires: "Any person who is particularly damnified thereby can bring an action in the courts for damages or an injunction, whichever be the most appropriate" (at p. 647).
43 "A plaintiff complaining of negligence must prove . . . 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": loc. cit., p. 755. It is interesting to note that Lord Diplock in the Dorset Yacht case more than once referred to the need to prove ultra vires as being "a condition precedent to . . . liability" rather than to the establishment of a duty (loc. cit., p. 1069. Emphasis added). Elsewhere, however, (see note 12 above), he referred to it as a preliminary to establishing jurisdiction.
preliminary stroke at that, instead of paying due regard to it in the light of its true importance at each stage of the ordinary negligence inquiry. The policy/operational cuckoo is therefore seen to be a distinctly less handsome and delicate creature than its private law foster-brothers whose rightful place in the nest it shows signs of usurping.

(3) Ascertaining the limits: post-Anns cases

(a) The dichotomy applied

It has been strongly argued\(^ {45} \) that the Anns case should not be regarded as reducing liability in respect of the negligent exercise of powers:

It is at present unthinkable that a public authority which is under a duty of care either at common law, or under a statute (such as the Occupiers’ Liability Act) might be able to plead in its defence that, for example, the public interest or the rival claims of efficiency and thrift, as evaluated by the authority, entitled it to neglect its duty.\(^ {46} \)

We would concur with these sentiments. It is doubtful, however, whether the authority cited, *Bird v. Pearce, Somerset County Council (Third Party)*,\(^ {47} \) truly supports this argument.\(^ {48} \)

The council established a traffic system that gave priority to a major road and provided the appropriate road signs and markings on the minor roads that joined it. White lines at a particular junction were obliterated by re-surfacing of the road, but no warning signs were put up pending the re-drawing of the white lines. The first defendant, who was driving along the minor road, did not realise that he was approaching the major road, and an accident ensued. He now claimed contribution from the council. The council argued, *inter alia*, that its decision not to exercise its discretionary power to put up temporary warnings\(^ {49} \) was a matter of policy and it could not be shown that the decision was ultra vires. Wood J., however, regarded the decisions to establish the traffic system and to reinstate it after re-surfacing operations as the “discretionary planning” stage, and the conduct of the re-surfacing operation as “something carried out at the operational level,”\(^ {50} \) to which ordinary negligence principles applied. As that operation created a danger, the council should have taken reasonable steps to minimise it by providing temporary warning signs, a step that

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\(^{46}\) Ibid., at p. 273.


\(^{48}\) Cases decided since Oliver’s article was written and which might be interpreted as supporting her argument are mentioned below in parts 3(b) and 3(c).

\(^{49}\) Road Traffic Regulation Act 1967. ss.54 and 55.

would have been simple and inexpensive. The council appealed unsuccessfully to the Court of Appeal. One ground of appeal was that the judge failed to pay any or any sufficient regard to the fact that the authority was not under a statutory duty to put down or maintain white lines at the junction and that under section 55(1) of the Road Traffic Regulation Act 1967 the authority had a discretion whether or not to put down or maintain white lines at the junction.

It is not, however, clear that the council pressed the policy OPERATIONAL distinction on appeal. Anns was only mentioned once, when counsel for the council sought to forestall reliance upon it by stating that it was no authority for imposing a duty on the council in the circumstances of the case. Anns was thus thought of as a potential sword rather than as a shield. The argument then developed on behalf of the council was that as there was no duty to provide road markings, only a power, "the authority was entitled to remove the sign without incurring an obligation to give any warning that this had been done or to provide some substitute sign." This contention was based on Sheppard v. Glossop Corporation where the authority exercised a statutory power to light a street on a hill, but decided that the light should be extinguished every night soon after nine o'clock. A pedestrian missed his way, fell and injured himself in the dark. The Court of Appeal held that, as the corporation had done nothing to make the street dangerous and as the statute did not impose a duty, it was under no obligation to light the street and so was not liable in tort. This case was easily distinguished by Eveleigh L.J. in Bird v. Pearce on the ground that in the latter case the authority had created a source of danger by establishing the traffic system that gave priority to the major road: cars travelling along that road would proceed more quickly at crossroads and junctions than if no such system had been established. This rather optimistic reliance upon Sheppard v. Glossop Corporation does not seem to amount to an argument that the conduct of the re-surfacing

51 Ibid., at p. 300.
53 Ibid., at p. 370.
54 Ibid., at p. 372.
55 Ibid., at p. 373.
56 [1921] 3 K.B. 132.
57 That was indeed the basis upon which Lamley v. East Retford Corporation (1891) 55 J.P. 133 was distinguished in Sheppard v. Glossop Corporation. In the former case the corporation had placed a post in the middle of a footpath but failed to light it and were held liable to a pedestrian who walked into it at night. See, to the same effect, McClelland v. Manchester Corporation [1912] 1 K.B. 118, Morrison v. Sheffield Corporation [1917] 2 K.B. 866 and Fisher v. Ruislip-Northwood U.D.C. [1945] K.B. 854.
operation was a matter of policy and that, accordingly, it had to be shown to be ultra vires. Indeed, these arguments were treated separately by Wood J. at first instance. The ground of appeal mentioned above seems to have been designed to raise the *Sheppard v. Glossop Corporation* point.

Dawn Oliver takes the judgments as showing impliedly that the policy/operational dichotomy has no relevance in this kind of case. It is, however, submitted that it is more plausible that the council accepted Wood J.'s view that this was operational negligence, and that therefore the dichotomy was of no help to them on the facts of the case.

*Bird v. Pearce* was a straightforward "infliction of loss" case. The next case to be discussed involved a "failure to confer a benefit," but in circumstances in which the common law recognised a duty of care to arise. In *Vicar of Writtle v. Essex County Council*, a boy of 12 was remanded by a juvenile court for eight days into the care of the council, which placed him in a community home. He walked out of the home and set fire to the nearby parish church. The council denied that it had been warned of the boy's dangerous fire-raising propensities and claimed that, even if it had, it was entitled in the exercise of its discretion to disregard such a warning in the interests of the boy. Forbes J. held that one council official was aware of the risk of fire-raising but that this information had not been passed to head office or to the home. Had the home been aware of the danger, a stricter watch would have been maintained. His Lordship held first that there was a sufficient relationship of neighbourhood necessary to found a duty of care. The council's duty was that of a parent. Secondly, however, the duty was limited by the fact that the council was exercising a statutory discretion. In deciding how to deal with the child it had to weigh the respective interests of the child itself, other children committed to care, the staff of the establishment and persons in the outside world. Such questions were for the authority alone and the courts could not substitute their view for any arrived at bona fide by the authority. Thirdly, this potential limit was ultimately not relevant because the information was not passed on. The official concerned had no "statutory discretion" to suppress this information and, without it, the head office could not be said to have decided as a matter of discretion to place a known or suspected fire-raiser in a particular kind

60 See the text accompanying note 53, above.
63 Ibid., at p. 672.
of home. Therefore, the matter had to be determined on ordinary negligence principles and the council was liable.

Justice in this case was accordingly done. However, the argument unsuccessfully advanced shows how dubious the Anns principle could be if widely applied. It is well established that parents owe a duty to take reasonable steps to prevent their children damaging third parties, whether by fire, sword, gun or otherwise. That duty also applies to persons in loco parentis, such as local authorities, vis-à-vis children in their care, and does not seem to constitute a novel situation. Had the defendant been an ordinary parent, a duty would clearly have been owed. Moreover, in deciding how to deal with a child with a known penchant for arson, a parent will have to weigh up the interests of all concerned: the child himself, his brothers and sisters, the cleaning lady and persons in the outside world. A parent will only be required to do what is reasonable: mounting a 24-hour guard or tying the little monster to the bed would be going too far. There is no obvious reason why the fact that the defendant was a local authority should have made any difference.

The Writtle case thus stands both as an authority against the argument that the policy/operational dichotomy is limited in its application, and at the same time as a very good illustration of why it should be. First, it added a dimension of complication to what was otherwise a case for the straightforward application of ordinary principles. Secondly, the factors advanced as to why the ultra vires test should be applied could easily be accommodated within the ordinary breach of duty formula.

That the judges regard the policy/operational dichotomy as relevant in all cases involving statutory powers was confirmed in Fellowes v. Rother District Council. A predecessor in title of the council installed groynes in a beach near what was now the plaintiff’s property. The aim was to prevent erosion by the sea. Subsequently, the council, as coast protection authority under the Coast Protection Act 1949, carried out repairs. The plaintiff alleged that these were carried out negligently in that the height or length of particular groynes was inadequate. This, it was alleged, created a scouring effect, which caused the sea to wash away part of the plaintiff’s land. Whether the council would be liable on the alleged facts was tried as a preliminary question. Robert Goff J. held that the council owed a duty of care to the plaintiff in exercising its statutory powers to undertake coast protection works, provided that the act complained of was not within the limits of a discretion exercised bona fide. His view was that the

64 See, e.g., Williams v. Eady (1893) 10 T.L.R. 41 (schoolmaster).
policy/operational dichotomy was applicable here, and indeed in all cases concerning the allegedly negligent exercise or non-exercise of statutory powers. He said that the Geddis principle must be read in its context as referring to private Acts of Parliament, such as those which conferred a power to interfere with property rights or take other action which would otherwise be unlawful, since Parliament could not have intended that such a power should be exercised in such a manner as to cause avoidable injury. Such an exercise of power would necessarily be ultra vires. Public Acts of Parliament or delegated legislation, and acts done thereunder, were to be distinguished, however, for if the conduct fell within the area of policy or discretion it would be intra vires and no action would lie.66

It is understandable that his Lordship took at face value the statements in the House of Lords in the Dorset Yacht and Anns cases. It is, however, difficult to see why he regarded the distinction between private and public acts as significant. Surely what is important is the nature of the power and the consequences of its exercise or non-exercise, not whether it appears in a public or private Act.67 A public authority, like a statutory undertaker, may obtain powers under a public Act: a public Act may confer powers similar to those conferred by a private Act.

At the trial68 Michael Davies J., after hearing expert evidence, held (1) that the council had not been negligent and (2) that in fact there was no causal link between the state of the groynes and the erosion of the plaintiff’s property. However, he also considered a third question, which was whether what he termed “the ‘policy’ or ‘discretion’ defence” succeeded. As to the law, he accepted and endorsed the judgment of Robert Goff J. As to the facts, he stated that the strongest point made on behalf of the plaintiff was that there was no evidence in the council’s minutes that the lowering or non-extension of particular groynes were ever specifically considered by the council. Nevertheless, he found that these matters were part of the scheme of works as intended by the expert engineers who advised the council, and that the council had approved the scheme. His Lordship appeared to conclude that as these decisions were deliberate they were therefore matters of “policy” or “discretion.” It is submitted, however, that it is questionable whether this necessarily follows.69

The Fellowes case is of particular significance in two important and related contexts. First, it might be convincing to argue that there was

66 Ibid., at p. 518.
67 See note 29, above, and the accompanying text.
68 Unreported, 24 January 1983 (Lexis).
69 A hypothetical example concerning building inspectors used in the Kinnear case (below) suggests the contrary.
value in the approach of Lord Wilberforce in Anns if it enabled a severable preliminary issue to be identified in order to filter out cases which, because of their public law dimension, might be unsuitable for judicial determination on the merits. It would then be possible to avoid a full trial in many cases. As to this, Michael Davies J. stated:

It was plain to the learned judge, as was indeed accepted by both sides before me, that it is impossible to decide whether this “discretion” (or “policy” as it is sometimes put) case without hearing the evidence and finding the facts. This led the learned judge to express some regret, so it seems to me, that a preliminary issue trial had been ordered in the present case, with the inevitable increase in the expenditure in time and money.

Secondly, the case casts doubt on the very idea underlying the Anns principle that “policy” issues are unsuitable for judicial determination, since, although the judge ultimately characterised the matter as one of policy, he examined the issue of negligence in detail and had no difficulty in dealing with the expert evidence and in acquitting the defendants on that point.70

Similarly interesting is the case of Allison v. Corby District Council, where a motor cyclist was involved in an accident caused by a pack of dogs running across a road. The presence of dogs roaming the streets in Corby had been recognised as a serious problem for some time.72 The council took various measures to combat this hazard, including the appointment of a part-time dog-catcher. It was alleged that these measures were inadequate, and, in particular, that full-time dog-catchers might have been appointed. The trial judge, Peter Pain J., held that, even if a duty were owed, the council was not in breach of it since it had given careful consideration to the matter and taken measures which had had an immediate and substantial effect in reducing the hazard to a level which might reasonably have been regarded as acceptable. Once again, the case is significant with respect to the proposition that the policy/operational dichotomy might be a convenient device to sift out at a preliminary stage cases which the court will be ill-equipped to judge on the merits. Having quoted extensively from Lord Wilberforce’s judgment in Anns, which he

70 Cf. D. H. S.S. v. Kinnear and others (1984) 134 N. L. J. 886; The Times, 7 July 1984, where children allegedly brain-damaged by whooping-cough vaccine sued the D.H.S.S. in negligence. Those aspects of the claim that comprised a challenge to the policy decision to establish a vaccination programme were struck out as disclosing no reasonable cause of action, as it was not alleged that the decision was ultra vires. However, the medical issues had much in common with those arising in ordinary medical malpractice suits where it is alleged that a practice approved by a respectable body of medical opinion should be regarded by the courts as negligent. It is unlikely that any part of the claim would have been struck out if the matter had been judged on the basis of ordinary negligence principles alone.


72 The deputy town clerk recalled that in 1970 92 road accidents in which dogs were involved had occurred in the urban district (loc. cit., p. 114).
professed to find of “considerable assistance,” Peter Pain J. admitted to uncertainty over the question of duty, but had no difficulty in acquitting the council of any breach. He thereby short-circuited apparent problems involved in the handling of the helpful sifting device by cutting straight to a speedy resolution of the issue he was allegedly ill-equipped to determine!

Confirmation of the essentially arbitrary nature of the policy/operational dichotomy is provided by Rigby v. Chief Constable of Northamptonshire. In December 1977, a young psychopath broke into a gunsmiths shop owned by the first plaintiff. The police laid siege, and eventually fired in a canister of CS gas. The canister set the shop ablaze. The plaintiff framed his case, inter alia, in negligence, claiming that the police had been at fault in using the particular kind of CS equipment employed at the siege. This released the gas by means of a pyrotechnic device and accordingly posed an obvious fire risk. The plaintiff claimed that the police should have used instead a device known as “Ferret,” which delivered CS in liquid form contained in a small plastic projectile which was designed to disintegrate and disperse the liquid like an aerosol. This device carried no fire risk. At the time of the siege, the current Home Office advice was to the effect that there were possible disadvantages to the use of Ferret, including the risk of various kinds of personal injury. Scientific and medical enquiries were continuing, but for the moment the standard CS cartridges should be used as the main weapon, keeping Ferret for use in extreme cases, where the standard equipment would be unsuitable and the risks of using Ferret would be justified. The advice was received in May 1974. The Northamptonshire police then had enough stocks of standard cartridges for three years or so, and decided not to obtain Ferret until the results of the further enquiries were known. Counsel for the Chief Constable argued that one of his duties was to advise the police authority as to the equipment required to be provided for the police force. Thus he is performing a statutory function when giving advice in the exercise of his discretion. That discretion cannot be impugned if it is exercised bona fide. The judge, Taylor J., accepted this submission, and held on the facts that the policy

73 Though it should be pointed out that the difficulty stemmed at least partly from uncertainty as to the question to whom any duty was owed. Since this was a question which would have to have been considered in accordance with ordinary private law principles, the difficulties cannot be attributed solely to the need to deal with the policy/operational dichotomy.
75 There is no such power expressly given. However, s.4(4) provides that “the police authority . . . may . . . provide and maintain such . . . equipment as may be required for police purposes of their area” and s.5(1) provides that the police force “shall be under the direction and control of the chief constable . . . .” The power of the chief constable to advise the authority as to what equipment is required is presumably implied or incidental.
76 Loc. cit., p. 992.
decision to defer purchase of Ferret was taken bona fide. In any event, the decision was not on the facts negligent. Taylor J. went on, however, to hold the defendant liable in negligence on the different ground that the police on the spot had fired the canister, with its known potential for causing fire, when, as they knew or ought to have known, the fire brigade was not in attendance. No mention was made of the policy/operational point in this context, and it must have been assumed that this action was at the operational level.

It is once again significant that the judge encountered no difficulty in evaluating on the merits the decision to defer purchase of Ferret, even though he had characterised that decision as one of policy. Certainly it is hard to see why that decision was any less suitable for judicial determination than the apparently operational decision of the officers at the siege to use the standard CS cartridges without a fire engine standing by. Both will have involved an exercise of professional judgment based on a process of balancing a variety of competing considerations.

(b) The dichotomy disregarded

These cases demonstrate that the Anns principle has been quite widely accepted and applied by the courts in the comparatively few years since it was expounded. However, attention has been drawn by

77 Cf. Suleman v. Secretary of State for Home Affairs, The Times, 21 July 1981 (immigration officer’s decision that he was not satisfied that S. was a returning resident: Thompson J. held that the same considerations sufficed to reject allegations that the officer had acted (i) in bad faith; and (ii) negligently). See also Haydon v. Kent County Council [1978] Q.B. 343, 361, 363.

78 Cf. D.H.S.S. v. Kinmore and others (1984) 134 N.L.J. 886 (see note 70 above), where a similar comparison may be drawn between the medical issues arising (i) in respect of the “policy” aspects of the claims, which were struck out, and (ii) in respect of the “operational” aspects, concerning implementation of the vaccination programme, which were not. In addition, this case provides further evidence of the arbitrary nature of the dichotomy in the judge’s holding that events leading up to the policy decision were “still within the area of discretion.” Thus, the careless oversight of some secretary in the D.H.S.S. which resulted in the non-submission of relevant reports to the person making the policy decision would not be characterised as an “operational” failure, whereas a similar oversight at the implementation stage would be. Note also the criticism of the dichotomy by D. Cohen and J.C. Smith that it “fails to recognise that all decisions of bureaucrats are both policy decisions (insofar as they establish objectives, standards and criteria to be taken into account by inferior bureaucrats), and operational decisions insofar as they are made in the context of achieving and implementing other, prior superior policy decisions.” (“Entitlement and the Body Politic: Rethinking Negligence in Public Law,” (1986) 64 Can. Bar Rev. 1, 26).
learned commentators\(^8\) to certain cases where, to their surprise, the policy/operational dichotomy has not been mentioned at all. It may be instructive to consider a few such cases in order to determine whether any light is shed on the scope of the Anns principle, and whether anything is lost by omitting to apply it in a particular case.

The first example is *Mutasa v. Attorney-General*,\(^81\) where the plaintiff complained of the Government's failure to protect him from arrest and detention at the hands of the Smith regime in Southern Rhodesia after the illegal unilateral declaration of independence. Boreham J. held, without reference to Anns, that the plaintiff had no cause of action, since the Crown's duty of protection towards its subjects was a "duty of imperfect obligation"\(^82\) and any breach was not justiciable in the courts. In any event, the plaintiff was precluded from bringing the proceedings by section 40(2)(b) of the Crown Proceedings Act 1947. It is submitted, however, that it should not occasion great surprise that Anns was not mentioned in this case. In the first place, the Anns principle appears to relate to the exercise by public authorities of statutory functions, whereas this case concerned the exercise or non-exercise of the royal prerogative.\(^83\) Secondly, that principle is regarded as concerning the establishment of a duty of care in the tort of negligence, and it is by no means clear that that was the nature of the plaintiff's claim here.\(^84\) In any event, he appeared to abandon any claim to damages in the course of the action.\(^85\) Thirdly, the view taken of the nature of the Crown's duty and the interpretation placed upon the Crown Proceedings Act made it unnecessary to examine other aspects of the case in any detail. The case does not, therefore, provide strong support for the proposition that the policy/operational dichotomy has made little impact in the courts generally.\(^86\)

\(^{83}\) That is, either a moral or a political duty or, if a legal duty, one which is not enforceable in the courts: *ibid.*, at pp. 118-120.  
\(^{84}\) Since the Mutasa case was decided, the House of Lords has suggested, in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, that the decisive factor in determining whether the exercise of a power is subject to judicial review is the nature and justiciability of the subject-matter, rather than whether the power derives from statute or from the prerogative. The same argument might well apply to actions for damages.  
\(^{85}\) The concession by the plaintiff that "there may very well be perfectly good reasons why nothing effective could be done" does not sit very happily with an allegation of negligence. It appears that the damages were claimed for "unlawful arrest and detention": the defence stated that the arrest and detention were not carried out for or on behalf of the Crown and that the Crown was not under any liability in respect of them ([1980] 1 Q.B. 114, 115).  
\(^{86}\) [1980] 1 Q.B. 114, 118. The remedy with which the plaintiff was primarily concerned was in the form of a declaration.  
\(^{87}\) Aronson and Whitmore state (*op. cit.*, at p. 74) that "One would have expected a flood of actions against local and other authorities as a result of Anns. But if the law reports are anything to go by, Anns has not been used much in England in cases calling for special treatment of alleged negligence of government authorities." Quite apart from the fact that this judgment, made in early 1982, seems somewhat premature, it is not clear that the case-law supports it.
The same is true of *Farrell v. Secretary of State for Defence* [1986]. The widow of a man shot by the security forces in Northern Ireland claimed damages from the Secretary of State on the grounds that her husband’s death had been caused by negligence, and in the course of an assault and battery upon him. The Secretary of State relied in his defence on section 3(1) of the Criminal Law Act (Northern Ireland) 1967. The trial judge ultimately declined to leave the issue of negligence to the jury [1986] and, following answers given by the jury to questions put to them relating to the section 3 defence, gave judgment for the Secretary of State. On appeal, the plaintiff argued that the judge should have left to the jury the question of negligence on the part of persons other than the soldiers on the spot—namely those responsible for the planning of the operation. The Court of Appeal allowed the appeal and ordered a new trial. The House of Lords reversed that decision, however, on the grounds that the question of the negligence of other persons was not legitimately raised by the pleadings. If it had been, the trial would inevitably have followed a very different course. There was, therefore, never any issue to which the policy/operational inquiry could be applied.

The final case is *Co-operative Retail Services Ltd v. Taff-Ely Borough Council.* [1980] It concerned competing attempts by the Co-op. and Tesco to establish an out-of-town superstore in the Pontypridd area. Rival planning applications were made. A sub-committee of the district council recommended rejection of the Co-op.’s application and acceptance of the Tesco proposals. On 6 July 1976, the council accepted their report, but it was realised that it would be necessary to refer the matter to a joint meeting with Mid-Glamorgan County Council in accordance with the agreed Development Control Scheme. It was, in fact, unlikely that the County Council would have supported the application, since it was not consistent with the County’s declared policy concerning superstores.
being prejudiced by the delay and threatened legal\textsuperscript{91} and other action if such notification were not forthcoming. The Clerk to the Council, believing that the solicitor was representing Tesco, and that there was a real risk that his ratepayers would be liable to a “huge sum in damages,” issued the notice of planning consent, back-dated to 6 July. On 26 November, Tesco declared the contract for the purchase of the site unconditional. The validity of the notice was, however, challenged by the Co-op., and the House of Lords,\textsuperscript{92} affirming the decision of the Court of Appeal,\textsuperscript{93} ultimately ruled that the clerk’s action was unauthorised and could not have the effect of converting into planning permission something which was not planning permission.\textsuperscript{94} The purported grant of permission was therefore ultra vires and void. The issue which came before Beldam J. was Tesco’s claim for damages against the council, based upon the contention that they had given up the right to rescind the contract for the purchase of the site as a result of the clerk’s negligence.

The learned judge held that the action of the clerk in issuing a notice which might turn out to be invalid was not that of a careful and prudent Chief Executive. He had “allowed himself to be stampeded by the unscrupulous tactics” of the solicitor. Furthermore, Tesco had relied on the issue of the notice in declaring the contract unconditional and had suffered damage in the sense that they had acquired not land with planning consent but the less valuable commodity of land with the chance of planning consent at some time in the future. Nevertheless, their claim failed, as they could not be regarded as bona fide purchasers of the land without notice of the circumstances in which the consent had been issued. Indeed, it was obvious that they were well aware that the resolution of 6 July did not amount to a grant of planning permission. The clerk could not be said to have made a representation to anyone—rather he had acceded to representations made to him by others.\textsuperscript{95} It did not lie in the mouth of such persons to complain that he had relied on the truth of what they themselves had stated. Finally, it would be contrary to the public interest to allow someone who had secured the issue of a planning consent in such circumstances to pursue a claim for damages. If he were wrong in these

\textsuperscript{91} The precise basis of this claim was uncertain. Counsel had apparently advised that mandamus was not appropriate, but that there was possibly a claim under the \textit{Hedley Byrne} principle.

\textsuperscript{92} (1981) 42 P.\&C.R. 1.

\textsuperscript{93} (1979) 39 P.\&C.R. 223.

\textsuperscript{94} On 14th December 1976 the council resolved to confirm the clerk’s action: it was held that that rendered it authorised, but still could not have the effect of transforming into planning permission something which was not such.

\textsuperscript{95} This particular point, it is submitted, is not wholly convincing. Only the council or its representatives could provide an authoritative statement as to whether planning permission had been granted, and the issue of the notice must have amounted to a representation to that effect. In the circumstances, however, it was not reasonable or permissible for Tesco to rely upon that representation. This, broadly, is the purport of the other points made by Beldam J.
views, the judge would in any event have concluded that Tesco's conduct amounted to fault which caused or substantially contributed to any loss which they had suffered.

The judge is criticised by Crawford for arriving at these conclusions "without any discussion of Anns and more especially of the policy/operational dichotomy established in that case. . . ." Yet this criticism is not supported by reference to any consideration of substance which the judge overlooked, nor any alleged advantage to be gained by employing the Anns approach. It is as though the mere ritual incantation of the words is all that is required. Furthermore, the arguments which the learned commentator goes on to develop provide ample testimony to the dangers inherent in the approach he advocates. He states: "For the first time, then, we have a decision clearly stating that at least one part of the planning process is 'operational' and therefore open to negligence actions . . . although speculation will remain over the limits of the 'operational' aspects. . . ." In the first place, it is difficult to see how there can be a clear statement as to the operational character of the process involved when, as Crawford himself points out, there is no trace of a reference to the concept. More importantly it is unwise to draw conclusions from this case regarding the way in which other types of negligence claim arising out of the planning process should be dealt with. "The planning process" is no more than the factual background from which various types of claim may emerge. For example, an applicant for planning permission may claim to have suffered loss as a result of the refusal of his application, or an objector to development might seek relief in the event of permission being granted. Alternatively, it may not be the actual planning decision which is under attack, but some action related to it, as in the Taff-Ely case itself where the plaintiff was claiming to have been prejudiced by the unwarranted issue of the notice of permission. In each case the claim is of a very different nature, bearing in mind the interest which the plaintiff is seeking to protect, the availability of alternative remedies and the aspect of the planning process which is impugned. The policy/operational dichotomy alone is quite incapable of ensuring that due consideration is given to all these issues.

Tesco's claim appeared to be based upon the principle of Hedley, Byrne & Co. Ltd. v. Heller & Partners Ltd. Although the case is not
specifically mentioned in this part of the judgment, the references to "representations" and "reliance" are indicative that this was the nature of the claim. It thus involved a well-established duty-situation where the legal principles are reasonably clearly formulated. It is difficult to see what advantage there could have been in referring to the policy/operational dichotomy, particularly if that were to have the effect of blurring the distinctions of legal principle between this category of case and other, quite different, categories of legal claim that might arise out of the planning process.

(c) The dichotomy held to be irrelevant

If the policy/operational dichotomy were truly of value in considering the liability of public authorities, it might be supposed that it could be utilised outside the precise context in which it was conceived, namely the tort of negligence. There would appear, however, to be little enthusiasm for so applying it.

In *Haydon v. Kent County Council* it was held that it had no application to a claim for breach of statutory duty. Furthermore, in *Page Motors Ltd. v. Epsom and Ewell Borough Council* the Court of Appeal declined to apply it in a case of nuisance. The council was held liable for a nuisance caused by gypsies on its land: the council knew of the nuisance and was liable for not taking steps to end it under the principle of *Sedleigh-Denfield v. O'Callaghan*. The council sought to rely on the policy/operational dichotomy, arguing that, as its approach to the problem of the gypsies was a matter of policy, it could not be held liable unless it was shown to have abused its discretion. This argument was rejected:

[T]his submission runs quite contrary to the established principle that a public body, whether a trading body or not, is not authorised to create a nuisance or otherwise to affect private rights unless compensation is provided.

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99 *Hedley Byrne* was apparently to have been the basis of the action threatened to induce the clerk to issue the notice: see note 91 above. Once the notice had been issued, and action taken in reliance, such a claim seems rather more appropriate.


3 *Per* Lord Denning M.R., at p. 361, and Goff L.J., at p. 363. These judges also indicated that in any event it would not assist the plaintiff here.


5 [1940] A.C. 880.

6 *Per* Ackner L.J., at p. 347.
It is perhaps significant that the court did not seek to dispose of the policy/operational dichotomy simply on the grounds that it had no application to a claim in nuisance. Indeed, by stating that public bodies have no authority "to create a nuisance or otherwise to affect private rights," Ackner L.J. might be thought to be envisaging a uniform approach to negligence, nuisance and possibly other torts also. Certainly it is difficult to see what legitimate reason there could be for distinguishing negligence and nuisance in this regard.

Unfortunately, the ground upon which Anns was actually distinguished does not seem to be tenable. Ackner L.J. stated:

No statutory power was exercised by the council in this case. Anns v. Merton London Council was another case which concerned the exercise by a public authority of statutory powers and contains, understandably, no suggestion that the position of a local authority as landowners is different from any other landowner, in relation to their duties and obligations to abate nuisances—subject always to any statutory exemption.

However, all the actions of local authorities must be referable to statutory authority, whether express or implied. Nevertheless, the instincts of their Lordships to hold that the policy/operational dichotomy was not relevant seem, with respect, to be sound. The council's attempt to rely upon it complicated an issue that could have been settled perfectly adequately by the application of established tort principles. Indeed, the court recognised that account could be taken of the special position of the council in the course of applying the principle of Goldman v. Hargrave. It was, of course necessary to distinguish Anns. This could be done by pointing out that, although the situation was admittedly one of failure to confer a benefit, it was one where an obligation to act was well established at common law.

(4) Conclusions

In any negligence action where the defendant is a public authority, it will of course be necessary to bear that factor in mind when determining questions of liability. Furthermore, it will be necessary to pay close attention to the nature and purpose of the functions the authority was exercising, since that will inevitably colour the conclusions to be drawn concerning such questions as to whom any duty of care is owed, the kind of harm the duty was designed to prevent.

7 Ibid.
8 Interestingly, this view has been described as one held by "cynics": Oliver [1980] C.L.P. 269. If the cap fits . . .!
9 [1967] 1 A.C. 645. For a discussion of this point, see [1984] P.L. 277, 301–303. For examples of nuisance cases where the policy/operational dichotomy appears not to have been discussed at all, see note 1 above, p. 453.
(and consequent issues concerning the operation of the limitation period), the standard of care to be expected and the allocation of responsibility as between the authority and others who may also have played a part in the causing of the harm. Finally, it will be relevant to consider whether the plaintiff is seeking to impugn a conscious exercise of judgment by the defendant, or some unintended blunder or oversight on his part.

None of this, however, requires the creation of any special legal principle—it is all part and parcel of the traditional private law principles of negligence. Furthermore, the special principle devised by the House of Lords for such situations, which appeared at first sight to be an extremely blunt instrument, has acquired no greater indication of subtlety with the passage of time and the generation of case-law. The underlying thesis that the exercise by public authorities of statutory discretion is wont to raise issues which are incapable of judicial determination is contradicted by the cases. In any event, the policy/operational dichotomy has proved inadequate for the purpose of identifying the allegedly non-justiciable cases at a preliminary stage, and unhelpful in dealing with them on the merits. It merely raises an extra dimension of confusion created by the need to determine what are policy and what are operational matters—an issue which as yet is illuminated only by a series of apparently inconsistent assertions and unconvincing assumptions. Within this confusion, there is a danger that genuinely relevant issues will be lost sight of.

It will be recalled that the policy/operational distinction was originally devised for the purpose of facilitating the interpretation of the Federal Tort Claims Act 1946. It has been suggested, however, that that task is not aided by the importation of the planning stage—operational stage standard. . . . Such a distinction is specious. It may be a makeweight in easy cases where of course it is not needed, but in difficult cases it proves to be another example of a distinction “so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.”

It is submitted that the distinction in question is of no more assistance in the present context, and that therefore there is no value in further


reference to it. If it is to be used, however, and it now seems well entrenched in the case law, it should be confined to as narrow a scope as possible. One possibility would be to confine it to “failure to confer a benefit” cases, given that the two cases in which it originated (Dorset Yacht and Anns) were of this kind. Alternatively, it could be confined, in line with Lord Diplock’s reasoning in Dorset Yacht, to cases where a duty of care would not otherwise arise in accordance with established tort principles. It should not be applied in ordinary “infliction of loss” cases or (if Lord Diplock’s approach is adopted) in those “failure to confer a benefit” cases where a duty of care is already well established.