Barrett v Enfield:

A wise decision at an awkward junction?

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'Where a statutory power is given to a local authority and damage is caused by what it does pursuant to that power, the ultimate question is whether the particular issue is justiciable or whether the court should accept that it has no role to play'.

Barrett v Enfield **[1999] 3 All ER 193 at 211 per Lord Slynn.**

I confess that I think the case law as to the duty and liabilities of a statutory body to members of the public is in a state of lamentable obscurity and confusion'.[1]

Introduction

Since *Barrett v Enfield*[2] marks a significant departure from the settled, albeit exceptionally restrictive, criteria espoused by Lord Browne-Wilkinson in *X v Bedforshire CC*[3], which is required to be established to found an action in negligence against a public authority, it is a decision of considerable importance.[4] It is to be admitted that I did not fully understand the reasoning of some of the passages in the judgments; in areas they were a little opaque and somewhat hard to follow, but one wonders if that is especially important; to grasp the overall thread of the argument and work from those principles is perhaps a more fruitful journey. To facilitate the coherence of this essay, and to accommodate the judicial reversal in the previously settled law, it will be necessary to divide this essay into three parts:

- **Part 1** will be an analysis of the leading cases prior to *Barrett*, in particular *X v Bedfordshire CC*[5] and *Stovin v Wise*[6].

[1] *East Suffolk Catchment Board v Kent* [1941] AC 74 Per Mackinnon L.J.
[2] *Barrett v Enfield* [1999] 3 All ER 193 (hereafter *Barrett*).
[3] *X v Bedfordshire County Council* [1995] 2 AC 633 (hereafter *X v Beds).*
[4] Although the *Barrett* case cannot probably be considered as an authority possessing the same level of formal significance as either *X v Beds* or *Stovin*. *Public Authority Negligence Revisited* SH Bailey and MJ Bowman CLJ 59(1), March 2000 p.123
[5] *X v Bedfordshire County Council* [1995] 2 AC 633 (hereafter *X v Beds).*
[6] *Stovin v Wise (Norfolk County Council, third party)* [1996] 3 WLR 388 (hereafter *Stovin*).

- **Part 2** will be the decision in *Barrett* itself, the notion of justiciability (whether it provides a greater degree of certainty and clarity than the policy/operational dichotomy), and the policy considerations embodied in the 'fair, just and reasonable' test.
- **Part 3** will be employed to ascertain whether *Barrett* settles on a satisfactory conclusion, and hypothesises whether subsequent judgments will give it a broad or narrow construction, particularly in the light of the ECtHR's ruling in *Osman.*[7]

Part 1

To illuminate the judicial *volte-face* witnessed in *Barrett*, it is necessary to discuss the two recent House of Lords decisions of *X v Beds* and *Stovin* , which were perhaps wholly representative of the nadir of a plaintiff's success in this field of negligence law. *X v Beds* sought to consolidate the existing law, with Lord Browne-Wilkinson orchestrating the judicial opinion in the House of Lords, where he sought to provide much needed clarification to this complicated area of law. To achieve this task, he utilised the seminal case of *Dorset Yacht*[8] in the House of Lords, and the decisions which were to follow *Anns*[9], to establish a much stricter regime for tortious liability against statutory bodies, and fused them together, creating a strong, but rather inward-looking hybrid, relying excessively on the specious distinction between discretionary and non-discretionary decisions. As a whole, Lord Browne-Wilkinson's speech could be seen to have clarified and consolidated much of the law that preceded it. However, his approach introduced new and unnecessary complexities into the law. His overriding emphasis was on discretion; indeed, he ring-fenced policy decisions even more than the earlier cases, and it seemed that either statutory duties or powers which were heavily dependent on policy were unimpeachable and could never be adjudicated on. He recognised the ease with which statutory bodies could be sued and thus developed a set of 'preventative criteria'.

Stovin is perhaps an even more contentious case, for it elevates policy decisions in the exercise of a statutory power to a level of blanket immunity that would appear to be even more restrictive than *X v Beds*. What was exceptional in the case was the antithetical reasoning contained in the leading speeches given by the majority and minority. Lord Hoffmann, who gave the leading judgment for the majority, saw things very much in the public law sphere, and was reluctant to determine whether the common law could take the strain of 'reconciling the need to preserve discretion with the public expectation that it was conferred for a purpose'.[10] Therefore, a plaintiff, before he could go on to establish a breach of a duty in private law terms, must overcome the

[7] *Osman v UK* (1998) 5 BHRC 293
[8] *Dorset Yacht Co. Ltd v Home Office* [1970] AC 1004
[9] *Anns v London Borough of Merton* [1978] AC 728
[10] MC Harris 113 LQR 398

considerable public law hurdle in his path. Lord Hoffmann preferred the approach taken in *East Suffolk*[11], where there was a denial of a duty when a body was acting pursuant to a statutory power, rather than the more expansionist reasoning in to *Anns*. Both Lord Goff and Lord Jauncey agreed with him, unfortunately not giving any of their own reasons for their conclusion. Lord Nicholls, arguing along simpler lines, stated that the superimposition of a common law duty of care could almost always run concurrently with the relevant statutory framework where justice required redress to be given. His speech contained a more favourable exposition of *Anns*, and placed weight on the concept of reliance, which he felt underpinned the decision both in *Anns* and in *Invercargill*[12]. It is interesting to note that Lord Slynn, who would go on to give the leading judgment in *Barrett*, agreed with Lord Nicholl's reasoning. However, before a more exhaustive analysis is made of this complex and difficult case, it will first be necessary to examine a public authority's liability in negligence for failure to exercise a statutory duty, for it is this which underpins much of public authority liability, including the failure to exercise a statutory power.

Lord Browne-Wilkinson in *X v Beds*: The Preventative Criteria

Lord Browne-Wilkinson, after a review of both *Dorset* and *Geddis*[13], was of the opinion that the mere assertion of the careless exercise of a statutory power or duty is not sufficient to found a cause of action in negligence at common law.[14] Using this assumption as his starting point, he unites the decisions of *Dorset* and *Anns* by stating that, where a statute confers on a public body a duty to perform a particular function(s), then it is the significance of the degree of discretion which is the pivotal consideration of the case. If Parliament has authorised a public body to act pursuant to a particular course, and it complies by acting within the ambit or scope of that function, then the local authority cannot be liable in damages for doing that which Parliament has authorised. However, a local authority will not be acting within the ambit of its discretion if, in pursuance of exercising a particular statutory function, it acts so unreasonably that it could no longer be said to be acting within the scope of that duty or power conferred on it. The public law case of *Wednesbury*[15] harnesses the criteria used to establish unreasonableness; it is an important consideration because it highlights the difficulty a plaintiff will have in bringing a successful action, both at the public law hurdle and at the breach stage. As a pre-cursor to liability, not only must the negligent act be manifestly unreasonable, but also that the standard of care in a negligence action in respect of the exercise of a statutory discretion be *Wednesbury* (or, in private law terms, *Bolam*[16]), unreasonableness. *Wednesbury*

[11] *East Suffolk Catchment Board v Kent* [1941] AC 74
[12] *Invercargill City Council v Hamlin* [1996] 2 WLR 367
[13] *Geddis v Proprietors of Bann Reservoir* 3 App. Cas. 430
[14] *Ibid.* no.2 at p.735
[15] *Associate Provincial Picture Houses Ltd. V Wednesbury Corporation* [1948] 1 KB 223
[16] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

unreasonableness, although a useful tool for demarcating when an action for negligence will be able to be brought in a discretionary area, cannot, as Lord Browne-Wilkinson adverted to, be the sole criteria for judging unreasonableness. In the realm of public law, a decision can be *ultra vires* for reasons other than *Wednesbury* unreasonableness, and one would imagine that position will be taken when adjudicating on a private law negligence suit.

Lord Browne-Wilkinson, too, is rather dismissive of the public law concept of *ultra vires* , introduced by Lord Diplock in *Dorset*, as neither 'helpful or necessary ... as to the validity of a decision into the question of liability at common law for negligence'.[17] However, it would appear that it is perhaps only the label that he objects to, and not the reasoning behind it, which he greets somewhat favourably, remodelling it as '... the exercise of a statutory discretion cannot be impugned unless it is so unreasonable that it falls altogether outside the ambit of statutory discretion'.[18]

In deciding whether or not this requirement is satisfied, the court has to assess the relevant factors taken into account by the authority in exercising their discretion. To achieve this, the courts have employed two devices; one is currently out of judicial fashion, but nevertheless, is still important, for it acts as a kind of implicit buttress to the second. These concepts are the policy or planning/operational dichotomy and the notion of justiciability. To fully understand the concept of justiciability it is necessary to delimit the policy/operational distinction because, despite its critics, it still underpins many of the decisions in establishing when tortious liability of a statutory body is amenable to justiciability or not.

The policy/operational dichotomy, which was tacitly employed in the reasoning of *Dorset*[19], was first adumbrated specifically in those terms by Lord Wilberforce in *Anns*.[20] It is perhaps most illuminating to use the facts of *Dorset* to explain the distinction between policy and operation.[21] An area of policy, that is to say, an area where Parliament chooses to engage in its statutory functions, would be, in the case of *Dorset*, the public bodies' ability to choose between an 'open' or 'closed' borstal system. In making their choice, the authority will have weighed up various questions of policy, which will, *inter alia*, encompass social and economic factors. In deciding on an open borstal, the authority must have thought that the social utility of reforming young offenders in a less restrictive environment outweighed the probable increase of the number of potential escapees making a bid for freedom and therefore the increased foreseeability that they might injure person or property. Despite

[17] *Ibid.* no.2 at p.736f
[18] *Supra* at p.736h-737a
[19] What about Lord Denning in the Court of Appeal decision?
[20] *Ibid. Anns* at p.754

these risks, a private law action would not lie in deciding that the policy of implementing an open borstal was the wrong decision, provided it was made in the ambit of the authority's discretion; in other words, 'the system adopted' would have to be 'so unrelated to any purpose of reformation that no reasonable person could have reached a bona fide conclusion that it was conducive to that purpose. Only then would the decision to adopt it be *ultra vires* in public law.'[22]

An operational area is one where discretion is less heavily involved. I say 'less heavily involved' because there will always be some degree of discretion 'even in the hammering of a nail', and this perhaps highlights the difficulty of deciding when a decision taken by an authority is one of policy or operation, particularly at the margins. The supervision of the borstal boys by an allocated number of wardens would be one example couched in difficulty. An operational area, and one therefore amenable to a private law action of negligence, would be the degree of proficiency engendered by the wardens to keep the boys under control at all times. If there is an escape, but it is not attributable to the negligence of the wardens, but rather because of the very imposition of an open borstal, then no action in negligence will lie. If, however, the wardens have been negligent in discharging their duties to reasonably safeguard and monitor the prisoners under their control, then an action in negligence will lie. The number of wardens allocated to supervise the boys would be an area of policy, and therefore immune from a suit in negligence, unless, once again, it could be established that the authority had acted outwith its discretion.

Lord Wilberforce recognised the limits of this doctrine when he said '...Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction in degree; many 'operational ' powers or duties have in them some element of 'discretion'. It can surely 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'.[23]

Indeed, Lord Wilberforce could not have highlighted the inherent difficulties in adopting the distinction with any greater precision; the policy/operational distinction, far from clarifying the existing case law and providing a sound template for cases in the future, is throttled of any efficacy by the subjectivity of its application. Quilliam J., the trial judge in *Rowling v Takaro Properties*[24] before it reached the Privy Council, was a victim of this uncertainty:

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[21] The House of Lords decision in *Dorset* exerts rather a paradoxical force over this area of law. At once it is illuminating, but because its facts are extremely easy to fit into the policy/operational distinction it does not provide much certainty when a case needs to be decided on more polycentric principles.
[22] *Ibid.* no.6 at p.1068 per Lord Diplock
[23] *Ibid*. *Anns* at p.754 per Lord Wilberforce
[24] [1986] 1 NZLR 22

'The distinction between the policy and the operational areas can be both fine and confusing. Various expressions have been used instead of operational, e.g., 'administrative' or 'business powers.' It may not be easy to attach any of these labels to the decision of the minister in this case, but what appears to me to emerge clearly enough is that for the reasons I have indicated his decision was the antithesis of policy or discretion. I therefore equate it with having been operational. The result of that conclusion is that I consider the prima facie existence of a duty of care has been established.'[25]
Lord Keith, in his judgment on the Privy Council[26], felt considerable sympathy with the difficulty of adjudicating on such a distinction. He went on to say that 'they [the Lordships sitting on the Privy Council] incline to the opinion, expressed in the literature, that this distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution'. This undeniably gives a more settled foundation than the labile concept of policy and operation, although there is an element of circularity in the argument postulated above which makes it a rather flawed judicial tool, for, if construed incorrectly, may yield the same restrictive result every time. In short, to find out if a decision is unsuitable for judicial resolution will require the employment of the dichotomy; so, in essence, it will be just as active, although it will be subsumed into the larger notion of justiciability.

Following from this, Lord Browne-Wilkinson said that the court could not assess factors which were held to be non-justiciable, that is to say, factors which fell into the policy area of the policy/operational dichotomy. 'Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist'.[27] Lord Browne-Wilkinson, perhaps beguiled by the apparent simplicity of Lord Keith's judgment, saw the notion of justiciability not as an independent head, free from the policy/operational distinction, but one inextricably linked to the dichotomy, creating something akin to a blanket immunity for policy or heavily discretionary decisions. Surely the notion of justiciability, to give any sense of flexibility, must be seen to act freely from the policy/operational dichotomy?

In conclusion, if something is a matter of policy, involving a large area discretionary decision making, then it will be non-justiciable. If it is more operational in its scope, then it will be more amenable to the notion of justiciability. Although the rigorous logic of this cannot be denied, it does seem unnecessarily restrictive, and its practical effect is a ring-fencing of those decisions which are adjudged to be ones of policy to such an extent that cries of injustice seem an inevitable concomitant of employing such a theory.

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[25] *Supra* at p.35
[26] *Rowling v Takaro Properties Ltd. (PC)* 1 AC 473 at p.501
[27] *Ibid.* no.3 atp.738H

Once this has been satisfied, Lord Browne-Wilkinson then states that if an act (or indeed an omission) is justiciable; in other words, if in the practical manner in which the act has been performed there has been carelessness amounting to, at least, *prima facie* negligence, or the public authority has acted outwith the ambit of its discretion, then the tripartite approach espoused by Lord Bridge in *Caparo*[28] will be employed to establish the outcome of the case along the ordinary lines of a typical negligence action.

This reasoning by Lord Browne-Wilkinson can be summarised as follows[29]:

- If the statutory discretion in question involves wide areas of policy, the matter is non-justiciable. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist.
- If justiciable, (i.e. when the statutory discretion functions at an operational level), the authority would have to act beyond the ambit of its discretion in a manner which was manifestly or *Wednesbury* unreasonable.
- The standard tests for the determination of a common law duty of care laid down in *Caparo* would then be applied.

Statutory powers: *Stovin v Wise* and the preventative criteria enlarged

The three stage test propounded by Lord Browne-Wilkinson in *X v Beds* above is a useful and necessary starting point in any public authority case; indeed, if those factors outlined above were required for the existence of a common law duty of care pursuant to a statutory duty, it would be contrary to principle to demand less in the context of a statutory power. Indeed, it is often exceedingly difficult to discern between a power and a duty as it is between misfeasance and nonfeasance, and will often be purely a question of semantics or particularly creative counsel.

The case of *Stovin* is perhaps even more apposite to the discussion of justiciability, and more pertinently, the marked difference of judicial opinion on the correct approach to be taken when there is an action of tortious liability against a statutory body. Lord Hoffmann's speech for the majority, and Lord Nicholls' vigorous dissenting judgment indicates the level of uncertainty when adjudicating on a case of such penumbral complexity.

[28] *Caparo Industries Plc. V Dickman* [1990] 2 AC 605 at pp.617-618
[29] See P. Craig and D.Fairgrieve: *Barrett, Negligence and Discretionary Powers* [1999] PL 626

Lord Hoffmann's speech can be categorised as follows:

- Acts and omissions;
- Negligent conduct in the exercise of statutory powers;
- *Anns*: Policy and Operation; and
- Particular and general reliance

Lord Nicholls' speech can be categorised as follows:

- Liability for omissions;
- Duty to take affirmative action at common law;
- Proximity in relation to:

(a) Omissions

(b) Public authorities

(c) Statutory powers

Even at this stage one can clearly see the different approach taken by the judges. Lord Hoffmann centres his argument exclusively on issues that were raised in the prior decision of *X v Beds*, and more importantly on the emphasis placed on *East Suffolk* and thus the protection of the public purse to deny the existence of a duty of care in relation to a statutory power. Conversely, Lord Nicholls almost completely eschews the public law element, and contrasts the private individuals' duty to act when he has not caused the source of danger to that of a public body's analogous position. He then seeks to establish liability through the traditional principles of private law, and more precisely, the notion of proximity, rather than on justiciability or the policy/operational dichotomy, although throughout his judgment due regard would have to be had to the statutory framework in which the functionary acts.

Omissions and the duty to take affirmative action

Should something be non-justiciable merely because it is the failure to confer a benefit, rather than a positive duty to act, which is being complained of?[30] Both agree that liability for omissions in the sphere of private individuals should be strictly limited, unless there is a special relationship sufficient enough to constitute the imposition of a duty to act, but this is often extremely difficult to discern, especially against the backdrop of intricate legislation.[31]

[30] French administrative law on liability clearly does not make a distinction between acts and omissions. 'Omission (*carence*) is a frequent cause of liability and there are no signs in case law that it would, in any intellectual sense, be treated in a different was than negligent acts'. B.S. Markesinis, J-B Auby, D. Coester-Waltien and S.Deakin *Tortious Liability for statutory bodies* at p.57

[31] [1996] 3 WLR 388 at p.405h: 'Omissions, like economic loss, are notoriously a category of conduct in which Lord Atkin's generalisation in *Donoghue v Stevenson* [1932] AC 562 offers limited help'.

What Lord Hoffmann appears to be saying is that he concedes that 'some of the arguments against liability for omissions do not apply to public bodies like a highway authority'[32] but states that there will be other arguments 'which may negative the existence of a duty of care'. Lord Nicholls contends himself with the fact that a highway authorities position is analogous to the duty occupiers of land owe to their neighbours. 'An occupier is under a common law duty to take positive action to remove or reduce hazards to his neighbours, even though the hazard is not one the occupier brought about. He must take reasonable steps to this end, for the benefit of his neighbours'.[33] He then approaches the case in very customary terms: he admits that mere foreseeability of injury is not enough, and that 'something more is required than being a bystander'.[34] After consideration of this, he establishes that this case fulfils the 'something more' requirement' in that the 'council was more than a bystander; indeed its very function was to eradicate danger from the highway'.

Lord Hoffmann adopted Lord Romer's views on public authority liability for the exercise of statutory powers in the *East Suffolk* case, that is, a simple failure to exercise a statutory power did not give rise to a common law claim for damages. Conversely, Lord Nicholls considered *East Suffolk* had left the law in a less than satisfactory state; it was only the decision of *Anns* which 'liberated the law from this unacceptable yoke'.[35] It is at this point that Lords Hoffmann and Nicholls views diverge considerably.

The Judgment of Lord Nicholls: a Gateway to Barrett?

In short, Lord Nicholls' judgment has a certain pleasing simplicity. Firstly, he establishes that, despite a private individuals (less onerous) position, a public authority will sometimes be under a duty to take affirmative action. However, both Hoffmann and Nicholls agree that this, in itself, is not enough to found a duty; Nicholls relies on the twin concepts of proximity and general, community dependence[36], to provide the necessary special relationship which will give rise to such a duty. He then uses *Anns* to state that a failure to exercise a statutory power may give rise to a common law claim for damages. However, once this has been established in the positive, he relies not on *Anns*, but on the tripartite approach in *Caparo*, and treats the case just as he would were it an action between two private individuals.

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[32] *Supra* at p.408g
[33] *Supra* at pp.393h-394a
[34] *Supra* at p.394e
[35] *Supra* at p.394g-h
[36] General dependence, or reliance, in this sense means that persons in the position of the plaintiff may be expected to act in reliance on the authority exercising its powers, and exercising them in a reasonable manner. Reliance is also used in the particular, but that is not applicable to the facts of the present case. See Mason J. in *Sutherland Shire Council v Heyman* 157 CLR 424 at p.464

No explicit or unduly weighted mention is made of the policy/operational distinction or of the question of justiciability; Lord Nicholls merely contends to ask if, within the current statutory framework, a concurrent common law duty of care can lie. In the most pointed part of his judgment, a precursor perhaps to Lord Slynn's rhetoric in *Barrett*, where he touches only briefly on public law constraints, it seems he is far more concerned with the desire to establish an approach to public authority liability which is more 'open-ended' in character and thus, at least *prima facie*, more just. In this section, he implicitly tackles the question of policy/operation and of justiciability. He states categorically that he dislikes the 'no go' area because it will lead to injustice in cases that are clearly amenable to adjudication by the courts. This '...exclusionary approach presupposes an identifiable boundary, between policy and other decisions, corresponding to a perceived impossibility for the court to handle policy decisions. But the boundary is elusive, because the distinction is artificial, and an area of blanket immunity seems undesirable and unnecessary'.[37] What he is saying, and what I think Lord Keith originally tried to say in *Takaro properties*, although subsequently misapplied by Lord Browne-Wilkinson in *X v Beds*, is that just because a decision taken by an authority is heavily couched in discretion should not make it completely non-justiciable; there will invariably be times when the courts should be able to adjudicate on these matters. The policy/operational dichotomy is flawed; it works well in cases like *Dorset* because the distinction between policy and operation is so marked as to make it obvious. Judges, increasingly aware of the fact that public authorities seem to be squeezed from all sides and are often casually very peripheral to the actual damage sustained[38], can use this easy template to deny redress in all but the most glaring of cases by using the preventative criteria first established in any concise form by Lord Browne-Wilkinson in *X v Beds*. Quite simply, judges can now, with only a cursory consideration, 'sacrifice justice … completely to the altar of financial good management'.[39]

Part 2

Justiciability: Barrett v Enfield

The facts of the case were summarised succinctly by Lord Woolf MR in the court of Appeal decision:[40]

[37] [1996] 3 WLR 388 at p.401d-e
[38] J. Stapleton: *Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence* 1995 LQR 301
[39] B.S. Markesinis, J-B Auby, D. Coester-Waltien and S.Deakin *Tortious Liability for statutory bodies* at p.45
[40] [1997] 3 All ER 171 at 174

'Among the complaints which are made are failing to arrange for the plaintiff's adoption, inappropriate placements with foster parents and community homes, and the lack of proper monitoring and supervision of the plaintiff while he was at the different placements. There is also criticism of the failure to obtain appropriate psychiatric treatment for the plaintiff and an allegation of failing properly to manage the reintroduction of the plaintiff to his mother in 1986 after he had not seen her for 11 years. Reference should also be made to the criticism of how his relationship with his half-sister was managed.' The plaintiff now claims to be suffering from, as a direct result of the council's failure to look after him satisfactorily, an alcohol problem and a propensity to harm himself.

It is clear that Lord Slynn saw the notion of justiciability in terms conceptually similar to prior decisions and the judgments given therein.[41] 'It is no doubt right for the courts to restrain within reasonable bounds claims against public authorities exercising statutory powers in this social welfare context'. However, his next sentence, perhaps with the ECtHR decision of *Osman* implicit in his reasoning, states: It is equally important to set reasonable bounds to the immunity such public authorities can assert'.[42] In using Lord Browne-Wilkinson's three stage test in *X v Beds* as a basic template, he devises his own method for an action in negligence against a public authority, neatly circumventing the preventative criteria established therein, by regarding the test as simply a guide to the ultimate question which was whether the issue was justiciable or not. Firstly, he recognises that if, under a statutory scheme, a public body is compelled to act and some sort of damage occurs 'the authority taking such action in accordance with the statute will not be liable in damages unless the statute expressly or impliedly so provides'.[43] This would appear to be in line with Lord Nicholls reasoning in Stovin (which Lord Slynn concurred with), in the sense that conscious regard should always be had to the statutory framework within which the particular body operates. Secondly, in very much a softer re-appraisal of Lord Browne-Wilkinson's approach in *X v Beds*, his Lordship states a public authority *will not normally* be liable in negligence if it has acted within that discretion conferred on it by statute, subject, of course, to the retainer that it actually stayed within the ambit of its powers so conferred.[44] Lord Slynn then proceeded to add a new facet to weaken the immovable stone of immunity from liability that Lord Browne-Wilkinson had created in areas that purportedly had a large element of policy. He attempted to divorce completely the notion of justiciability from the concept of policy/operation by explaining that, even if an element of discretion is involved in the exercise of a statutory power and the public authority acts squarely within that discretion, an action for common law negligence would not be necessarily ruled out. What is of overriding importance is if it is justiciable or not.[45] '... acts done pursuant to the lawful exercise of the discretion can ... be

[41] See *Dorset, Anns and Rowling v Takaro Properties*
[42] [1999] 3 All ER 193 at p.209g
[43] *Supra*
[44] *Supra* at p.209j –210a
[45] *Supra* at p.210j

subject to a duty of care, even if some element of discretion is involved'.[46] The test that is then to be adopted, whether there is an alleged excess of power or not, is the tripartite approach of *Caparo*.

Lord Slynn, while recognising that certain matters will not be justiciable, embraced Lord Nicholls' opinion in *Stovin* about the undesirability of an excluded zone or blanket immunity. Both admitted that in deciding what is justiciable or not, regard must be had to the statutory context and the nature of the tasks involved[47], and that there should be, *prima facie*, nothing to militate against the fact that a concurrent common law duty could very well exist in an area of broad policy. Moreover, the public law constraints and the oppressive criteria formulated in *X v Beds* and relied on so heavily in earlier decisions will thus have no relevance in actions of this type, at least not at the preliminary stage of proceedings.

Lord Hutton, with only a slight shift of emphasis from the conclusions reached by Lord Slynn, first sought to establish the inherent unpredictability of the policy/operational distinction by quoting *dicta* from Lord Wilberforce[48], Lord Keith[49], Lord Nicholls[50] and Lord Hoffmann[51]. This lead him to the view that despite 'the decision which is challenged was made within the ambit of a statutory discretion and is capable of being described as a policy decision is not in itself a reason why it should be held that no claim for negligence can be brought in respect of it'.[52] Lord Hutton also considered that the imperative question in this type of case would always be whether the issues involved were apposite to the notion of justiciability.[53] His Lordship, after seeking to establish a degree of certainty with his rejection of the policy/operational distinction and his endorsement of justiciability, then contrived to add an unnecessary obfuscation by stating that whether an act (or indeed an omission) is justiciable in the way elucidated above, very much depends on the nature and the extent of the tasks involved in the decision; discretionary decisions on the allocation of risks and resources would be matters which the court would be ill-equipped to assess and therefore non-justiciable.[54] This ill-defined remark has the effect of constraining the adaptability of justiciability, and, in all but the label attributed to it, it would appear that, on this interpretation, the notion of justiciability is to be formulated on principles almost identical to the policy/operational dichotomy. However, perhaps I have placed undue weight on the statement made by Lord Hutton; it can be seen

[46] *Supra* at p.211g
[47] *Supra* at p.212b
[48] *Anns v Merton London Borough* [1977] 2 All ER 492 at p.500
[49] *Rowling v Takaro Properties Ltd.* [1988] 1 All ER 163 at p.172
[50] *Stovin v Wise (Norfolk CC, third party)* [1996] 3 All ER 801 at 814
[51] *Supra* at p.826
[52] *Ibid.* no.2 at p.222d
[53] [1999] 3 All ER 193 at pp.216 - 226
[54] 'It is only where the decision involves the weighing of competing public interests or is dictated by considerations which the courts are not fitted to assess that the courts ill hold that the issue is non-justiciable on

that, reading the speech as a whole, the overarching requirement needed by a court to assess on the justiciability of an issue will always be a careful analysis and weighing of the relevant circumstances.[55] This interpretation of justiciability is imported from the *Takaro Properties*[56] case, and provided it is used more in line with Lord Nicholls' approach in *Stovin*, then it has much to commend it.

To get to the very gist of the question, what reasons of policy and what level of discretion will render a decision non-justiciable? Lord Hutton frames his judgment very cautiously; he defends the decision of Lord Browne-Wilkinson in *X v Beds*, albeit by narrowing its applicability considerably, and states, rather nebulously, that '... although the decisions of the defendant were within the ambit of its statutory discretion, nevertheless those decisions did not involve the balancing of the type of policy considerations which render the decision non-justiciable'.[57] This approach highlights both the flexibility of justiciability but also its ability to be used oppressively - it still has no settled definition, and as we have seen in the case law, particularly when it is used co-extensively with the policy/operational distinction, it can be used to manufacture inequitable results.

What then has been the outcome of changing from policy/operational to justiciability? Judges still speak of policy considerations when addressing the notion of justiciability, indeed, it would be impossible to frame an answer without recourse to such principles, except, at this particular juncture, a policy decision will not render the act unimpeachable in an action for negligence. The element of discretion involved, however large or small, therefore, will not be an indication of its suitability for such a private law action. This does not mean that *all* actions taken by public authorities will be justiciable, for, as Lord Hutton said, there will always be certain policy considerations[58] which will render the decision non-justiciable. This perhaps brings justiciability, in the tortious sense, in line with the notion of justiciability in the public law sense; policy matters which embrace myriad decisions and encompass many areas are said to be polycentric, and only they will be rightly held to be non-justiciable.[59] The policy/operational dichotomy, although unhelpful at the margins, established a rigid structure that had to be overcome as a precursor to challenging a public body in negligence. Judges, perhaps wary of the vulnerability of such bodies, thought it desirous to construct

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the ground that the decision was made in the exercise of a statutory discretion'. P.222e In getting rid of policy/operation in the preceding paragraphs, is he not just resurrecting it by the back door?

[55] [1999] 3 All ER 193 at p.225h

[56] [1988] AC 473 at p.501 per Lord Keith

[57] [1999] 3 All ER 193 at p.224h

[58] Lord Browne-Wilkinson explained the concept of non-justiciability in several ways. He spoke of 'matters of social policy', 'the determination of general policy', 'the weighing of policy factors' and decisions about the 'allocation of finite resources between different calls made upon them or …the balance between pursuing desirable social aims against the risk to the public inherent in so doing'. [1995] 2 AC 633, 737, 748, 749 and 737 respectively.

[59] This concept was used by Lon Fuller (1978) 92 Harvard LR 353

such a hurdle which would make it increasingly difficult for private individuals to bring such actions. In short, an individual would always be unsuccessful if he were challenging a policy decision, and would have to seek an alternative remedy. Justiciability, by way of alternative, does not preclude a wholesale bar on matters of policy, but does this make it a more acceptable alternative? Certainly on a more theoretical level it seems better suited to justice; in this sense it is likely to provide the aggrieved individual with, at least initially, considerably more help and flexibility when suing a public body. Moreover, it is likely to placate the ECtHR, where cases will be more amenable to the trial process than struck-out at the earliest possible stage because of the more open-ended approach that it embodies. In practice, however, it would appear that the difference between the two tests is merely one of degree: under the policy/operational head there is a large area which will be non-justiciable, whereas the area of non-justiciability will be considerably smaller under the other head, although this is only perhaps because the influence from Europe has dictated this more expansionist and liberal construction.

But this still begs the question, why does there need to be the imposition of this complex and prolix structure, whatever label it is given, when the law of negligence itself is perfectly suited to adjudge on such matters? The notion of justiciability seems to offer nothing more than a somewhat relaxed version of the policy/operational distinction, but because it has yet to be comprehensively delimited, just how relaxed is still open to academic dispute. The speech of Lord Hutton confirms the judicial unease surrounding justiciability, and it is apparent that only time will establish whether this evolving doctrine proves to be a workable guide to steer the private litigant into the often impenetrable forest of public authority negligence. My opinion is that the continuing influence from Europe will provide a much greater impact in shaping the law.

The Just and Reasonable Test

One wonders what is really the substantive difference between the question of justiciability and the notion of the 'fair, just and reasonable' prong of the *Caparo* tripartite fork; could established tort principles be employed to do the job and do it in a far more systematic and cogent fashion than the preventative criteria espoused by Lord Browne-Wilkinson in *X v Beds*? Both are employed to weigh up questions of policy which invariably throw up considerations about the utility of compensating the victim with the more general aspects of benefiting society as a whole. In other words, is it more just to deny redress to all possible plaintiffs in the future who suffer the same fate on the understanding that to do so is for the greater communitarian good? Both concepts are used to establish the correct economic and monetary equilibrium between compensating the plaintiff or denying him reparation; the 'floodgates' argument and the economic injustice of suing a casually peripheral tortfeasor could equally be accommodated in either doctrine, so why then have judges

encouraged the growth of justiciability at the expense of traditional tort principles? The policy/operational dichotomy and justiciability are used primarily by judges as a convenient reason to strike-out decisions and thus prevent local authorities from getting embroiled in costly and lengthy litigation. How far can judges let economy and expediency prevail over the plaintiff's right to attempt to prove a just claim?

It seems increasingly likely that the courts will consider policy factors above all else. Indeed, one wonders if the fair, just and reasonable prong of the tripartite fork has now consumed both the historically more important heads of foreseeability and proximity and all aspects of the law of negligence, including even liability for personal injury.[60] The *Caparo* case itself involved auditor's liability for pure economic loss, and although *Perret* goes some way to bringing back the 'foreseeability of harm' approach in relation to physical injury, the Scottish case of *Gibson v Orr*[61] adds to the already impressive list of cases involved with physical damage that have readily adopted the *Caparo* test; albeit that these cases can be described as 'novel' in character. However, it would appear now that Lord Hamilton sees 'no logical justification in modern circumstances as the law has developed for applying a different test for the existence of a duty of care in respect of personal injury from that applicable relative to physical damage to property or to economic loss'.[62] Will this remarkable passage be followed in other jurisdictions? It appears that policy has usurped the fundamental principles of negligence law to such a degree that Lord Browne-Wilkinson can boldly assert that 'the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied'[63]. However laudable this proposition may seem on the surface, it would appear that the 'loyalty of the law', although swift to arrive at the scene, is often inconsequentially removed by often unsubstantiated and tenuous policy concerns. This can clearly be seen in *X v Beds,* where Lord Browne-Wilkinson was quick to assert that there were very potent counter-considerations to override the default position enunciated above. It would appear, however, that judges are becoming less inclined to resort to such matters, as *Barrett* amply demonstrated.

[60] *Marc Rich & Co. AG v Bishop Rock Marine Co. Ltd.* [1996] 1 AC 211 established that fairness, justness and reasonableness could be used as a criterion to establish property damage – although the case is often thought of as one which involved pure economic loss. Is it not the case that for physical injury cases, all that is needed is foreseeability of such damage? Why then is fairness, justice and reasonableness used in the cases of *Hill v Chief Constable of East Yorkshire* [1988] 1 WLR 1049, *Stovin* and *X v Beds*? The judges in *Perret v Collins* [1998] s Lloyd's Rep. 255, where fairness, justice and reasonableness was employed even though it was a case of physical injury, were revolted by this reasoning. Physical injury goes to the very heartland of the law of negligence and 'that such a point should be considered to be even arguable shows how far some of the fundamental principles of the la of negligence have come to be eroded'. At p.258

[61] 1999 SC 420

[62] at p.431

[63] *ibid.* no.3 at p.749

In *X v Beds*, Lord Browne-Wilkinson enumerated five policy considerations which he thought were particularly important, and which, cumulatively, militated against a finding of liability against the defendant. These were:

- **The multi-disciplinary child protection conference involved in deciding whether a child should be placed on the child protection register;**

In a system implemented by statute for the protection of children, myriad authorities would be involved (the police, educational bodies, doctors and psychiatrists), and therefore Lord Browne-Wilkinson thought it would be unfair to lay all the blame at the door of only one participant; moreover, to impose liability on all parties would create impossible problems of disentangling as between the respective bodies the liability, both primary and by way of contribution, of each for reaching a decision found to be negligent.[64] Lord Hutton dispenses with this reasoning in *Barrett*, merely stating that in the present case it was apparent that other disciplines, although involved, were not closely involved.[65] In truth, the distinctions drawn by Lord Hutton between *Barrett* and *X v Beds* are rather unconvincing, but it certainly shows an increasing judicial unease at using unsubstantiated policy factors for denying the existence of a duty of care. Indeed, even if what was said were factually accurate and could be reinforced by solid evidence, should it still dissuade the court from imposing a duty of care, especially in cases which involve personal injury? Surely the rules on joint and several liability are specifically designed to prevent this from being a problem which the plaintiff has to bear?

- **The balance involved in dealing with the 'extraordinarily delicate decisions' in having regard to the rights of the child, but also to the advantages of not disrupting the family environment.**

Although both Lord Hutton and Lord Slynn were conscious of not upsetting the *X v Beds* decision, they gave little reasoning for why the policy considerations, so weighty in that case, provided such little bite in *Barrett.* He feels that the twin notions of justiciability and the *Bolam*[66] test, now firmly enshrined in the standard of care, would provide the significant degree of protection to defendants.[67] There are many professional areas where decisions of a sensitive and controversial nature are needed to be made and this has not precluded the existence of a duty of care. It could be argued that the case of *Dorset Yacht* itself involved a 'delicate' decision, and yet a duty was held to exist under those considerations.

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[64] *Supra*
[65] *Ibid.* no.2 at p.228d
[66] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

- **The risk of the authority being over-cautious and defensive if it were subject to judicial decisions in a damages claim.**

The 'inhibition' argument was used forcefully by Lord Keith in *Hill*[68]:

'In some instances the imposition of liability may lead to the exercise of a function being carried out in a detrimentally defensive frame of mind'.

The decision of *Hill* (it is perhaps interesting to note that the House of Lords still addressed the policy factors even though the plaintiff would have failed on the question of proximity) could be seen as the first real case to clearly enumerate the policy considerations militating against the imposition of a duty of care. Similar arguments where then made in most other cases which involved public authorities or other professional bodies as defendants. The very claim that negligence liability leads to 'defensive practices' is not reinforced by any evidence or empirical data, and sometimes just seems to be 'thrown in' at the last instant merely to add greater weight to an airy and Delphic judgment.[69] Legal arguments cannot be solved, and litigation cannot be determined, on the basis of hunches, however eminent and experienced their sources may be. The House of Lords in *Barrett* seemed to be taking cognisance of this point, and the opinion of Evans LJ[70] in the Court of Appeal was cited favourably in both the leading judgments. However, it is Lord Reid's judgment in *Dorset* that offers the most caustic dismissal of such arguments; even as long as thirty years ago it became apparent that decisions based on such ideas had little to acclaim it.[71]

- **The fact that the statutory complaints procedure and the ombudsman would allow complaints to be investigated.**

The existence of alternative remedies is a fourth factor which has been cited as a reason for rejecting a common law duty. 'If there were no other remedy for maladministration of the statutory system for the protection of children, it would provide substantial argument for imposing a duty of care. But the statutory complaints procedures contained in section 76 of the Act of 1980 and the

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[67] P. Cane *The Anatomy of Tort Law* (Oxford, 1997) p.41
[68] *Hill v Chief Constable of South Yorkshire* [1988] 2 WLR 1049 at p.1055
[69] See Lord Hoffmann in *Stovin*
[70] 'I would agree that what is said to be a "policy" consideration, namely, that imposing a duty of care might lead to defensive conduct on the part of the person concerned and might require him to spend time or resources on keeping full records or otherwise providing for self-justification, if called upon to do so, should normally be a factor of little, if any, weight. If the conduct in question is of a kind which can be measured against the standards of the reasonable man, placed as the defendant was, then I do not see why the law in the public interest should not require those standards to be observed.' [1997] 3 All ER 171 at p.181
[71] See [1970] 2 WLR 1140 at p.1151

much fuller procedures now available under the Act of 1989 provide a means to have grievances investigated, though not to recover compensation. Further, it was submitted (and not controverted) that the local authorities Ombudsman would have power to investigate cases such as these.'[72] Therefore, as Lord Browne-Wilkinson himself adverted to, although these remedies might be capable of replacing a good decision with a bad one, they will provide nothing in the form of pecuniary damages, and thus their applicability will be considerably limited.

- **The fact that no analogous duty had been recognised before in accordance with the current preference for developing the law of negligence incrementally.**

The Court of Appeal in this case did not think it was fair, just or reasonable to impose a duty of care on the defendant; the court observed that the very position the defendant engendered was analogous to that of a parent, and to impose liability on a parent in this manner would be manifestly wrong.[73] However, Lord Hutton did not think it apt to compare the position of a parent with that of the responsibility a local authority could exert, since a parent would never, in a normal family, have to make the decision whether their child should be placed for adoption, placed with foster parents or placed in a residential home.[74] This approach seems to mark a deliberate shift from the policy-laden reasoning of previous decisions, where the overriding concern was that the '...courts should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoing of others'.[75]

Part 3

As I established in the previous section, the notion of justiciability appears to be a technique with a closely analogous substance to that of fairness, justice and reasonableness. Indeed, the latter head seems not only more apposite to discuss such policy matters, but would also remove the considerable complexity and prolixity of argument endemic in litigation of this type. Although justiciability was still used in *Barrett* to delimit between the impeachable and the unimpeachable decision, and realistically not wholly confined to the amount of discretion conferred on a particular statutory body, one wonders still of the durability of this Delphic doctrine.

What contribution *Barrett* has made is that the case appears to have removed the overt public hurdle in all but the most necessary of cases, but put a much more insidious block to compensation in

[72] *X v Beds* p.751
[73] See Lord Woolf MR [1997] 3 All ER 171 at 178
[74] *Ibid*. no.2 at p.227c
[75] [1995] 2 AC 633 at p.751

the breach stage. The standard of care will thus become the pivotal factor, and instead of a plaintiff failing from the outset, i.e. being struck out because they fail Lord Browne-Wilkinson's preventative criteria, they will get the ability to adjudicate on matters at the trial stage. The practical significance of this is yet to be seen, and if something akin to the *Bolam* test is established, then the case law in this area would undoubtedly become more settled, although it will not be a necessary concomitant of this that the chance of plaintiff success will increase.

The change will undoubtedly placate the ECtHR who were stolidly against the perceived 'blanket immunity' given to various 'rescue' authorities, such as the police, but will perhaps not change the substantial difficulty that private individuals face when trying to sue a public authority; albeit that the difficulty will now be subsumed into the tripartite test formulated by Lord Oliver in *Caparo*.

The *Osman* ruling in the ECtHR is perhaps responsible[76] for the judicial shift from the principle of justiciability and other more restrictive public law factors, to the breach stage, much to the *chagrin* of Lord Browne-Wilkinson.[77] In the present situation, the plaintiff, rather than having his case struck-out at the 'preventative criteria' stage, should be able to go to trial to have the dispute addressed at the breach stage. This was clearly in the mind of Lord Hutton[78], and his passage on the subject forcefully argues that because the standard of care is such a flexible and sophisticated instrument, employed to considerable effect in other 'difficult' areas[79], it is somewhat curious as to why the concepts of policy/operation and justiciability have come to usurp this function. The decision in *Barrett* can be seen, at least in part, to adopt this traditional reasoning, but it still attempted a rather fruitless re-modelling of the public law hurdles. *Barrett* will only become a significant case if the attempt by Lord Hutton and Lord Slynn to allow more cases to go to trial is followed without the excessive reliance on the notion of justiciability. To proceed in this manner (even if much of the 'bite' of Lord Browne-Wilkinson's preventative criteria is narrowed considerably by the decision in *Barrett*), judges should always be wary before they embark on cases of this type to dismiss them as ones that deal with issues that are non-justiciable. The 'teeth' of each decision will then have to come from a discussion of basic negligence principles, regardless of whether the defendant is a private person or a public body.

[76] Para. 139: 'The applicants must be taken to have a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim'.
[77] *Ibid.* no.2 at p.200a: 'In the present very unsatisfactory state of affairs, and bearing in mind that under the Human Rights Act 1998 art.6 will shortly become part of English law, in such cases as these it is difficult to say that it is a clear and obvious case calling for striking out'.
[78] [1999] 3 All ER 193 at p.230a-d
[79] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

However, the true impact of *Barrett* still remains to be seen, and what effect it will have on public authority litigation is yet to be ascertained. Public authority liability, like other facets of the law of negligence[80], has fluctuated between pro-plaintiff and pro-defendant phases. If *Anns* represented the high-point of plaintiff success, then *X v Beds* and the majority *Stovin* highlighted its forceful demise. *Barrett* will certainly ignite talk of a reversal back to the less restrictive regime of *Anns* and perhaps even the Court of Appeal's reasoning in *Dorset* (without, it is hoped, the unnecessary recourse to policy/operation and only the strictly limited application of justiciability), but whether this is enough to mount a true turn-around or is but a mere aberration is difficult to speculate on; one imagines, however, that *Barrett* will be used both technically and cautiously.[81]

Just v British Columbia[82]

Although *Barrett* represents a shift from the established law in England, it can be compared approvingly to the viewpoint held in Canada, particularly the case of *Just v British Columbia*, which was cited approvingly both in *Stovin* and in *Barrett.* The Supreme Court of Canada still pays due regard to the two-stage approach in *Anns*[83], but in practice this makes very little difference to the rather more refined approach in *Caparo*, since it is admitted that it should not always be 'slavishly followed'.[84] Both countries have firmly agreed that the policy/operational dichotomy is an ineffectual tool to discover when it is appropriate to impose a duty of care or not, for the real issue is finding a balance between the interests of the plaintiff against the interests of the public authority and not necessarily the amount of policy or discretion each decision engenders. The case of *Kamloops v Neilsen*, in highlighting the often insuperable difficulty of dividing decisions of policy from those of operation, followed Lord Wilberforce's opinion that it can be 'a matter of very fine distinctions'.[85] Questions of policy should therefore not be wholly excluded from adjudication on this matter alone; due regard must also be had to the public authority's function, because in some instances it will be acceptable to have a concurrent common law duty of care superimposed into the particular statutory framework in question. Cory J. in *Just* recognises such a distinction, and very much in line with *Barrett's* delimitation between justiciability and non-justiciability, emphasises that the '... characterisation of such a decision rests on the nature of the decision and not on the identity of the

[80] Most notably liability for psychiatric damage and pure economic loss.
[81] See B.S. Markesinis, J-B Auby, D. Coester-Waltien and S.Deakin *Tortious Liability for statutory bodies*. *Palmer v Tees Health Authority* The Times, 6th July, demonstrates that the courts will attempt to circumvent the perceived generality of application of cases like *Barrett* even if the reasoning appears inconsistent and irrational. Cases will thus be struck out on lack of proximity, further highlighting the judicial disfavour of the ECHR ruling in *Osman* and the impact it had on *Barrett*. See [1999] Lloyd's Rep Med 351 for a full report.
[82] 64 DLR (4th) 689
[83] See *Kamloops v Neilsen* [1984] 2 SCR 2
[84] *Supra* at p.701d
[85] [1984] 2 SCR 2 at p.23

actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions'.[86]

Therefore, the case of *Just v British Columbia*, the dissenting speech of Lord Nicholls in *Stovin* and *Barrett v Enfield* are all representative of the fact that despite the decision which is challenged was made within the ambit of a statutory discretion and is capable of being described as a policy decision is not in itself a reason why it should be held that no claim for negligence can be brought in respect of it. Most people, in any field of employment, and whatever their status, make decisions involving discretion and this could very easily be thus construed as a matter of policy. Prior to the decision in *Barrett*, this would have made a decision of this sort *prima facie* unchallengeable. This was clearly unsatisfactory. What this case succeeds in doing is removing the judicial inclination to evaluate the policy/operational distinction in such a rigid and strict manner, and to focus more on the individual merits and facts of each case, which the notion of justiciability, if it has to be applied at all, at least facilitates far more easily than the policy/operational dichotomy. The Canadian cases have no need to discard the policy/operational divide, for it was phrased from its inception in a manner far more conducive to private law concerns. Whatever label we decide to use, and it would certainly appear to be justiciability[87], should be formulated in a manner similar to the Canadian standpoint, and this seems to be the position adopted in *Barrett*, at least by Lord Hutton and Lord Slynn. The test to be embraced is that of the reasonable man, and this '... traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual'.[88] The question of breach, since it will now be far easier to establish a duty, will be the stage that the plaintiff will now have to overcome if he is to be successful in suing a public authority for delictual liability. This brings public authorities and other statutory bodies in line with other professions such as doctors, nurses, firemen etc. Substantively, it might be even more difficult to show a breach of the standard of care, but at least it will take away much of the complexity that fermented under the surface of the earlier case law.

'Once a duty of care that is not exempted has been established, the trial will determine whether the government agency has met the requisite standard of care. At that stage the system and manner of

[86] *Supra* at p.708
[87] See *W v Essex County Council* House of Lords; Lord Slynn main judgment: The Times, March 17. Whether the nature of the council's task was such that the court should not recognise an actionable duty of care, in other words, that the claim was not justiciable, and whether there was a breach of the duty depended, in the first place, on an investigation of the full facts known to, and the factors influencing the decision of the defendants. The rest of the case report deals with nervous shock issues. In this brief paragraph we can discern the points raised in *Barrett* by Lord Slynn himself.
[88] *Supra*

inspection will be reviewed. However, the review will be undertaken bearing in mind the budgetary restraints imposed and the availability or personnel and equipment to carry out such an inspection'.[89]

It is this approach, which eschews the preventative criteria as precursor to public authority liability, which is to be favoured, and *Barrett* unquestionably plants the first seed which is needed to bring a degree of rationality to a chaotic area of law. Whether the seed is an acorn, or merely a pip, is still to be established, but if the judicial disquiet over *Osman* continues, and cases continue to be decided on similar reasoning adopted in *Palmer*[90], then further intervention by Strasbourg will be needed to provide sustenance to the arid landscape of justice in negligently inflicted loss caused by public authorities.

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