JUDICIAL INDEPENDENCE AND THE SEPARATION OF POWERS - SOME PROBLEMS OLD AND NEW*

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I am delighted and privileged to be invited to deliver this Lecture in honour of Leon Ladner, Q.C. That is because the invitation is a tangible recognition of the growing communication that is taking place between Canadian and Australian lawyers. This communication is occurring at various levels, not least of them being the consideration by Australian courts of Canadian decisions. The accessibility of law reports and journals has brought the commonality of the common law world into sharp relief. So, in shaping the common law for Australia, we consciously have regard to how the common law stands elsewhere, in particular Canada. The process seems to be reciprocal. All this is not surprising. In no country can an important discipline, such as the law, afford to turn its back on developments outside national boundaries.

However, that is not my topic on this occasion. I speak now on a different subject - judicial independence in the context of the relationship between the Judiciary and the other branches of government. With the rise of the welfare state and the increasing importance of the individual's rights against government, not to mention the pervasive power of the Executive, judicial

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independence is now more important than it ever was. In his paper entitled "Fundamentals" delivered at the Canada-Australasia Law Conference in April 1988, Sir Robin Cooke, President of the New Zealand Court of Appeal said:[1]

> [T]he modern common law should be seen to have a free and democratic society as its basic tenet and, for that reason, to be built on two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts.

The relationship between the Judiciary and the Executive is now more complex than it used to be. It is subject to tensions arising from, on the one hand, legislative and executive actions that illustrate the need to protect the institutional independence of the courts, and on the other hand, judicial decisions on policy issues that have been seen by some as overstepping the elusive boundary between law and politics. It is those two areas that I shall discuss.

I. JUDICIAL INDEPENDENCE

I speak of judicial independence in an extended sense, an independence that is something more than the freedom of a judicial officer to make a decision free from governmental threat or favour, an independence that extends to the institutional autonomy of the courts; it is in much the same sense as Chief Justice Dickson spoke of judicial independence in *The Queen* v. *Beauregard*.[2] The tensions to which I refer may be illustrated by reference to events in the United Kingdom and Australia where the doctrine of legislative supremacy is still dominant. The pervasive influence of Professor Dicey's views on parliamentary supremacy is perhaps the principal reason for the non-adoption as yet of a Charter of Rights in the United Kingdom and Australia. As it is, the Canadian Charter of Rights and Freedoms has reinforced the indispensable role of the courts in protecting individual rights.

II. ADMINISTRATIVE TRIBUNALS AND JUDICIAL INDEPENDENCE

The vast expansion in the system of administrative justice has blurred community recognition of the intrinsic value of judicial independence. Administrative tribunals exercise adjudicative functions which might, in many

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1 [1988] *New Zealand Law Journal* 158 at 164.

2 [1986] 2 SCR 56, 73, when he said that the Judiciary should be "completely separate in authority and function from *all* other participants in the justice system". See also *Valente v. The Queen* [1985] 2 SCR 673 and the discussion of the two cases by Ian Greene, "The Doctrine of Judicial Independence Developed by the Supreme Court of Canada" (1988) 26 *Osgoode Hall Law Journal* 177.

instances, be entrusted to a court. Yet these functions are vested in tribunals because it is sometimes thought that they will be more sensitive to issues involving policy or political considerations. Tribunals do not exhibit the same spirit of independence for which the Judiciary is noted. That is one reason they are regarded with approval by politicians and administrators. I do not make that comment in a critical sense. Very often tribunals are authorised to take into account government policies. However, familiarity with that important feature of administrative justice and the deference paid by tribunals to government policy induces non-lawyers to question the intrinsic value of judicial independence.

III. EMERGING PROBLEMS: COURT ADMINISTRATION AND FUNDING

In the distant days when I was Solicitor-General for Australia, court funding and administration were never a difficulty. The court system was much smaller than it is now. The funding of the courts was not a strain on government resources and court administration was undertaken by court registry staff in conjunction with administrative officers in the Attorney-General's Departments, Federal and State. In the intervening years the volume of litigation expanded; criminal cases as a result of an upsurge in crime, civil work as a result of a growing level of affluence and, eventually, legal aid programmes. Legal aid was introduced in order to make the system of justice more accessible. In achieving that goal, legal aid contributed to the increase in the volume of litigation, both in the number of cases and the length of time of trial, notably the criminal trial. Increased access to the courts has led to a corresponding need for greater resources for the courts. Consequently governments have faced an ever-growing expenditure on the court system (a) to provide funds and administration to support more courts, judges, staff and facilities; and (b) to meet an ever-insistent and growing demand for legal aid funds.

To those parties who do not succeed in obtaining legal aid funding the cost of litigation is prohibitive. The escalating cost of litigation is largely due to increase in lawyers' fees. In Australia the reshaping of the legal profession, leading to the emergence of national megafirms competing for commercial work, has played a part in this. In the result community leaders and the media have expressed concern about the level of legal costs and the possibility that it constitutes a barrier to public access to justice.

The realisation that the adversary system is a high cost system has sparked a number of initiatives in Australia, including renewed emphasis on other modes of dispute resolution, inquiries into the court system and an inquiry into legal costs by the Senate Constitutional and Legal Affairs Committee. The multiplicity of these inquiries indicates the level of public concern about deficiencies in, and the cost of, legal services. Needless to say, delays in the

court system are being addressed by more efficient case management techniques and the provision of more resources and improved facilities. There remains, however, residual concern on the part of government, not only about the high cost of legal services but also about the expanding costs of providing the court system and the burden of legal aid. This concern is more profound in Australia where, as in the United Kingdom, the willingness of the community and of government to continue to absorb ever-increasing costs is perhaps less than it is in the United States and Canada.

In the United Kingdom, according to the traditional model, the Lord Chancellor's Department continues to provide administration for the courts and to determine, in conjunction with the Ministry of Finance, the financial budgets for the courts. Although the Judiciary found this procedure to be satisfactory in earlier times, it has come under criticism recently. Judges have felt that there has been inadequate consultation on budgetary matters and that administrative officers owe a primary allegiance to the Department rather than to the courts.[3] These difficulties are heightened by the difference in outlook between the legal and the administrative cultures. In earlier times administrators were inclined to defer to the judges' views on matters of administration. Now they are more inclined to impose their own solutions.

In Australia, at the Federal level, courts have acquired greater autonomy in matters of administration and expenditure. The *High Court of Australia Act* 1979 (Cth) gave the High Court corporate status and made it responsible for its own administration. The Court enjoys a one-line appropriation and, within certain parameters, it is theoretically at liberty to expend its funds as it sees fit. The Federal Court and the Family Court are now also to have the benefit of a one-line appropriation and the *Courts and Tribunals Administration Amendment Act* 1989 (Cth) has made the Chief Justice in each case responsible for managing the administrative affairs of the Court, without giving the Courts corporate status.

Although Parliament appropriates the High Court's funds by the annual Appropriation Acts, for all practical purposes the High Court's budget is determined by the Department of Finance after negotiation with officers of the Court and officers of the Attorney-General's Department. The process of negotiation may involve the Attorney-General and the Minister for Finance and ultimately, if a decision is not reached at that level, the Expenditure Review Committee of Cabinet. The participation of the Attorney-General and his officers is essential. Because our system of Executive government reflects the Westminster model, important decisions affecting the courts are made at ministerial or Cabinet level. So, it is essential that the Court be represented by the responsible Minister in negotiation with other Ministers or in Cabinet discussions. We have not followed the United States procedure of negotiating

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3 Sir Nicolas Browne-Wilkinson, "The Independence of the Judicary in the 1980s" (1988) *Public Law* 44.

an appropriation directly from the Legislature. That is a public procedure in which the Justices of the Supreme Court appear and testify before a Congressional Committee.

Our system has some disadvantages, notably in staff recruitment. Courts can only offer a limited career path and staff turnover tends to be high. On the other hand, the system lessens the scope for conflict between the Executive and the Judiciary in matters of court administration. It also gives the courts a role in negotiation of their budgets. However, there remains the problem of securing adequate funding when government considers that it must reduce public expenditure. Determination of court funding by the Parliament, rather than the Executive, might alleviate this problem and eliminate this source of conflict with the Executive. It would involve a public process of negotiation in contrast to the present process of private negotiation. And it might involve a more direct participation by the Chief Justice in the process of negotiation than obtains under our existing system.

IV. COURT FEES AS A SOURCE OF REVENUE

An emerging and related difficulty is that governments are now looking to court fees as a significant source of revenue. Fees have been increased sharply and are now regarded as a major source of court funding. Justification for this approach is found in the "user pays" principle. As litigants make use of public facilities for their private advantage, it is only fair that they should pay fees that reflect the cost of providing the facilities which they use. That is how the argument runs. It is somewhat at odds with the traditional view that the Queen's courts are open to all. A central plank in that approach was that court fees were fixed on a nominal rather than on a cost recovery basis. In a democracy which encourages the ordered settlement of disputes, government provides the courts as a forum for the resolution of disputes and the vindication of rights, so ease of access is vital.

The new approach to the setting of fees has implications for the courts as well as for the public. If implemented, it may encourage resort to private arbitration as an alternative to the orthodox court system, particularly on the part of commercial litigants. More specifically, the approach presents a problem for courts which set fees by rule of court. In exercising this power are the courts to defer to the wishes of the Executives? It is scarcely appropriate that judges should exercise their rule-making power at the behest of the Executive. There is no reason why the courts should take responsibility for an Executive decision, more especially when a bystander may interpret the court's action as being motivated by a desire to increase its revenue. On the other hand, it is equally inappropriate that the judges should determine for themselves the important questions of policy that are involved and, in so doing, confirm or override the wishes of the Executive. If such decisions are to be made, it seems preferable

that they should be made by the Legislature or, with its authority, by the Executive.

V. DETERMINATION BY THE EXECUTIVE AND THE LEGISLATURE OF RIGHTS OF AUDIENCE IN THE COURTS - THE RECENT UNITED KINGDOM EXPERIENCE

The recent controversy in the United Kingdom over the Lord Chancellor's proposals for the re-organisation of the legal profession illustrates in a different setting the existing potential for conflict between the Executive and the Judiciary. One of the critical issues was the Lord Chancellor's proposal to confer upon solicitors a right of audience in the High Court. To Canadian and Australian observers this proposal does not seem to be particularly alarming. Although independent Bars exist and flourish in every State but one in Australia, solicitors enjoy a right of audience in all courts. As it happens, solicitors do not exercise their right of audience in the superior courts to a significant extent, except in family law and criminal cases. But that is by the way. What concerned the Judiciary in the United Kingdom was the proposal to intrude into the judges' province of determining who was entitled to a right of audience.[4] The Lord Chancellor's initial proposal[5] was that he should determine the requisite education, qualifications and training of advocates in the various courts on advice from a reconstituted Advisory Committee on Legal Education and Conduct, after consultation with the Judiciary, his decision to be implemented by subordinate legislation. This proposal was hotly contested by the judges and was represented in some quarters as an intrusion into the independence of the Judiciary. Ultimately the Lord Chancellor modified his proposal so that, although solicitors would become eligible to advance to rights of audience in higher courts on achieving certain standards of competence, changes in the rules prescribing rights of audience will require the concurrence of the Lord Chancellor and of the Heads of Divisions.[6] In this way the balance between the Executive and the Judiciary was preserved. One commentator observed that the outcome accorded with the separation of powers, evidently assuming that this doctrine was a central feature of constitutional arrangements in the United Kingdom.

The conflict was an unusual one. The Lord Chancellor, in his Executive capacity, responding to perceived inadequacies in the provision of legal services, proposed remedies which included regulation of the right of audience in the courts, so that solicitors would enjoy that right in the superior courts. No

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4 See *Abse v. Smith* [1986] QB 536.

5 "The Work and Organisation of the Legal Profession" ("the Green paper"), Cm 570, paras 5.13 and 5.34.

6 "Legal Services: A Framework for the Future", Cm 740, para 3.10.

doubt that is a matter in which the judges have an important stake. Whether legislative and executive definition of the rights amounts to an intrusion into judicial independence is another question. Parliaments have legislated on such matters in Australia without that legislation being seen as a violation of judicial independence. Likewise, Parliaments have reformed the rules of procedure without provoking any claim of interference with judicial independence. An attempt by the Legislature to legislate for the displacement of oral argument in favour of written submissions might raise a different question.

VI. JUDICIAL SALARIES

My fourth example, and the area of controversy to which the media directs most attention, is the problem of judicial salaries. In Australia we have encountered the same problems as those that have arisen in the United States. Over the past five years there has been a serious erosion in the level of judicial salaries, particularly in the Federal arena. As in the United States, a recommendation for a very large "catch up" increase was rejected by the Federal government. After a long delay, legislation providing for a much smaller increase was enacted at the end of 1989, so that this problem still awaits resolution. In the United States Chief Justice Rehnquist has warned that failure to remedy the serious erosion of judicial salaries will inevitably lead to a fall in the quality of the Judiciary. Many judges have resigned and there are difficulties in recruiting judges of the highest quality. On a lesser scale, Australia is experiencing similar difficulties. No one could doubt that we also face a deterioration in the quality of our Judiciary if the present problems are not resolved. Financial security, as well as security of tenure, is an indispensable condition of a strong and independent Judiciary.

In Australia, as in the United States, the tribunal charged with setting the levels of judicial salaries, also fixes the salaries of parliamentarians, ministers, senior public servants and office holders. The tribunal's recommendations are reviewed by the government and require legislation in order to take effect. The fixing of judicial salaries takes place in a highly political context in which the ultimate government decision is likely to be affected by considerations which have little to do with the judges. It is impossible to take politics entirely out of salary determinations. However, the establishment of a separate tribunal would remove the present links with other office holders, assist in removing the judges from the centre stage of political controversy and provide a better prospect of evaluating the tribunal's decision on its merits free from other distractions. As things currently stand, executive or legislative disinclination to implement tribunal decisions has led to such potential conflict.

VII. JUDICIAL RETICENCE

Chief Justice Rehnquist considered the problem of judicial salaries to be so serious that he took the unprecedented step of holding a media conference in which he publicly stated the case for increased salaries. That break with tradition signalled a recognition that the judicial viewpoint could not be adequately stated by the Attorney-General. Given the nature of the Chief Justice's statement that was not surprising. Unfortunately we live in an age of image and impact in which it is expected that those who have claims upon the government or the Legislature are expected to speak for themselves. Unless they do, their claims appear to lack that sense of urgency and immediacy which so often carries the day.

Whether Chief Justice Rehnquist's initiative is a harbinger of things to come must remain a matter of speculation. I doubt that the United States experience in this area is a reliable guide to developments elsewhere. What is appropriate in terms of judicial conduct and public communication depends very much on the traditions and the climate of opinion prevailing in a particular society. Judicial reticence is difficult to maintain in a society where public discussion extends to criticism of the courts and their decisions, as it inevitably does when the decisions relate to political as well as legal issues. So it is not surprising that, in the face of the strong public criticisms made by Attorney-General Meese of the decisions of the Supreme Court of the United States, Justice William Brennan felt that there was a need to answer that criticism publicly.

In the United Kingdom and Australia, where the courts are not called upon to interpret a Bill of Rights, there is less likelihood of conflict arising between the Judiciary and the other branches of government. But the potentiality for conflict remains. You do not need a constitutional Charter of Rights in order to generate court decisions which have resounding political implications and sow the seeds of public controversy. If the presence of a written constitution were not sufficient, the growth of judicial review has seen to that.

The policy of judicial reticence served the Judiciary well when court decisions were respected according to a convention that insulated the Judiciary from controversy. In those days it was feasible for an Attorney-General to represent the judicial viewpoint adequately, indeed persuasively, in Parliament, in the counsels of government and in public discussion. Judicial reticence was, in one sense, the other side of that coin. Insulation from controversy required that you did not yourself invite it. But the old framework has been largely dismantled. The Judiciary, in common with other institutions, is not immune from criticism; nor should it be. But somebody must defend the Judiciary. Attorneys-General are today more conscious of the advantages of political expedience. A politician does not win votes by defending judges or public servants. An Attorney-General no longer feels that he needs to defend the judges or their decisions in the face of every critic. The critics will include his own political colleagues. In recent years members of Parliament and media

personalities have been prepared to criticise judges and judicial decisions to a greater extent than formerly. Many politicians - I speak of the Australian variety - do not understand judicial independence and its value. In this situation the public defence of the Judiciary is often undertaken by professional bodies. Yet it hardly seems right that the judges should rely on the professional bodies to speak up for them.

Nowadays, judges are more inclined to speak on public occasions and express a judicial viewpoint about current topics in which the Judiciary has a stake. This attitude has much to commend it, so long as the judge does not commit himself or herself to a point of view which compromises his or her neutrality in future cases. Whether judges should go further is a debatable question which may not admit of a categorical answer. Judges give interviews, as I have done on one occasion,[7] but generally for publication in a scholarly work,[8] or in a general work relating to judicial attitudes.[9] Putting to one side the exceptional case which requires an exceptional response, I favour a cautious approach. Judicial reticence has much to commend it. It preserves the neutrality of the judge; it shields him or her from controversy. And it deters the more loquacious members of the Judiciary from exposing their colleagues to controversy. Judges are not renowned for their sense of public relations.

The need for public defence of judicial institutions is a problem that needs to be remedied. Neither the issue of press statements nor the employment of public relations officers is an appropriate answer. The solution, if one exists under the Westminster system, is to encourage a bi-partisan political approach to the protection of judicial institutions and a return to the old tradition that politicians should be reluctant to attack the Judiciary because there is no acceptable way in which a judge can mount a defence.

The need for such an approach is all the greater now that steps have been taken to establish, in one Australian jurisdiction, a permanent tribunal to deal with allegations of judicial misconduct and, in others, ad hoc commissions of inquiry in relation to allegations against particular judicial officers. These procedures have significant implications for judicial independence and they are an entire topic in themselves.

That brings me to the impact of recent court decisions on the relationship between the Judiciary and the Executive. In Canada, that relationship has been profoundly affected by the Charter of Rights and Freedoms. However, my concern is not with that boundless topic, but with three areas of potential conflict between the Judiciary and the Executive with which Canadian and Australian courts have been confronted very recently.

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7 Gary Sturgess and Philip Chubb (eds), *Judging the World: Law and Politics in the World's Leading Courts* 1988.

8 Alan Paterson, *The Law Lords* 1982.

9 See note 7.

VIII. THE POWER OF THE COURTS TO STAY A CRIMINAL PROSECUTION

The first is the power of a superior court to stay a criminal prosecution on the ground of abuse of process or oppression. In the United States there is a constitutional right to a speedy trial which has been traced back to the ancient common law and the provisions of Magna Carta.[10] As such a right has been rejected in Australia,[11] the existence of a jurisdiction to stay proceedings for abuse of process or oppression is of particular importance. Viscount Dilhorne voiced the traditional opposition to the existence of such a jurisdiction in *Reg v. Humphrys* when he said[12] that judges should not have or appear to have any responsibility for the institution of a prosecution.

Lord Devlin had forcefully expressed the contrary view in *Connelly v. Director of Public Prosecutions*[13] in these terms:

> Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

For my part I would add the comment that, if the courts, by deferring to Executive judgment, allow the process of law to be abused and injustice to occur, the courts will reap the blame and public confidence in the court system will suffer.

The Supreme Court of Canada, after citing Viscount Dilhorne's remarks in a majority decision in *Rourke v. The Queen*,[14] more recently approved Lord Devlin's view in a unanimous judgment in *Reg. v. Jewitt*.[15] The Court held that there is a residual discretion in a trial judge not only to stay proceedings where compelling an accused to stand trial "would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" but also to prevent the abuse of process through oppressive or vexatious proceedings.

In Australia we have arrived at much the same position[16] without trenching upon the immunity from review of the Attorney-General's prerogative power to initiate a criminal prosecution. We have acknowledged that an alternative remedy for an accused person prejudiced by delay on the part of the prosecution is to make an order expediting the trial.

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10 *Klopfer v. North Carolina* (1967) 386 U.S. 213.

11 *Jago v. District Court of New South Wales* (1989) 63 ALJR 640; 87 ALR 577.

12 [1977] AC 1 at 26.

13 [1964] AC 1254 at 1354.

14 [1978] 1 SCR 1021 at 1043-1044.

15 [1985] 2 SCR 128 at 136.

16 *Jago v. District Court of New South Wales*, see note 11.

The exercise of this jurisdiction may well throw up some interesting questions. If delay is occasioned by inadequate allocation of resources to law enforcement agencies or to the court system, is that an answer to any prejudice which the accused may sustain in consequence of delay? In other areas of law, the courts have been reluctant to inquire into and pronounce upon the adequacy of government budgetary and planning decisions. But it may be that, in the context of a criminal prosecution, the courts cannot always accept inadequate funding and planning as an excuse or justification for prejudicial delay. The argument would be that the courts cannot place themselves in the position of condoning prejudicial delay, even if it flows from budget and planning decisions. In that event the Executive's freedom of action in determining the priorities according to which resources are allocated would be affected by the exercise of the courts' jurisdiction to grant a stay.

IX. JUDICIAL REVIEW AND CABINET DECISIONS

The frontiers of judicial review have advanced as far as Cabinet decisions. Cabinet documents are no longer automatically protected by privilege from production and inspection.[17] In the United Kingdom, Canada, Australia and New Zealand prerogative powers are no longer immune from review.[18] Likewise, the exercise of a statutory power vested in the Governor in Council is not beyond judicial review,[19] at least for jurisdictional defect and for denial of natural justice where there is a duty to accord natural justice. In Canada,[20] Australia[21] and New Zealand[22] it has been acknowledged that in some situations Cabinet decisions might be justiciable. However, granted the reluctance of the courts to review matters of general policy, as well as Cabinet's predominant concern with matters of general policy as distinct from considerations personal to the individual, the impracticality of placing any limit on the considerations that Cabinet may take into account and the impossibility

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17 *Burmah Oil Co. v. Bank of England* [1980] AC 1090; *Air Canada v. Secretary of State for Trade* [1983] 2 AC 394; *Gloucester Properties Ltd. v. The Queen* (1981) 129 DLR (3d) 275; *Smallwood v. Sparling* [1982] 2 SCR 686; *Sankey v. Whitlam* (1978) 142 CLR 1; *Environmental Defence Society v. South Pacific Aluminium (No.2)* [1981] 1 NZLR 153.

18 *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 374; *Operation Dismantle v. The Queen* [1985] 1 SCR 441; *The Queen v. Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurance Ltd. v. Winneke* (1982) 151 CLR 342; *CREEDNZ Inc.* v. *Governor-General* [1981] 1 NZLR 172.

19 *Attorney-General of Canada v. Inuit Tapirisat of Canada* [1980] 2 SCR 735 at 748; *FAI Insurance*, see note 18.

20 *Operation Dismantle*, see note 18.

21 *South Australia v. O'Shea* (1987) 163 CLR 378.

22 *CREEDNZ*, see note 18.

of proving, in the light of the obligation of secrecy, the substance and detail of Cabinet discussions, make the possibility of relief on most grounds rather remote. It is therefore not surprising that there is no recorded instance of judicial review of a Cabinet decision for bad faith, irrelevant considerations or unreasonableness. At the same time I should acknowledge the possibility that at State or Provincial level a Cabinet may sometimes deal with considerations personal to the individual free from policy factors. And I should make an exception for the possibility of relief being granted under the Charter. Such a possibility was acknowledged in *Operation Dismantle*. It would be unwise for me to attempt to predict whether judicial review will advance any further in this area. But I might hazard a shrewd guess that Executive dissatisfaction with judicial review is in practice more likely to arise from its application to decisions of ministers and officers than from its application to Cabinet decisions.

XI. LIABILITY OF GOVERNMENT AND PUBLIC AUTHORITIES IN NEGLIGENCE

The third area which I wish to mention is the liability of government and public authorities for negligence. The continuing willingness of the courts to acknowledge the existence of a duty of care in novel situations, coupled with the emergence of liability for negligent statements and the recognition of a right to recover loss that is purely economic when suffered in consequence of negligence, has changed the face of the law of negligence. Governments and public authorities are now exposed to potential liability in a range of situations in which, twenty-five years ago, liability would have been unthinkable. Not all the consequences of this revolution have been fully worked out. Thus, the inherent problems revealed in Canada in *Rivtow Marine Ltd. v. Washington Iron Works*[23] and in Australia in *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"*[24] have not yet been solved.[25] The circumstances in which pure economic loss is recoverable were discussed in Canada in *Kamloops v. Nielsen*[26] and in Australia in *Hawkins v. Clayton*[27] but the task of more precise definition lies ahead. Even in relation to something as basic as the duty of care,

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23 [1974] SCR 1189.

24 (1976) 136 CLR 529.

25 *Candlewood Corporation v. Mitsui Ltd.* [1986] AC 1; *Leigh and Sillavan Ltd. v. Aliakmon Ltd.* [1986] AC 785.

26 [1984] 2 SCR 2; see also *Central Trust Co. v. Rafuse* [1986] 2 SCR 147.

27 (1988) 164 CLR 539, where there was a disinclination on the part of Deane and Gaudron JJ. (at 588, 600-601) to accept the *Rafuse* sole criterion of discovery or discoverability as the time of accrual of a cause of action in negligence for economic loss sustained in relation to property.

contending theories continue to be advanced. Lord Wilberforce's two-stage approach in *Anns v. Merton London Borough*[28] was followed in *Kamloops* but discarded in Australia in *San Sebastian Pty. Ltd. v. The Minister*[29] in favour of a return to the concept of proximity based on Lord Atkin's famous foresight test in *Donoghue v. Stevenson.*[30] Since *Anns,* the House of Lords has qualified the approach taken by Lord Wilberforce[31] and, in so doing, referred to the criticism of the failure to distinguish between misfeasance and non-feasance made by Professors Smith and Burns in their article "Donoghue v. Stevenson - The Not So Golden Anniversary"[32] and to the judgment of Brennan J. in *Sutherland Shire Council v. Heyman.*[33] But Brennan J. did not subscribe to the proximity approach to the duty of care concept favoured by other members of the Court in that case or later in *San Sebastian.* His Honour's view of the duty of care was subsequently adopted by the House of Lords in *Caparo Plc. v. Dickman.*[34] Whether the different approaches to the duty of care taken on the one hand by the High Court and on the other by Brennan J. and the House of Lords are of general practical significance remains to be seen.

In *Curran v. Northern Ireland Housing Association*[35] the House of Lords effected a strategic withdrawal from its declaration of the liability of local authorities as stated in *Anns* and adopted in *Kamloops.* That strategic withdrawal stopped short of overruling the actual decision in *Anns.* That came in the very recent decision of the House of Lords in *Murphy v. Brentwood District Council.*[36] Just what *Murphy* has erected in place of *Anns* is not altogether clear. Their Lordships' speeches contain some important reservations. Until they are clarified there is a risk that, in resolving one problem, *Murphy* has identified others.

In *Murphy,* it was not necessary to consider the continuing applicability of Lord Wilberforce's more generalised proposition in *Anns* that a duty of care cannot arise in relation to acts and omissions which reflect the policy-making and discretionary elements in the exercise of statutory discretions. So far there has been an understandable reluctance to acknowledge that a public authority comes under a duty of care in relation to decisions that involve policy rather than operational factors.[37] In this way the courts have respected the position of

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28 [1978] AC 728.

29 (1986) 162 CLR 340.

30 [1932] AC 562.

31 *Curran v. Northern Ireland Housing Association* [1987] AC 718.

32 (1983) 46 *Modern Law Review* 147.

33 (1985) 157 CLR 424.

34 [1990] 2 WLR 358.

35 See note 31.

36 [1990] 3 WLR 414.

37 In *Sutherland Shire Council* I said (at 469):

government and public authorities and have preserved the balance between the various branches of government.

XII. CONCLUSION

It is this balance that we must seek to achieve and maintain in all those areas of potential conflict between the three branches of government. A harmonious and successful working relationship between those branches requires that, as a matter of comity, each appreciates and respects the role of the others under our constitutional arrangements.[38] In order to achieve that result we need to articulate clear principles governing that relationship. Much still remains to be done.

"The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

The Supreme Court of Canada expressed its agreement with this statement and applied it in *Just v. British Columbia*, (1989) 64 DLR (4th) 689, per Cory J. at 705-706.

38 Brazier, *Constitutional Practice* 1988.