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David Cohen, The Public and Private Law Dimensions of the UFFI Problem: Part II, 8 Can. Bus. L.J. 410 (1984), <http://digitalcommons.pace.edu/lawfaculty/446/>.

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THE PUBLIC AND PRIVATE LAW DIMENSIONS OF THE UFFI PROBLEM: PART II*

David Coherent†

3. Public Law Dimensions

The decentralized and unstructured decision-making process leading to the inclusion of UFFI in the federally financed home insulation programme suggests that the question whether the federal government is responsible in law for the injuries allegedly suffered by Canadian homeowners and their families is not easily answered. The liability of the federal government must first be analyzed in terms of the various *individual government employees* for whose activities the federal government or Crown corporations may be vicariously responsible, and in terms of an analysis of the *Crown corporations* for whose activities the federal government may be responsible. In addition, the question as to governmental liability must, to a very large degree, depend upon the nature of the activity (or failure to act) which is being addressed. It is possible to identify several acts of the federal government, acting through its employees, and of Crown corporations, acting through their boards or employees, which may be reviewed by the courts:

- (1) the decision of Cabinet in enacting regulations delegating financial and material acceptance authority over the home insulation programmes to C.M.H.C.;
- (2) the decision of C.M.H.C. to issue "acceptance" numbers to specific UFFI manufacturers in the summer of 1977, in the absence of an application standard, and without an effective policing or enforcement mechanism to ensure the quality of the installed insulation;
- (3) the decision of the Department of Supply and Services, acting through the C.G.S.B. to establish a product standard for

* For Part I of this paper see 8 C.B.L.J. 309 (1983-84).

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UFFI insulation, which apparently failed to consider any potential hazards to health associated with use of the foam;

- (4) the failure of C.M.H.C., the Department of Supply and Services, and the Department of Energy, Mines and Resources acting through the Office of Energy Conservation, to warn potential users of the risks to health and safety associated with use of the product;
- (5) the negligent representation of the acceptable quality of the product by the Department of Energy, Mines and Resources in its energy conservation information programme, and by C.M.H.C. through its issuance of acceptance numbers to particular manufacturers; and
- (6) the failure of the National Research Council to engage in adequate research and literature searches to ensure that its advice to the C.G.S.B. reflected all available information regarding the product.

The jurisdiction of the courts to impose liability on the federal government is founded in federal legislation — the Crown Liability Act,²³¹ which permits the court to find the state vicariously liable for the torts committed by its servants or agents.²³² The attention of the court must be focussed on individual rather than bureaucratic behaviour.²³³ Thus in any discussion of the potential liability of the federal government, the point of judicial inquiry will be the identification of a tort committed either by an individual federal employee or by a Crown corporation for whose acts the federal government is liable. The vicarious liability of the federal government for the faults of its individual employees

²³¹ R.S.C. 1970, c. C-38, as amended. The only amendment to the Act which is relevant to this study is the enactment of the wiretap provisions of the Criminal Code, and the related amendment of the Crown Liability Act which renders the state liable in damages where a servant of the Crown intentionally interrupts a private communication in the course of his employment. See Protection of Privacy Act, S.C. 1973-74, c. 50, s. 4; Crown Liability Act, R.S.C. 1970, c. C-38, s. 7.2(1).

²³² *Ibid.*, ss. 3(1)(a), 4(2). See *Sociedad Transoceanica Canopus S.A., Owners of the Vessel M.S. Procyon v. National Harbours Board*, [1968] 2 Ex. C.R. 330 (B.C. Admiralty Dist.).

²³³ It should be noted, however, that the vicarious liability of the state can be imposed by virtue of the collective acts or omissions of a number of servants whose behaviour contributed, albeit in a small way, to the alleged negligent act. See *Wilfred Nadeau Inc. v. The Queen in right of Canada*, [1977] 1 F.C. 541 (T.D.), at p. 545, *affd* [1980] 1 F.C. 808 (C.A.).

reflects an underlying philosophical and institutional perspective regarding the judicial imposition of liability on the state. This approach does not attribute fault to the state as an abstract concept, but to individuals — judicial control, if it is exercised at all, is directed at particular government employees, not at the public service or the state itself.²³⁴ The non-liability of the state reflects what I have chosen to refer to as a “pure-corrective justice model” of judicial decision-making.²³⁵ The primary element in this theory is the judicial view of the action as a dispute — a “one-against-one” conflict — and thus requires the individualization of responsibility as reflected in the vicarious liability structure of state liability.

It is my impression that judicial review will take place only rarely. First, one has to acknowledge the defendant bias introduced by the concept of vicarious liability. Second, the jurisdiction to impose liability on the state, as opposed to the jurisdiction to impose liability on a civil servant in his individual capacity, is quite novel,²³⁶ and obviously is enjoyed only with the

²³⁴ Perhaps an intended benefit of the vicarious liability of the state is the creation of judicial sympathy for the individual, often well-intentioned, public servant who must be found personally liable to the plaintiff(s) before the state can be found vicariously liable. See C. Harlow, “Fault Liability in French and English Public Law”, 39 *Mod. L. Rev.* 516 (1976), at p. 540; National Association of Attorneys-General, *Sovereign Immunity, The Liability of the Government and Its Officials*, revised ed. (1976), at pp. 25, 26. While some jurisdictions have expressly limited the scope of judicial review, the courts themselves will often voluntarily establish limited executive immunity. See *Evangelical United Brethren Church of Adna v. State*, 401 P.2d 440 (1965); *Weiss v. Fote*, 167 N.E.2d 63 (1960).

²³⁵ The corrective justice model, as its name implies, focuses on the positions of the litigants to restore, if possible, the relationship between the two. I. England, “The System Builders: A Critical Appraisal of Modern American Tort Theory”, 10 *J. Leg. Stud.* 27 (1981); S. Jorgensen, “Liability and Fault”, 49 *Tul. L. Rev.* 329 (1975); A. Chayes, “The Role of the Judge in Public Law Litigation”, 89 *Harv. L.R.* 1281 (1976).

²³⁶ The Crown Liability Act, *supra*, footnote 231, was enacted in 1953 (S.C. 1952-53, c. 30). One must keep in mind that until quite recently authority of the court to review executive decision-making was extremely limited, and to a large extent could be exercised only when the executive thought it appropriate. See *Petition of Right Act*, R.S.C. 1970, c. P-12, repealed by R.S.C. 1970, c. 10 (2nd Supp.), s. 64(1), proclaimed in force August 1, 1972; *Crown Procedure Act*, R.S.B.C. 1960, c. 89, repealed by S.B.C. 1974, c. 24, s. 16(1), proclaimed in force August 1, 1974 (but see s. 16(2)) and superseded by the *Crown Proceedings Act*, S.B.C. 1974, c. 24; H. Street, *Governmental Liability: A Comparative Study* (Cambridge University Press, 1953), at pp. 1-6; W.P. Kennedy, “Suits by and Against the Crown”, 6 *Can. Bar Rev.* 329 (1928); D.P. Jamieson, “Proceedings by and Against the Crown in Canada”, 26 *Can. Bar Rev.* 373 (1948); P. Hogg, *Liability of the Crown in Australia and New Zealand* (Melbourne, Law Book Co., 1971), at pp. 2-9.

permission of the defendant. The courts are certainly aware of the propensity of Legislatures to enact privative clauses to restrict judicial review of administrative action in the traditional sense of that term. In the case of judicial review of incompetence, the openness of the judicial role cannot be disguised in jurisdictional/process terms, and thus the risk of legislative retaliation is even more acute. The result, it seems, is a deliberate judicial reluctance to engage in review of anything but the most insignificant bureaucratic acts. In addition, the courts may be cognizant that even damage awards may have an instrumental effect on bureaucratic behaviour, and that this "primary direct effect" may be quite powerful in the case of public officials.²³⁷ Accordingly, the courts may be much more sensitive to the potential instrumental effect of their decisions in cases of bureaucratic incompetence than would be the case in the development of rules of private conduct.

The final reason for judicial reluctance to act concerns the nature of the task in which the courts must engage when reviewing bureaucratic incompetence. The decision of the executive branch of government which the courts must decide was so incompetent as to justify compensation to an injured party will almost always involve the exercise of discretion. The discretion may range from the establishment of the national energy programme — the establishment of priorities, national objectives, and massive economic and social programmes intended to define and describe the role and function of the state in a specific sector of society — to the decision of a building inspector to issue a building permit, a decision directly involving an individual private citizen. In both cases, and in all cases falling between these extremes, the "discretionary decision" is simply a statutorily authorized power of decision requiring a choice to be made among alternative courses of action in accordance with the exercise of judgment by an individual.²³⁸ The court's reluctance to interfere with discretionary decisions rests on the traditional model of judicial decision-making — that the court simply applies

²³⁷ See P. Atiyah, *Accidents, Compensation and the Law*, 3rd ed. (London, Weidenfeld and Nicolson, 1980), at p. 62.

²³⁸ See P. Anisman, *Discretion*, Law Reform Commission of Canada, Administrative Law Project (1975), p. 2; S.A. de Smith, *Judicial Review of Administrative Action*, 2nd ed. (London, Stevens & Sons, 1969), p. 264; Ontario Royal Commission, *Inquiry into Civil Rights I* (1968), p. 30; K.C. Davis, *Discretionary Justice* (1969), p. 4.

positive rules established in earlier cases, to a specific fact situation. The legal decision (according to this model) is the result of an inexorable (and mechanical) process of logical analysis.²³⁹ The classic, albeit naive, view, especially in Canada and England, is that the exercise of discretion is for the public service, the rule of law for the courts.²⁴⁰ The result is judicial retreat when courts are confronted with executive decisions which are clearly based on an analysis of political, social, economic or cultural variables (or rationalized on that basis). The prior executive or bureaucratic activity cannot easily be distorted into a rule-based decision which would permit judicial review under the guise of law. To acknowledge judicial review of bureaucratic discretion might very well be to acknowledge judicial *exercise* of discretion. For the courts to review bureaucratic activity is not only to overstep institutional boundaries and risk governmental disapproval, but also involves the courts in an activity which they have insisted is inappropriate and in which they do not openly admit to participating.²⁴¹

At the same time, the courts are aware that the bureaucracy should not be immune from legal responsibility for its behaviour in every case where it injures a member of the public. The bureaucracy does not, as a matter of dogma, act in the public interest,²⁴² and if one accepts that premise then perhaps there are *some* cases where review is appropriate. As well, the argument can be made that the injury suffered by an individual was incurred as a result of an activity which benefitted the state, and certainly benefitted the public either in terms of an abstract

²³⁹ See P. Russell, "Judicial Power in Canada's Political Culture" in M.L. Friedland, ed., *Courts and Trials: A Multidisciplinary Approach* (1975), at pp. 77-9; E. Hehner, "Growth of Discretions — Decline of Accountability" in K. Kernaghan, ed., *Public Administration in Canada*, 3rd ed. (1977), at p. 325.

²⁴⁰ See Dicey, *The Law of the Constitution*, 10th ed. (1959). "The rule of law is contrasted with ... government based on the exercises of persons in authority of wider arbitrary or discretionary powers". See also S. Wexler, "Discretion: The Unacknowledged Side of Law", 25 U.T.L.J. 120 (1975), at pp. 121, 122; M.R. Cohen, "Rule Versus Discretion" in *Law and the Social Order* (1933), at p. 259.

²⁴¹ Associated with this concern is the converse. If the courts establish themselves as a bureaucratic review agency, they may be perceived by the public as a participant in the implementation of public policy as defined by the government in power. See Nonet, *Administrative Justice* (1969), at p. 4.

²⁴² That argument has in fact been made by public authorities. See C.J. Hamson, "Escaping Borstel Boys and the Immunity of Office", 27 Camb. L.J. 273 (1969), at p. 276.

social/economic calculus, or directly in terms of reduced government contributions. Moreover, institutional limits which judges place on themselves should be imposed with the knowledge that their decision does not necessarily involve second-guessing the bureaucracy, or controlling governmental activity²⁴³ — it simply obliges the state to pay compensation to an injured party. The argument for limited judicial review is also supported by a reassessment of the impact of damage awards on government decision-making. At one time it might have been possible to argue that a judicial order to pay damages would have a substantial impact on the allocation of financial resources by government among competing claims for limited funds. Whatever the merit of that argument in the past, the expansion of state revenue-raising powers and activity suggests that the risk of judicial control of resource allocation has been ameliorated.²⁴⁴ Finally, the courts, while not the sole institution available to provide compensation and to ensure accountability, are independent, at least on a relative basis, from the state.²⁴⁵

The conclusion which one draws from this analysis and what is apparent from the cases which I discuss later, is that judges will review alleged bureaucratic incompetence only in cases of unlawful²⁴⁶ and wrongful²⁴⁷ individual bureaucratic activities which take place in a direct relationship with private individuals. The ultimate judicial concern appears to be that judicial review in

²⁴³ P.P. Craig, "Negligence in the Exercise of a Statutory Power", 94 L.Q.R. 428 (1978), at p. 446. This perspective reinforces the compensatory rather than injunctive characteristic of the corrective justice model of law making. The damage award obliges the government to calculate the risks generated by its activity, and establish an insurance scheme to provide compensation to losers.

²⁴⁴ See D. Engdahl, "Immunity and Accountability for Positive Government Wrongs", 44 U. Colo. L. Rev. 1 (1972), at pp. 59, 60.

²⁴⁵ K.C. Davis, *Administrative Law* (1972), p. 497.

²⁴⁶ A prerequisite to judicial review in all cases is the preliminary determination that the act of the bureaucrat was *not* authorized. See text, *infra*, at footnotes 248 to 263.

²⁴⁷ Not only must the behaviour be unlawful, it must be associated with fault, either in terms of subjective bad faith or of negligence. See *Malat v. Bjornson*, [1978] 5 W.W.R. 429 at p. 435, 6 C.C.L.T. 142 at p. 150 (B.C.S.C.), affd 114 D.L.R. (3d) 612, 23 B.C.L.R. 235 (C.A.); *Inland Feeders Ltd. v. Viridi* (1981), 129 D.L.R. (3d) 685, [1982] 1 W.W.R. 551 (B.C.C.A.). The same analysis is applied in the case of statutory duties. See *Canadian Pacific Airlines Ltd. v. The Queen* (1978), 87 D.L.R. (3d) 511 at pp. 515-16, [1979] 1 F.C. 39 at p. 45.

Similarly, the courts repeatedly stress that they will not impose liability simply for "errors of judgment". See *Home Office v. Dorset Yacht Co. Ltd.*, [1970] 2 All E.R. 294, [1970] A.C. 1004 (H.L.).

the form of damage awards does not influence the institution of government. That is, the damage award is designed to have only a minimal instrumental effect on bureaucratic activity.

It is well established that if an employee or agent of the state acts within his lawfully delegated area of authority, there is no judicial review of the activity for the purposes of establishing civil liability.²⁴⁸ At this early stage in the development of the scope of judicial review of administrative incompetence, the criteria which the judges will use to determine the lawfulness of bureaucratic activity have not been fully articulated, and one must keep in mind that the decision of unlawfulness is simply a technique which will permit the courts to legitimize their role as reviewers of executive action. Some judges have indicated that an activity or decision will be unlawful if the decision was so unreasonable that no reasonable person could hold that the statutory object would be furthered by the decision.²⁴⁹ Others suggest that a decision will be unlawful where no reasonable person could argue that it was justified by the delegating instrument;²⁵⁰ where the decision is so unreasonable that there has been no exercise of the delegated discretion;²⁵¹ and most commonly, where there is no evidence or rational explanation upon which to base the discretionary act.²⁵²

²⁴⁸ See *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 at pp. 501, 503, 505-6, [1977] 2 W.L.R. 1024 p. 1037 (H.L.); *Home Office v. Dorset Yacht Co. Ltd.*, *supra*, footnote 247 at p. 333 All E.R., p. 1068 A.C.; *Hogg*, *supra*, footnote 236 at pp. 72-7, 81, 104; *James v. Commonwealth* (1939), 62 C.L.R. 339; *Takaro Properties Ltd. v. Rowling*, [1978] 2 N.Z.L.R. 314 at p. 340; K.C. Davis, 3 *Administrative Law Treatise* (St. Paul, West Publishing Co., 1958), p. 487.

This analysis has been adopted in Canada. See *Diversified Holdings Ltd. v. The Queen in right of British Columbia* (1982), 133 D.L.R. (3d) 712 at pp. 720-3, 35 B.C.L.R. 349 at pp. 358-60 (S.C.), *affd* 143 D.L.R. (3d) 529, 41 B.C.L.R. 29 (C.A.); *Barratt v. District of North Vancouver* (1978), 89 D.L.R. (3d) 473, 6 B.C.L.R. 319 (C.A.), *affd* 114 D.L.R. (3d) 577, [1980] 2 S.C.R. 418; *Berryland Canning Co. Ltd. v. The Queen* (1974), 44 D.L.R. (3d) 568, [1974] 1 F.C. 91 (T.D.); *Central Canada Potash Co. Ltd. v. Government of Saskatchewan* (1978), 88 D.L.R. (3d) 609 at p. 642, [1979] 1 S.C.R. 42 at p. 90.

²⁴⁹ See *Home Office v. Dorset Yacht Co. Ltd.*, *supra*, footnote 247 at pp. 331-5 All E.R., pp. 1067-71 A.C., *per* Lord Diplock; *Nielsen v. City of Kamloops* (1981), 129 D.L.R. (3d) 111, [1982] 1 W.W.R. 461 (B.C.C.A.).

²⁵⁰ See H.W.R. Wade, *Administrative Law*, 4th ed. (Oxford, Clarendon Press, 1977), p. 628; Harlow, *supra*, footnote 234 at p. 532.

²⁵¹ See cases, *supra*, footnote 249.

²⁵² *Malat v. Bjornson* (1980) 114 D.L.R. (3d) 612 at p. 619, 23 B.C.L.R. 235 at p. 242 (C.A.); Craig, *supra*, footnote 243 at p. 429. Thus in *Nielsen v. City of Kamloops*, *supra*, footnote 249, Lambert J.A. held, at p. 119 D.L.R., p. 469 W.W.R., that "a decision not to act at all, or a failure to decide to act, cannot be supported by any reasonable policy choice."

It is not clear if there is a distinction among these tests, or if it matters.

The important point is that the judges feel it necessary for good reason to rationalize their interference by stigmatizing the bureaucratic behaviour as “unlawful”. This emphasizes the blameworthiness of the defendant’s conduct and reinforces the corrective justice philosophy which I believe fuels judicial activity in this area. In addition, where the court adopts the “no rational justification for the exercise of discretion” criterion of unlawfulness, the state as the defendant must offer, publicly, the rationale or justification for its activity. While the scope of judicial review is perhaps limited, the state justification must be made in public, which encourages, or at least permits, political accountability.

A further explanation for the judicial requirement of unlawfulness is the view that by predicating judicial review on a determination of unlawfulness, the courts will *not* be risking executive retaliation²⁵³ against judicial interference with bureaucratic government. Where the court can say that a public servant has disregarded the limits of authority delegated to him by a superior decision-maker, the courts will simply reinforce the expected bureaucratic sanction by imposing a complementary legal sanction.²⁵⁴ The courts can thus identify their activity as an adjunct to the internal disciplinary action which the bureaucrat will face.

The judicial requirement of unlawfulness is also explained by the nature of state liability under the Crown Liability Act. The plaintiff must, under s. 3 of the Act, point to a tort committed by an individual employee or agent who will be personally liable to the plaintiff. The possible catastrophic impact of personal liability in damages (which the bureaucrat may not be able to shift to his employer) suggests that the court may be reluctant to impose personal liability for activity which an official was lawfully instructed to carry out.²⁵⁵ Further, s. 3(6) of the Act provides that

²⁵³ The courts must be aware of the power of the defendant to retaliate. See Harlow, *supra*, footnote 234 at p. 540.

²⁵⁴ See *e.g.*, *Home Office v. Dorset Yacht Co. Ltd.*, *supra*, footnote 247, where Lord Diplock made the point that the officers in control of the prisoners disregarded their instructions concerning the preventive means which they ought to have taken to prevent the escape of the prisoners.

²⁵⁵ See *Fox-Hitchner v. Province of Alberta, Butt and Foster* (1977), 6 A.R. 43, 3 C.P.C. 288 (S.C.T.D.); Wade, *supra*, footnote 250.

nothing in the Act renders the Crown liable in respect of any act or omission of a civil servant in the exercise of powers pursuant to statutory authority. It is arguable that this statutory provision demands a preliminary determination that the activity under scrutiny was carried out without statutory authority.²⁵⁶

A complicating factor introduced by the concept of unlawfulness is the obvious logical inconsistency between *vicarious* liability of the Crown for acts which are committed *without* authority by its agents.²⁵⁷ In many cases the court will impose liability only when the employee is acting in the course of his employment without reference to the unlawful nature of the activity,²⁵⁸ but where the argument has been made by the Crown it has been rejected outright²⁵⁹ — on the grounds that to accede to that proposition would be to immunize the state from the precise liability which the legislation was designed to impose.²⁶⁰

²⁵⁶ The purpose of the analogous English provision is obscure. See H. Street, *Government Liability: A Comparative Study* (Cambridge, Cambridge University Press, 1953), pp. 39, 48. A comparable provision in the Saskatchewan Proceedings Against the Crown Act, R.S.S. 1965, c. 87, now R.S.S. 1978, c. P-27, as amended, supports this view. See *Canadian Industrial Gas & Oil Co. Ltd. v. Government of Saskatchewan* (1974), 46 D.L.R. (3d) 314, [1974] 4 W.W.R. 557 (Sask. Q.B.); *Central Canada Potash Co. Ltd. v. A.-G. Sask.* (1976), 57 D.L.R. (3d) 7 at pp. 130-3, [1975] 5 W.W.R. 193 (Sask. Q.B.), rev'd 79 D.L.R. (3d) 203, [1977] 1 W.W.R. 487 (Sask. C.A.), var'd 88 D.L.R. (3d) 609, [1979] 1 S.C.R. 42. But see *Amax Potash Ltd. v. Government of Saskatchewan* (1976), 71 D.L.R. (3d) 1 at p. 5, [1976] 6 W.W.R. 61 at p. 66 (S.C.C.).

²⁵⁷ See J.R.B. Smith and K.W.B. Middleton, *The Crown Proceedings Act, 1947* (1948), p. 28.

²⁵⁸ See *MacLean v. The Queen* (1972), 27 D.L.R. (3d) 365 at p. 368, [1973] S.C.R. 2 at pp. 6-7. See also *Timm v. The Queen*, [1965] 1 Ex. C.R. 174.

²⁵⁹ See *United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States & Canada, Local Union 488 v. Canadian Broadcasting Corporation* (1979), 97 D.L.R. (3d) 56 at p. 61, 17 A.R. 396 at p. 404 (S.C.T.D.); *National Harbours Board v. Langelier* (1968), 2 D.L.R. (3d) 81, [1969] S.C.R. 60; Hogg, *supra*, footnote 236 at pp. 76, 77.

²⁶⁰ See *James v. Commonwealth* (1939), 62 C.L.R. 339; Hogg, *supra*, footnote 236 at pp. 76, 77. See also *Long v. Province of New Brunswick* (1959), 19 D.L.R. (2d) 437, 126 C.C.C. 83 (N.B.S.C. App. Div.); *Farrington v. Thompson and Bridgland*, [1959] V.R. 286; *R. v. Anthony, R. v. Thompson*, [1946] 3 D.L.R. 577, [1946] S.C.R. 569; *Harris v. The Queen*, [1955] Ex. C.R. 75; *Central Canada Potash Co. Ltd. v. A.-G. Sask.* (1976), 57 D.L.R. (3d) 7 at pp. 136-7, [1975] 5 W.W.R. 193 at pp. 324-5.

In the case of the Crown Liability Act it is interesting to note that the predecessor of s. 3(1)(a) expressly limited the liability of the state to the negligence of an employee which occurred when he was acting within the scope of his duties or employment. See Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c); *R. v. Hochelaga Shipping Co.* [1940] 1 D.L.R. 369, [1940] S.C.R. 153. In addition, the present s. 7.2 of the Act, makes specific reference to vicarious state liability incurred where servants or agents act within the scope of their employment: S.C. 1973-74, c. 50, s. 4.

A determination of unlawfulness is, however, not dispositive in establishing Crown liability.²⁶¹ Under the Crown Liability Act the plaintiff must demonstrate that the civil servant committed a tort, which in most cases will involve either a decision that the employee acted in bad faith²⁶² or, alternatively, was negligent in carrying out a statutory duty or in exercising a statutory power.²⁶³

The issue of judicial review of bureaucratic incompetence in the performance of mandatory statutory duties or in the exercise of statutory discretion will, it seems, be considered in the context of a negligence action. At one time it was thought that breach of a statutory duty would develop as a conceptually distinct private law action. Recent cases suggest however, that traditional negligence concepts will be applied both to activities rendered pursuant to mandatory statutory duties and to discretionary statutory directives. In the former case, which may arise under the Department of Supply and Services Act,²⁶⁴ the action may be framed as a "breach of statutory duty",²⁶⁵ while in the latter case it will be framed in common law negligence terms.²⁶⁶ In both cases, the court must determine whether a bureaucrat (or a group of bureaucrats) in carrying out statutory responsibilities, owed a legal duty of care to the person who alleges that he was injured as a result of the negligent performance of those statutory responsibilities.

The decision to impose a private legal duty on bureaucratic

²⁶¹ See *Welbridge Holdings Ltd. v. Metropolitan Corp. of Greater Winnipeg* (1970), 22 D.L.R. (3d) 470, [1971] S.C.R. 957; *Bowen v. City of Edmonton* (1977), 80 D.L.R. (3d) 501 at p. 514, [1977] 6 W.W.R. 344 at p. 360 (Alta. S.C.T.D.).

²⁶² See J. McBride, "Damages as a Remedy for Unlawful Administrative Action", [1979] Camb. L.J. 323; B. Gould, "Damages as a Remedy in Administrative Law", 5 N.Z.U.L.R. 105 (1972).

²⁶³ It is not surprising that the courts demand more than simple unlawfulness before they will impose liability on individual civil servants. This accords with the corrective justice paradigm which I believe is operative in this area of law. As well, it is quite possible that the public law role of the judges would be limited to a substantial degree if they were to do otherwise. See Public and Administrative Law Reform Committee (New Zealand), *Damages in Administrative Law* (1980), at pp. 34-5.

²⁶⁴ R.S.C. 1970, c. S-18.

²⁶⁵ See Hogg, *supra*, footnote 236 at pp. 99-104.

²⁶⁶ In the case of an alleged breach of a statutory duty, the court will often ask whether the statute establishes a private right of action for the breach of the statutory duty. See Hogg, *supra*, footnote 236 at p. 100; *de Smith's Judicial Review of Administrative Action*, 4th ed. (London, Stevens & Sons Ltd., 1980), p. 530; *Cutler v. Wandsworth Stadium Ltd.*, [1949] A.C. 398 (H.L.), at p. 407; *Canadian Federation of Independent Business v. The Queen* (1974), 49 D.L.R. (3d) 718 at p. 720, [1974] 2 F.C. 443 at pp. 449-50 (T.D.).

activity has been said to depend on the nature of the activity under review. Where the bureaucratic decision takes place within the *operational* sphere of government, the court will hold that the bureaucrat owes the individual a private, legal duty of care. Conversely, policy or planning decisions of bureaucrats are beyond judicial review. This categorical distinction has been adverted to with increasing frequency since the House of Lords' decision in *Anns v. London Borough of Merton*.²⁶⁷

The categorization of governmental functions into policy and operational spheres, even if we could agree on the criteria to use in determining into which camp one should put a particular decision, is entirely artificial. The description of the foam insulation approval process which took place in the context of a financial incentive grant programme, which itself was an element in a multi-sector conservation policy, which itself was an aspect of a national energy programme designed to achieve energy self-sufficiency in Canada suggests that each bureaucratic decision is both an operational and a policy or planning decision. Each decision, in most cases, will be made in the context of implementing a superior policy decision; and will itself constitute a superior policy decision which will be implemented by inferior operational (policy) decisions. It is not that a decision has both operational and policy *aspects*, and that as the former predominates the court is more likely to review it.²⁶⁸ Rather, the decision

²⁶⁷ This bipartite test was first stated by the House of Lords in *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492, [1977] 2 W.L.R. 1024. It has been adopted almost without criticism by Canadian courts. See *Nielsen v. City of Kamloops* (1981), 129 D.L.R. (3d) 111, [1982] 1 W.W.R. 461 (B.C.C.A.); *Barratt v. District of North Vancouver* (1978), 89 D.L.R. (3d) 473, 6 B.C.L.R. 319 (C.A.); *Johnson v. Adamson* (1981), 128 D.L.R. (3d) 470 at p. 475, 34 O.R. (2d) 236 at p. 241 (C.A.).

Every case which I have been able to discover adopts this categorical framework of analysis. Under this analysis the issue of judicial review is absolute. Where the court decides that the decision is "operational", it will hold that the bureaucrat owed the class of persons to whom the plaintiff belongs a private legal duty of care, and will then go on to determine whether the activity was "negligent". Where the court decides that the decision was a "policy" decision, it will hold that no legal duty of care arises, and thus that the conduct is immune from judicial review. See M. Bridges, "Governmental Liability, The Tort of Negligence and the House of Lords Decision in *Anns v. Merton* London B.C.", 24 McGill L.J. 277 (1978), at p. 285; J.A. Smillie, "Negligence and Economic Loss", 32 U.T.L.J. 231 (1982), at p. 265.

²⁶⁸ Cf. *Anns v. London Borough of Merton*, *supra*, footnote 267 at p. 500, *per* Lord Wilberforce.

is both a planning and an operational decision, and the court must decide whether it will review the policy/operational decision.²⁶⁹

The categorization demanded by *Anns* will certainly breed apparently inconsistent decisions, and produce simplistic definitions of policy decisions contrasted with operational decisions.²⁷⁰ What we must keep in mind is that we do not have policy and operational decisions in government. We have decisions, some of which are appropriate for judicial review, and some of which are not. What we need are the tools to assist us in making the distinction. For the time being we are working within a conceptual framework which, at the very least, should require the courts to formulate their reasons for deciding that a particular act is appropriate for review. I have identified several interdependent variables which I consider to be relevant to this determination. No doubt there are many others.

I have chosen to describe the first variable as "standards of conduct". To a very large degree, the reticence of the courts to review bureaucratic behaviour is due to their inability to identify an independent, external, pre-existing objective standard against which to assess the executive decision.²⁷¹ Where the court is able to identify a superior bureaucratic standard pursuant to which the decision under review ought to have been exercised, it is able to assert that the fault of the latter consists of a departure from a standard. The court can thus avoid evaluating "fault" in terms of

²⁶⁹ What the UFFI case study demonstrates is the development of administrative policy at the "implementation" stage of governmental action. Superior policy instruments which appear to give bureaucrats unlimited discretion, are applied through the development of inferior policy to restrict the exercise of that discretion. See Molot, "The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion", 18 McGill L.J. 340 (1972); Robinson, "The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform", 118 U. Pa. L. Rev. 485 (1970); K.C. Davis, *Discretionary Justice* (1969), at pp. 97-103; J. Willis, *Canadian Boards at Work* (Toronto, MacMillan Co. of Canada Ltd., 1941), at p. 71; *Re Becker and Minister for Immigration and Ethnic Affairs* (1977), 15 A.L.R. 696 at p. 701 (reference to departmental policy).

²⁷⁰ See cases at footnote 267, *supra*. See also *Toews v. MacKenzie* (1980), 109 D.L.R. (3d) 473, [1980] 4 W.W.R. 108 (B.C.C.A.); *Canadian Federation of Independent Business v. The Queen*, *supra*, footnote 266 at p. 723 D.L.R., p. 450 F.C.; *The Queen in right of P.E.I. v. The Queen in right of Canada* (1976), 66 D.L.R. (3d) 465 at pp. 483-4, [1976] 2 F.C. 712 at pp. 733-4 (T.D.), appeal dismissed, cross appeal allowed 83 D.L.R. (3d) 492, [1978] 1 F.C. 533 (C.A.); *Berryland Canning Co. Ltd. v. The Queen* (1974), 44 D.L.R. (3d) 568, [1974] 1 F.C. 91 (T.D.); *Canadian Pacific Airlines Ltd. v. The Queen* (1978), 87 D.L.R. (3d) 511 at pp. 519-21, [1979] 1 F.C. 39 at pp. 50-3 (C.A.).

²⁷¹ Craig, *supra*, footnote 243 at p. 434; R. Pepper, "The Negligent Exercise of Statutory Power: A Comment on *Kwong v. The Queen*", 39 U.T.F.L.R. 77 (1981), at p. 93.

the abstract propriety of the conduct according to the personal view of the judge as to the correctness of the decision.²⁷² The existence of a standard is important for several reasons. First, it reduces the risk that the legitimacy of judicial discretion will be questioned. Second, the court need not spend inordinate amounts of time and resources developing the standard against which to assess the bureaucratic conduct. Finally, the court, where it applies a superior bureaucratic standard, is in fact reinforcing the position of the superior bureaucrat, by adding a legal sanction to whatever internal disciplinary measures exist. Thus Lord Diplock in *Dorset Yacht*²⁷³ could state that the role of the court was to deter the government employees from completely disregarding the interests of the escaped prisoners; and in *Anns*,²⁷⁴ the standard against which the inspector's conduct was assessed was to take reasonable care to observe that the government's *own* bylaws were observed.²⁷⁵

The identification of an independent standard of conduct developed within the bureaucracy may be facilitated where the alleged negligence takes place in the context of "programmed decisions". This second variable acknowledges that the bureaucratic process may be described as a series of discretionary decisions with varying degrees of uniqueness.²⁷⁶ As decisions become routine, and must be made more frequently, it is less likely that discretion can be exercised, and the "correctness" of a particular programmed decision can be evaluated through a comparison with other decisions of the same class. The bureaucrat's own decision becomes the standard.²⁷⁷ In the foam insulation case, one might examine the governmental standard-setting process, including evaluative techniques, variables under inquiry, the identity of the participants and the independence of the research data, which was applied in the case of the several

²⁷² See Harlow, *supra*, footnote 234 at p. 517.

²⁷³ *Home Office v. Dorset Yacht Co. Ltd.*, [1970] 2 All E.R. 294 at pp. 331-5, [1970] A.C. 1004 at pp. 1067-71.

²⁷⁴ *Supra*, footnote 267 at p. 501 All E.R., p. 1035 W.L.R., *per* Lord Wilberforce.

²⁷⁵ Thus in the foam insulation case, the prospects of judicial review would be increased to the extent that one can identify superior policy decisions within the Department of Energy, Mines and Resources, the Department of Supply and Services, the National Research Council or the C.M.H.C. which were not observed by the bureaucracy.

²⁷⁶ See K. Kernaghan, *Public Administration in Canada*, 3rd ed. (1977), p. 314.

²⁷⁷ The courts are well aware of this "uniqueness" concept. See *A.-G. Ont. v. Palmer* (1979), 108 D.L.R. (3d) 349 at p. 351, 28 O.R. (2d) 35 at p. 37 (C.A.).

insulation products for which standards were set. These programmed decisions may provide an objective basis upon which to determine the "reasonableness" of the state conduct in the particular case of establishing a foam insulation standard.

The third variable which the courts have recognized as an element in the establishment of a legal duty of care is the degree of discretion exercised by the bureaucrat whose conduct is under inquiry. Even where a superior standard of conduct can be identified, it may be that the inferior bureaucratic conduct is characterized by substantial discretionary elements which point away from judicial review.²⁷⁸ While it is true that the mere presence of discretion will not preclude review,²⁷⁹ the court must be aware of the political risks which it runs were it to identify conflicting interests of the classes of persons likely to be affected by the decision, place a value or weight on those interests, and perhaps identify a general public interest in the pursuit of the activity in question. The court, even in this case, has standards which it can apply — the difficulty is that the criteria involve elements of social wisdom, political practicability, and economic expediency,²⁸⁰ whose application might expose the court to political retaliation and social criticism. As well, the self-defined role of the courts has been to deny the exercise of judicial discretion and, as the bureaucratic decision is characterized by increasing discretionary authority, it becomes difficult to disguise what the court is doing.

The fourth variable which should be considered focuses on the nature of the private interest affected by the bureaucratic activity. It is possible that the long history of judicial review of nuisance cases involving interference with use of land,²⁸¹ and a similar willingness to review police enforcement practices,²⁸² reflects

²⁷⁸ See *Toews v. MacKenzie*, *supra*, footnote 270.

²⁷⁹ See *Nielsen v. City of Kamloops*, *supra*, footnote 267; *Johnson v. State of California*, 447 P.2d 352 (1968). But see *Craig*, *supra*, footnote 243 at p. 444.

²⁸⁰ See *Blessing v. United States*, 447 F. Supp. 1160 (1978). This factor explains the concern of some commentators that the "impartiality of the courts would be impaired if it were asked to make value judgments on matters of social and economic policy". See The Law Reform Commission of Western Australia, *Working Paper and Survey: Review of Administrative Decisions, Part I — Appeals* (1978), at para. 4.17.

²⁸¹ See *e.g.*, *Managers of the Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193 (H.L.); *Harlow*, *supra*, footnote 234 at pp. 527-33.

²⁸² See Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer" in Linden, ed., *Studies in Canadian Tort Law* (1968); *Christie v. Leachinsky*, [1947] A.C. 573 (H.L.); *Koechlin v. Waugh and Hamilton* (1957), 11 D.L.R. (2d) 447, [1957] O.W.N. 245 (C.A.); *Harlow*, *supra*, footnote 234 at pp. 527-8.

judicial values which demand a greater degree of bureaucratic circumspection where land ownership or occupation, or individual freedom, are at stake. This consideration may have been influencing Linden J. in *Johnston v. A.-G. Can.*,²⁸³ who refused to follow an earlier decision²⁸⁴ denying the existence of a duty of care in similar circumstances. One explanation offered by Linden J. was that in the former case the plaintiff suffered personal injuries, while in the latter the alleged loss was purely economic. It may be that the nature of the injuries in the foam insulation case, where they can be identified as the loss of the family home and serious risks of personal injury, will point towards judicial review.

A fifth variable which may be relevant in deciding if judicial review ought to take place looks to the *unintentional* nature of the government activity. Where a bureaucrat makes a deliberate choice to injure a particular class of individuals, or to expose that class to the risk of injury, the question as to whether the losers should be compensated has not been perceived as a question for the judiciary. In such cases, the decision will most likely have been authorized, and where the injury is deliberate, the combination of lawfulness and intentional infliction of injury suggests that political review will be the appropriate mechanism for redress. It is difficult to picture deliberate, lawful activity as wrongful in the context of the corrective justice model of law-making. As well, judicial sanctions imposed on deliberate governmental activity may result in retaliation, which may not take place where judicial review is restricted to unintentional conduct. It is always open to the bureaucracy to argue that it decided to expose a large class of homeowners to the risk of personal injury in order to expedite the establishment of a home insulation programme, and that this decision was authorized under the relevant statutory mandate.²⁸⁵

A sixth variable involving judicial review looks to the nature of

²⁸³ (1981), 128 D.L.R. (3d) 459 at p. 468, 34 O.R. (2d) 208 at pp. 215-16 (H.C.J.).

²⁸⁴ *Canadian Pacific Airlines, Ltd. v. The Queen*, *supra*, footnote 270 at p. 520 D.L.R., p. 51 F.C.

²⁸⁵ Where deliberate injury is unlawful, the potential for judicial review on the grounds of malice exists. See, *supra*, footnote 262. See also *Roncarelli v. Duplessis* (1959), 16 D.L.R. (2d) 689, [1959] S.C.R. 121; *Gersham v. Manitoba Vegetable Producers Marketing Board* (1976), 69 D.L.R. (3d) 114, [1976] 4 W.W.R. 406 (Man. C.A.).

the government activity which is alleged to have been negligent. It seems that the courts will be much more willing to exercise a supervisory jurisdiction where the state is engaged in an activity which can be identified as "commercial" in nature, as opposed to activities which are characterized as "governmental".²⁸⁶ The distinction, which admittedly is not an easy one, is based on a number of factors. First, the court, in assessing a commercial activity carried out by government will be able to turn to the behaviour and practice of private enterprise as an independent, objective standard against which to gauge the reasonableness of the government behaviour.²⁸⁷ Secondly, where the state is engaged in commercial activities in competition with private enterprise, the court may be concerned that the state not be given competitive advantages, and thus will subject the public enterprise to the same constraints as its private counterparts.²⁸⁸ Where, on the other hand, the state is engaged in providing a service which would not, for a variety of reasons, be produced through the market, the court may consider it inappropriate to impose market constraints. In the latter case, the traditional test of negligence which looks to the cost of injury prevention in light of the probability, nature and extent of the injury, gives rise to serious inconsistencies. The public, non-commercial enterprise does not necessarily operate subject to the pricing and budgetary constraints imposed by the costs of labour, capital and other inputs, and by market competition.²⁸⁹ Where the activity is commercial in nature, however, it may be subject to constraints analogous to those operating in private enterprises.

²⁸⁶ See *Welbridge Holdings Ltd. v. Winnipeg* (1970), 22 D.L.R. (3d) 470, [1971] S.C.R. 957 (potential liability of city in negligence when exercising business powers); *Virdi and Thompson-Nicola Regional District v. Inland Feeders Ltd.* (1981), 129 D.L.R. (3d) 685 at pp. 688-9, [1982] 1 W.W.R. 551 at p. 555 (B.C.C.A.). See also *North and Wartime Housing Ltd. v. Madden*, [1944] 4 D.L.R. 161, [1944] Que. K.B. 366, appeal dismissed [1945] 1 D.L.R. 753, [1945] S.C.R. 169; *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93.

²⁸⁷ This is most obvious in the case of government road construction, in which the techniques of road construction used in private industry are familiar to the courts. See *R. v. Cote*; *Millette v. Kalogeropoulos* (1974), 51 D.L.R. (3d) 244, [1976] 1 S.C.R. 595. See generally, *East Suffolk Rivers Catchment Board v. Kent*, [1941] 1 A.C. 74 (H.L.), where the defendant's behaviour is compared with that of a private building contractor. See also *Boynton v. The Commissioners for the Ancholme Drainage and Navigation*, [1921] 2 K.B. 213 (C.A.).

²⁸⁸ See *British Columbia Power Corp. Ltd. v. A.-G. B.C.* (1962), 34 D.L.R. (2d) 25 at p. 29, 38 W.W.R. 657 at pp. 661-2 (B.C.C.A.).

²⁸⁹ See *British Railways Board v. Herrington*, [1972] A.C. 877 (H.L.), at p. 899.

In addition, the state, where it is engaged in a commercial activity, may be able to pass on the costs of the negligence liability to the users of the government service or product.²⁹⁰ This loss allocation mechanism may not be as easy to implement in the case of non-commercial, governmental activities,²⁹¹ where access to the service cannot be controlled to the same degree. In the case of commercial activities the loss will be borne, to some degree, by the users of the service or good. The beneficiaries of the government programme and policy decisions will, in the commercial context, be compensating the losers. This transfer from winners to losers may take place in "governmental" activities as well, but the redistribution is more likely to take place through pricing decisions in the provision of commercial services. In governmental activities the bureaucratic and political embarrassment accompanied by public, forced compensation may point away from a decision to allocate the costs of regulation to the beneficiaries of government decisions.²⁹² Finally, the willingness of the court to review commercial governmental activities may be justified on the basis of protecting expectations of individuals who may find it difficult to distinguish between private and public enterprises when the latter are carrying on commercial activities.²⁹³

The activity of the government in the foam insulation case runs from the creation of an energy conservation programme, to standard setting of product quality, to the encouragement of product purchases through information dissemination. The standard-setting process has been classified as a policy decision in several American cases,²⁹⁴ even though political scientists might describe this activity as administrative rather than policy-making in nature.²⁹⁵ Cases of government information transfer to

²⁹⁰ This cost may in fact be spread through an insurance arrangement which, at least in the case of relatively small governmental units, may be available in the case of commercial activities. It might not be available in respect of "governmental" functions.

²⁹¹ See Hogg, *supra*, footnote 236 at pp. 89-90.

²⁹² See J. Quinn and M. Trebilcock, *Compensation, Transition Costs and Regulatory Change*, Working Paper No. 18, Economic Council of Canada (1981), at p. 23.

²⁹³ See *Berardinelli v. Ontario Housing Corp.* (1978), 90 D.L.R. (3d) 481 at p. 495, [1979] 1 S.C.R. 275 at p. 283.

²⁹⁴ See *Gelley v. Astra Pharmaceutical Products*, 610 F.2d 558 (1979). Cf. *Griffin v. United States*, 500 F.2d 1059 (1974). This governmental immunity has not been the case in all jurisdictions. See J.G. Fleming, "Drug Injury Compensation Plans", 30 Am. J. of Comp. L. 297 (1982), at p. 318.

²⁹⁵ See *Public Government for Private People*, The Report of the Commission of Freedom of Information and Individual Privacy, Vol. 2 (1980), at pp. 192-4.

encourage or facilitate private transactions have, however, been the subject of judicial review on several occasions.²⁹⁶ The explanation for the willingness of the court to review the government's role as an information broker is that to require the government to disseminate accurate information is a relatively non-intrusive judicial role. In many cases the transaction costs of the information transfer will be relatively insignificant, especially where, as in the foam insulation case, the state has decided to establish an information transfer system in the pursuit of its policy objectives. As well, the courts are quite familiar with the regulation of information transfer in the private sector. Thus, while the provision of information by the state in the case of insulation may not have been a "pure" commercial activity, the nature of the enterprise was such that the courts may be able to invoke private standards which they can apply to the governmental behaviour.

A court may, however, hesitate to impose liability on the state where the issue is not the duty to transfer information which the state possesses, but to investigate certain matters and acquire information which must then be transferred. In the latter case, the costs of information acquisition may suggest to the court that a private duty of care should not be established.²⁹⁷ The issue is a relative one, and in two recent cases the Federal Court has suggested that the information-gathering activities of Treasury Board officials²⁹⁸ and officials of the Food and Drug Directorate²⁹⁹ will be subject to judicial review.³⁰⁰

²⁹⁶ See *Hendricks v. The Queen* (1970), 9 D.L.R. (3d) 454 at p. 465, [1970] S.C.R. 237 at pp. 250-1. See also cases, *infra*, at footnote 308.

²⁹⁷ The cases support this analysis. Judges are averse to the imposition of legal duties to investigate, or to disclose information which the employee of the state "ought to have known". See *Toews v. MacKenzie* (1980), 109 D.L.R. (3d) 473 at p. 480, [1980] 4 W.W.R. 108 at p. 115 (B.C.C.A.); *Barratt v. District of North Vancouver* (1980), 114 D.L.R. (3d) 577 at p. 584, [1980] 2 S.C.R. 418 at pp. 427-8; affg 89 D.L.R. (3d) 473 at pp. 484-5, 6 B.C.L.R. 319 at pp. 332-3 (C.A.); *Grand Restaurants of Canada Ltd. v. City of Toronto* (1981), 123 D.L.R. (3d) 349 at pp. 361-2, 32 O.R. (2d) 757 at p. 770 (decision to inspect building is discretionary and not subject to review, while decision not to disclose results of inspection had it been made, will give rise to liability); *Windsor Building Supplies Ltd. v. Art Harrison Ltd., Yanke & Son Builders Ltd., Third Parties* (1980), 14 C.C.L.T. 129 at p. 160 (B.C.S.C.) (investigation of possible bylaw violations outside scope of judicial review).

²⁹⁸ See *Wilfred Nadeau Inc. v. The Queen in right of Canada*, [1977] 1 F.C. 541 (T.D.), affd [1980] 1 F.C. 808 (C.A.).

²⁹⁹ *Berryland Canning Co. Ltd. v. The Queen* (1974), 44 D.L.R. (3d) 568 at p. 583, [1974] 1 F.C. 91 at pp. 107-8 (T.D.). The Alberta Court of Appeal, however, has suggested

A seventh variable which may influence a decision to impose civil liability on the state relates to the status or identity of the government actor.³⁰¹ At the ultimate level of governmental decision-making, the court will be asked to assess the negligence of legislative acts — a responsibility which they deny absolutely.³⁰² In most cases, however, the determination of bureaucratic status will require an assessment of the bureaucratic infra-structure in which the decision was made, in an effort to determine the responsibility and authority of this bureaucrat and his relationship with other political actors. The requirement that the court investigate the *actual* bureaucratic decision-making process and the *actual* nature and extent of scrutiny of the decision by specific bureaucratic and political actors³⁰³ is important for a number of reasons. As the behaviour of more senior bureaucrats is scrutinized, it becomes increasingly likely

that similar bureaucratic activity is not subject to judicial review. See *Kwong v. The Queen in right of Alberta* (1978), 96 D.L.R. (3d) 214 at p. 231, [1979] 2 W.W.R. 1 at p. 19 (Alta. S.C. App. Div.), affd 105 D.L.R. (3d) 576n, [1979] 2 S.C.R. 1010n. In that case, a decision of Gas Protection Branch officials not to warn the public of risks posed by converted gas furnaces was held to be a policy decision. The Court of Appeal appeared to direct its attention to an alleged duty of care owed by the bureaucrats to the public, consisting of an obligation to advise the provincial Cabinet to enact regulations. (See L.W. Klar, "Developments in Tort Law: The 1979-80 Term", 2 S.Ct.L.Rev. 325 (1981), at p. 363.) The decision of the Court of Appeal was affirmed in a manner which suggests that the Supreme Court of Canada was analyzing the duty issue on the same lines.

³⁰⁰ One should keep in mind in evaluating the likelihood of judicial review in the foam insulation case that the civil liability of product endorers is a relatively novel development in products liability litigation. See *Hempstead v. General Fire Extinguisher Corp.*, 269 F. Supp. 109 (1967); *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680 (1969); C.F. Pechlin, "Liability of Certifiers of Products for Personal Injuries to the User or Consumer", 56 Cor. L. Rev. 501 (1970); Note, "Tort Liability of Independent Testing Agencies", 22 Rut. L. Rev. 299 (1968).

³⁰¹ See P.S. Atiyah, *Accidents, Compensation and the Law*, 3rd ed. (London, Weidenfeld & Nicolson, 1980), pp. 61-3; Bridges, *supra*, footnote 267 at p. 281; *Canadian Pacific Airlines Ltd. v. The Queen* (1978), 87 D.L.R. (3d) 511 at p. 521, [1979] 1 F.C. 39 at p. 53 (C.A.); *Dalehite v. United States*, 346 U.S. 515 (1953); *Hendry v. United States*, 418 F.2d 774 (1969); D. Schwartz and S.B. Jacoby, *Litigation with the Federal Government* (1970), p. 204.

³⁰² See *Kwong v. The Queen in right of Alberta*, *supra*, footnote 299 at pp. 221-3 D.L.R., pp. 7-9 W.W.R.; *Welbridge Holdings Ltd. v. Metropolitan Corp. of Greater Winnipeg* (1970), 22 D.L.R. (3d) 470, [1972] 3 W.W.R. 433 (S.C.C.); *J.R.S. Holdings Ltd. v. District of Maple Ridge* (1981), 122 D.L.R. (3d) 398 at p. 408, [1981] 4 W.W.R. 632 at p. 644 (B.C.S.C.) (no duty of care owed in the passage of legislation).

³⁰³ See *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* 2 A.L.J. 634 (1979), at pp. 644-5; see M.D. Kirby, "Administrative Review Beyond the Frontier Marked 'Policy-Lawyers Keep Out'", 12 Fed. L. Rev. 121 (1981), at 132-3.

that political and broad discretionary decision-making will be involved. Further, where the court attempts to review the activities of more senior bureaucrats it may risk political retaliation, and thus it is not at all surprising to discover that the majority of cases involving judicial review of governmental activity have involved municipal governments — the one tier of government which cannot retaliate directly by withdrawing its operations from judicial review. Finally, by demanding that the government identify the bureaucrat or group of bureaucrats who participated in the decision under review, the court will encourage political accountability where appropriate. The government can identify a lower level bureaucrat where it wants to minimize direct political responsibility, but when it does so, it risks legal liability. At the same time, where the state points to bureaucratic seniority to avoid legal responsibility, it increases the likelihood of political responsibility.

The question as to the status and identity of the bureaucrat who made the decision under review is complemented by judicial concern that courts not interfere officiously in broadly based social disputes which may be resolved through non-legal processes. The availability of limited judicial resources is only one aspect of this attitude. The courts are also aware of the risk of conflicting judicial/political solutions to the dispute. The availability of alternative sources of accountability — whether through political action³⁰⁴ or through the doctrines of ministerial³⁰⁵ and bureaucratic³⁰⁶ responsibility — has been noted by the courts as a relevant factor in deciding whether to create a private right of action.

Possibly the most significant factor which the courts recognize

³⁰⁴ *The Queen in right of Canada v. The Queen in right of Prince Edward Island* (1977), 83 D.L.R. (3d) 492 at p. 520, [1978] 1 F.C. 533 at p. 567 (C.A.), Appendix A (the question is whether political action is the sole sanction for a failure to provide adequate service to the public); *Barratt v. District of North Vancouver* (1978), 89 D.L.R. (3d) 473, 6 B.C.L.R. 319 (C.A.)

³⁰⁵ *Canadian Federation of Independent Business v. The Queen* (1974), 49 D.L.R. (3d) 718 at p. 721, [1974] 2 F.C. 443 at p. 450 (T.D.).

³⁰⁶ See *Stopforth v. Goyer* (1978), 87 D.L.R. (3d) 373, 4 C.C.L.T. 265 (Ont. H.C.J.), rev'd 97 D.L.R. (3d) 369, 8 C.C.L.T. 172 (Ont. C.A.). As Kernaghan points out, the view that bureaucrats are not subject to parliamentary review is being transformed as the policy and political decision-making roles of senior bureaucrats become impossible to ignore: see K. Kernaghan, *Freedom of Information and Ministerial Responsibility*, Research Publication 2, Commission on Freedom of Information and Individual Privacy (1978), at pp. 17-29.

in determining whether a private legal duty of care should be imposed on the bureaucracy is the requirement of an individualized wrong. The nature of corrective justice is that it is designed to redress a perceived wrong which one party has committed against another. This suggests that the alleged wrong must be individualized in nature — there must be an “individualization of responsibility” for the alleged negligence founded on a direct relation between the state employee and an individual member of the public.³⁰⁷ In fact, in almost all cases in which the state has been found liable for the acts of its employees the alleged negligent behaviour occurred in this “one-on-one” bilateral relationship.³⁰⁸

This requirement of individualization of harm can be justified on a number of grounds. First, the courts ameliorate the interjurisdictional tension between the judiciary and executive when they restrict themselves to compensating individual wrongs. Second, the requirement of an individual nexus reduces the potential impact of the decision on the exercise of broadly described bureaucratic discretion. Third, by requiring an individualistic aspect, the courts avoid the substantial administrative costs of determining the identity of numerous claimants, and the nature and extent of their alleged losses.³⁰⁹ As well, the existing procedural rules and administrative structure of the court system are singularly ill-suited to the resolution of group wrongs.³¹⁰

³⁰⁷ See *Welbridge Holdings Ltd. v. Metropolitan Corp. of Greater Winnipeg*, *supra*, footnote 302 at pp. 477-8 D.L.R., p. 441 W.W.R.; *Kwong v. The Queen in right of Alberta*, *supra*, footnote 299 at p. 229 D.L.R., p. 16 W.W.R.; *Cleveland-Cliffs Steamships Co. and Cleveland-Cliffs Iron Co. v. The Queen* (1957), 10 D.L.R. (2d) 673 at pp. 679-80, [1957] S.C.R. 810 at p. 814.

³⁰⁸ See *Grossman v. The King*, [1952] 2 D.L.R. 241, [1952] 1 S.C.R. 571; *O'Rourke v. Schacht* (1974), 55 D.L.R. (3d) 96, [1976] 1 S.C.R. 53; *Ostash v. Sonnenberg* (1968), 67 D.L.R. (2d) 311, 63 W.W.R. 257; *Dutton v. Bognor Regis Urban District Council*, [1972] 1 Q.B. 373 (C.A.); *Ordog v. District of Mission* (1980), 110 D.L.R. (3d) 718, 31 B.C.L.R. 371 (S.C.); *Grand Restaurants of Canada Ltd. v. City of Toronto*, *supra*, footnote 297; *Danard v. The Queen*, [1971] F.C. 417 (T.D.); *Sociedad Transoceanica Canopus S.A. v. National Harbours Board*, [1968] 2 Ex. C.R. 330; *Lyon v. Village of Shelburne*; *Triton Engineering Services Ltd., Third Parties* (1982), 130 D.L.R. (3d) 307 (Ont. Co. Ct.); *Nielsen v. City of Kamloops* (1981), 129 D.L.R. (3d) 111 at p. 118, [1982] 1 W.W.R. 461 at pp. 468-9 (B.C.C.A.).

³⁰⁹ See *Quinn and Trebilcock*, *supra*, footnote 292 at pp. 32-7.

³¹⁰ This argument works both ways. If the claim against the government should be permitted, the establishment of government liability will avoid the enormous litigation costs inherent in the alternative private, fault-based product liability cases. The administrative costs posed by a governmental liability suit must be compared to the adminis-

Fourth, the courts recognize the potential instrumental effect of damage awards which, where they involve increasing numbers of plaintiffs, may have a significant prospective, instrumental influence on bureaucratic behaviour.³¹¹ In addition, the courts are aware that as the number of losers increases, the prospect of political or parliamentary accountability increases. Finally, where a large number of potential losers exists, the ability of the court to entertain a range of interests in its decision-making process may be limited. The "losers" are not a homogeneous group,³¹² and the technical and quite artificial rules of evidence and procedure may distort the adequate representation of these disparate interests.³¹³

The tenth variable is probably the judicial favourite. The decision of the state to engage in certain activities will often involve an allocation of public resources, and the decision will be made in the context of competing claims for government largesse and programmes, both from within and from without the bureaucracy. If the alleged negligent decision involved the allocation of resources among competing claims for social resources,³¹⁴ or if the impact of the decision will influence future resource allocation decisions,³¹⁵ the decision is less likely to be

trative costs incurred in the alternative. I would suspect that the former are far greater in magnitude. See G. Calabresi, *The Costs of Accidents* (1970), pp. 28, 250-9; T. Ison, *Accident Compensation* (1980), p. 122; U.S. Department of Commerce, *Inter-Agency Task Force on Products Liability*, Final Report, Vol. 5 (1976); Fleming, *supra*, footnote 294 at p. 316.

³¹¹ See text, *supra*, at footnote 237.

³¹² The potential losers include: homeowner-purchasers of urea formaldehyde insulation; sub-buyers of homes; persons who relied upon information provided by government (and those who did not); purchasers who purchased insulation prior to C.M.H.C. acceptance; and those who bought after August 1977; insulation installation companies and their shareholders and employees; insulation component manufacturing companies and their shareholders and employees; a variety of insurance companies; and members of the public who directly or indirectly will be asked to bear the financial responsibility of a government liability suit. It is obvious that the interests of these groups may not be co-extensive.

³¹³ See *Home Office v. Dorset Yacht Co. Ltd.*, [1970] 2 All E.R. 294 at pp. 331-2, [1970] A.C. 1004 at p. 1067.

³¹⁴ See *Cleveland-Cliffs Steamships Co. and Cleveland-Cliffs Iron Co. v. The Queen*, *supra*, footnote 307 at pp. 679-80 D.L.R., p. 814 S.C.R. (authority involves the action of Parliament in voting money); *Barratt v. District of North Vancouver*, *supra*, footnote 297; *Hugh v. Vancouver* (1981), 126 D.L.R. (3d) 527 at p. 538, [1981] 5 W.W.R. 250 at p. 264 (B.C.S.C.).

³¹⁵ *Canadian Pacific Airlines Ltd. v. The Queen*, *supra*, footnote 301 at p. 520 D.L.R., p. 51 F.C. This attitude is also reflected in suggestions that the state should be liable only for "additional damage" caused by its negligent acts. See *East Suffolk Rivers*

reviewed.³¹⁶ Once the resource allocation decision has taken place, then the inferior decision as to how the activity should be carried out may be reviewed.³¹⁷

I have no difficulty accepting the general proposition that resource allocation is a function which almost by definition will require that particular interests be sacrificed. It is also difficult to see how the reasonableness of a particular resource allocation decision could be objectively assessed by a court.³¹⁸ At the same time, the court should appreciate that resource allocation is a question of degree; and that the state can obtain insurance to spread the costs of its activities.³¹⁹

The courts have also turned to the misfeasance/nonfeasance distinction as a relevant variable in determining whether to impose a private duty of care on bureaucratic actors,³²⁰ although it is unclear whether the distinction is still doctrinally correct after the decision of the House of Lords in *Anns v. Merton London Borough Council*.³²¹ At best it may have been a categorical relative of the policy/operational distinction.³²² The distinction between nonfeasance and misfeasance is a difficult one to draw at best, and adds little to the analysis of the propriety of judicial review of state behaviour.³²³ None the less, judicial deference to

Catchment Board v. Kent, [1941] 1 A.C. 74 (H.L.), at p. 83; Hogg, *supra*, footnote 236 at pp. 85-91; *Seguin v. Town of Hawkesbury*, [1955] 5 D.L.R. 809, [1955] O.R. 956 (C.A.).

³¹⁶ The decision of the British Columbia Court of Appeal in *Malat v. Bjornson*, [1978] 5 W.W.R. 429 at p. 437, 6 C.C.L.T. 142 at p. 152, in which a decision not to implement an earlier decision to raise a highway barrier to 30 inches was reviewed, can be explained on the basis that, as the trial judge found, the implementation decision could have taken place "with no great expense or inconvenience".

³¹⁷ *Sheppard v. Mayor, Aldermen and Burgesses of the Borough of Glossop*, [1921] 3 K.B. 132 (C.A.); *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 at p. 502, [1977] 2 W.L.R. 1024 at p. 1036 (H.L.); Bridges, *supra*, footnote 267 at p. 288; Craig, *supra*, footnote 243 at pp. 432-3.

³¹⁸ See text, *supra*, at footnotes 271-7.

³¹⁹ G.F. Kugler, *Report of the Attorney-General's Task Force on Sovereign Immunity* (1972), at pp. 118-32, 147-8; *Ministry of Housing and Local Government v. Sharp*, [1970] 2 Q.B. 223 (C.A.), at p. 269.

³²⁰ See *McCrea v. City of White Rock* (1974), 56 D.L.R. (3d) 525, [1975] 2 W.W.R. 593 (B.C.C.A.).

³²¹ *Supra*, footnote 317. See *Nielsen v. City of Kamloops*, *supra*, footnote 308. But see *Windsor Building Supplies Ltd. v. Art Harrison Ltd., Yanke & Son Builders Ltd., Third Parties* (1980), 14 C.C.L.T. 129 (B.C.S.C.), at pp. 160-4; *Kwong v. The Queen in right of Alberta* (1978), 96 D.L.R. (3d) 214, [1979] 2 W.W.R. 1 (Alta. S.C. App. Div.), *affd* 105 D.L.R. (3d) 576n, [1979] 6 W.W.R. 573n (S.C.C.).

³²² See Bridges, *supra*, footnote 267 at pp. 299-300; *Neabel v. Town of Ingersoll* (1967), 63 D.L.R. (2d) 484, [1967] 2 O.R. 343 (H.C.J.).

³²³ In some cases the policy/operational and nonfeasance/misfeasance concepts are used as

bureaucratic “nonfeasance” may be understood as a reflection of several concerns. First, where a bureaucrat has acted, it may be possible to use his own intended behaviour as an objective standard against which to assess the reasonableness of his actual behaviour. Second, where an alleged loss is incurred as a result of governmental *inactivity*, the injury may be a foregone opportunity which may be viewed as a less substantial injury than an actual incurred loss.³²⁴ Finally, a concern with “pure” inaction will often result in an inquiry as to whether the defendant’s conduct created or increased the risk of injury.³²⁵ This risk creation concept brings us to the final variable which I have identified in the judicial decision to impose a legal duty of care on a state employee — the concept of reliance.

The courts appear to react to two categories of reliance. The first is direct reliance, common in the “individualized wrong” discussed earlier,³²⁶ where a member of the public relies upon acts or representations of a particular bureaucrat.³²⁷ The second is what may be called institutional reliance — the creation of an environment by the state in which members of the public assume that the state will be taking adequate precautions to ensure that their interests will be safeguarded. Thus in cases of pure omission the court may be willing to impose liability where the state has established an institutional framework upon which the public relies and where an individual refrains from adopting alternate measures to reduce the risk of injury, or from insuring against the risk.³²⁸

interchangeable concepts. See *Kwong v. The Queen in right of Alberta*, *supra*, footnote 321; J. Irvine, annotation entitled “*Toews v. MacKenzie*”, 12 C.C.L.T. 263 (1980), at p. 267.

³²⁴ See E. Weinrib, “The Case for a Duty to Rescue”, 90 Yale L.J. 247 (1980), at pp. 249, 251.

³²⁵ Weinrib, *ibid.*, at pp. 254-7. See *Grossman v. The King*, *supra*, footnote 308; *O’Rourke v. Schacht*, *supra*, footnote 308; *Hendricks v. The Queen* (1970), 9 D.L.R. (3d) 454, [1970] S.C.R. 237.

³²⁶ See text, *supra*, at footnote 307.

³²⁷ See cases at footnote 308; *Town of the Pas v. Porky Packers Ltd.* (1976), 65 D.L.R. (3d) 1, [1977] 1 S.C.R. 51; *Windsor Motors Ltd. v. District of Powell River* (1969), 4 D.L.R. (3d) 155, 68 W.W.R. 173 (B.C.C.A.). The same factor has been recognized in the United States. See *Clemente v. United States*, 567 F.2d 1140 (1977), at p. 1148, cert. denied 435 U.S. 1006 (1978); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

³²⁸ See *Anns v. London Borough of Merton*, *supra*, footnote 317 at p. 500 All E.R., p. 1034 W.L.R.; *Craig*, *supra*, footnote 243 at p. 451; *Dutton v. Bognor Regis Urban District Council*, [1972] 2 W.L.R. 299 at p. 308, [1972] 1 Q.B. 373 at p. 392 (C.A.);

The reliance issue is, I think, a central concept in the decision to impose a legal duty on the bureaucrat. It reflects the overriding corrective justice philosophy which operates in this area, in that it demands a bilateral relationship. The bureaucrat or bureaucracy assumes responsibility for a certain activity which creates a reciprocal sense of trust and dependence.³²⁹ More generally, we may be able to see a more general interest in compensating disappointed individuals whose expectations were created by a governmental, institutional arrangement, and who relied on that arrangement to protect their interests.³³⁰

4. Conclusion

So far there is no solution to the urea formaldehyde problem. The nature of the urea formaldehyde foam insulation production process points to obvious gaps in existing product liability legislation, and reveals the as yet rudimentary conceptual framework which the common law has developed to deal with complex products liability claims. As well, the foam insulation problem is not simply a legal phenomenon.

So far the efforts of public-interest lawyers have been primarily directed to the design of a federal compensation programme. The legislation establishing the programme, the Urea Formaldehyde Insulation Act,³³¹ provides for an initial funding of the programme at \$55,000,000.³³² In addition, the federal government has established a National Advisory Council on UFFI, consisting of representatives of homeowners' associations as well as individual homeowners, whose apparent function is to represent the interest of unorganized homeowners in negotiations

Bridges, *supra*, footnote 267 at p. 282; Weinrib, *supra*, footnote 324 at pp. 254-7; J.A. Smillie, "Negligence and Economic Loss", 32 U.T.L.J. 231 (1982), at p. 268; A. Linden, *Canadian Negligence Law* (Toronto, Butterworth & Co. (Canada) Ltd., 1972), at p. 82.

However, the point has been implicitly rejected by Le Dain J. in *Canadian Pacific Airlines Ltd. v. The Queen* (1978), 87 D.L.R. (3d) 511, [1979] 1 F.C. 39 (C.A.), where he suggested that general reliance on a government-controlled public service or facility, even if it is a monopoly service, is not in and of itself sufficient to establish a legal duty to the public to provide it.

³²⁹ Smillie, *supra*, footnote 328 at p. 268.

³³⁰ Quinn and Trebilcock, *supra*, footnote 292 at p. 61.

³³¹ Bill C-109, 1st Sess., 32nd Legisl., 29-30-31 Eliz. II, 1980-81-82. The Bill received Royal Assent on August 4, 1982, was proclaimed in force October 25, 1982, and is now S.C. 1980-81-82, c. 119.

³³² *Ibid.*, s. 8(1).

concerning the substance of the compensation programme. Legal representation has been retained to assist the Council. The Standing Committee on Health, Welfare and Social Affairs conducted an inquiry into urea formaldehyde foam insulation, and tabled its Report to Parliament in December, 1982.³³³ Thus the resolution of the compensatory objectives of the potential losers in the energy conservation programme is being worked out in the political arena.

It is too early to predict the outcome of the political negotiations. The discussions involve a number of issues including the aggregate amount of compensation to be paid, the identification of the classes of persons eligible to receive compensation, controls on consumer and industry abuse of the compensation programme, and in particular whether the compensation payments should be mandatory or discretionary. Negotiations in the political arena are, however, distorted by the apparent absence of leverage available to the homeowners' associations. The benefits which the associations can offer to the state in return for increased government largesse or for concessions relating to the second order decision as to who should receive compensation are limited. They are limited, first, to political support of the programme, and second, to the homeowners' associations' assurances that the federal government's home insulation programme — the cornerstone of Canada's conservation policy — will not be jeopardized by public disclosure of the uninsured and unknown potential risks associated with insulation materials and procedures currently in use in the residential sector.

These tentative advances in the political sector have not, however, been complemented by legal victories. The difficulties confronting individuals contemplating legal action include substantial organizational costs, both in terms of financial resources and time, and the existing legal, technical and scientific uncertainties regarding the outcome of possible litigation against the federal government, Crown corporations and commercial enterprises. These logistical difficulties and the unavailability, in

³³³ See Minutes of Proceedings and Evidence of the Standing Committee on Health, Welfare and Social Affairs, Respecting Inquiry into Urea Formaldehyde Foam Insulation, Issue No. 39, 3-8-82, at 39-3. The mandate of the Committee includes consideration of the process used to approve the material for use in Canadian homes. *Ibid.* See *Report on Urea Formaldehyde Foam Insulation*, Standing Committee on Health, Welfare and Social Affairs (December, 1982).

most jurisdictions, of an effective class action procedure, have combined to restrict legal action to those jurisdictions in which the state has seen fit to subsidize the lawsuit.³³⁴

The class action is a mechanism which would permit collective legal action to be organized without the direct infusion of public resources. It is my impression, however, that most lawyers involved either directly or indirectly in the UFFI case, have avoided existing rudimentary class action mechanisms for a number of very good reasons. First, recent experience with class actions suggests that the defendants will almost certainly counter with a barrage of pre-trial motions in an attempt to have the proceedings dismissed for procedural irregularities.³³⁵ In light of the existing uncertainty as to the appropriate conceptual basis for class actions, that potential response cannot be disregarded. Further, the current procedural rules do not permit a preliminary application to be brought to "certify" the proceeding as appropriate for a class action, nor do the current rules contemplate review of counsel adequacy. The prospects of a class action are further reduced by the enormous financial risks which lawyers or their clients must face if either were to finance ultimately unsuccessful legal battles on preliminary procedural grounds.³³⁶ The viability of a class action of national scope or perhaps of inter-provincial co-operation has also been adversely affected by the enactment of products liability legislation in Quebec, New Brunswick and Saskatchewan which depart to a substantial degree from the common law, and which differ in very significant respects from one another as well. There is thus a limited community of interest among consumers from various provinces. Moreover, the current representative action, even if it were allowed to operate in the most enlightened fashion possible, does not contemplate individual recovery of idiosyncratic damage claims subsequent to an initial determination of liability.

³³⁴ Discussions with members of the Advisory Council indicate that the provinces of Quebec and New Brunswick are assisting homeowner associations in this manner.

³³⁵ *Naken v. General Motors of Canada Ltd.* (1979), 92 D.L.R. (3d) 100, 21 O.R. (2d) 780 (C.A.), rev'd 144 D.L.R. (3d) 385, 32 C.P.C. 138 (S.C.C.), is now infamous. See also, *Cobbold v. Time Canada Ltd.* (1980), 109 D.L.R. (3d) 611, 28 O.R. (2d) 326 (H.C.J.); *York Condominium Corp. No. 148 v. Singular Investments Ltd.* (1977), 77 D.L.R. (3d) 61, 16 O.R. (2d) 31 (H.C.J.); *Seafarers International Union of Canada v. Lawrence* (1979), 97 D.L.R. (3d) 324, 24 O.R. (2d) 257 (C.A.); *Stephenson v. Air Canada* (1979), 103 D.L.R. (3d) 148, 26 O.R. (2d) 369 (H.C.J.). All of these cases gave rise to pre-trial applications to dismiss the action on procedural grounds.

³³⁶ See *Cobbold v. Time Canada Ltd.*, *supra*, footnote 335.

Even if recovery on this basis were possible the utility of the class action is open to question where, as in the UFFI case, the class of potential beneficiaries may consist of conflicting interest groups. The current rules do not contemplate either notice or opting-out mechanisms, nor are there methods in place to resolve intra-class conflict. Finally, the class action in Federal Court is subject to substantial free-rider problems where the potential class members are able to predict that the defendant may, as a matter of political necessity, compensate all homeowners if one suit is successful.

The result of the archaic class action procedures has been the creation of a corporate class action vehicle in Ontario.³³⁷ This arrangement contemplates the incorporation of a non-profit corporation authorized, by each member, to retain a lawyer on behalf of that member. The member also delegates to the board of directors authority to make all litigation decisions on his behalf, except for an agreement to settle the action. The lawyer, acting for each member, will then commence legal proceedings against the identical defendant(s) in each case, alleging the identical wrong, and claiming liquidated damages on behalf of each client. A major risk in this action, as in the class action, is the degree of centralization of decision-making. The existing corporate structure contemplates a four-man board of directors, with the president having the deciding vote. The retainer provides that the lawyer will be instructed by one individual appointed by the board. The risks of intra-class conflicts of interest arise in this case to the same extent as they arise in the current, unsophisticated class action procedure, and again no effective mechanism for resolving the conflicts appears to exist.

The political, legal, and social implications of the urea formaldehyde foam insulation problem have created a product liability phenomenon which transcends the boundaries of a single societal institution. A satisfactory resolution of the problem, if there is one, may be possible only through the creation of a decision-making body, with authority to award compensation, which avoids the institutional limitations inherent in the current judicial system and can perhaps also overcome the inadequacies of the existing procedural and substantive legal rules.

³³⁷ See, *infra*, this issue, Comment by Andrew Roman.

Comment on David Cohen's Paper: The Public and Private Law Dimensions of the UFFI Problem

*Michael J. Trebilcock**

Liability for Economic Loss

The urea formaldehyde disaster raises a number of important and intricate issues of public policy. These relate to the civil liability of private suppliers of defective consumer products, the compensatory obligations of government towards losers from its policy-making and regulatory activities, and issues of the appropriate structure and processes of regulatory agencies charged with public standard setting for products that may present health hazards but where considerable technical or scientific uncertainty initially surrounds the existence and extent of the hazards. Professor Cohen's paper very ably and comprehensively canvasses many of these issues.

I wish to comment on those aspects of Professor Cohen's paper that focus on the civil liability of direct and indirect suppliers of a defective product for what he calls abstract economic loss — essentially the substantial decline in market value of the homes of purchasers of UFFI as a result of now generalized perceptions of the risks entailed in living in such homes. The prevailing doctrinal impediments to recovery especially against indirect suppliers (manufacturers) are not to be gainsaid. The question I would like to address briefly is, what would an optimal liability regime look like? In examining this question, I will focus primarily on the consumer-manufacturer relationship. Installers seem to be too insubstantial a target to warrant practical consideration and, in any event, seem to have controlled few of the key product safety inputs. Removal costs facing the 80,000-odd homeowners who purchased UFFI may run anywhere between 1 billion and 1.5 billion dollars (which may, of course, in many cases, render even manufacturer liability moot).

This problem aside, economic analysis would tend to evaluate product liability regimes against two distinct objectives — a deterrent objective and an insurance (compensation) objective — not clearly enough identified and differentiated in Cohen's paper.

With respect to deterrence, there is now wide consensus in the

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law and economics literature that where significant consumer misperception (underestimation) of risk is present, the first best liability regime is strict liability, with a contributory negligence defence if cost-justified consumer avoidance precautions are possible (not, it seems, the case in the UFFI case).¹ What strict liability achieves from a deterrence perspective is two things. First, at least in theory, it forces manufacturers to adopt an efficient level of care by balancing product defect costs to the consumer against the costs of possible avoidance precautions to the manufacturer and minimizing the sum of these two sets of costs. Each manufacturer must make his own calculus, unlike a negligence regime where courts must undertake the balancing exercise, often in the face of complex and perhaps biased information about a manufacturer's avoidance possibilities (*e.g.*, product modification) and associated costs. Second, strict liability, by forcing adjustments in product prices to reflect expected accident costs, even where these costs are unavoidable, leads to an efficient level of output in the industry by causing consumers to act, in response to relative prices, as if they were fully informed. A negligence regime, on the other hand, given consumer underestimation of residual risks, will lead to too high a level of output being demanded in the industry in question, even if the appropriate standard of care is correctly determined in individual cases.

From an insurance perspective, if one assumes that most consumers are risk averse, especially with respect to significant risks to health or significant risks of substantial economic losses, then the issue becomes whether manufacturers are the least-cost providers of insurance (through a strict liability regime). In the UFFI case, certainly as between manufacturer and consumer, it seems highly likely that manufacturers were better placed than consumers to appraise the risks, *i.e.*, the probabilities of product breakdown and consequences associated therewith and were better placed than consumers to pool the risks either by taking

¹ See *e.g.*, A. Michael Spence, "Consumer Misperceptions, Product Failure and Producer Liability", 44 *Rev. Econ. Stud.* 561 (1977); Steven Shavell, "Strict Liability Versus Negligence", 9 *J. Legal Studies* 1 (1980); Dennis Eppele and Arthur Raviv, "Product Safety: Liability Rules, Market Structure and Imperfect Information", 68 *Am. Econ. Rev.* 80 (1978); A. Mitchell Polinsky, "Strict Liability Versus Negligence in a Market Setting", 70 *Am. Econ. Rev.* 367 (1980); Richard Craswell, "Products Liability and The Duty to Disclose", *J. Legal Studies* (forthcoming).

out product liability insurance or diversifying the risks across various chemical or other product lines.

I conclude that an optimal liability regime for manufacturers in the UFFI situation is strict liability. However, this conclusion does not resolve the question of what costs strict liability should confront manufacturers with.

Cohen is concerned that to allow all homeowners who had UFFI installed to recover the depreciation they have suffered in the value of their houses (assuming enforced disclosure of the presence of UFFI) ignores the fact that the product is not defective (a health hazard) in all cases and that not all consumers may react adversely to it, even when it is (*i.e.*, reactions may be allergic in nature). I am not convinced by his concerns.

From a deterrent perspective, the objective of the choice of liability regimes is to ensure that all suppliers (and indirectly all consumers) are confronted with the full social costs associated with use of a product. This promotes efficient resource allocation. In the light of this objective, the analysis might usefully proceed in two stages. First, contemplate a scenario where all units of the product are defective and where all homeowners react or will, over time, react adversely to it. Consider also that efficiency considerations require that there should be a duty on homeowners to mitigate the anticipated adverse health hazards by taking appropriate avoidance precautions where the former are more costly than the latter. These precautions presumably involve removing the UFFI, installing new insulation, and suffering disruption costs in the process. In this case, I would assume that the market depreciation in the value of homes that have not been repaired will roughly approximate these costs. Thus either the repair costs (fully calculated) or the depreciation costs should be reasonable measures of damage and properly reflect the additional social costs (the real resource costs) associated with the purchase of the defective product.

Consider next the scenario in the UFFI case posited by Cohen where the market writes down all houses containing UFFI without discriminating between defective and non-defective units of the product or between allergic and non-allergic consumers. One possibility is that the market is accurately discounting these probabilities. The other is that it may not be — perhaps we have moved from an initial underestimation by consumers of the risk to a subsequent generalized overestimation in the market of these

risks (and the social costs attendant thereon). However, how this is known or can be discovered is not clear to me, given that no one seems to know even now what the precise probabilities are.

Cohen seems to indicate a preference for confronting manufacturers only with the "true" or realized social costs of the product defect, presumably homeowners with demonstrated adverse health reactions who are compelled to remove the product. On this view, consumers with adverse reactions and unsafe products would be required to sort themselves, over time, from the larger pool of homeowners.

I would argue, to the contrary, that market perceptions of the risks (and attendant social costs) may be the most efficient measure we have of these costs. Differentiating safe units of the product from unsafe units and "safe" consumers from "unsafe" consumers is likely to involve even greater social costs on the part of whoever undertakes the task, whether consumers, suppliers, the courts or regulatory agencies — if not, someone would probably have done it, but no one has or seems about to. Highly individualized court determinations of liability and measures of damage, given difficult problems of causation and quantification of health costs, would seem to involve higher administrative costs than generalized liability of manufacturers to all homeowners in the amount of the market depreciation of their homes.

Moreover, Cohen's proposal, in an environment of legal uncertainty as to applicable liability rules, may significantly impair the liquidity of housing markets. For example, a homeowner who wants or needs to move and whose house has been written down \$20,000 by the market but who has not yet become sick, will either have to absorb this loss or avoid moving until he gets sick (which may be inconsistent with cost-conserving rationales underlying conventional mitigation principles). A sub-buyer who subsequently gets sick will have been compensated *ex ante* by the reduction in the house price. Thus, no one may be able to recover for the loss. It is true that if liability on the part of manufacturers to both first and subsequent generations of homeowners who get sick is clear, this problem may not arise, as one would assume that sub-buyers (now guaranteed full compensation if they get sick) would no longer have any reason to discount house prices.

Assuming away the possibility of market overestimation of the risks, the aggregate damages under my proposal should be the same as under Cohen's proposal, but with, it would seem, a

significant saving in transaction costs. This, of course, underscores the artificiality of distinctions drawn in present tort law in some contexts between liability for personal injury and consequential economic losses and liability for so-called abstract economic loss.² The latter may often be simply a cheaper way of calculating the former. The only difference in the effects of the alternative measures of damage may lie in the distributive impacts on individual homeowners. If the market, in writing down the value of houses with UFFI, is discounting significantly probabilities of defects and adverse reactions thereto, *all* homeowners will get their *expected costs* as damages whereas under Cohen's proposals *some* homeowners will get their *actual* costs (larger individual amounts in those cases). Risk averse consumers may prefer not to assume the risk of facing this difference between expected and actual costs. However, it is not clear that in the UFFI case the market valuations of houses containing UFFI are yielding significantly different measures of expected and actual costs.

I conclude, therefore, that on deterrence grounds an optimal liability regime for manufacturers of UFFI is strict liability to all homeowners who have installed the insulation, with damages measured either in terms of actual or anticipated repair costs or market depreciation in the value of their homes. A second-best regime, in deterrence terms, is a negligence regime which includes liability for economic losses.

I believe that this general conclusion is reinforced by the insurance perspective. The losses at issue are substantial, uncommon, and unanticipated by most consumers. They are of a magnitude and a type that standard homeowners' insurance policies are addressed to (although not in this case apparently included, presumably because unperceived). The prevalence of homeowners' insurance for risks of this general magnitude and kind suggest that if homeowners who had purchased UFFI had accurately perceived the type of risks involved, they would have wanted to be insured against them.

This, to my mind, leaves unresolved at the doctrinal level only the problem of retroactivity. It might be argued that for the courts to impose a strict liability regime, with liability for

² See the observations of Laskin C.J. in *Rivtow Marine Ltd. v. Washington Iron Works* (1973), 40 D.L.R. (3d) 530 at pp. 548 *et seq.*, [1974] S.C.R. 1189 at pp. 1216 *et seq.*

economic loss, on manufacturers in a mass damage situation, as in the UFFI case, would involve serious elements of non-marginal retroactivity which would deny manufacturers the opportunity for precautionary pricing and insurance adjustments that are central to the arguments for strict liability. There is some force to this argument. However, even under the present negligence regime, I would argue that expected costs (market depreciation) should be awarded to all homeowners as the cheapest way of estimating actual personal injury and consequential property losses (for which manufacturers are already liable). Thus, the present negligence regime should lead in the direction of the outcomes proposed in this Comment.

One critical difference will remain between the two regimes: under negligence, the courts will have to determine whether the manufacturers took due care in designing and manufacturing their product; under strict liability this is unnecessary. Until we have such a regime in Canada, consumers and courts will be forced to struggle with complex technological issues largely beyond their competence. This is the ultimate civil liability problem, in my view, facing the homeowners in the UFFI case. In the further absence of sensible class action rules, the costs of satisfying the evidentiary requirements cannot easily be borne collectively.³

The final difficulty is a practical one. Do the manufacturers have the resources to sustain the liability payments that may be entailed? If they do not, homeowners face an equally intractable set of difficulties in claiming against the government, either on account of negligence in the regulatory process or on broader grounds of public policy that might dictate that in some circumstances governments should compensate losers from state action, whether or not negligence is involved.⁴ All of this may be to suggest that the long-term lesson from the UFFI case is that much more effective regulatory processes are required with respect to many different forms of product-related or occupationally-related health hazards so that UFFI-type cases arise less frequently in the future. Designing such processes is itself a formidable task, given

³ See Donald N. Dewees, J. Robert, S. Prichard, Michael J. Trebilcock, "An Economic Analysis of Cost and Fee Rules for Class Actions", 10 *J. Legal Studies* 155 (1981).

⁴ See e.g., John Quinn and Michael J. Trebilcock, "Compensation, Transition Costs and Regulatory Change", 32 *U.T. L.J.* 117 (1982).

the environment of scientific uncertainty and technological complexity in which the regulatory process here typically must operate.⁵

Comment on David Cohen's Paper: The Public and Private Law Dimensions of the UFFI Problem

*Andrew J. Roman**

Introduction

The strongest message I get from Professor Cohen's paper is that the law in this area borders on chaos. The reasoning is circular, and the considerations taken into account so large in number and mutually contradictory as to preclude the discovery of any rational underlying principle. In short: a golden opportunity for the advocate.

The UFFI problem, when fed into this confusing matrix, provides an excellent lesson for the student of jurisprudence. There must be half a dozen or more principles under which the action could succeed, and probably an equal number under which it could fail. There is more than enough "law" to justify any conclusion. Hence, to me, the most important and interesting legal lessons to be learned are not in the substantive law (that is, in how to frame the cause of action) but in procedure and organization.

The FRESH Solution

Through a referral from Professor Cohen, I was approached by a group of UFFI householders to explore the possibility of a class action. After a moment's reflection, it was obvious that a class action would be tactically inappropriate. None of the plaintiffs nor their lawyer would probably live long enough to survive the inevitable appeals of the motions to strike. In Canada there has yet to be a major class action to succeed at trial. Given the present climate of judicial hostility towards class actions and the

⁵ See e.g., Carolyn J. Tuohy and Michael J. Trebilcock, *Policy Options in the Regulation of Asbestos-Related Hazards*, Study Series, Ontario Royal Commission on Asbestos (January, 1982).

* General Counsel, The Public Interest Research Centre, Toronto. These comments were delivered at the 12th Annual Workshop on Commercial and Consumer Law on October 23, 1982, and, except as otherwise indicated, they only speak to events as of this date.

rather heterogeneous nature of the UFFI class, I could see little chance of success even under the Quebec law or the reform proposed by the Ontario Law Reform Commission.

However, even if a class action were permitted and could be undertaken expeditiously, it would create other problems. What individual class representative would have, and would risk, the amount of cash necessary (which I estimate at a minimum of \$30,000) to obtain the expert evidence required to prove the necessary facts? What lawyer would risk perhaps an equal amount of his own money for a chance at a most uncertain costs award (even if contingent fees of the type recommended by the Ontario Law Reform Commission were allowed)? To put it simply, the UFFI litigation problem is not the law, but money.

Clearly, only a group of UFFI victims, pooling their resources, can collect enough money to make the risk economically worthwhile. Given damages probably in the range of \$35,000 - \$60,000 per house, it is worth risking *something* to obtain redress; however, it cannot be worth risking as much or more than the potential recovery. On the other hand, once a group of individuals decides to pool resources to make the legal action possible, why bring a class action to help all the "free riders" who contribute nothing? As a practical matter, no programme of fundraising for the action can succeed if one may obtain all of the benefits without any of the burdens. For all of these reasons, the only practical solution appeared to me to be a group action.¹

To provide a collection device and conduit for the money, a corporation called Foam Removal for Environmentally Safe Housing Inc. (FRESH) was created. It is now recruiting actively across Canada. Membership is obtained by submitting an application which includes a detailed questionnaire describing the precise nature of the damages to the house, and attaching estimates from qualified contractors for the removal of the foam and the restoration of the building or, if that is impossible, for the costs of its demolition and the purchase of another comparable home. This application form is required to be filled out carefully and to be sworn before a lawyer, notary, or commissioner.² An

¹ The group may have to be subdivided for purposes of litigation into two or more groups, depending on the common and different features of their claims.

² Thus the court will have before it not merely paper allegations but actual sworn evidence of damages. This can also reduce or eliminate the need for discoveries for many of the plaintiffs and streamline the process of proving damages.

initial contribution of \$300 is also required. Further contributions may also be required, but all of the revenues collected will be held in trust and used only for the action.

To ensure that I am not swamped with dozens of phone calls and letters from prospective members, as counsel to FRESH I will be taking my instructions initially from one person. Once the action is under way, that will change. The officers of FRESH will be required to report regularly to the membership, and to convey to the members, at my request, such information about the action or offers to settle as may be relevant. This is to protect the members from the danger of the defendant "buying off" the leadership of FRESH with special offers in return for instructing me to settle at a rate that is unfair to the other members. Also, settlement will be on a basis of percentage of all claims, rather than a fixed dollar amount per house. This avoids the creation of conflicts of interest between members of the group with widely differing damage claims.

The foregoing is only a short description of FRESH, although I will be happy to expand on it if there is time during discussion. I would be the first to agree, however, that FRESH is not for every UFFI householder. We cannot provide a Rolls Royce level of client service at a Lada price. Undoubtedly, if an individual plaintiff can afford the costs of lawyers and expert witnesses on his own, he would get much more attentive and individualized service from his own lawyer. Similarly, there may still be a few people naive enough to believe that a suit is unnecessary as there may be a successful political solution to their problem if they wait long enough. (All that this requires is half a dozen federal government departments and agencies to announce publicly that they were negligent, and to make voluntary compensation payments for a total of approximately 1½ billion dollars to all of the victims. This veritable orgy of political humility will be achieved, it is hoped, by the seductive negotiating skills of the federal government's National Advisory Council on UFFI.)

Professor Cohen describes the apparent function of the Advisory Council as being "to represent the interests of unorganized homeowners in negotiations concerning the substance of the compensation programme".³ From what I hear, the government's treatment of the Advisory Council has become

³ *Supra*, p. 435.

something of a joke. Its members have no organizational cohesiveness and nothing in common other than the fact that they have formaldehyde in their homes. They have very little communication outside of official meetings, when they are flown to Ottawa by their negotiating "adversaries" and brought into a room where they are confronted by an organized team of skilled and experienced bureaucrats. The legal skills which have been retained to assist the Council are those of the government, and not made available independently to the homeowners.⁴ So far, if one looks at what the Council has accomplished, the meeting agendas suggest that apart from some minor administrative improvements in a statute which offers a maximum of \$5,000 compensation (and then only after all of the cost of removal has been paid by the owner), the homeowners have nothing to show for all their effort over almost a year. Rather, the government has been successful in diverting, and perhaps even co-opting such precarious indigenous leadership as the UFFI problem in its early stages was able to create. If the members of these UFFI groups realized that their membership dues had accomplished so little, while so much time has been allowed to pass, they would no doubt be concerned. I agree with Professor Cohen that the apparent absence of leverage available to the homeowners' associations in the political forum makes it clear that the legal route is the only route to meaningful redress for what is undoubtedly the largest and most serious single consumer problem of the decade.

It is no longer particularly enlightening to describe the UFFI problem, as Professor Cohen does, as a "political problem". Whose political problem is it? The government has already put its final offer on the table through the Urea Formaldehyde Insulation Act and its Regulations. After a year of so-called negotiations, not an extra dollar has been offered. Professor Cohen suggests that the only satisfactory solution may be a decision-making body with authority to award compensation, but he neglects to tell us who would create such a body. Obviously, it could only be the government, through legislation. But why should the government do this? *Its* urea formaldehyde problem has been solved. The next step is up to the homeowners.

While litigation is admittedly a slow and uncertain route to

⁴ However, I understand that as a result of Professor Cohen's efforts the services of a *pro bono publico* lawyer were made available to the Committee.

compensation, it is at least preferable to passive acceptance of the certainty that there will be no more voluntary compensation forthcoming from the government.

The homeowners' UFFI problem can best be solved, in my view, through a group action in the Federal Court of Canada against the Federal Crown and several Crown agencies.

Conclusion

It seems to me that the UFFI challenge is primarily one of procedure or organization, and of funding; it is not primarily legal in the substantive sense. This is not to say that there will not be difficult and complex substantive legal questions to resolve. However, the techniques for resolving them are well established. We must research and analyse all of the existing and emerging legal doctrines, the statutes and the case law — compulsively. We must use all our advocacy skills to distinguish the cases which seem to run against us, while supporting those which favour our argument. And, of course, we must retain and work collaboratively with the best expert witnesses we can find. None of this, however, is truly new.

On the other hand, the initiation and development of a group action is not well known. I could not find any law books explaining how to set up the membership in a group action, or how to prepare my own retainer so as to be fair to all of the divergent interests in the group.

Let me conclude with a substantive point. In an age when big government has in some areas supplanted the principle of *caveat emptor* with a statutorily created government warning system under the Hazardous Products Act,⁵ and has held itself out as the expert in product safety, it is understandable that the public will rely on these representations. This is particularly true when the government publicizes the fact that it will provide grants to install insulation which meets government-set standards, including UFFI. Unfortunately, even programmes designed with the best of intentions to help the consumer can, if carried out wrongly, damage consumers on an unprecedented scale.

⁵ R.S.C. 1970, c. H-3, as amended.