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In the 1990 decision of *Murphy* v. *Brentwood District Council*,[1] the British House of Lords unanimously overruled the landmark judgement in *Anns* v. *Merton District Council*.[2] In his judgement, Lord Keith states:

> My Lords, I would hold that *Anns* was wrongly decided as regards the scope of any private law duty of care resting on local authorities in relation to their function of taking steps to secure compliance with building byelaws or regulations...[3]

This decision runs contrary to the Supreme Court of Canada decision in *Kamloops* v. *Nielsen*.[4] In light of this development, it is valuable to speculate upon whether *Murphy* will affect the liability of public authorities in Canada.

Prior to *Anns*, negligence on the part of the public authority did not automatically give rise to liability in tort. In *Home Office* v. *Dorset Yacht*,[5] the Court of Appeal held that in determining liability of public authorities the first question that must be asked was whether the alleged act or omission was *ultra vires*. A public authority's act or omission would be *ultra vires* if the act was one which it had no jurisdiction to make or, in rare circumstances, if the act was tainted by a substantive defect such as irrationality, extreme unreasonableness, or improper purpose. The public law notion of *ultra vires* differentiated actions against local authorities from those against private individuals.

In addition, a public authority could also be held liable for breach of statutory duty. With this type of action, the empowering legislation determined the scope of the duty owed by the public authority and the remedy available in the event of breach.

In summary, before *Anns*, a public authority could be held liable for breach of statutory duty or, if the *ultra vires* hurdle was cleared, for negligence in common law. This situation meant that a public authority was less likely to be held liable for negligent acts or omissions than a private individual.

Anns significantly increased the liability potential for public authorities. In the majority judgement, Lord Wilberforce states:

> The problem which this type of action creates is to define the circumstances in which the law should impose, over

> and above, or perhaps alongside, these public law powers and duties, a duty in private law towards individuals such that they may sue for damages in a civil court.[6]

Prior to this decision, public authority liability was based on either statute (breach of statutory duty) or the common law. Lord Wilberforce implies that liability could be based on a combination of the two.[7]

Lord Wilberforce increased the liability potential even further with his general duty of care formula. In the first step of his test, he asked whether there was sufficient proximity between the parties that damage to the plaintiff was a foreseeable outcome of carelessness on the part of the defendant. In the second step, he asked whether there were policy or other considerations which ought to limit or negate the *prima facie* duty established in the first step of his test. Because of the broad scope of the first step of this test, and the fact that the test was one that established a duty at the onset and then limited or negated the duty as a 'secondary' stage, this test favoured the plaintiff and thus expanded the liability potential of defendant public authorities.

In an attempt to determine exactly when a public authority liability could arise, Lord Wilberforce distinguished between policy and operational decisions.[8] Policy decisions cover government choices premised on social, economic, or political factors. If made within the jurisdiction conferred on the public authority, such choices are subject to judicial review only if one of the recognized grounds of substantive *ultra vires* is proved. On the other hand, operational decisions, which involve the implementation of the decided policy, are reviewable under the *Anns* test. Lord Wilberforce states:

> Although this distinction...is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion." It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose upon it a common law duty of care.[9]

While this distinction is a useful concept, its practical application is fraught with difficulties.

Lord Wilberforce also stated that public authorities could be held liable for failing to exercise their statutory powers.[10] Consequently, if the public authority was entrusted with a power, liability could arise with regards to either the manner in which the action was carried out or, if the power was deemed to be discretionary, the decision or lack of decision to exercise that power. This second situation covered instances where policy considerations enter the operational realm.

In *Kamloops* v. *Nielsen*, the majority of the Supreme Court of Canada applied the *Anns* test. The court held that the public authority's duty to properly inspect building foundations extended to the prevention of continued construction and occupancy of buildings which had failed

to meet inspection standards. In the majority judgement, Madame Justice Wilson states:

> ...I think that this is an appropriate case for the application of the principle in *Anns*. I do not think the appellant can take any comfort from the distinction between nonfeasance and misfeasance where there is a duty to act or, at the very least, to make a conscious decision not to act on policy grounds. In my view inaction for no reason or inaction for improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion.[11]

In response to the argument that an expansion of the liability potential of public authorities might well expose them to "liability in an indeterminate amount for an indeterminate time to an indeterminate class...".[12] Madame Justice Wilson held that the *Anns* approach contained "its own built in barriers...".[13] These included the relevant statute and the distinction between policy and operational decisions.

In *Murphy*, the House of Lords categorically overruled *Anns*. It is significant that while counsel for the defendant in this case was prepared to concede that the District Authority did owe a common law duty to persons who might foreseeably suffer injury to their person or property, the law lords did not affirm the existence of such a duty. Lord Bridge states:

> ...a duty of care of a scope sufficient to make the authority liable... can only be based on the principle of reliance and ... there is nothing in the ordinary relationship of a local authority, as statutory supervisor of building operations, and the purchaser of a defective building capable of giving rise to such a duty.[14]

Importantly, Lord Keith states that the damage suffered in *Anns* was in fact purely economic loss.[15] Lord Oliver expresses aversion to decisions in which public authorities shoulder the burden of paying for damages caused by negligent individuals.[16] The *Murphy* decision severely restricts the possibility of recovery for economic loss against public authorities.

In *Murphy*, the House of Lords also rejected the *Anns* concept of a *prima facie* duty of care.[17] It favoured the approach taken by the Australian High Court in *Sutherland Shire* v. *Heyman*.[18] In that case, Mr. Justice Brennan held:

> It is preferable in my view that the law should develop novel categories of negligence incremental and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to nega-

tive, or to reduce or limit the scope of the duty or the class of persons to whom it is owed".[19]

One year prior to the *Kamloops* decision, the Supreme Court of Canada, in *R* v. *Saskatchewan Wheat Pool*,[20] refused to recognize breach of statutory duty as a nominate tort. Giving judgement for the majority, Mr. Justice Dickson, as he then was, held that such a breach should be considered under the ambit of the general law of negligence. This decision, which may be interpreted as supporting the use of a general duty of care, expands the liability potential of public authorities.

Five years after *Kamloops*, in *Just* v. *Right of British Columbia*,[21] the Supreme Court specifically addressed the distinction between policy and operational decisions made by public authorities. The court held that secondary policy decisions that fell within the operational sphere were subject to the common law of negligence; only pure policy decisions were immune from liability in negligence. Thus, on the facts of this case, only the initial decision to implement a highway inspection system could be classified as a policy decision. All subsequent decisions were to be reviewed on the operational level and subject to the common law duty of care.

In 1989, in *Rothfield* v. *Manolakos*,[22] the Supreme Court considered a situation similar to *Kamloops*. In this case, however, the plaintiff homeowners negligently failed to observe the municipal by-law. While all of the justices agreed that the city was negligent, the effect of the homeowner's negligence was the subject of divergent opinion. Only Mr. Justice Cory held that the homeowner's negligence absolved the city from any liability.[23] Mr. Justice La Forest stated that the homeowners were contributorily liable.[24] Madame Justice Wilson went even further; she stated that the homeowners should bear no responsibility at all.[25] This decision illustrates the court's readiness to hold public authorities liable in negligence.

Since the House of Lords decision in *Murphy*, three Canadian cases have dealt with similar issues. In *Petrie* v. *Groome*,[26] the British Columbia Supreme Court refused to follow *Murphy*. In this case, the District of North Vancouver was held liable for negligently approving building foundations. Although the private contractors were also held to be liable, judgement in full was entered against the municipality. This decision, which is currently under appeal, follows the current readiness to hold public authorities liable in negligence.

In *Arsenault* v. *Charlottetown City*,[27] the court followed *Anns*. In this case, the defendant city was held liable in negligence for failing to enforce its by-laws. In his judgement, Mr. Justice McQuaid states: "*Anns*, as interpreted by *Kamloops* ... nonetheless remains the law as it prevails in Canada...".[28] Notably, however, the learned judge also quotes at length from Lord Keith's judgement in *Murphy*. This reference suggests that Mr. Justice McQuaid applies *Anns* with some reluctance.

To date, the 1991 decision of *Macaulay* v. *Wagorn*[29] is the only Canadian case that has followed *Murphy*. In this case, however, the action against the Crown was settled before trial and the case essentially

dealt with an action between private litigants. In his judgement, Mr. Justice Charron states:

> The House of Lords later revisited the *Anns* case in *Murphy*... and, although it overruled the case in some respect, it confirmed that the principle of *Donoghue* v. *Stephenson* did indeed apply "so as to place the builder of premises under a duty to take reasonable care to avoid injury through defects in the premises to the person or property of those whom he should have in contemplation as likely to suffer such injury if care is not taken." [30]

Not only does this case follow *Murphy*, it suggests a possible alternative to the *Murphy - Kamloops* dilemma.

As previously discussed, the House of Lords in *Murphy* did not categorically state that public authorities owed no duty at all to parties with whom they deal. It must be emphasized, however, that *Murphy* essentially dealt with recovery for economic loss. As Lord Keith states:

> Liability under the *Anns* decision is postulated on the existence of a presence of imminent danger to health or safety. But, considering that the loss involved in incurring expenditure to avert the danger is pure economic loss, there would seem to be no logic confining the remedy to cases where such danger exists.[31]

While the *Murphy* decision warns against classifying *de facto* economic loss as physical loss, it does not completely reject such recovery. To recover for pure economic loss, a strong proximate relationship is required as well as an element of reliance. A strict test for the recovery of economic loss was advocated by all of the law lords.

In his article, "What Has Become of *Anns?*",[32] W.S. Schlosser refers to the words of Madame Justice Wilson in *Kamloops*. Madame Justice Wilson states:

> In order to obtain recovery for economic loss the statute has to create a private law duty to the plaintiff alongside the public duty...Finally, and perhaps this merits some emphasis economic loss will only be recoverable if as a matter of statutory interpretation it is a type of loss the statute intended to guard against.[33]

This quotation supports the idea that the decisions in *Murphy* and *Kamloops* can coexist; it suggests that the use of the *Anns* test in *Kamloops* will not automatically lead to recovery for pure economic loss.

It is important to remember that while *Murphy* advocates an incremental approach to the law of negligence, the decision does not overrule the *Donoghue* v. *Stephenson*[34] neighbour principle, nor does it overrule *Dorset Yacht*.[35] Both of these cases may be considered as

specific examples of the incremental approach within the tort of negligence. Consequently, if *Kamloops* can fit into an established tort category, or if it can be distinguished from *Anns*, it may be seen as compatible with the *Murphy* approach.

In his article, Schlosser advocates a narrow view of *Kamloops*. He states that the duty of a municipality is "similar to that found in rescuer cases".[36] Thus, having taken an initial affirmative action to stop the negligent building, the city of Kamloops was obliged to follow through with that action according to reasonable standards. This analysis distinguishes *Kamloops* from *Anns*.

Before predicting the effect that *Murphy* may have on the liability of public authorities in Canada, the policy issues underlying the *Kamloops* and *Murphy* decisions must be addressed. *Anns* emphasized accident compensation and loss distribution. The decision may be viewed as one in which the burden of damages is placed on the one who is in the best position to pay: the public authority. Sympathy for the plaintiff, in this case a private homeowner, and recognition of the fact that contractors and builders are notorious for 'escaping' liability support the expansion of the liability potential of public authorities. In *Kamloops,* Madame Justice Wilson states:

> The only area, in my view, which leaves scope for honest concern is... where the operational subsumes what might be called secondary policy considerations, *i.e.* policy considerations at the secondary level.[37]

She continues :

> On the assumption that by and large municipalities and their officials discharge their responsibilities in a conscientious fashion, I believe that such a failure will be the exception rather than the rule and that the scope for application of the principle in *Anns* will be relatively narrow. I do not see it, as do some commentators, as potentially ruinous financially to municipalities. I do see it as a useful protection to the citizen whose ever-increasing reliance on public officials seems to be a feature of our age...[38]

The object of holding governmental authorities more accountable for their actions is seen as an important underlying consideration.

Conversely, the House of Lords in *Murphy* emphasized the importance of adhering to strict legal principle. They abhorred a situation in which a public authority would be held liable for damages which were in fact caused by private individuals. To expand the liability of public authorities would discourage the maintenance of high building standards and adversely affect the private consumer. The House of Lords stressed that if there was a defect in the law with regards to the liability of public authorities, such a defect was to be remedied by

Parliament, not the judiciary. It is notable that in Canada, particularly since the advent of the *Charter*[39], the Supreme Court has relaxed its strict adherence to the separation of powers doctrine.

It is submitted that in both legal principle and underlying policy, the Canadian tradition follows *Anns* v. *Merton*. In determining the effect that *Murphy* will have on the future of liability of public authorities in negligence, it must be re-emphasized that *Murphy* primarily dealt with recovery for economic loss. By applying the criteria of close proximity and reliance set forth in *Murphy*, the Canadian courts could severely restrict recovery for economic loss in negligence actions against public authorities. They could thus restrict the liability potential of public authorities without contradicting *Anns*.

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1. [1990] 2 All E.R. 908 (H.L.) [hereinafter *Murphy*].
2. Anns v. Merton District Council,[1978] A.C. 720 (H.L.) [hereinafter *Anns*].
3. *Murphy, supra*, note 1 at 923.
4. [1984] 2 S.C.R. 2 [hereinafter *Kamloops].*
5. [1970] A.C. 1004 (H.L.) [hereinafter *Dorset Yacht].*
6. *Anns, supra*, note 2 at 754.
7. The Honourable Sir Gerard Brennan, A.C., K.B.E., "Liability in Negligence of Public Authorities: The Divergent Views" in *Donohue* v. *Stephenson and the Modern Law of Negligence, The Paisley Papers*, (Vancouver: Continuing Legal Education Society of British Columbia, 1991) at 79-115.
8. *Anns, supra* note 2 at 754.
9. *Ibid.*
10. *Ibid.*
11. *Kamloops, supra*, note 4 at 24.
12. *Ultramares Corp.* v. *Touche*, 74 A.L.R. 1139, 1145 (N.Y. App 1931).
13. *Kamloops, supra*, note 4 at 25.
14. *Murphy, supra*, note 1 at 930.
15. *Ibid.*
16. *Ibid.*, at 936.
17. *Ibid.*, at 934-935.
18. (1085), 59 A.L.J.R. 564 (H.C.).
19. *Ibid.*, at 588.
20. [1983] 1 S.C.R. 205.
21. [1989] 2 S.C.R. 1228.
22. [1989] 2 S.C.R. 1259.
23. *Ibid.*, at 1289.
24. *Ibid.*, at 1277.
25. *Ibid.*, at 1295.
26. (9 August 1991), Vancouver C89 23 79 (B.C.S.C.).
27. (10 January 1991), Charlottletown GSC-7863 (P.E.I.S.C., T.D.).
28. *Ibid.*
29. (11 March 1991), Ottawa 14023/87 (Ont.H.C., G.D.).
30. *Ibid.*, citing *Murphy, supra*, note 1 at 916.
31. *Murphy, supra*, note 1 at 922.
32. (1991) 24 Alta. L. Rev.673 at 699.
33. *Kamloops, supra*, note 4 at 35.
34. [1932] All E.R. Rep. 1 (H.L.).
35. *Supra*, note 5.
36. Schlosser, *supra*, note 32 at 699.
37. *Kamloops, supra*, note 4 at 25-26.
38. *Ibid.*

39. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.