CASE COMMENT: FALLING BOULDERS, FALLING TREES AND ICY HIGHWAYS: THE POLICY/OPERATIONAL TEST REVISITED

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I. INTRODUCTION

Deciding the issue of the tort liability of public authorities by applying the policy/operational dichotomy to their activities has long seemed to be an exercise in frustration. Reflection reveals that governmental activities do not neatly divide into policy decision making, on the one hand, and policy implementation, on the other, because inherent in each are elements of the other. When *Just* v. *Queen In Right Of British Columbia*[1] was decided by the Supreme Court of Canada in 1989, I thought that the Supreme Court of Canada had helped to significantly minimize the importance of the dichotomy by characterizing almost all governmental activities as operational and leaving very little to policy.[2] Thus, despite the questionable wisdom of allowing courts to apply negligence law standards to governmental policy decisions, the *Just* decision at least seemed to move the resolution of the issue forward by setting a rather clear boundary line between policy and operations.

Two recent cases from the Supreme Court of Canada cast doubt on my assessment and analysis of *Just*. In *Brown* v. *British Columbia (Minister of Transportation & Highways)*[3] and *Swinamer* v. *Nova Scotia (Attorney General)*[4] the issue of the policy/operational dichotomy was revisited by the Supreme Court. While, on the surface, the judgment in *Just* was reaffirmed by the Court, I will suggest in this comment that the boundary line between policy and operations has been shifted. The time is here for the Court to heed the words of Sopinka J. in the *Brown* case and to reconsider "the continued usefulness of this test as an exclusive touchstone of liability."[5]

II. FALLING BOULDERS, FALLING TREES AND ICY HIGHWAYS

There is a strong similarily between the facts of *Just* and *Swinamer*. In *Just*, one person in a car on the highway leading to a ski resort in British Columbia was seriously injured and another killed when a boulder from the slope above the highway became dislodged and crashed down upon their car. In *Swinamer*, the plaintiff was injured while driving his truck along the highway when a tree from the slope above the highway fell down onto his truck. In both cases, the accidents were caused due to natural forces. In *Just*, the boulder fell when underground tree roots acted as a lever

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1 (1989), 1 C.C.L.T. (2d) 1 (S.C.C.) [hereinafter *Just*].

2 See L. Klar, "Extending The Tort Liability Of Public Authorities" (1990) 2 Alta. L. Rev. 648 [hereinafter "Extending the Tort Liability"].

3 (1994), 19 C.C.L.T. (2d) 268 [hereinafter *Brown*].

4 (1994), 19 C.C.L.T. (2d) 233 [hereinafter *Swinamer*].

5 *Supra* note 3 at 288.

dislodging the boulder from its position. This danger was not apparent from mere visual inspection. In *Swinamer*, the tree fell because it had become weakened by a fungus infection. This condition was also very difficult to detect.

The facts of *Brown* are somewhat different. The plaintiff was injured when his vehicle skidded on an icy patch on the highway. His accident was the fourth that morning on that same icy stretch.

In the three cases, the victims sued the government departments that were charged with the responsibility of maintaining the roads in question. There were similar legislative provisions applicable to these three cases. In *Just*, it was the *Highway Act*[6] and the *Ministry of Transportation and Highways Act*[7] which were held to apply. These provisions gave the Ministry of Highways the power to maintain, repair and improve the highway upon which the plaintiff was driving. The *Highway Act*[8] was also the relevant legislation in *Brown*. In *Swinamer*, the applicable legislation was the *Public Highways Act*[9] which gave the Minister the responsibility for the supervision, management and control of the highway in question and the power to maintain it.

In all three cases, the departments exercised their legislative powers and instituted programs to maintain the roads and prevent against these types of accidents. In *Just*, the department had set up a small rock scaling crew to monitor and deal with the inspection of slopes, including the power to make all decisions regarding the remedial steps to be taken to deal with dangerous situations. The slope from which the boulder fell had been visually inspected from the highway on numerous occasions. The crew had decided however not to "scale" the slope,[10] nor to closely inspect the slope by climbing since it had not considered that work to be a priority.[11] In *Swinamer*, the department had instituted a program of removing dangerous trees from the properties above the highways, even though some of these properties were privately owned. They had surveyed the trees in this region and had flagged some 200 dangerous trees for removal. The tree which fell had not been one of those identified and flagged. Partial funding had been received by the department for the removal of dangerous trees. In *Brown*, there was a program for sanding icy and dangerous roads. A system of crews working on various shifts had been established, along with a method of notification of dangerous conditions and dispatching crews. Two schedules had been implemented, a "summer schedule", which was less intensive and expensive to operate, and a more complete "winter schedule". The icy road in issue in this case was in fact identified as a danger and sanding crews had been dispatched. Unfortunately they arrived shortly after the plaintiff had his accident.

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6 R.S.B.C. 1979, c. 167, s. 8.

7 R.S.B.C. 1979, c. 280, s. 14.

8 *Supra* note 6.

9 R.S.N.S. 1989, c. 371, ss. 4-5.

10 "To scale" means to loosen and bring down the rock by mechanical means.

11 This account of the facts is from the first trial, reported at (1985), 33 C.C.L.T. 49. The trial judge was McLachlin J., later of the Supreme Court of Canada.

On the surface these three cases are similar and illustrate typical problems of road safety and maintenance in Canada. The legal questions which they pose are clear and extremely important. Can a court of law in a private tort case brought by a victim injured on the highway review the department of highway's road maintenance and safety program? Is this review limited to certain aspects of the program? If so, which ones? If reviewable, what standards of conduct must the departments meet?

A. THE JUDGMENT IN *JUST*

The policy/operational dichotomy was established as the touchstone for public tort liability in *Anns* v. *Merton London Borough Council.*[12] This was accepted by the Supreme Court of Canada in *Kamloops* v. *Nielsen,*[13] and it was applied and refined by the Supreme Court of Canada in *Just* v. *B.C.*[14] At the risk of oversimplification, the test can be explained as follows. Courts in a private law negligence suit will not subject the true policy decisions of public authorities to ordinary negligence law standards of care. These decisions can only be challenged if they are not made in good faith. In this context, good faith refers to decisions made for ulterior motives, as a result of corruption, or with such a lack of conscientiousness that one can only conclude that no real discretion was ever exercised. Activities which are not true policy decisions can be subjected to negligence law standards of care, with the caveat that courts in reviewing these activities must keep in mind the nature of government and the constraints under which it operates.[15]

In *Just*, Cory J. for the Supreme Court drew the line between "true" policy decisions and operations. Although one may disagree with where the line was drawn, it appeared to be clearly drawn. By referring to a hypothetical example of a governmental decision to inspect lighthouses, Cory J. seemed to be saying that the true policy decision was restricted to what I have elsewhere called "threshold decisions, *i.e.* the initial decision as to whether something will or will not be done."[16] As I wrote in my previous analysis of *Just*, Cory J.'s statements in *Just* support this assessment.[17] For example, while Cory J. conceded that governmental decisions not to expend funds on lighthouse inspection, to reduce the funds allocated to lighthouse inspection, not to inspect, or to reduce the number of inspections, were decisions which could not be attacked as long as they constituted the reasonable exercise of a *bona fide* discretion, once the decision is made to inspect lighthoses, "the *system of inspections itself* must be reasonable and

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12 [1978] 2 A.C. 728 (H.L.).

13 (1984), 29 C.C.L.T. 97 (S.C.C.).

14 *Supra* note 1.

15 For a detailed review of the issue of government tort liability, see J.M. Law, "Private Law Remedies" in D. Jones & A. de Villars, *Principles of Administrative Law*, 2d ed. (Toronto: Carswell, 1994) 499, c. 15.

16 See L. Klar, *Tort Law* (Toronto: Carswell, 1991) at 195 [hereinafter *Tort Law*]. This was not only my interpretation of what Cory J. stated. Sopinka J., in his dissent in *Just*, summed up Cory J.'s position by stating that in Cory J.'s analysis, "it is difficult to determine what aspect of a policy decision would be immune from review. All that is left is the decision to inspect." *Supra* note 1 at 26.

17 *Supra* note 2.

the inspections must be made properly."[18] Cory J. reinforced this view by stating that "the manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue."[19] Cory J. also stated that policy decisions are "usually" made at a "high level", and that while "a true policy decision may be made at a lower level," the government agency must establish "that it was a *reasonable* decision in light of the surrounding circumstances."[20]

Whatever doubts arose from Cory J.'s discussion of hypothetical examples in *Just*,[21] the matter was clarified by the actual decision in *Just*. The manner and quality of the slope inspection system and the steps taken to remedy dangers were, in the opinion of Cory J., operational activities subject to review in a negligence action.[22] He thus ordered that a new trial be held to evaluate the department's program. At the subsequent trial,[23] the trial judge accepted the allocation of resources which the department had committed to address the problem of rock stability as being a nonreviewable policy matter. Everthing else, however, relating to the manner and quality of the inspection system and the remedial system was in issue. The crux of the case came down to whether the decision not to conduct a climbing inspection was a reasonable one. The trial judge decided that based on the evidence, the slope should have been climbed and the defendant was held liable.[24]

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18 *Supra* note 1 at 17 [emphasis added].

19 *Ibid.* at 18.

20 *Ibid.* at 17 [emphasis added].

21 In addition to the lighthouse example, Cory J. also discussed the case of government aircraft inspectors making the "policy" decision to conduct periodic spot checks of aircraft parts rather than a system of checking all items made in one hour. Cory J. stated that this "policy" decision could not be attacked. While I concede that this illustration contradicts my assertion that policy decisions are threshold decisions, this is in my opinion an example of one of the inconsistencies and ambiguities which feature in Cory J.'s judgment. Would this decision to conduct spot checks not relate to the "manner and quality" of the inspection system, which Cory J. later states "is *clearly* part of the operational aspect of a governmental activity"? *Ibid.* at 18 [emphasis added]. As well, Cory J. concludes the aircraft part example by stating that this inspection decision would have to be shown to be "a *reasonable* decision in light of all the surrounding circumstances." *Ibid.* at 17 [emphasis added]. If it were a policy decision, would the standard not be one of "good faith" rather than mere reasonableness?

22 Recall that McLachlin J. at trial held that this was "policy" and not reviewable. McLachlin J. took into consideration the factors which Cory J. would himself agree are the hallmarks of policy. See trial decision, *supra* note 11. The Court of Appeal in a short and unanimous judgment also agreed that it was policy. See (1986), 40 C.C.L.T. 160.

23 The judgment is reported at (1991), 60 B.C.L.R. (2d) 209.

24 It is important to stress that it was the department's policy, or decision, not to climb every slope and more specifically not to climb this slope which was in issue. This decision was subjected to ordinary negligence law review. It was not treated as a policy decision made at a lower level of authority. Relate this to Cory J.'s discussion in *Just* concerning a decision made by aircraft inspectors not to inspect all manufactured aircraft parts but to make spot checks instead. That type of decision Cory J. termed a "policy" one which was not reviewable. I would suggest that there is no difference between the two decisions. They both relate to the manner and quality of the system, and should be treated in the same way.

B. THE JUDGMENT IN *SWINAMER*

At trial, Justice Grant held that the activities of the department relating to its tree removal program were operational and hence reviewable. The judgment was released about two months after the Supreme Court's judgment in *Just* and relied extensively on it.[25] Grant J. found that the department had "the will, the plan and the money to remove trees which were a hazard."[26] A duty of care to implement the plan was owed and according to the judge the duty was breached. The department was found to have been negligent and was held liable.

The Court of Appeal reversed the trial judgment and dismissed the plaintiff's action.[27] The policy/operational dichotomy, however, did not play an important factor in this decision. The Court of Appeal's judgment resided primarily on two considerations: (1) the nature of the legislative provisions; and (2) evidence as to whether the department even had a policy concerning the monitoring and removal of *diseased* trees, which grew *outside* of the defendant's own highway right-of-way. According to Jones J.A., the *Public Highways Act*[28] not only did not impose an obligation on the defendant to maintain highways, but expressly relieved the Minister of the duty to do so. Further, the Court questioned the right of the Minister to go onto private lands to remove trees. The Court of Appeal also questioned whether the department's policy regarding the removal of dangerous trees itself extended to the removal of diseased trees as opposed to dead trees, and further whether if it did extend to diseased trees it extended to trees outside of the highway's right of way.[29] In other words, there being no evidence of any plan or program to deal with this hazard, and there being no duty to have a plan, the question of whether the program was operational or policy was a non-issue.

The majority judgment in the Supreme Court of Canada was delivered by Cory J., and concurred in by Gonthier, Iacobucci and Major JJ. Cory J. found that the statute[30] imposed a *duty* on the Minister to maintain highways. This finding seems questionable on the wording of the provisions themselves. As noted by the Court of Appeal, the legislation in fact seems to discount a duty to maintain highways.[31] Cory J., however, held that the section was not sufficiently explicit to constitute a statutory exemption from the general common law duty of care owed to highway users. It was unclear, however, from where this common law duty of care to maintain roads emanates.[32]

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25 Grant J. quoted at length from Cory J.'s judgment. In fact, in the C.C.L.T. report, there are eight pages of direct quote from *Just*.

26 (1991), 6 C.C.L.T. (2d) 270 at 290.

27 (1992), 10 C.C.L.T. (2d) 207.

28 R.S.N.S. 1989, c. 371, ss. 4-5.

29 Jones J.A. stated that there was nothing in the *Just* decision to indicate whether the rock which fell was inside or outside of the highway right of way.

30 *Public Highways Act*, R.S.N.S. 1989, c. 371, ss. 4-5.

31 "Nothing in this Act compels or obliges the Minister to construct or maintain any highway or to expend money on the highway." *Ibid.* at s. 5.

32 In his decision in *Brown*, *supra* note 3, Cory J. argued that the duty to maintain the roads emanates from the statute which placed control of the roads in the defendant.

Cory J. stated that once the authority had exercised its statutory power to build highways, it had, despite the wording of the legislation, a duty to maintain them. Cory J., drawing a direct analogy to *Just*, then found that this duty to maintain extended to a duty to protect travellers from injury caused by hazardous trees.[33]

What is interesting from the perspective of this commentary is how Cory J. dealt with the issue of the policy/operational dichotomy. An effort was made by Cory J. to broaden the policy zone of the department's activities in this case, although ultimately this was, in my opinion, not relevant to the outcome of the case. Cory J. focused on the department's decision to conduct a survey of the trees in the region, and argued that this was but a preliminary step taken by the department to determine the extent of the danger posed by dead and diseased trees and to formulate the plan for dealing with these dangers. This was a matter of policy and subject to the good faith requirement, not reviewable. It is, with respect, difficult to follow Cory J.'s reasoning regarding this matter. For one thing, it does not appear that the decision to conduct a survey was being questioned by the plaintiff. What really was in issue was the manner and quality of the system. As well, the arguments used by Cory J. are strained. Cory J. argues, for example, that despite the survey to identify dangerous trees, that there was "no general policy in effect to inspect trees."[34] This was said to represent a distinguishing feature from *Just*, where there was a "general" policy to inspect as opposed to the "limited" policy, in the instant case.

What is most troubling, however, from the point of understanding the decision, is that, having said all of this, Cory J. then proceeded to review the manner and quality of the survey to determine whether it was reasonably carried out or not. Cory J. held that the *decision* to survey was prudent, and that in view of the perceived risks, and the budgetary and time constraints, there was no need to retain the services of an expert or to require that the foremen undergo special training. In other words, in the last analysis, decisions involving matters of planning, budget, and resources, made by the department, were, as in *Just*, subjected to negligence law review.[35]

C. THE JUDGMENT IN *BROWN*

The plaintiff, injured on the icy highway, sued the department alleging negligence in two respects. The plaintiff alleged that the department did not respond in a timely fashion to the reports of the icy conditions and to remedy them, and that it failed to maintain the road in question so as to prevent the ice formation in the first place.

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[33] Cory J. also considered arguments relating to the interpretation of Nova Scotia's *Proceedings Against The Crown Act*, R.S.N.S. 1989, c. 360, s. 5(1)(a) and concluded that the wording of these provisions provided no immunity to the Crown with regard to allegations of its negligence as opposed to the negligence of its servants. Cory J. also rejected the argument that the Crown did not have the power to enter onto private lands to remove dangerous trees.

[34] *Supra* note 4 at 248.

[35] The real difference between *Swinamer* and *Just* is that, in *Just*, Cory J. left it to the trial judge to evaluate the program whereas in *Swinamer*, Cory J. took the matter away from the trial judge. Recall that at trial in *Swinamer*, Grant J. did find that the manner and quality of the survey and program were not reasonably carried out.

At trial,[36] the action was dismissed. The trial judge determined that there was no undue delay on the part of the department in attending to the icy highway. The trial judge also held that the failure to maintain the road so as to prevent ice was a matter of policy which excluded a duty of care.[37]

In the Court of Appeal,[38] the lack of any negligence which was causally related to the accident formed the basis of the action's dismissal.

An issue which faced the Court of Appeal and the Supreme Court was whether the decision to maintain two different schedules for staffing road maintenance was a decision which was subject to ordinary tort law review. Was it, in other words, a matter of policy or operations? The Court of Appeal finessed the issue by finding that if it was a policy decision, the plaintiff had failed to show that it was not a "rational" one, and if it were a matter of operations, it was not shown to have been negligent. Interestingly, the Court of Appeal adopted the four considerations outlined by McLachlin J. in her trial judgment in *Just* to determine the policy/operations dichotomy.[39] This is interesting because, as we have seen, these four considerations led McLachlin J. to believe that the activities in *Just* were a matter of policy, a finding later reversed by the Supreme Court in *Just*.

In the Supreme Court, Cory J. for the majority affirmed that there was a duty on the department to reasonably maintain its roads and that this duty extended to the prevention of injury to users of the road by icy conditions. Cory J. referred back to his decision in *Just* where he stated that by inference the provisions relating to the Province's duties with respect to its highways "appear to place an obligation on the province to maintain its highways at least to the same extent that a municipality is obligated to repair its roads."[40] This reasoning was applied to the *Brown* case.[41]

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36 (1989), 17 M.V.R. (2d) 69. It is important to note that the trial judgment was rendered after the trial judgment in *Just* v. *B.C.* had dismissed the plaintiff's action based on the "policy" argument, and before the Supreme Court had reversed *Just*.

37 Cory J. in commenting upon this aspect of the case concluded that there was also no evidence to support the allegation that the state of the road or its design led to the formation of the ice. That is, there was no negligence that the road was badly maintained.

38 (1992), 10 C.C.L.T. (2d) 188.

39 The four considerations are: (1) policy involves planning, which involves a consideration of priorities and needs; (2) policy involves allocating resources and balancing factors such as efficiency or thrift; (3) the greater the discretion conferred on the decision-maker, the more likely the decision is a matter of policy; (4) where there are standards against which the conduct can be evaluated the decision may move into the operational area.

40 *Supra* note 3 at 283.

41 One of the interesting things to note about this finding and the accompanying discussion is the lack of any reference in the Supreme Court's judgment, and in fact in the Court of Appeal's judgment, to previous Supreme Court of Canada authority, or lower court authority, on the question of the Ministry's duty to salt or sand icy highways under their maintenance as part of their duties to maintain and repair their roads. There is, in fact, substantial jurisprudence on this question. One might recall, for example, the 1974 Supreme Court of Canada decision in *The Queen* v. *Cote* (1974), 51 D.L.R. (3d) 244. That case involved a highway traffic accident caused in part by an icy highway. The legislation in issue in that case was the *Highway Improvement Act*, R.S.O. 1960, c. 171, s. 33 (1) which imposed a statutory duty on the Province to maintain and keep its highways

One of the issues which Cory J. discussed was whether the Crown could be attacked for its decision to have its crews on a summer schedule at the time of this incident.[42] It was, in fact, by focusing on this specific issue that Cory J. was able to revisit the issue of the "policy/operational" dichotomy which he had elaborated on so extensively in *Just*.[43]

Cory J. decided that the decision to maintain the summer schedule was a "policy" decision, immune from ordinary negligence law review. It involved matters of finance and personnel. It involved negotiations with unions. Hence, "it was truly a governmental decision involving social, political and economic factors."[44] It could therefore only be attacked on the ground that it "was not *bona fide* or was so irrational or unreasonable as to constitute an improper exercise of governmental discretion."[45]

In arriving at his position, Cory J. expressly repudiated the argument that "policy decisions must be limited to so called threshold decisions, that is to say, broad initial decisions as to whether something will or will not be done."[46] According to Cory J.,

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in repair. While excusing an authority from liability for what I may call "ordinarily" dangerous icy roads, the trial judge held that where certain patches of highway are unusually icy, treacherous and dangerous, and there was ample time for the department to have done something about it, but did nothing, there is negligence. This is so both when the department knew of the condition, and did not know, where their ignorance was due to their negligence in failing to inspect. (See (1971), 17 D.L.R. (3d) 247). This decision was affirmed by the Court of Appeal, where it was held that the duty to salt or sand arose where there is "a highly special dangerous situation at a location in the highway which otherwise, to persons reasonably using the same, was quite passable and usable for traffic." See (1972), 27 D.L.R. (3d) 676 (Ont. C.A.). These words were adopted by Dickson J. in the Supreme Court, and liability for a traffic accident caused in part by an icy road was attributed to the Ministry of Highways and one of the drivers. The case proceeded on negligence principles without reference to the now popular "policy/operational" dichotomy. It could be suggested that had the courts considered and applied *Queen* v. *Cote* in the *Brown* case, the issue could have been resolved without the need to consider *Just*. That is, the courts need only have asked whether the road conditions posed an extraordinary danger, and if so, whether taking into account all circumstances, the Crown acted reasonably.

42 The summer schedule relied on a Friday and week-end call-out system as opposed to the winter system which involved several crew on three shifts seven days a week. The accident occurred on a Friday one week before the winter schedule was to go into effect.

43 The issue of the summer versus winter schedule did not figure in at all as an issue in the trial judgment. The facts, taken from the trial judgment, indicate that the gist of the plaintiff's complaint was that the time taken to remedy the dangerous condition on the road was unreasonably long. The dangerous condition of the highway and the request for sanding were first reported at 7:25 a.m., however, it was not until about 9:30 a.m., very shortly after the accident occurred, that a sanding truck arrived at the relevant scene. What was in issue were the methods of communication which were used to get in touch with the sanding crews and the time taken to actually dispatch the crew. On appeal, the issue of the schedule was discussed by the Court of Appeal, but it was dealt with very perfunctorily. Lambert J.A. held that if it were a question of policy, it was a "rational" decision, and alternatively, it met the standard of care imposed on the Crown. I assumed that in this latter respect Lambert J.A. was dealing with the decision as if it were a matter of operations. Cory J.'s focus on this aspect of the case seems, therefore, to have been primarily for the purpose of revisiting the discussion concerning the policy/operational test.

44 *Supra* note 3 at 285.

45 *Ibid.* at 280.

46 *Ibid.* at 285.

"this would be contrary to the principles set out in *Just* referred to earlier."[47] Policy decisions can be made by persons at all levels of authority; "it is the nature of the decision itself that must be scrutinized, rather than the position of the person who makes it."[48]

Having concluded that the decision to maintain a summer schedule was a non-reviewable matter of policy, Cory J. then subjected the manner in which the sanding was carried out under that schedule to negligence law review. He concluded that the plaintiff had failed to show that there was negligence in the manner in which the system had been operated, and that although there had been negligence in one aspect of the system, this negligence was not causally related to the plaintiff's accident.

III. ANALYSIS AND SUMMARY

The two recent judgments, and particularly the one in *Brown*, have created new uncertainty as to where the Supreme Court intends to draw the line between the true policy decisions and operational activities of government. Whereas in *Just*, it seemed that the line was to be drawn at a very high stage of policy formulation, Cory J. has made it clear that that analysis is not correct. It appears that policy decisions can occur at any stage of the planning or even the operational aspect of governmental activities. Thus, not only is the decision to implement a system of road inspection and repair a matter of policy, but so is the decision to operate the system on two schedules. Similarly, not only is the decision to implement a system of tree inspection a matter of policy, but so is the decision to conduct a survey of the trees.

The significant question raised by this series of cases is whether *any line at all* can or should be drawn between the policy decisions and operational activities of government as a way of demarcating their reviewable and nonreviewable activities. Is there, in other words, any value to be gained in attempting to categorize governmental activities as either being matters of policy or operations? The reality is that initial decisions by government to institute programs are inevitably followed by the need to make more decisions. These subsequent decisions, as with the initial decisions, inevitably involve social, political, and economic factors. It was recognized by Lord Wilberforce in *Anns* v. *Merton London Borough*[49] that the distinction between policy

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[47] *Ibid.* As previously noted, in my earlier writings on the *Just* decision, the position which has now been expressly repudiated by Cory J., was the analysis which I put forward as explaining *Just.* For example, in "Extending The Tort Liability", *supra* note 2 at 653, I wrote:

> The "true" policy decisions, which are immune from ordinary tort law principles, are the broad, formulative decisions, generally made by those in high levels of authority. They are what I may describe as "threshold" decisions; they decide in general terms whether something will or will not be done.

As well, in *Tort Law*, *supra* note 16, I wrote:

> Policy was restricted to what may be called threshold decisions, *i.e.*, the initial decision as to whether something will or will not be done. These decisions which formulate policy are made by those in high levels of authority, and will involve such considerations as budgetary allocation or other political matters.

[48] *Supra* note 3 at 286.

[49] [1978] 2 A.C. 728.

and operations, rather than being distinct, is probably "a distinction of degree."[50] Or as stated by Professor Cohen, "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."[51] What Mr. Justice Cory did in *Just* was to use the policy/operations dichotomy as a "bright line" test. This proved to be unworkable, as evidenced in *Brown* and *Swinamer*. In *Swinamer*, for example, although the decision to have a survey apparently was not reviewable, the decision whether to hire experts or to specially train staff to conduct the survey was. What, however, is the essential difference between these types of decisions? They both involve "political" factors, they both involve planning. Similarly in *Just*, the planning decision not to climb slopes but rather to visually inspect them was reviewable. In *Brown*, the decision to be on a summer schedule was not reviewable, although the manner of the call-out system on the summer schedule was. These, however, are all resource allocation decisions, and it is difficult to distinguish between them.

There is no easy answer to the question of the tort liability of public authorities, although there have been solutions proposed. Professor Cohen suggests, for example, that tort law should not be used at all to resolve individual/government conflict.[52] Cohen writes that the court as an institution "does not appear to be well-suited to deal with individual claims against the government in a modern activist state" and that "alternative institutional designs addressing these concerns offer substantial benefits to those concerned with developing effective responses to regulatory failure."[53] Another point of view is that tort law should be applied to public authorities, but that the same rules should govern these suits as govern disputes between private individuals.[54] This means, for example, that a public authority's failure to inspect and regulate highway construction or maintenance should be seen as a case of "nonfeasance"; that is, a mere failure to confer a benefit. The ordinary tort law rule for a failure to confer a benefit by protecting another from injury is that there is no liability, unless the case fits within one of the exceptional cases. The exception which might apply here is that of reliance. If a specific reliance relationship was created between the individual and the department which led to the plaintiff's injury, then a duty could be owed. Professor Woodall doubts, however, whether parties who drive on highways can establish that they do so only due to reliance on the department of highway's road maintenance programs.

An approach which I favour is to ask legislators to be explicit in defining the liabilities of public authorities. Thus, statutes which confer powers or duties on bodies with respect to highway maintenance and safety programs, and other similar activities, should contain provisions which specifically deal with the issue of remedies for injuries

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50 *Ibid.* at 754.

51 D. Cohen, "The Public and Private Law Dimensions of the UFFI Problem" (1983-84) 8 Can. Bus. L.J. 410 at 421.

52 D. Cohen, "Tort Law And The Crown: Administrative Compensation And The Modern State" in Cooper-Stephenson & Saunders, eds., *Tort Theory* (North York: Captus U. Publications, 1993) 361.

53 *Ibid.* at 391.

54 M.K. Woodall, "Private Law Liability of Public Authorities for Negligent Inspection and Regulation" (1992) 37 McGill L.J. 83.

caused by regulatory failures. Legislators could provide that there be immunity from suit for these programs, subject authorities to good faith requirements or to lower standards of care. Statutory provisions such as these do exist and seem to work relatively well. One must recall that the reasons for declining to impose liability on public authorities for policy and planning decisions are essentially political. It is argued that as a matter of competence, courts should not be second-guessing the decisions of public bodies, and that they lack the expertise and capacity to do so in any event. One might persuasively argue that the decision to restrict the courts' power of reviewing policy decisions of government should be made by legislators when they create and empower public authorities.

Although I have previously been critical of the decision in *Just* to draw the policy line at a very high level of policy formulation, it at least had the advantantage of making the test largely irrelevant to the decision as to whether most of the matters were reviewable. According to the *Just* description, most were. What I think has become evident, however, and what *Just*, *Brown*, and *Swinamer* show is that a clear boundary between policy and operations does not exist and therefore cannot work as the threshold test.[55] If none of the other solutions suggested above are acceptable, perhaps the best we can do at this point is to accept that *all* governmental decision making and activities should be subject to private law review on the following understanding: courts when reviewing the decisions and activities of public authorities should do so with a variable standard of care. Activities which involve the exercise of discretion based on finances, resources, and competing claims, will be judged based on the good faith of the decision makers and standards of reasonableness which take into account the special factors. Activities which involve less discretion based on these factors will be judged according to ordinary standards of care. The policy/operational test will no longer be treated as a categorical test, although factors such as planning and resource allocation should continue to be important to the review itself. While this approach suffers from the defect of potentially opening up a wide area of costly and time consuming litigation, the application by judges of variable standards of care which make successful suits against government for planning decisions unlikely to succeed except for gross abuses might in the long run serve to discourage excessive litigation.

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[55] One must just look at the difficulty which the various judges had in these cases in deciding where the boundary was to see the point. In *Just*, the trial judge, the Court of Appeal and one of the Supreme Court justices felt that the activities were matters of policy. The majority of the Supreme Court in that case thought they were operational. In *Swinamer*, the trial judge thought the activity was operational, the Court of Appeal dealt with the case on another basis, and the Supreme Court held that certain activities were policy and others operational. In *Brown*, the trial judge dealt with the main complaint as a question of operations, the Court of Appeal dealt with one of the activities by assuming that it was either policy or operations and the Supreme Court again viewed some of the activities as policy and others as operational.