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Article abstract

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The *Crown Liability Act* and article 94 of the *Code of Civil Procedure* both incorporate as against the Crown rules of private law delictual behaviour which were originally developed for regulating activity between private parties as such. They, therefore, compel courts to determine whether jurisdictional error *per se* constitutes fault.

The history of twentieth century attempts to reconcile ultra vires and fault is a history of the judicial search for boundary criteria between realms of public and private law. These boundaries have been, among others, a good faith test, functional criteria such as judicial and legislative immunity or immunity for planning functions, the notion of breach of statutory duty, and so on. Each of these attempts has ultimately be repulsed by the desire of litigants to recover against the Crown on the widest possible basis. Modern theories of jurisdiction being so all-embracing and modern conceptions of fault being so comprehensive, the courts are constantly being asked to develop an absolute equation between fault and *ultra vires*.

The paper concludes by exploring several options for harmonizing private law and public law risk allocation regimes. It recommends a restructuring of the *Crown Liability Act* so as (i) to permit recovery on a variety of no fault bases, (ii) to permit recovery even when *intra vires* acts have been undertaken (if these cause significant or disproportional damage) and (iii) to permit the immunization of certain governmental functions from private law liability even when the decisions in question have been taken in an *ultra vires* fashion.

Jurisdiction, Illegality and Fault: An Unholy Trinity

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ABSTRACT

The relationship between fault and ultra vires *is one of the most difficult aspects of the law of Crown Liability. It sets clearly into relief the policy conflicts which arise when private law risk allocation regimes (the adversarial adjudicative imposition of liability rules grounded in a concept of corrective justice) are invoked to police the functioning of public law risk allocation regimes (the allocation through various non-adjudicative procedures of the benefit and burden according to a variety of conceptions of distributive justice).*

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RÉSUMÉ

*Le rapport entre les notions de faute et d'*ultra vires *constitue l'un des éléments les plus difficiles de la responsabilité extra-contractuelle de la Couronne. Ce rapport révèle clairement les conflits qui peuvent surgir quand les régimes d'attribution de responsabilité du droit privé (l'imposition des règles de la justice rétributive selon un processus d'adjudication) sont invoqués pour censurer les régimes d'attribution du droit public (l'attribution par divers processus non-adjudicatif des bénéfices et des charges, selon les règles de la justice distributive).*

La Loi sur la responsabilité de la Couronne *et l'article 94 du* Code de procédure civile *incorporent vis-à-vis la Couronne les règles du droit privé en matière de délits qui ont été élaborés pour réglementer les rapports entre les individus. En conséquence, ces règles obligent les tribunaux de droit commun à déterminer si l'erreur de compétence constitue en soi une faute civile.*

* I should like to thank my research assistant, Richard Janda, for his help in the preparation of this essay. My colleagues Michael Bridge and Stephen Perry pointed out several gaps in the original argument and I am most grateful for their perceptive comments. Neither, of course, is responsible for any errors or omissions.

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*Sur ce point, l'évolution de la jurisprudence contemporaine peut être résumée comme la recherche de critères pour différencier le droit public et le droit privé. Les critères élaborés sont, entre autres, un critère de bonne foi, un critère fonctionnel qui rattache l'immunité à des fonctions judiciaires ou législatives, la notion de manquement à un devoir statutaire, et ainsi de suite. Chacune de ces tentatives a échoué à cause du désir des parties de fonder la responsabilité de la Couronne sur la notion la plus large possible. La conception moderne de la compétence, et celle de la faute, se sont tellement étendues que les tribunaux de droit commun sont constamment sollicités pour consacrer l'équation entre l'*ultra vires *et la faute.*

L'étude conclut avec plusieurs recommandations pour rendre compatibles les régimes d'attribution des risques propres au droit privé ou au droit public. L'auteur y recommande notamment le remaniement de la Loi sur la responsabilité de la Couronne *pour reconnaître (1) la responsabilité sans faute dans diverses hypothèses, (2) le versement d'une indemnité, même à la suite d'un acte* intra vires, *lorsqu'il cause un dommage important ou disproportionné, et (3) l'immunité absolue de certaines fonctions gouvernementales face aux régimes de responsabilité du droit privé, même lorsque la décision qui en résulte est entachée d'un vice de compétence.*

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INTRODUCTION

Today, almost all commentators are agreed that the legal regime governing the liability of public authorities in delict and tort is a model of confusion, if not incoherence.[1] In part this confusion results from the diversity of its sources. These include (i) general principles of delictual or tort liability, (ii) the common law of Crown prerogative and Crown immunity, (iii) the panoply of rules defining the concept of jurisdiction, and (iv) inadequately explored assumptions about the appropriate means for distributing social benefits and burdens in a democracy — all married by a patchwork of legislative provisions exposing the Crown and its agencies to civil liability in specific, but random, circumstances.[2]

While the entire domain is ripe for reform, one of its branches — the delictual or tort liability of the Crown for the *ultra vires* acts of its servants and agents — is especially vexing. Not surprisingly, this narrower topic sets into relief most clearly the policy conflicts which permeate all aspects of Crown liability. Hence, it is a particularly apt vehicle for exploring how legislatures and courts have attempted to resolve these conflicts.

This essay will examine the regime of Crown liability for *ultra vires* acts in both civil law and common law Canada. It begins by situating the question of Crown liability in its broader theoretical context. Thereafter, the development of contemporary judicial responses to the interplay of fault liability and jurisdiction will be reviewed. The essay concludes with some general suggestions for harmonizing the risk allocation regimes of private law and public law, and for improving the overall legal regime of Crown liability in Canada.

It should be noted at the outset that this subject offers little opportunity for elaborate comparative analysis. The basic framework of both the public and private law of governmental delictual liability is

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1. While some writers attribute this situation to inadequacies of the courts, the reality is quite otherwise. As will become evident later in this paper the courts have been labouring under enormous handicaps caused by the failure of legislatures to provide them with workable Crown liability statutes. In view of this it is remarkable that courts have been able to give the law of Crown liability any coherence whatever.

2. See, for example, the *Crown Liability Act*, R.S.C. 1970, chap. C-38; the *Federal Court Act*, R.S.C. 1970, chap. 10 (2d Supp.); *Public Service Staff Relations Act*, R.S.C. 1970, chap. P-35, s. 2; *Government Companies Operation Act*, R.S.C. 1970, chap. G-7, s. 3; *Pesticide Residue Compensation Act*, R.S.C. 1970, chap. P-11; *Nuclear Liability Act*, R.S.C. 1970, chap. 29 (1st Supp.); *Railway Act*, R.S.C. 1970, chap. R-2, s. 338; *Government Employee's Compensation Act*, R.S.C. 1970, chap. G-8; *National Defence Act*, R.S.C. 1970, chap. N-4, s. 227(1); *Customs Act*, R.S.C. 1970, chap. C-40, s. 151; *Excise Act*, R.S.C. 1970, chap. E-12, s. 80 ff. A similar range of legislative provisions may be found at the provincial level: in Québec the key general text is article 94 of the *Code of Civil Procedure;* in Ontario it is the *Proceedings Against the Crown Act*, R.S.O. 1980, chap. 393.

substantially similar across Canada. Moreover, neither civil law nor common law jurisdictions have evolved distinctive principles for dealing with the relationship of jurisdiction, illegality and fault. Finally, the Québec statutory regime of Crown liability parallels to a large degree that in common law provinces.[3]

I. A THEORY OF CROWN LIABILITY FOR *ULTRA VIRES* ACTS

In a very real sense, a proper analysis of Crown liability for *ultra vires* acts requires nothing short of a comprehensive theory of state and government. This is because almost everything that Parliament legislates, that courts decide and that public servants do will cause harm *(damnum)* to someone. Even when Parliament enacts a statute as innocuous as a new *National Flag Act,* significant economic loss to private parties can result; manufacturers and retailers of flags, as well as any business upon whose product the former flag is emblazoned will have to liquidate useless inventory. Whenever a court decides, say, a contracts case, that decision will involve a disruption of settled expectations among at least one, and possibly both, parties to many currently executory contracts. Again, the administrative decision of a Transport Commission to authorize a new carrier automatically deprives existing route monopolists and oligopolists of a part of their future profits.

Of course, the English common law which we have inherited in Canada implicitly reflects such a comprehensive theory. For example, it has always recognized, as a constitutional principle, that *damna* arising from legislative activity do not constitute actionable *injuria.*[4] The traditional immunity for *intra vires* judicial acts, which recent authority seems to extend even to *ultra vires* decisions as long as these are taken honestly and in good faith, also is a part of this general theory.[5] Nevertheless, the extent to which these immunities apply to non-legislative and non-judicial actors remains uncertain. While there is little doubt that as a general rule, public servants could be sued personally in delict or tort for their wrongful administrative and executive acts, even today it is far from settled whether liability may attach to delegated legislative activity and to judicial or quasi-

3. See PÉPIN and OUELLETTE, *Principes de contentieux administratif,* 2nd ed, Montréal, Les Éditions Yvon Blais, 1982, at page 489.

4. See, for example *Arthur Yates and Co. Pty. Ltd.* v. *The Vegetable Seeds Committee,* (1945-46) 72 C.L.R. 37. Except, of course where a right to compensation is expressly provided or can be inferred; see *Attorney-General* v. *De Keyser's Royal Hotel,* [1920] A.C. 508 (H.L.) and *Manitoba Fisheries Ltd.* v. *The Queen,* [1979] S.C.R. 101.

5. See *Sirros* v. *Moore,* [1975] Q.B. 118 (C.A.); *Mackenzie* v. *Martin,* [1954] S.C.R. 361.

judicial decision-making.[6] What is more, at the same time that the English common law imposed personal liability upon public servants and public authorities, it afforded the Crown an immunity from both direct and vicarious liability.

In the days when the functions of the state were few, and its personnel fewer, these common law rules probably were not inappropriate. But in the late 20th century governmental activity has assumed an entirely new dimension, and the number of civil servants has mushroomed. Not surprisingly, therefore, these traditional principles have shown certain deficiencies. To begin with, despite the invocation of negligence to expand the scope of public authority liability, a fault-based regime seems to be inadequate to capture the range of harm caused by public authorities. Furthermore, notwithstanding the recent advent of a statutory regime of Crown liability, as yet courts have found the terms of this legislation insufficient to ground recovery for harm flowing from a *faute de service*.

Modern commentators suggest that a new theory of Crown liability is required to cover at least those case where the state undertakes activity other than that associated with ordinary private rights-holdings (*i.e.* owning land or vehicles). Such a theory would have two components: a theory of governmental regulation, that is, about the distribution of social benefits and burdens via institutions and processes of private and public law; and a theory of Crown liability legislation, that is, about how differing liability regimes (including delictual or tort liability) ought to be made applicable to public authorities and the Crown.

A. REGULATION BY PRIVATE LAW AND PUBLIC LAW

Following Dicey, it is traditional in common law constitutional theory to assert the unity of private law and public law by subsuming the latter into the former; all limited jurisdictions are subject to the superintending and reforming power of the Superior Courts.[7] Yet even Dicey recognized that, in fact, our legal system consciously discriminates between regimes of private and public ordering. His real objective was to ensure the primacy of private law legal ordering (*i.e.* ordinary law) by telescoping all public law regimes into a hierarchy of private law.[8]

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6. On delegated legislation see *Berryland Canning Co. Ltd.* v. *The Queen*, [1974] 1 F.C. 91; on judicial and quasi-judicial functions see *Everett* v. *Griffiths*, [1921] 1 A.C. 631 (H.L.) and *O'Reilly* v. *Mackman*, [1982] 3 W.L.R. 604 (C.A.).

7. For a modern viewpoint see HARLOW, "Public and Private Law: Definition Without Distinction", (1980) 43 *Mod. L. Rev.* 241.

8. The analysis set out in ARTHURS, "Rethinking Administrative Law: A Slightly Dicey Business", (1979) 17 *Osgoode Hall L.J.* 1, is particularly helpful on this print.

Many contemporary private law theorists lament this subsumption, however, because it undermines the intelligibility of private law as such. To preserve a regime of regulation by private law, these theorists typically posit an institutional dichotomy.[9] Private law courts, they claim, engage in adversarial adjudication of rights, and apply rules of duty and entitlement grounded in the concept of corrective (or interpersonal) justice; public law authorities allocate burdens and benefits in a non-judicial manner, and make policy choices based on principles of distributive (or social) justice. While this basic dichotomy draws attention to certain procedural and substantive differences between private law and public law regimes, unfortunately it also suggests a sharper distinction than is warranted.

In the quest for a more adequate understanding one might begin by noting that there is, in practice, no simple correlation between the adjudicative process and an inter-personal liability calculus on the one hand, and private law on the other; neither are non-adjudicative processes and a social risk calculus coextensive with public law.[10] Sometimes a non-adjudicative process displaces rights adjudication and transforms disputes between individuals into more general compensation claims — witness Worker's Compensation, and no-fault accident insurance. Again, the rules of private law occasionally function in a distributive rather than corrective fashion (*e.g.* the law of wills, matrimonial property, and the tort of nuisance in the common law). By contrast, sometimes administrative agencies are engaged in classical adjudication — for example, the Tax Appeal Board. Finally, public authorities frequently opt into relationships governed by principles of corrective justice (*e.g.* government contracts).

Furthermore, the absolute equation of private law, adjudication and corrective justice can be misleading from a theoretical perspective. To begin with, it is clear that the modern state refracts a broad spectrum of modes and processes of social ordering. These comprise, in addition to court-like adjudication, various mediational, investigational, electoral, contractual, consultative and command processes. To the extent that *Codes of Civil Procedure* and *Judicature Acts* contemplate adversarial adjudication as the primary judicial process, they represent a conscious decision by legislatures to exploit the benefits of adjudicative ordering over a range of substantive areas. Moreover, by letting courts develop their own rules of practice and procedure, legislatures delegate responsibility for working out the optimal structure of adjudication to the body most directly affected by these rules. In a complementary fashion, the principle that parties have

9. See WEINRIB, *The Intelligibility of the Rule of Law*, 1984, (unpublished).

10. Certain theorists argue, however, that there is at least a functional correspondence between private law, corrective justice and adjudication, even if, in practice, courts are performing distributive tasks. See FULLER, "The Forms and Limits of Adjudication", (1978) 93 *Harv. L. Rev.* 353.

carriage of an action leaves the realm of private law adjudication to be determined by individuals.[11] In this sense legislative tolerance of and recourse to judicial adjudication may be found whenever all other ordering processes are considered to be sub-optimal.[12]

At the substantive level, one might also note that regimes of corrective justice are not a pre-given and necessary feature of legal organization. The decision to elaborate normative schemes which are grounded in inter-personal obligations is itself a social choice. Insofar as the principles laid down in the general texts of a *Civil Code* or elaborated over time by ordinary courts are not interfered with by statute it can be said that judge-made private law is a product of the delegation to courts of a broad discretion to develop on a case by case basis the detailed rules of corrective justice.[13] Similarly, the continued existence of private law regimes of delict, contract and property reflects a policy choice about how to allocate social risk. Here, responsibility for determining if and when risk should be assumed is not delegated to a managerial, administrative agency charged with pursuing the public good, (*i.e.* to a centralized institution overtly pursuing a substantive principle of distribution); rather, through judicial enforcement of private law rules it is delegated to the individual pursuing a private interest as contracting party, reasonable man (prudent administrator), and property holder.[14] In other words, even though private law rules are intelligible in themselves as a just mechanism for determining private rights, the concept of corrective justice nonetheless reflects an identifiable principle of social distribution.

Once it is recognized that placing disputes in a private adjudicative forum is regulatory choice and that principles of corrective justice have distributional consequences, the incoherence of Dicey's subsumption of public law into private law is exposed. Nevertheless, because courts and lawyers use the adjudicative process and a calculus of corrective justice

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11. See MACDONALD, "A Theory of Procedural Fairness", (1981) 1 *Windsor Yearb. Acc. Just.* 3. This may be contrasted with inquisitorial adjudicative systems, where the legislature can be understood as wishing to keep closer control over the realm of private law; it is no coincidence that inquisitorial systems are most common in codified private law jurisdictions.

12. This point is not advanced as a historical fact. It is offered rather as a functional explanation of legislative preferences in certain cases for non-adjudicative processes. It also bears repeating that the contrast is not being drawn between courts and agencies. Rather it is the process of adjudication (in whatever institution) which is being juxtaposed with other processes.

13. Again this is not to claim that, historically, private law evolved in this way, or that even today, Parliament or courts recognize that this is the consequence of the constitutional structure we have inherited. Interestingly, while this point is difficult to swallow for those trained in the common law, it is easily digested by students of codified systems.

14. See, for example, COASE, "The Problem of Social Cost", (1960) 3 *J. of Law & Econ.* 1.

as the window through which they view contemporary institutions of legal ordering, all non-adjudicative processes and non-corrective calculi of justice typically are lumped together and stigmatized as public law. It follows that whether or not courts intellectually subordinate non-adjudicative to adjudicative processes and non-corrective to corrective regimes of justice, has a large bearing on the potential extent of governmental liability.

The relative hierarchy of these processes and regimes is revealed most immediately where courts are asked to apply private law principles to the operation of state regulatory agencies. This occurs, notably, whenever public authorities that have been delegated a discretion to undertake a conscious allocation of cost and benefit in the public interest, act so as to give rise to injury compensable under ordinary private law principles. For here the common law compels courts to decide whether the fault-based liability regime of delict and tort should be imposed as a second level regulatory process of risk allocation upon a statutory administrative scheme which may have entirely different risk allocation objectives. In other words, in these cases the interface of regulation by private law (corrective justice) and by public law (distributive justice) becomes apparent. Unfortunately, however, because courts often perceive fault-based liability to be the only alternative to absolute immunity — rather than as one possible allocative regime among others such as immunity, *ex gratia* payment, or compensation by a no-fault or insurance principle — the subtlety of various public risk allocation schemes is lost, and Dicey's position tends to prevail.

B. JURISDICTION, ILLEGALITY AND FAULT UNDER LEGISLATIVE REGIMES OF CROWN LIABILITY

In Part II of this essay various 20th century judicial responses to the problem of hierarchy will be explored in detail. Here attention will be focussed on showing how the framework of governmental responsibility elaborated in various *Crown Liability Acts* does not depart from the common law principles of public authority liability just noted.[15]

The regime established under the federal *Crown Liability Act*[16] is typical of the approach adopted in common law jurisdictions. The relevant provision of this statute provides:

> 3.(1) The Crown is liable in tort for the damages which, if it were a private person of full age and capacity, it would be liable,
>
> (a) in respect of a tort committed by a servant of the Crown
>
> [. . .]

15. See MCBRIDE, "Damages as a Remedy for Unlawful Administrative Action", (1979) 38 *Cambridge Law Journal* 323.

16. R.S.C. 1970, chap. C-38. In common law provinces the statutory regime is similar. See *The Proceedings Against the Crown Act,* R.S.O. 1980, chap. 393.

In Québec a slightly different framework is established. Article 94 of the *Code of Civil Procedure* states:

> 94. Any person having a claim to exercise against the Crown, whether it be a revendication of moveable or immoveable property, or a claim for the payment of moneys on an alleged contract, or for damages, or otherwise, may exercise it in the same manner as if it were a claim against a person of full age and capacity, subject only to the provisions of this chapter.

One may discern four characteristics shared by each of these liability regimes.[17] First, the underlying principle continues to be that of Crown immunity; whatever liability attaches to the Crown and its administrative agencies has a statutory origin, be it the *Crown Liability Act,* the *Code of Civil Procedure,* or some other statute.[18] Second, the liability of the Crown is essentially vicarious or subsidiary; notwithstanding the potential afforded by article 1053 *C.C.L.C.*, the concept of *faute de service* has not really penetrated into Québec law.[19] Third, the regime of Crown liability is fault-based; both paragraph 3(1)(a) and article 1053 *C.C.L.C.* confirm that liability rests on a principle of wrong, not on a general principle of insurance or compensation.[20] Finally, while in theory the Crown is now subject to ordinary substantive principles of civil responsibility, various procedural rules relating to limitation periods, set-offs, notice and executions exempt it in fact from several major incidents of private liability.[21]

Of course, these legislative provisions may be desirable from an injured party's point of view in that they facilitate the quest for a deep pocket defendant (the Crown). But they have one major drawback: they acquiesce in the transplantation of liability concepts well suited to relationships between private parties into the fields of modern state regulatory activity. No doubt delictual and tort principles (including vicarious liability) are appropriate vehicles for assessing the right to compensation when

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17. For a fuller elaboration see texts in this number of the *Revue générale de Droit* by Yves Ouellette, Grégoire Lehoux and Louis-Philippe Pigeon.

18. Most notably as consequence of the section of the *Interpretation Act* (R.S.C. 1970, chap. I-23, s. 16; R.S.Q. 1977, chap. I-16, s. 42) which exempts the Crown from all legislative provisions which do not explicitly bind it. See also the statutes cited *supra,* note 2.

19. In common law jurisdictions see the classic case *The King* v. *Anthony,* [1946] S.C.R. 569. While the legislative structure in Québec permits such recovery it is hard to find cases where an individual delict has also not been committed. For discussion see Garant, *Droit Administratif,* Montréal, Les Éditions Yvon Blais, 1981, at pages 915-926.

20. The potential for such a development is left open in Québec by article 1057 *C.C.L.C.* and in various common law jurisdictions by provisions such as paragraph 5(1)(d) of the *Proceedings Against the Crown Act, supra,* note 16. See also the suggestions offered in the Conclusion to this essay.

21. The most important limitations are those found in the *Crown Liability Act* itself (sections 3, 6 and subsection 4(2) for example) and in articles 94.1 and 100 *C.C.P.* Various federal and provincial statutes, as well as the *Civil Code* set out other special restrictions.

a public servant or the Crown engages in a wrongful act which does not presuppose an express or implied decision as to risk allocation. By contrast where these private law concepts are invoked in respect of allegedly wrongful conduct arising from patently distributive decisions they confront courts with a difficult task: that of developing a set of public law liability-excluding criteria to be marshalled alongside traditional private law principles such as fault (duty), causation and damage (directness and remoteness). One such fundamental criterion has been jurisdiction.

Long before the passage of the various *Crown Liability Acts* two relatively straightforward common law principles defined the frontiers of public authority liability. First, as already noted, status as a servant of the Crown as such would afford no immunity from ordinary delictual or tort liability. That is, absent an express immunity, a servant of the Crown or an administrative body would be liable for breach of obligations imposed in favour of, or undertaken towards individual private parties. Of course, in the common law it was necessary to make out a claim according to the normal rules of tort liability (typically through an action framed in nuisance, trespass or negligent breach of a common law or statutory duty).[22] Under the *Civil Code,* the operative principles were not those of the nominate torts, but rather the delictual concept of fault.[23] In both systems, however, exposure to liability fell to be determined as an ordinary private law matter.

The second principle was that a servant of the Crown or an administrative body would not be found liable under private law regimes of delict or tort for injury flowing from validly made decisions. That is, decisions taken within legislatively delegated jurisdiction could not be wrongful. Thus, in the common law, statutory authority normally would defeat a claim arising in nuisance, or on the principle of *Rylands* v. *Fletcher,*[24] unless a special liability regime were expressly provided by statute, or unless the loss need not inevitably have flowed from the exercise of the statutory power, or unless the powers were exercised in bad faith.[25] Under the *Civil Code,* a similar conclusion is indicated.[26]

It follows that when a servant of the Crown or an administrative agency is not acting in a manner which can be easily assimilated to that of a private party, and nevertheless exceeds its statutory authority, causing

22. For a first statement of this principle see *Entick* v. *Carrington,* (1765) 19 St. Tr. 1029.

23. See *Martineau* v. *The King,* [1944] S.C.R. 194; *Chartier* v. *A.G. Quebec,* [1979] 2 S.C.R. 474.

24. [1868] L.R. 3 H.L. 330.

25. See generally, CRAIG, "Compensation in Public Law", (1980) 96 *L.Q.R.* 413; CRAIG, *Administrative Law,* 1983, at pages 527-533.

26. See PÉPIN and OUELLETTE, *op. cit., supra,* note 3, at pages 487-489; GARANT, *op. cit., supra,* note 19, at pages 926-959.

damage to a third party, neither of these historical principles speaks directly to the status of its acts.[27] Nor does modern Crown liability legislation offer any assistance.[28] Yet precisely these situations generate the most difficult policy conflicts in the attribution of liability. Simply because statutory authority cannot be raised as a defence does not mean that the regime of ordinary civil liability should be made applicable to acts of public officials: there is still a problem with using a conception of corrective justice as between individuals to assess the propriety of conduct which by definition cannot be undertaken by an individual.

This problem is rendered all the more difficult because of the slipperiness of the concept of *ultra vires*. Today the idea of jurisdictional error encompasses errors relating to the person exercising a statutory power, the object of the power exercised, the procedures by which the power was exercised, and the motives or justification for which the power was exercised.[29] It is unnecessary here to examine the nuances of this theory, other than to note that review by prerogative remedy frequently is no more than the use of jurisdictional error either to ensure that court-like adjudicative procedures are followed or to substitute court decisions for those of administrative agencies. Ironically, the more courts insist upon the adjudicative "private law" model of dispute resolution in reviewing the decisions of administrative agencies, the more those agencies are caught in the teeth of "private law" tort or delictual liability for acting without statutory authority.[30]

Further difficulties flow from the fact that the law recognizes no difference among jurisdictional errors; on the classical view, every *ultra vires* act is an illegal act. Thus, illegality can flow from outrageous *ultra vires* acts, say, if a Municipal Council illegally grants a divorce; and illegality can flow from the innocent (and minor) misinterpretation of a statute, say, if the same body, relying in good faith upon the permit held by the Commissioner for Roads, illegally takes gravel. Does it follow that in all cases there should be a one-to-one correspondence between *ultra vires,* illegality and fault, such that all *ultra vires* acts causing injury should be compensable? In other words, because injury to a private party *(damnum)*

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27. See HARTOW and DISTEL, « Légalité, illégalité et responsabilité de la puissance publique en Angleterre », (1977-78) *Études et Documents, Conseil d'État* 335-354.

28. In *Nord-Deutsche Versicherungs Geselshaft* v. *The Queen,* [1971] S.C.R. 849, the Court made it clear that Crown liability legislation does no more than referentially incorporate existing principles of delicutal or tort liability.

29. See MACDONALD, "Absence of Jurisdiction: A Perspective", (1983) 43 *R. du B.* 337 for a taxonomy.

30. The classic example is *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg,* [1971] S.C.R. 957, 22 D.L.R. (3d) 470, in which the Supreme Court of Canada was faced with the aftermath of *Wiswell et. al.* v. *Metropolitan Corporation of Greater Winnipeg,* [1965] S.C.R. 512, 51 D.L.R. (2d) 754.

may well flow from any governmental action, should illegality be deployed to distinguish non-delictual from delictual conduct *(injuria)*, and to link jurisdictional *ultra vires* with fault?

In one recent case, *Beaudesert Shire Council* v. *Smith*,[31] the Australian High Court disregarded these policy conflicts and followed the logic of jurisdictional error rigorously. It concluded that since a public authority had performed a positive act forbidden by law it was liable in tort for the damage caused to a third party. *Ultra vires* was held to amount to fault *per se*. While the result reached in the *Beaudesert Shire* case has not been followed,[32] the problem raised by the case has at least provoked a re-thinking of the relation between jurisdictional error, illegality, and fault within Anglo-Canadian law.[33] In consequence, courts now seem more prepared to acknowledge the tension between classical adjudicative, interpersonal liability regimes and modern non-adjudicative, distributive regimes. However, to appreciate fully the dilemmas generated by our inherited doctrinal structure, it is necessary to review various judicial attempts to reconcile this trinity of competing concepts.

II. TWENTIETH-CENTURY ATTEMPTS TO RECONCILE JURISDICTION, ILLEGALITY AND FAULT

At the turn of the century, when the law concerning *ultra vires* acts of administrative bodies was grounded in a formalistic conception of errors of jurisdiction and a restrictive view of natural justice, a broad statement of the consequences of an *ultra vires* act — *viz.* that liability for tortious or delictual conduct would flow automatically — did not entangle courts in overextensive application of private law liability rules to

31. [1966] A.L.R. 1175 (H.C.).

32. See the doubts exposed in *Dunlop* c. *Woollahra Municipal Council*, [1981] 1 All E.R. 1202 (P.C.). Ironically, there has been authority for this position for at least three hundred years; see, for example, *Cooper* v. *Wandsworth Board of Works*, (1863) 14 C.B. (N.S.) 180. But since the rise of the *état bénévole* in the 20th century, courts have rarely taken such an uncompromising position. It was for this reason that *Beaudesert Shire* provoked such a reaction.

33. See the following doctrinal sources as evidence of this newfound interest: GOULD, "Damages as a Remedy in Administrative Law", (1972-73) 5 *New Zealand Universities Law Review* 105; GANZ, "Compensation for Negligent Administrative Action", [1975] *Public Law* 84; MOLOT, "Tort Remedies Against Administrative Tribunals for Economic Loss", [1973] *Special Lectures of the Law Society of Upper Canada* 413; HARLOW, "Fault Liability in French and English Public Law", (1976) 39 *Mod. L. Rev.* 516; PHEGAN, "Public Authority Liability in Negligence", (1976) 22 *McGill L. J.* 605; CRAIG, "Negligence in the Exercise of a Statutory Power", (1978) 94 *L.Q.R.* 428; MOLOT, "Administrative Discretion and Current Judicial Activism", (1979) 11 *Ottawa L. Rev.* 337; BROWN and LEMIEUX, « La responsabilité civile découlant de l'inaction gouvernementale », (1979) 20 *C. de D.* 783.

public authorities. Moreover, the tort of negligence had not yet emerged as a dynamic common law liability principle and in Quebec courts were still deploying relatively restrictive ideas of fault, causation and vicarious liability.[34] Not surprisingly, therefore, prior to judicial decisions widening the concept of jurisdiction and broadening the the scope of delictual and tort liability, one typically finds a judicial posture toward liability for damage caused by *ultra vires* acts parallel to that adopted in *Beaudesert Shire*.

At the same time courts were expanding the concept of jurisdiction and broadening the realm of civil liability in the private law, they were struggling to restrict the delictual consequences of finding an act *ultra vires*. In fact, this struggle long antedates the radical reformulation of jurisdiction which has occurred over the past two decades. Sometimes courts attempted to introduce the doctrine of good faith immunity in order to pare down the number of *ultra vires* cases in which liability will be found;[35] on occasion they endeavoured to announce formal criteria for hiving off large areas of administrative activity where private law liability cannot trespass;[36] and, of course, they also simply applied tort notions of duty and the delictual concept of fault as a control over the attribution of liability where the alleged jurisdictional error was the misfeasance or non-feasance of a statutory duty.[37]

Unfortunately, these strategies have not always left Canadian courts with particularly workable standards. Because traditional administrative law doctrine does not address the issue of competing risk-allocation regimes directly, courts continually are pressured by litigants to collapse distinctions drawn to immunize certain public activity from private law liability. The end result, of course, has been the failure of all attempts to create truly public law principles for excluding private law liability.

A. ILLEGALITY EQUATED WITH *ULTRA VIRES*: THE PROBLEMS OF A "GOOD FAITH" STANDARD

The modern saga begins with *McGillivray* v. *Kimber*,[38] where the Supreme Court of Canada equated want of jurisdiction with illegality, and illegality with fault, in finding a pilotage authority liable for dismissing

34. But see *Mersey Docks and Harbours Board Trustees* v. *Gibbs*, (1864-1866) 11 H.L.C. 686, for evidence that the tort of negligence could, in principle be alleged against public bodies. For the position in Québec see the discussion in *R.* v. *Cliche*, [1935] S.C.R. 561.

35. *Hlookoff* v. *City of Vancouver*, (1968) 67 D.L.R. (2d) 119 (B.C.S.C.); *Fortin* v. *La Reine*, [1975] C.S. 168.

36. *Marcoux* v. *Plessisville*, [1973] R.P. 385; *Roman Corporation Ltd.* v. *Hudson's Bay Oil and Gas Co. Ltd.*, [1973] S.C.R. 870.

37. *Fafard* v. *Cité de Québec*, (1923) 50 C.S. 226.

38. (1915) 52 S.C.R. 146, 26 D.L.R. 164.

a pilot without any colour of jurisdiction. Having concluded that the authority had no warrant for acting as it did, the court ruled that the plaintiff was not required to plead *mala fides* in order to recover. Want of jurisdiction itself was sufficient to give rise to liability. The idea that there could be negligent *ultra vires* was, at that time, unthinkable. In addition to announcing a rule of strict liability for illegality, the Court declined to adopt a principle of immunity for administrative agencies analogous to that applicable to inferior courts. Even though pressed by counsel for the defendants to restrict liability for *ultra vires* decisions to cases of *mala fides* the Supreme Court felt unable to differentiate between categories of jurisdictional error.

Despite the rather absolute character of the Court's judgment, the ruling in *McGillivray* was far from an uncontested statement of the law.[39] Indeed, the Supreme Court had occasion, two decades later, to adopt the *bona fides* exception to liability without so much as a dismissive bow to *McGillivray*. In *Harris* v. *Law Society of Alberta*[40] the Court considered whether to grant damages to a lawyer wrongfully disbarred by the Law Society. The *Legal Profession Act* established a two-tiered decisionmaking process, but Harris had been disbarred by a panel of Benchers acting without a report from the Discipline Committee. While the Court was prepared to order that Harris be reinstated (on the basis that the decision of the Benchers was taken in absence of jurisdiction), it would not grant damages. Since the Benchers had acted *bona fides* in exercising functions which were not merely ministerial, but discretionary and judicial, they were immune from civil liability for their *ultra vires* acts.

The third major case in the pre-modern period was *Roncarelli* v. *Duplessis*.[41] Here the Supreme Court was faced squarely with the problem of an abuse of public authority. Nevertheless the majority was divided as to whether ascribing liability to Duplessis required them to favour the test set forth in *McGillivray* or whether liability could be grounded in some other principle. Mr. Justice Abbott stated a very broad *ratio*, holding a public officer to be responsible for all acts done by him without legal justification. By contrast, Mr. Justice Rand took a narrower view and held that malice was a necessary element of the cause of action. Yet, Mr. Justice Rand proposed quite a liberal definition of malice which equated it to acting for a reason and purpose knowingly foreign to the intention of the statute.

Between these two positions was that of Mr. Justice Martland, who was prepared to abandon the *bona fides* exception where an official

39. See, for example, *Partridge* v. *The General Council of Medical Education*, (1890) 25 Q.B.D. 90.

40. [1936] S.C.R. 88, 1 D.L.R. 401; see also *Lapointe* v. *The King*, (1924) 37 B.R. 170.

41. [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

acted in total absence of any authority. This perspective suggests that, as a matter of statutory interpretation, there are some *ultra vires* acts which are more *ultra vires* than others — a proposition which may be attractive to common sense but which is difficult to apply. For Duplessis' views on governmental authority, the role of the Attorney-General and the status of liquor licence "privileges" (which views grounded his belief that his actions were lawful), were in fact shared by the Québec Court of Appeal and two justices of the Supreme Court.

It follows that the judgments of Rand J. and Martland J. reveal an identical category problem: how does the category *"ultra vires"* map on to the category "liability"? Both the "good faith as preserving the object of the Act" criterion (and for that matter any other good faith standard), and the "total illegality" criterion depend upon the niceties of statutory interpretation. For both require courts to engage in the rather difficult exercise of determining gradations in how bad the defendant's interpretation of a statute has been. In practice this makes it difficult for courts to resist finding, as Abbott J. suggested, a one-to-one correspondence between *ultra vires* and liability on the basis of a good faith standard alone.[42]

B. DETERMINING LIABILITY REGIMES ON FUNCTIONAL GROUNDS: THE OPERATIONAL/PLANNING DISTINCTION

As early as the *Harris* case the Supreme Court intimated that the nature of the function being exercised by the administrative body was the key to determining civil liability. The Court entered this territory once again, albeit from a slightly direction, in *Welbridge Holdings Ltd* v. *Metropolitan Corporation of Greater Winnipeg*.[43] Some seven years earlier, in *Wiswell et al.* v. *Metropolitan Corporation of Greater Winnipeg,*[44] the Court struck down a municipal by-law because the city had not given adequate notice of a rezoning hearing to interested parties. Welbridge Holdings undertook a development project and relied upon the zoning change contemplated in the quashed by-law. The developer incurred significant expenses up until proceedings in the *Wiswell* case were launched, and sued the city for negligently passing the by-law. In rendering judgment, Laskin J. (as he then was) sought to confine the *dicta* in *McGillivray* to situations in which there is either a complete want of jurisdiction, or

42. Some commentators argue that this should be the position. Thus GARANT, *op. cit., supra,* note 19, at pages 948-950 claims that, at least in Québec, good faith is not a criterion for excusing conduct which would otherwise be caught by a simple fault criterion. For a critique of this view see *infra,* section III.

43. *Supra,* note 30. See also *Marcoux* v. *Ville de Plessisville,* [1973] R.P. 385.

44. *Supra,* note 30.

an intentional wrongdoing which might, in any event, be reflected in the want of jurisdiction. Thus, the principle in *McGillivray* was held not to apply to cases of negligent *ultra vires*. To resolve problems sounding in negligence, the Court proposed to differentiate between public bodies acting like private parties (*i.e.* entering into a private nexus) and public bodies acting in the public interest (*i.e.* exerting governmental authority pursuant to a statute, which no private person could do).[45] In this way, the Court sought, over a wide range of cases, to avoid the one-to-one correspondence between error of jurisdiction, illegality, and fault without having to rely upon a test of *mala fides*.

Underlying the conclusion that an agency negligently may act *ultra vires* without giving rise to liability in damages is a rudimentary theory of public risk allocation. For Mr. Justice Laskin, the exercise of legislative or adjudicative authority would amount to a general public risk for which compensation ought not to be supported on the basis of a private duty of care. This characterization of the question is helpful because it focuses attention upon a basic objective of schemes of private responsibility — *viz.* the allocation of risk between individuals — and because it suggests that private law principles of risk allocation need not necessarily apply to state allocative activity as such. The purpose of drawing a distinction between « operational » and « planning » functions is, therefore, to produce a boundary between administrative law and private law.[46]

Yet the example given to illustrate these two functions, *Windsor Motors Ltd.* v. *District of Powell River*[47] shows how tricky the distinction can become. In *Windsor Motors* the district was found vicariously liable for the negligence of an inspector in issuing a licence to a used car dealership contrary to zoning regulations. Comparing *Welbridge* with *Windsor Motors*, one might ask, for example, how different is failure to notice a rule from misinterpretation of a rule? For that matter, from a planning perspective, how is a grant of a power — a licence — different from legislation? Why could not the inspector's mistake be characterized as an *ultra vires* act of a quasi-judicial or quasi-legislative actor?

In other words, even if one constructs second-order distinctions to elaborate upon the difference between planning and operational functions, the conclusions that government agencies are fully part of the network

45. This distinction is drawn from *Dalehite* v. *U.S.*, 346 U.S. 15 at 59 (1953). A similar trend developed in English law through *Home Office* v. *Dorset Yacht*, [1970] 2 W.L.R. 140 (H.L.), as now complemented by *Anns* v. *Merton London Borough Council*, [1977] 2 W.L.R. 1024 (H.L.). See also *Fortin* c. *La Reine*, [1965] C.S. 168 and *Fasano* c. *Ville de Pierrefonds*, [1974] C.S. 460.

46. See BRIDGE, "Government Liability, the Tort of Negligence and the House of Lords decision in *Anns* v. *Merton London Borough Council*", (1978) 24 *McGill L.J.* 277; and CRAIG, *op. cit., supra*, note 25, 539 ff.

47. (1969) 4 D.L.R. (3d) 155, 68 W.W.R. 173 (B.C.C.A.).

of private parties, and that the "public" function is precisely the structuring of that network cannot be avoided. Participation in the network (operational function) and structuring the network (planning function) are inseparable in administrative action. Planning is not simply quiet contemplation. It is action as well.

Like the *bona fides/mala fides* criterion, the planning/operational distinction attempts to delimit tort liability by severing jurisdictional error from fault. It is an improvement in that it directs attention to questions of risk allocation, but it nevertheless remains a formal on/off criterion. As a consequence, in order to deal with situations such as the U.F.F.I. debacle, courts must either attribute *mala fides* liberally, or attempt to operationalize planning functions.[48] History has shown that both manoeuvres tend to reestablish the absolute equation of jurisdiction and fault.[49]

C. PRIVATIZING PLANNING FUNCTIONS: THE SEARCH FOR STATUTORY DUTIES

It may be that *Welbridge* succeeds in describing two kinds of administrative activity, each of which falls under its own liability regime. Using the vocabulary of traditional delictual or tort liability, one might say that planning functions involve the recognition of general public risk which cannot imply fault as between individuals; operational functions are those where there is no general public risk, but rather where private duties of care may arise. Yet recasting liability in these terms undermines the very boundary the case sought to establish; for it encourages litigants to ransack legislation for statutory duties upon which liability may be erected.

It is therefore not surprising that since *Welbridge*, liability arguments relating to jurisdictional error have often been reformulated as statutory duty arguments. A typical example is *Canada* v. *Greenway*,[50] which involved a question of procedure under the *Public Service Superannuation Act*. The trial judge found that on a proper reading of the Act, a pension

48. For a discussion of such strategies, see COHEN, "Legal Dimensions of the UFFI Problem", (1984) 8 *C.B.L.J.* 308-373; 410-448. See also *Lapierre* c. *P.G. de la province de Québec*, [1979] C.S. 907.

49. While questions of social distribution remain within the legislative domain, the position of the individual who sustains injury through judicial, legislative, and administrative actions has been altered by the presence of a *Charter of Rights*. An argument can be made that the Charter can provide part of the conceptual framework for harmonizing private rights with administrative law so long as it is not viewed as a mechanism for subordinating administrative law to private rights, *cf.* MACDONALD, "Postscript and Prelude — The Jurisprudence of the Charter: Eight Theses", (1982) 4 *S.C.L.R.* 304.

50. [1982] 1 F.C. 259, 122 D.L.R. (3d) 554 (C.A.). In Québec this is exactly the position which results from *Potvin* v. *Ville de St.-Bruno*, [1975] C.S. 952 and which rests on a refusal to distinguish *ultra vires* and fault.

matter should have been referred to the Secretary of the Treasury Board rather than being decided by an official of the Department of Supply and Services. While this conclusion amounted to finding that the a holder of a statutory power acted *ultra vires,* the Court did not advert to the operational/planning distinction and was only concerned to find statutory duties. Once it concluded that *ultra vires* acts were also breaches of a statutory duty, it imposed liability. Jurisdictional error was assimilated into statutory duty.[51]

In *Saskatchewan Wheat Pool* v. *Government of Canada*[52] the Supreme Court was, for the first time, confronted in a quasi-public setting with an attempt to engage the private law of fault liability through the assertion of a breach of statutory duty. The case concerned an infested shipment of grain and a provision in the *Canada Grain Act* which specifically forbade grain elevator operators from shipping infested grain. No claim of negligence was made, but the appellant attempted to recover damages for the cost of fumigating the infested wheat simply on the basis of a breach of statutory duty. After reviewing the different approaches to breach of statutory duty taken in the United States and England, Dickson J. (as he then was) rejected the English approach — to create a nominate tort of statutory breach — on the grounds that it would produce an artificial search through the statute to find some legislative intention to create delictual or tort liability. Since more often than not, statutes are silent as to which class of persons is to benefit from a particular duty, Dickson J. felt that courts should not attempt to find implied classes.[53] The extreme version of the American view, that statutory breach constitutes negligence *per se,* was also viewed unfavourably by Mr. Justice Dickson. Rather than impose absolute liability for breach of a statutory obligation, he preferred to take the view that such a breach was only evidence of negligence — the socalled "minority" American position. In other words, Dickson J. came to the conclusion that breach of a statutory obligation should lead to civil liability only where there was fault. Statutory duties could not give rise to no-fault indemnification for their breach.

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51. The Federal Court of Appeal upheld this decision. Although counsel argued that mandamus, the standard judicial review remedy, was more appropriate than awarding damages, the Federal Court of Appeal was not prepared to disturb the findings of the Trial Division. For a similar result see *Gladstone Petroleum Ltd.* v. *Husky Oil (Alberta) Ltd.*, [1982] 6 W.W.R. 577 (Sask. C.A.) (motion to appeal to the Supreme Court of Canada dismissed Nov. 23, 1982, 46 N.R. 89) in which the plaintiff attempted to ground the liability of Husky Oil on the invalidity of certain orders-in-council. In dismissing the plaintiff's claim against Husky, the Court also considered the possibility of an action against the government and subsumed the breach of statutory duty argument under the *Welbridge* principle. Again, the plaintiff converted a jurisdictional error argument into a statutory duty argument.

52. (1983) 45 N.R. 425 (S.C.C.).

53. *Id.*, at 435.

The Court reasoned as follows. To create a nominate tort of breach of statutory duty is superfluous since the fault principle has become sufficiently pervasive to serve the purpose invoked for statutory breach. Moreover, in light of the proliferation of modern legislative compensation schemes (*e.g.* consumer protection acts, rental acts, business corporation acts, and securities acts), the role of delictual and tort liability in compensation and allocation of loss is becoming less and less important. The range of relationships which can be considered sufficiently proximate to ground a duty of care and fault-based liability have undergone considerable expansion. But this expansion of possible private relationships simply reinforces the trend toward risk-spreading through insurance and government compensation schemes. As more and more events are seen as both *damnum* and *injuria*, risk allocation schemes which are not fault-based proliferate. Hence, there is a diminishing the need to insist upon the application of private law principles to all governmental activity.[54]

In other words, *Saskatchewan Wheat* did not attempt to carve out a place for fault-based liability among competing risk allocation schemes. At the same time that Dickson J. resisted the further move away from fault-based liability represented by the strict liability regime for breach of statutory duty, he also resisted the attempt to allow judicial legislation to decide when a statute calls for compensation. In short, the Court took notice of the changing position of fault liability and left it for the legislature to make a coherent system out of competing and, as yet unsystematized, regimes of risk allocation. Nevertheless, while Mr. Justice Dickson may have thought that he was implying caution in the attribution of civil responsibility, the judgment leaves delict and tort law free to operate throughout the entire range of *ultra vires* administrative activity and thus also to become the presumptive regime of risk allocation.[55]

D. THE TRIUMPH OF FAULT LIABILITY: THE DECLINE OF *ULTRA VIRES*

While *Saskatchewan Wheat* did not itself concern the activity of a public official, the case has already been applied so as to expand governmental liability on a private law model. For example, in two recent

54. See FLEMING, "More Thoughts on Loss Distribution", (1966) 4 *O.H.L.J.* 161. One can argue that the range of relationships which come under the ambit of corrective justice expands precisely to avoid the hegemony of distributive justice, or that the growth of distributive justice transforms corrective justice so that the latter becomes more and more an adjunct to the former, or that, proceeding on many fronts, fault-based interpersonal liability is gradually surpassed in favour of generalized compensation — *i.e.* through the activity of courts, legislatures, and the marketplace (insurance).

55. This position had already been achieved in Québec in *Leroux* v. *Corporation municipale de Aston*, [1975] C.A. 715. Nevertheless, plaintiffs in Québec have been less concerned to formulate statutory duties because of the courts' tendency not to apply *Wellbridge* to administrative functions.

cases, motions to strike out statements of claim were dismissed despite the fact that the allegations of negligence related to what, on the *Welbridge* standard, could well be seen as planning-type functions.[56] In a third case, the operational/planning distinction was dismissed as being "of not much assistance".[57] What is common to these cases is the courts' reluctance to use the operational/planning distinction as a *prima facie* test to immunize a range of administrative activity from private law liability.

The decision in *Baird* v. *Canada*[58] illustrates this new tendency. A trust company had been operated in an allegedly illegal and improper manner with the result that investors, including the plaintiffs, lost heavily. The plaintiffs brought an action against the Government of Canada for the failure of the Superintendent of Insurance to fulfill a series of general statutory duties. The Trial Division of the Federal Court struck out the statement of claim on the basis that the statute disclosed no intention to create Crown liability.[59] In the Federal Court of Appeal, however, LeDain J. applied *Saskatchewan Wheat,* holding that civil liability for alleged breaches of a statutory duty was determined by the application, in the public law context, of common law principles governing liability for negligence. Put this way, LeDain J. made explicit the possibility that Dickson J. left open in *Saskatchewan Wheat:* common law fault principles could serve to expand rather than contract the range of public authority liability.

In other words, the *Saskatchewan Wheat* test can be invoked not only to ground delictual and tort liability in the realm of planning functions, it can serve to obliterate the distinction between *intra vires* and *ultra vires* acts. The common law of fault liability has now swallowed up whole even the slightest deference to inferred legislative intention. It follows that there no longer seems to be any principle of exclusion — be it statutory authority, *bona fides,* planning function or no intention to establish private duties — which would protect administrative decision-makers from being scrutinized according to the private law standard of reasonable decision-making. Not only would this scrutiny be directed to formal errors of jurisdiction (absence and excess of jurisdiction), but it could be employed to second-guess (with the benefit of hindsight) the motives for, and the evidence supporting, the exercise or non-exercise of statutory discretions.[60]

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56. *Baird* v. *Canada,* (1983) 43 N.R. 276 (F.C.A.); *Thorne Riddell Inc.* v. *The Queen in Right of Alberta,* (1983) 28 Alta. L.R. (2d) 326.

57. *Taylor* v. *The Queen in Right of Ontario et. al.,* (1983) 42 O.L.R. (3d) 741 (Ont. H.C.).

58. *Supra,* note 56.

59. In coming to this conclusion, the Court followed the "ransack the statute" approach test set forth in *C.P. Air* v. *The Queen,* [1979] 1 F.C. 39, 21 N.R. 340, (C.A.), and rejected in *Saskatchewan Wheat.*

60. Of course, until recently courts displayed a reticence to second-guess discretionary decisions on the grounds that the breach of a duty required misfeasance. See, for example *Barratt* v. *City of North Vancouver,* [1980] 2 S.C.R. 418.

The potential of breach of statutory duty as a device for exposing public decisionmakers to liability has recently been confirmed by the Supreme Court decision in *Kamloops* v. *Nielsen et al.*[61] In this case the Court concluded that a failure by a Municipal Council to ensure the enforcement of its building by-laws by taking court action amounted to a simple non-feasance of a statutory duty. But, the Court denied the distinction between misfeasance and non-feasance as applied to public authorities. In effect, Wilson J. held that absent an express policy decision not to enforce by-laws, damage resulting from non-enforcement would be compensable. Thus, the judgment appears to effect a reversal of the process traditionally adopted by courts for resolving governmental liability questions. One no longer begins by asking public law questions: is an act *intra vires* or *ultra vires?* is a function planning or operational? The trick for the litigant becomes to find a fault on which to base a cause of action.[62]

The assumption that tortious breach of a statutory duty is an *ultra vires* act runs through Wilson J.'s reasoning in *Kamloops*. While analytically this position is no different than that first announced in *McGillivray*, in practical terms a significant shift has occurred. The restraint implied by the necessity of careful statutory analysis prior to characterizing agency activity as *ultra vires* no longer operates; and the attribution of fault tends to be consequentialist since the injurious consequences are known before the action is brought. Once again jurisdictional error and liability have been linked, although modern law would reverse the interface. The one-to-one correspondence appears no longer to be jurisdiction, illegality, fault; it is now tortious breach of statutory duty (fault), illegality, jurisdiction. One might call this private law's revenge.[63]

E. FROM FAULT TO RISK: THE STATE AS INSURER

The line of cases from *McGillivray* to *Kamloops* can be seen as a series of boundary shifting exercises (operating on differing axes) through which courts struggle to segregate the liability regimes of private and public law.[64] While earlier decisions accepted, as determining test,

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61. Unreported S.C.C. file number 16896 released on July 26, 1984.

62. In Québec see *Oxyvor Québec Ltd.* v. *Cantons unis de Stoneham et Terkesbury*, (C.S. Québec, September 10, 1979, J.E. 79-908); *Patria Construction* v. *Communauté régionale de l'Outaouais*, (C.S. Hull, November 22, 1979, J.E. 79-363).

63. See PERELL, "Common Law Negligence and the Liability of Governments and Public Authorities", (1983) 4 *Adv. Q.* 191.

64. See the discussion in SUGARMAN, "Review of Cosgrove, *Rule of Law: Albert Venn Dicey, Victorian Jurist*", (1983) 46 *Mod. L. Rev.* 102.

the distinction between *intra vires* and *ultra vires* acts, many later cases imposed second level criteria so as to avoid equating *ultra vires* and fault. But the failure of legislatures to develop generalized no-fault liability regimes has induced courts to collapse the distinctions they have drawn in order to avoid denying compensation. In other words, legislative inactivity has undermined judicial attempts to reconcile jurisdiction, illegality and fault in a broad, theoretical structure.[65]

The paradox of recent developments is that while they seem to recur to ordinary private law regimes of fault liability, in effect they produce a no-fault regime of Crown liability which approaches insurance. One cannot put the state into the position of a private party without recognizing that to find the state liable is to distribute risk across the whole community. Rather than being a function of corrective justice (which private law rules would suggest), compensation is then a matter of determining when everyone should bear a part of the burden for particular social costs. That is, public fault liability is no more than a judicial second guessing of legislatively chosen risk allocation principles.

A case such as *Kamloops* illustrates perfectly how the imposition of private law liability for *ultra vires* acts commits agencies to insure against risks in a way which need not correspond with their statutorily imposed social spending agenda. If, for example, public resources have been diverted to regulate housing standards, what is the social calculus that dictates further spending (by way of compensation) to guarantee perfect adherence to those standards? Given that these public resources are finite, and that governments already are over-committed to social risk insurance through, for example, unemployment insurance, workers compensation, and disability allowances, what is the case for also establishing a form of "government bungling insurance" in the shape of private law liability for all *ultra vires* acts? And if there is such a case, is the adversarial adjudicative process of courts the best way to administer it?

It now seems that whenever the government enters into the marketplace to establish and to supervise standards of behavior, delict and tort law can rear its head so as to place the government virtually in the position of guaranteeing those standards. If, for example, an inspection scheme is established, fault arguments would take the form: "government inspectors did not proceed quickly enough" or "government inspectors proceeded too quickly" or "government inspectors should have noticed X" or "government inspectors failed to enforce their findings stringently enough". Ironically non-market administrative schemes established to redress kinks in traditional private law relationships (market failures)

65. Of course courts still can rely on other principles such as the "no expropriation without compensation" rule to ground no-fault liability. See *Manitoba Fisheries Ltd.* v. *The Queen*, [1979] 1 S.C.R. 101.

become, through the operation of the private law, a kind of insurance policy against those kinks ever developing. Market risk is doubly assumed by public authorities: first, in the cost of administrative schemes, and second in the reinsurance of those risks through their distribution against all taxpayers.

Of course, defenders of strict liability for jurisdictional error claim that the normal side constraints on delictual or tort liability (the prudent administrator or reasonable man standard, causation, directness and remoteness of damages) are sufficient to prevent abuses of the private law risk allocation regime. Yet this misses the fundamental point that all liability regimes are distributional. The issue is not whether private law risk allocation principles may be sufficiently constrained; it is, rather, that any decision to apply these private law liability regimes to administrative bodies should first take account of the goals of individual public risk allocation schemes. It remains to review briefly different theoretical frameworks for carrying out this accounting.

III. Harmonizing Private Law and Public Law: From Hierarchy to Coherence

Despite the seemingly fundamental doctrinal shifts just reviewed, over the past 75 years the cases on the liability of public authorities for their *ultra vires* acts have not really produced any innovative understandings of how to harmonize private law and public law risk allocation regimes. In effect courts have been announcing and retreating from a variety of tests which alternate between two conceptions of the appropriate hierarchy for public and private law. These conceptions, which imply competing goals for public risk distribution, can be summarized as "private law prevails over public law" and "public law prevails over private law". Scholars, on the other hand, typically have not been content with the caution displayed by judges called upon to actually apply these conceptions. Rather they have taken each to an extreme. These more radical conceptions may be stated as "private law should swallow up public law", and "public law should swallow up private law". Each of these merits consideration as a principle of harmonization, even if each, in the end, is shown to be more in the nature of a principle of domination.

A. Private Law Prevails Over Public Law: Eliminating Administrative Law

The decision in *Kamloops* reflects this conception. Fault has become the pervasive regime in all but the most marginal cases. When public decisionmaking is subjected to a fault standard, it means that the

law of civil liability has come a long way from the general principle that loss from accident must lie where is falls. When courts first expanded the range of private duties, they took a step to replacing moral blame with compensation as the object of private law liability rules. Once compensation becomes the avowed objective of delictual or tort liability, extending this ethos to state activity is the easiest way to guarantee compensation to injured parties and to spread the consequences of loss among all of those able to bear part of it.

A century ago, Oliver Wendell Holmes Jr. anticipated the possibility of governments overtly adopting a general principle to compensate for loss. He observed:

> The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. . . . The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*. State interference is an evil where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise.[66]

But the fear of the state and the desire for minimal government have now abated and precisely the kind of state machinery Holmes thought was unrealistic has emerged.[67] Indeed, with the advent of the modern state, the alternative vision has become closer to reality than the conception of exclusive market allocation of losses ever was.[68] It follows that the theoretical underpinnings of fault-based liability — at least insofar as they include the presumption that loss should lie where it falls — are inadequate to cope with the insurance assumptions grounding public loss distribution and loss avoidance schemes. They are also inadequate as a basis for imposing liability for losses incurred through the administration of such schemes. In short, an expanded governmental presence in the economy calls forth a whole new series of assumptions about why and when risk should lie where it falls. A calculus of corrective justice cannot be applied as if corrective justice were not also a strategy of distributive justice.

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66. HOLMES, *The Common Law*, Boston, Little Brown, 1881, at 96, also quoted by Dickson J. in *Saskatchewan Wheat*.

67. See GORDON, "Review of White's *Tort Law in America*", (1981) 94 *Harv. L.J.* 903.

68. In Canada, the reality of economic life has always been far from simple laisser-faire. Indeed, early Canadian developments away from Crown immunity seem to have been based upon the view that colonial governments played a more active role in the development of their economies than the British government played in the British economy: see *Farnell* v. *Bowman*, (1887) 12 A.C. 643, at 649 and PÉPIN et OUELLETTE, *op. cit.*, *supra*, note 3, at 471.

The theoretical conundrums posed by the welfare state have caused many legal commentators who are nostalgic for the relative simplicity of *laisser-faire* market economics to proclaim that the incompatibility of administrative agencies and the regulatory state with market efficiency implies that they should be done away with.[69] That is, these critics have simply attacked the theoretical basis of distributional goals in order to sweep away the problem of applying fault-based liability to non-private party transactions.

Such a solution poses two problems. First, even as they render explicit the market objectives of private law risk allocation, law and economics theorists fail to account adequately for the presence of state machinery in the private law system itself. Why should the administrative agencies known as courts be second-guessing the market and providing cost-benefit analyses of private transactions? The existence of private law as an ordering mechanism in the market already implies an interpenetration of distributive and corrective justice. In response to the argument that public intervention secures the autonomy of the so-called private sphere, it is not enough to argue that the *raison d'être* of all legal ordering is to facilitate private transactions. Such an answer assumes that, but does not demonstrate, why the promotion of private transactions should be the overriding public distributional goal.[70] In other words, the application of private fault-based liability should depend upon an explicit theory as to when private risk allocation (*i.e.* corrective justice) is the appropriate distributional mechanism.

Second, as a number of commentators have pointed out, market economic theory has nothing to say about whether the original distribution of social benefit and burden is justified.[71] To insist on the ability of the market to allocate risks efficiently presupposes that efficiency has become an adequate distributional standard given the starting position of each party. To the extent that such a presupposition is unjustified, competing distributional standards gain purchase. Given modern understandings of the state and its functions, non-adjudicative processes and non-corrective liability regimes are required to complement classical private law regimes, and cannot simply be eliminated.

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69. See, for example, POSNER, *The Economics of Justice*, Boston, Little Brown, 1981, particularly 119 ff.; WHITE, *Tort Law in America*, New York, Oxford University Press (1980), at 219; EPSTEIN, "Taxation, Regulation, and Confiscation", (1982) 20 *O.H.L.J.* 483.

70. POSNER, "A comment on no-fault insurance for all accidents", (1975) 13 *O.H.L.J.* 471.

71. WEINRIB, "Utilitarianism, economics, and legal theory", (1980) 30 *U.T.L.J.* 307.

B. PUBLIC LAW PREVAILS OVER PRIVATE LAW: ELIMINATING THE COMMON LAW

On the other hand, for the state to wrap itself in the mantle of "distributive justice" and to claim immunity for the consequences of all its acts leads to equally unacceptable results.[72] Quite apart from any calculus of compensation, one finds in the cases a legitimate concern about the control of *mala fides* and the need to have those in positions of authority accountable for their actions. Frequently, the King can and does do wrong. The theory of judicial review under which *ultra vires* acts may be set aside is not always of sufficient clout to prevent statutory powers from becoming self-legitimating; for no opprobrium is directed personally to decision-makers who abuse their authority. To permit arguments of "administrative policy" to frustrate liability claims grounded in moral wrong-doing, is to permit public authorities to disregard the policy goals which they have been charged with achieving.

What is more, a rule of absolute immunity can often shift costs on to private parties in a way which runs counter to the distributional goals of the administrative scheme in issue. For example, when governments consciously seek the distributional benefits of contractual and proprietary ordering, they must be subject to the liability regime of private law. Similarly, they should assume the burden of delictual responsibility at least in those cases where their insurer function resembles that which arises in ordinary interpersonal relation-ships. An adequate conception of distributive justice cannot presuppose that corrective justice is no more important than any other distributive principle.

Over the past decade, a group of legal scholars has emerged which, like the law and economics group, finds the complexity of legal relationships in the modern state uncomfortable and seeks to purify law of all discordant elements.[73] For the Critical Legal Studies movement, the existence of private law can be attributed to flawed 18th and 19th century liberal principles of legal ordering. In particular, because legal liberalism is grounded in corrective justice and is unconcerned with original distribution and redistribution, it is seen as legitimating poverty and exploitation (*i.e.* unequal distributions). Unlike classical Marxists, this group seems unable to find solace in an historical imperative towards justice in a communist society. Instead, it serves up the standard critique of private law as corrective justice and advocates abolishing the common law.

This theoretical approach also has its weaknesses. To begin with, while public distributive principles and institutions are advocated,

72. See CALABRESI, *The Costs of Accidents*, New Haven, London, Yale University Press, 1970, Introduction.

73. See KAIRYS (ed.), *The Politics of Law: A Progressive Critique*, New York, Pantheon Books, 1982.

no suggestions for achieving them are mooted. It is one thing to deconstruct both private law and bureaucratic attempts to legitimize state authority; but such deconstruction must pave the way for positive institutions on processes of distributive justice.[74] Unfortunately, the movement develops not so much a theory of public law justice, as a theory of private law injustice.[75]

Aside from the above deficiency there are other problems with the Critical Legal Studies project. Briefly, the "suppression of private law" thesis does not account for the problem of scarcity, the role of private generation of wealth in the improvement of the general social condition, and the perils of administrative sovereignty justified only by an appeal to some abstract notion of the public good. In short, the movement has not taken up the challenge of articulating a place for a regime of reciprocity, private risk allocation and reliance within a general scheme of social distribution. In its endeavour to expose illegitimate incursions of private law regimes, it ignores that corrective justice is indeed an intelligible distributive mechanism.

C. A PRINCIPLE OF HARMONIZATION: COHERENCE

Against the background of these broad theoretical conflicts, the struggle of the courts to define the place of private law liability regimes in administrative decisionmaking can be viewed sympathetically. However, since both the harmonization strategies currently in vogue with courts involve carving out separate fields for the application of public and private risk allocation principles, the problems inherent in trying to draw a boundary between these two legal regimes remains. In a very real sense, the fundamental challenge is to overcome the boundary drawing approach to private and public law.

Recently, some commentators have suggested that courts ought consciously to deploy a functional, risk allocation analysis to determine when private law rules should ground governmental liability.[76] In a study of liability issues arising in the aftermath of the U.F.F.I. debacle, David Cohen sets out a range of factors which courts have (perhaps subconsciously) taken into account in attributing liability to the government. He concludes that liability usually attaches where: 1) the government has breached its own established standard of conduct; 2) the decision in question was "programmed" or routine; 3) the decision was made by a bureau-

74. For an example of the pure deconstructionism of this approach, see FRUG, "The Ideology of Bureaucracy in American Law", (1984) 97 *Harv. Law Rev.* 1276.

75. See Levinson review of Kairys, (1983) 96 *Harv. Law Rev.* 1466.

76. See, for example, COHEN, *loc. cit., supra,* note 48.

crat operating within a sphere of limited discretion; 4) the private interest affected is one traditionally protected by law; 5) the risk in question was not created by deliberate policy choice but was inadvertent; 6) the allegedly negligent government activity was "commercial" in nature; 7) the decisionmaker in question was at a low level in the bureaucracy; 8) no alternative sources of accountability (*e.g.* ministerial responsibility) exist; 9) an "individualized wrong" was committed; 10) the allegedly negligent decision did not involve an allocation of resources among competing social claims; 11) the decision in question amounted to a misfeasance rather than a nonfeasance; and 12) through the allegedly negligent decision the government caused members of the public to believe that it would take adequate precautions and the plaintiff relied on that belief to his or her detriment.

While these factors look like an elaboration of both the *Welbridge* operational/planning distinction and the generalized fault principle in *Saskatchewan Wheat,* in fact they operate at a different level. They are designed to isolate those types of governmental activity where the moral assumptions of corrective justice are intelligible in themselves.[77] In other words, to apply this type of analysis, it is unnecessary either to impose formal and functional boundaries or to subordinate one liability regime to another. Rather, a coherence principle, where liability for *injuria* is fashioned in individual cases according to principles which are consistent with those establishing the distributive scheme producing the *damnum,* becomes the key for harmonizing public and private law.

But the burden of coherence cannot be assumed entirely by courts. The legislature too must develop and articulate a spectrum of liability schemes ranging from immunity through to absolute liability. In other words, as long as Crown liability legislation leaves courts — except in the case of particular administrative regimes such as expropriation, pesticides, nuclear accidents, railways, public works and national defence — with only private law fault as a compensation technique, they will have no choice other than to manipulate the interrelation of fault and jurisdiction.

In the context of claims for damages consequent upon administrative activity, coherence requires as a minimum, that courts avoid setting up boundaries to effect an *a priori* partition of the universe of governmental *damna*. Coherence also requires that principles of private law risk allocation not become self-legitimating; that is, these principles cannot become the standard for judging their own application to public authorities. The judicial harmonization of public law and private law requires that courts not give a procedural paramountcy to their preferred mode of ordering

77. For a theoretical elaboration of this point see WEINRIB, "Toward A Moral Theory of Negligence Law", (1983) 2 *J. of Law and Philosophy* 37.

(*i.e.* adjudication), and that they avoid a methodology which compels them to impose their preferred regime of risk allocation (*i.e.* corrective justice).

While this is not the place to develop arguments about the merits of a *Conseil d'État* as a means for achieving the first goal, suffice it to say that either the court system must be integrated fully with the administrative system, or that a separate body positioned so as to weigh the procedural and jurisdictional merits of differing allocation mechanisms must be created.[78] As to the second goal, since corrective justice has distributive consequences, it must be balanced as a risk allocation scheme against other ditributive goals which may gain paramountcy, (*e.g.* those which are pursued when a redistributive mechanism is in question).[79] After all, this is precisely the approach now taken in France through doctrines such as *inégalité des charges*.

Coherence is also a normative principle for legislatures. It argues, therefore, for a thorough revision of Crown liability legislation. As noted, both article 94 *C.C.P.* and the federal Act today rest almost uniquely on a principle of wrong. Yet both also contain the rudiments of a more sophisticated liability theory. For example, article 94 *C.C.P.* admits of the application of the no-fault regimes of articles 407 and 1057 *C.C.L.C.* to a wide range of state activity. Further, subsections 3(6) and 4(2) of the *Crown Liability Act* expressly mention alternative compensation and immunity regimes not tied to private law notions of fault. They state:

> 3.(6) Nothing in the section makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if this section had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power of authority conferred on the Crown by any statute, and in particular, but without restricting the generality of the foregoing, nothing in this section makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of the Canadian Forces.
>
> 4.(1) No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

These provisions show first, that it is possible to generate, by means of general legislation, liability regimes resting overtly on distributive principles, and second, that it is plausible to limit the ambit of Crown

78. On this point see MACDONALD, "Judicial Review and Procedural Fairness in Administrative Law", (1980) 25 *McGill L. J.* 520; (1981) 26 *McGill L. J.* 1, especially at pages 22-42.

79. See MACDONALD, *Regulation by Regulations in Canada since 1945*, a study prepared for the Royal Commission on the Economic Union and Development Prospects for Canada, for the broader implications of this point.

liability in delict and tort to cases where these non-corrective liability regimes have not been established. Several examples come to mind. One might enact sections permitting fault or no-fault claims against a pre-determined sum (as in a bankruptcy proceeding): such a regime could be called into play whenever something akin to the U.F.F.I. or Crown Trust situations arise. Again, a section providing for no-fault liability for certain types of non-expropriation taking could be added: this, of course, is the argument now being pursued in the *Lapierre* case. Further, it would be possible, as in Torrens land-titles systems, to elaborate compulsory insurance regimes for Regulatory harms on either a fault or no-fault basis: securities markets, consumer protection, product labelling and drug testing regulatory programs are likely candidates for such treatment. Finally, one might enact a regime of immunity which induces secondary markets, such as those existing in title insurance matters in the United States: an excellent example of a case where secondary markets could easily arise is that afforded by *Kamloops*. In other words, the liability sections of the *Crown Liability Act* ought no longer to be grounded in the assumptions that only fault should produce compensation, and that wherever fault exists, the measure of compensation should be that of corrective justice.

CONCLUSION

Understanding the role of delictual and tort risk allocation principles in administrative law forces one back to understanding the general relationship between private and public law. In the judicial sphere, as noted in the first part of this essay, this relationship has both a procedural and a substantive facet. Just as there are great difficulties with current judicial review doctrines as applied to administrative agencies so too there are problems with ordinary court review of Crown liability. In both cases adjudicative fora sit in judgment over non-adjudicative decisionmaking processes; in both, standards of corrective justice are invoked in judgment of diverse other schemes of distributive justice.

The lesson of 20th century judicial attempts to reconcile jurisdiction, illegality and fault is simple. Because these doctrinal categories do not permit courts to make conscious decisions about the merits of competing risk allocation regimes, judges will continue to strive fruitlessly for an undrawable boundary line between public and private law.

In the legislative realm a similar conclusion is indicated. Because current Crown liability legislation simply engrafts private law regimes onto public decisionmaking it forces litigants to juxtapose jurisdiction and fault. Confronted with significant *damna* it is hardly surprising that private parties will seek to characterize their loss as *injuria*. Only legislation which dissociates fault from jurisdiction will pave the way for a scheme of compen-

sation which permits recovery for *intra vires* harm, and which enables liability regimes for *ultra vires* harm to be tailor-made to pre-existing risk allocation choices.

Until both legislature and courts take up this challenge jurisdiction, illegality and fault will remain an unholy trinity.