Disorder in the Courts: The Duty of Care after *Cooper*

Chesley F. Crosbie, Q.C.
Ches Crosbie Barristers
169 Water Street, 4th Floor
St. John's, NL A1C 1B1
(709) 579-4000
ccrosbie@chescrosbie.nf.net

In its 2001 decision in *Cooper v. Hobart*[1], the Supreme Court of Canada attempted to clarify and restate the *Anns* two-stage test for expansion of the duty of care. A confusing and largely conservative wave of lower court decisions has been the unintended result. The outcome of many of these lower court decisions has been the termination of claims of negligent harm without trial. The Supreme Court of Canada itself has stirred up the law of negligence by sending a mixed signal, at once affirming its adherence to the *Anns* test, while investing the test with an unprecedented emphasis on the liability controlling function of the proximity concept at the first stage of the test. Many lower courts have seized on the new proximity analysis as a mandate to discourage negligence claims in any situation which exhibits novel features.

Has the expansionary trend of the past twenty years been halted? Is expansion of negligence law still possible in Canada? Is the burden of proof on the plaintiff at each stage of the *Anns/Cooper* test, and what is the nature and standard of the evidence required, if any? Does the test have two stages or three? Does proximity have analytical content or is it merely a dressed-up conclusion? Should the courts decide claims to extend the duty of care to new situations without hearing evidence? Are the courts mistakenly classifying as novel, claims of duty which should be considered under established principles?

This paper will suggest answers to these questions, summarize the current test for the existence of a duty of care in novel situations, and provide a list of recognized factors for analysis of such

---

[1] *Cooper v. Hobart,* [2001] 3 S.C.R. 537.

claims. The chief contradictory forces at work in 21st century tort law remain what they were in the 20th: the demand by the injured and the wronged for transparency and accountability, and the desire of corporate and government officialdom to conduct its activities opaquely and without concern for consequence. The leadership challenge is to identify where, along the shifting battle lines of a complex and evolving free and democratic society, the judgment writ of tort should be stayed.

Anns and the Expansion of Negligence

Before the famous speech of Lord Atkins in *Donaghue v. Stevenson*[2], negligence law advanced by an incremental process of examination of relationships and circumstances and by categorizing relationships in which a duty of care was proved. This process suffered from the lack of an underlying and unifying principle by which future cases could be decided – a "general conception" as Lord Atkins put it, of actionable negligence.

This changed with the enunciation of the famous "neighbour" principle in *Donaghue*, which laid down such a general conception:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[3]

Two concepts coexist in the famous neighbour passage. One is the concept of a close and direct relationship, which may be assimilated to the word proximity. This word does not appear in the

---

[2] *Donaghue v. Stevenson,* [1932] A.C. 562 (H.L.).
[3] *Ibid.* at 580.

passage above, but is used later in the judgment. The other is the concept of contemplation or foreseeability of damage to the plaintiff. Academic and judicial exegesis has debated whether Lord Atkins intended proximity (closeness and directness) or foreseeability (reasonable contemplation) to be the controlling concept for identifying when a duty of care in negligence would arise.

Academic commentators have pointed out that the decision to expand the duty of care to a new situation involves a balancing of interests, and therefore a policy decision by the courts as to which interests to favour. Judicial reluctance to openly acknowledge the process of policy analysis which lay behind case outcomes began to change before *Anns*, but change received dramatic impetus with the speech of Lord Wilberforce in *Anns v. Merton London Borough Council*:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or class of person to whom it is owed or the damages to which a breach of it may give rise.[4]

The *Anns* two-stage formulation invited transparency in the application of judicial policy. But perhaps more importantly, in appearing to assimilate proximity to foreseeability, it created an implicit presumption of duty in all situations, including new situations, in which harm is reasonably foreseeable. If the harm is foreseeable, then "a *prima facie* duty of care arises." The barrier to duty then becomes a residual one: whether considerations can be found to "negative" the duty.

---

[4] *Anns v. Merton London Borough Council,* [1978] A.C. 728 (H.L.) 751.

In *Nielsen v. Kamloops (City of)*[5], the Supreme Court of Canada adopted the *Anns* two-stage formulation for identifying a duty of care in a new situation. Both *Anns* and *Kamloops* arose out of the failure of local authorities to execute their statutory duties to inspect the integrity of building foundations. In both cases the duty of care to which the local authority was held was found to involve operational rather than policy decisions, the statutory scheme contained both mandatory and permissive provisions, and the gist of the claim was omission to prevent a potential harm, not positive action causing the harm. The specific wording of the *Anns* test, as adopted and interpreted by *Kamloops*, was as follows:

> The trilogy of House of Lords cases—*Donoghue v. Stevenson,* [1932] A.C. 562, *Hedley Byrne & Co. v. Heller & Partners Ltd.,* [1964] A.C. 465, and *Home Office v. Dorset Yacht Co.,* [1970] A.C. 1004—clearly established that in order to decide whether or not a private law duty of care existed, two questions must be asked:
>
> (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?
>
> These questions, Lord Wilberforce said, must be answered by an examination of the governing legislation.[6]

In his 2003 textbook, Osborne has described the expansionary impact of the new two-stage test adopted by *Kamloops* as being based on the issues of presumption of duty, and allocation of onus:

> The *Anns/Kamloops* test reinvigorated the expansionary trends in negligence law in two ways. First, it created a presumption of a duty of care in all relationships giving rise

---

[5] *Nielsen v. Kamloops (City of)*, [1984] 2 S.C.R. 2.
[6] *Ibid.* at pp. 10-11.

> to a reasonable foreseeability of damage to the plaintiff. Second, it placed on the defendant the unenviable, and sometimes considerable, burden of persuading the court that the plaintiff did not deserve to be protected from his negligent conduct.[7]

The foreseeability of negligent harm is usually easily established. The equation of foreseeable injury with presumptive breach of legal duty, and the imposition of an onus of persuasion against those who would negate the duty, facilitated the expansionary trend of Canadian negligence law for the past twenty years.

Cooper Restructures *Anns*

The Supreme Court adhered to the *Anns/Kamloops* two-stage test and its expansionary implications of presumption of duty and onus to negate, until the decision in *Cooper*. The Court in *Cooper* acknowledged the importance of *Anns* in recognizing the role of policy in deciding whether to extend the duty of care to new situations: para. 25, and that *Anns* remained "a useful framework in which to approach the question": para. 28, and *Cooper* was but another "gloss" on *Anns*.[8] The Supreme Court described the aim of this "gloss" in the companion case of *Edwards v. Law Society of Upper Canada*: "Specifically, *Cooper* revisits the *Anns* test and clarifies the express policy components to be considered at each stage."[9]

Edwards summarized the restatement of the *Anns* test achieved in *Cooper*:

> At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has

[7] Osborne, *The Law of Torts*, 2d, 2003, p. 66.
[8] *Cooper, supra,* paras. 25, 28.
[9] *Edwards v. Law Society of Upper Canada,* [2001] 3 S.C.R. 562, para 8.

> previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity -- that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.
>
> If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.[10]

In *Cooper*, the Court retained the language of "first stage" and "second stage", but indicated that two distinct analytical tasks were to be performed at the first stage:

> At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? And (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises.[11]

[10] *Ibid.* at paras. 9-10.
[11] *Cooper, supra*.

In stating that in addition to foreseeability of harm, the plaintiff must also show proximity of relationship, including broad considerations of policy which focus on the relationship, the Court has for the first time unequivocally laid an additional threshold requirement on the proponent of a *prima facie* duty, along with an onus to establish that the additional requirement is met.

Test for Proximity

Cooper held that at the first stage, the "closeness and directness of the relationship", or proximity, was to be gauged by examining the type of relationship in the surrounding circumstances, including "expectations, representations, reliance and the property or other interests"[12] inhering in the relationship. The jurisprudential utility of proximity had been subject to previous debate and dissent by members of the Court, and much criticism by academic commentators. Subsequently to *Cooper*, the Court acknowledged these criticisms in *Odhavji Estate v. Woodhouse*[13] and noted the need for analytical distinctness as between foreseeability and proximity. The classical formulations of the approach to duty, from *Donaghue* through *Anns* and *Kamloops*, contained a "fateful ambiguity", which might seem to "conflate foreseeability of harm and duty."[14]

Woodhouse observed that *Cooper* analysis required that at the first stage, there must be an ingredient additional to reasonable foreseeability: reasonable foreseeability "plus something more". The additional ingredient was proximity. Proximity analysis required an inquiry into the relationship between the parties, the "essential purpose" of which "is to evaluate the nature of that relationship in order to determine if it is just and fair to impose a duty." Only if reasonable foreseeability of harm and a sufficient degree of proximity were present, would a *prima facie* duty of care arise.

Academic criticism persists, that proximity is not a test but a conclusion. However, it is submitted that at this stage of development of the law, proximity analysis does have a useful

[12] *Cooper, supra,* para. 34.
[13] *Donaghue, supra*, para. 47.

emerging content. The broad principle of evaluation was stated in *Hercules Managements Ltd. v. Ernst & Young*:

> The label "proximity", as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.[15]

Caselaw has directed that the evaluation of proximity should focus on such factors arising from the relationship of parties as close causal connection, physical propinquity, reasonable expectations, reliance, and nature of the damage. These factors, and perhaps others yet to be identified, help to identify the types of relationships not yet evaluated and categorized by law, in which fairness and justice incline that a *prima facie* duty to be mindful of the plaintiff's legitimate interests should arise.

Two Stages or Three

Although the Court retained the *Anns/Kamloops* terminology of first stage and second stage, it was clear from the text of *Cooper* that analytically, there were really three questions to be asked, or three progressions to the analysis: (1) the question of reasonable foreseeability of harm, (2) the question of relational proximity, and (3) the question of whether there existed residual policy considerations outside the scope of the relationship of the parties, which might negative any *prima facie* duty of care which arose if a case passed muster at the first two stages.

In the 2003 decision *Odhavji Estate v. Woodhouse*, the Court appeared to bring that analysis to its logical conclusion. *Woodhouse* made explicit what had previously been implicit in the *Cooper* reasoning, specifically that the test did not have two steps but three. *Woodhouse* also appeared to indicate that the onus was on the plaintiff at all three stages:

---

[14] *Ibid.,* para.
[15] *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, para. 24.

> On the analysis above, this requires the Odhavji family to establish each of the following: (i) that the harm complained of is a reasonably foreseeable consequence of the alleged breach; (ii) that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and (iii) that there exist no policy reasons to negative or otherwise restrict that duty.[16]

Prior to the Supreme Court's 2006 decision in *Young v. Bella,* the conclusion seemed unavoidable that the *Anns/Cooper/Woodhouse* test had metamorphised into an explicitly three-stage test, with distinct policy weighing functions assigned to stages two and three. Interestingly, the Court in *Young* ignored the above passage from *Woodhouse* and confirmed the two-stage test, which it formulated in the following way:

> 28 The Court recently affirmed in *Cooper v. Hobart,* [2001] 3 S.C.R. 537, 2001 SCC 79, at para. 24, and *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60, at para. 46, that the "duty" analysis proceeds in two stages:
>
> (a) Is there a sufficiently close relationship of proximity between the parties such that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff?
>
> (b) If so, are there any considerations which ought to negative or limit: (a) the scope of the duty; (b) the class of persons to whom it is owed; or (c) the damages to which a breach of it may give rise?[17]

Despite the Supreme Court's recent confirmation of a two-stage formulation of the approach to duty, the major adjustments made by *Cooper* seem likely to endure. *Cooper* achieved the separation of proximity from foreseeability, and invested proximity with a liability controlling function of its own. The formulation of the test in *Young* is materially identical to the formulation in *Kamloops,* with one difference; whereas *Kamloops* refers to "a sufficiently close relationship" and does not use the word proximity, *Young* refers to "a sufficiently close

---

[16] *Odhavji Estate, supra,* para. 52.

relationship of proximity". No longer is foreseeability of harm enough to establish a *prima facie* breach of duty. *Cooper* imposed the onus of proof of proximity issues on the plaintiff. Only when the plaintiff has satisfied the court that factors arising out of the relationship meet the requirement of proximity can a *prima facie* duty of care be posited. This is a departure from twenty years of Supreme Court tort jurisprudence.

Impact of *Cooper*

Opinion among observers varied as to the expected impact of the new emphasis on policy analysis at the proximity stage. Pitel in "Negligence: Canada Remakes the *Anns* Test" concluded that "it is not clear whether the court's reworking of the *Anns* test is intended to make it more difficult for Canadian plaintiffs to succeed in novel cases."[18] Fleming, *Law of Torts*, 2002, noticed *Cooper* only in footnotes. In an "unprecedented" Supplement to his *Canadian Tort Law*, Linden stated that "when *Cooper v. Hobart* was decided, just prior to the publication of the 7th edition of this book, I mistakenly did not think it would have a major impact."[19] Osborne in *The Law of Torts*, had a different expectation:

> The Court anticipated that the new *Anns/Cooper* test would not lead to any significant change in Canadian negligence law. Indeed, no prior decision of the Supreme Court was reversed or criticized and the Court approved the incremental extension of those authorities to analogous circumstances. Nevertheless, *Cooper*, with its emphasis on relational proximity, is likely to have a chilling effect on the expansionary tendencies of modern negligence law.[20]

Osborne's prediction has turned out to be correct. However, *Cooper* has had a major impact. This has been described by Linden in his Supplement:

> It is clear that *Cooper* has unleashed a complex and confusing force that has largely halted the expansion of

---

[17] *Young, supra*.
[18] Pitel, "Negligence: Canada Remakes the *Anns* Test", Camb.L.J. (2002) 252.
[19] Linden, Supplement to *Canadian Tort Law*, December 2004, Preface.
[20] Osborne, "The Law of Torts", Second Edition 2003, p. 67.

> negligence law in Canada. While this was not the express purpose of the Supreme Court, this has certainly been the undoubted result.[21]

The Supreme Court itself in *Cooper* expressly disavowed any intention to abandon the *Anns* test:

> In our view, *Anns* continues to provide a useful framework in which to approach the question of whether a duty of care should be imposed in a new situation. [22]

Nonetheless, in the Preface to the Supplement, Linden noted the disorder in the lower courts and lamented:

> Not only is the future development of negligence law being thwarted, but heretofore stable aspects of existing negligence law are being threatened, despite the express purpose of the Supreme Court not to do so.[23]

The explanation for this arrested development lies in *Cooper's* new emphasis on proximity, and its promotion of proximity as a liability control device, with the onus of proof on the plaintiff. Foreseeability of harm does not usually present problems and is easily established. The argument that *Anns/Kamloops* has been a driving force behind the expansion of modern negligence law, has been advanced by Klar, "Foreseeability, Proximity and Policy":

> [T]o recognize a presumption of duty in all cases of foreseeable losses which then must be counterbalanced by policy considerations creates a situation that is favourable to the recognition of a duty of care in new situations. It asserts that presumptively the negligence law action is without inherent boundaries, if foreseeability of loss can be shown.[24]

---

[21] Linden, *supra,* at p. 10.
[22] *Cooper, supra*, para. 28.
[23] Linden, *supra,* at Preface.
[24] Klar, "Foreseeability, Proximity and Policy", [2002] 25 Adv.Q. 360, 364-376.

If foreseeability has hitherto been equated to a rebuttable presumption of duty, then a direction from the Supreme Court that this is no longer so, has the potential for a significant effect on judicial receptiveness to new claims of duty.

By promoting the use of policy analysis at an initial stage of the test, the Supreme Court may have given many in the judiciary – an inherently conservative group – the false impression that there is now a presumption *against* expansion of the duty of care. Many courts have been apt to classify what is merely a new set of facts as a new category of negligence, and to apply an unrealistic burden of proof at the proximity stage, in order to deny liability. Truly new categories of negligence are rare, and to take one important example, physical loss due to negligence is not a new category. Many courts do not seem to realize that the Supreme Court *intended the new regime to apply only to cases of pure economic loss outside the established categories of recovery for pure economic loss* – such as the claim for pure economic loss laid by a large and anonymous group of investors against the Registrar of mortgage brokers in *Cooper*. As explained immediately below, physical harm to person or property is an established category of recovery for which *Cooper* proximity analysis is irrelevant. Once reasonable foreseeability is demonstrated, a *prima facie* duty of care is assumed.

Recognized Categories of Proximity

In *Cooper,* the Supreme Court reiterated that where reasonable foreseeability exists and a case falls within a previously established situation or category of duty or an analogous one, proximity is established and a *prima facie* duty of care may be said to exist. The Court provided a partial list:

> 36 What then are the categories in which proximity has been recognized? First, of course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. This has been extended to nervous shock…. Yet other categories are liability for negligent misstatement … and misfeasance in public office. A duty to warn of the risk of damage has been recognized…. Again, a municipality has been held to owe

> a duty to prospective purchasers of real estate to inspect housing developments without negligence…. Similarly, governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner…. Relational economic loss (related to a contract's performance) may give risk to a tort duty of care in certain situations, as where the claimant has a possessory or proprietary interest in the property, the general average cases, and cases where the relationship between the claimant and the property owner constitutes a joint venture…. When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited.[25]

This list is certainly not exhaustive and was intended as an illustration. But a point of major significance is that the Court directed that *Cooper* analysis is *inapplicable to claims of physical harm to person or property*. A *prima facie* duty of care may be posited with respect to claims of this character, in the absence of very unusual esoteric features.

Some of the listed categories are broadly drawn, such as physical damage to property or person, which includes nervous shock. Some categories are narrowly drawn, such as the liability of government for negligent road maintenance (which resulted in bodily injury and death) established in *Just v. British Columbia*.[26] Only two of the five established categories of economic loss are mentioned, probably because these categories (negligent misstatement and relational economic loss) are better developed in decisional law than the others.

In *Cooper* itself, the issue before the Court was narrowly stated as being whether a statutory regulator of mortgage brokers owed a duty of care to investors. The loss concerned was purely economic, which is often the case where the activities of statutory authorities are concerned. The Court in *Cooper* made no attempt to situate this narrowly defined issue concerning the liability of statutory regulators within established categories of economic loss, the most obvious of which is the independent liability of public authorities. However, the liability of public authorities must

---

[25] *Cooper, supra,* para. 36.

[26] *Just v. British Columbia* (1989), 64 D.L.R. (4th) 689 (S.C.C.).

always be grounded in the governing statute, so categorization of a case within that established category of recovery for pure economic loss, which is known as the independent liability of public authorities, does not relieve a court from the necessity of construing whether the particular governing statute intended a duty of care in the circumstances. So in this light, any issue concerning the liability of public authorities will always be narrow, in the sense that it is always specific to the governing statute. In *Cooper*, the Court stated that to impose a duty in the circumstances would effectively establish a public insurance scheme financed by the taxpayer, which was not the intention of the statute.

To repeat, the Supreme Court in *Cooper* indicated that physical damage cases were an established category and therefore exempt from *Cooper* analysis. Nervous shock was also an established category. Given that the harm complained of in *Woodhouse* was psychiatric harm, it might be wondered why the Court in *Woodhouse* embarked on *Cooper* analysis at all. The Court accepted that the allegation of psychiatric harm disclosed a possible cause of action within the established category of nervous shock. Why then apply a *Cooper* analysis? The answer must lie in the esoteric nature of the allegations in the case, lying at the far margins of the nervous shock category, and the fact that a duty of care was alleged against the Chief of Police and others, based on a duty imposed by statute. The Supreme Court in *Woodhouse* decided the Chief might owe the duty alleged, and the case in negligence could go forward.

It may be true that the Supreme Court had never considered the narrow issue posed by the facts of *Woodhouse*: whether the Chief of Police owed a duty of care based in statute, to the family of a person killed by police, to ensure that the officers involved cooperated with an internal investigation. However, with respect, new elements can be found in the facts of almost any case, and care should be taken to avoid defining cases so narrowly and uniquely that the established categories seldom apply. A case-by-case approach is not the same as the category-by-category approach directed by the Court in *Cooper*. The accepted categories of negligence, and situations analogous, are and should remain the principal doctrinal approach to the determination of a duty of care in all cases that are not truly novel. The most sweeping of the established categories is physical harm to person or property, and absent some intruding element, such as dubious

pleadings at the margins of the nervous shock category, *Cooper* analysis is not applicable. Many courts do not seem to understand this. As Linden has observed at p. 10 of his Supplement:

> The established category of physical harm and property damage is downplayed or ignored in most of the cases, in spite of the fact that the Supreme Court meant to exempt physical harm and property damage cases altogether from the *Cooper* analysis. Instead, some of the established negligence law is being dismantled by use of the new regime, even though this was not meant to be the case.[27]

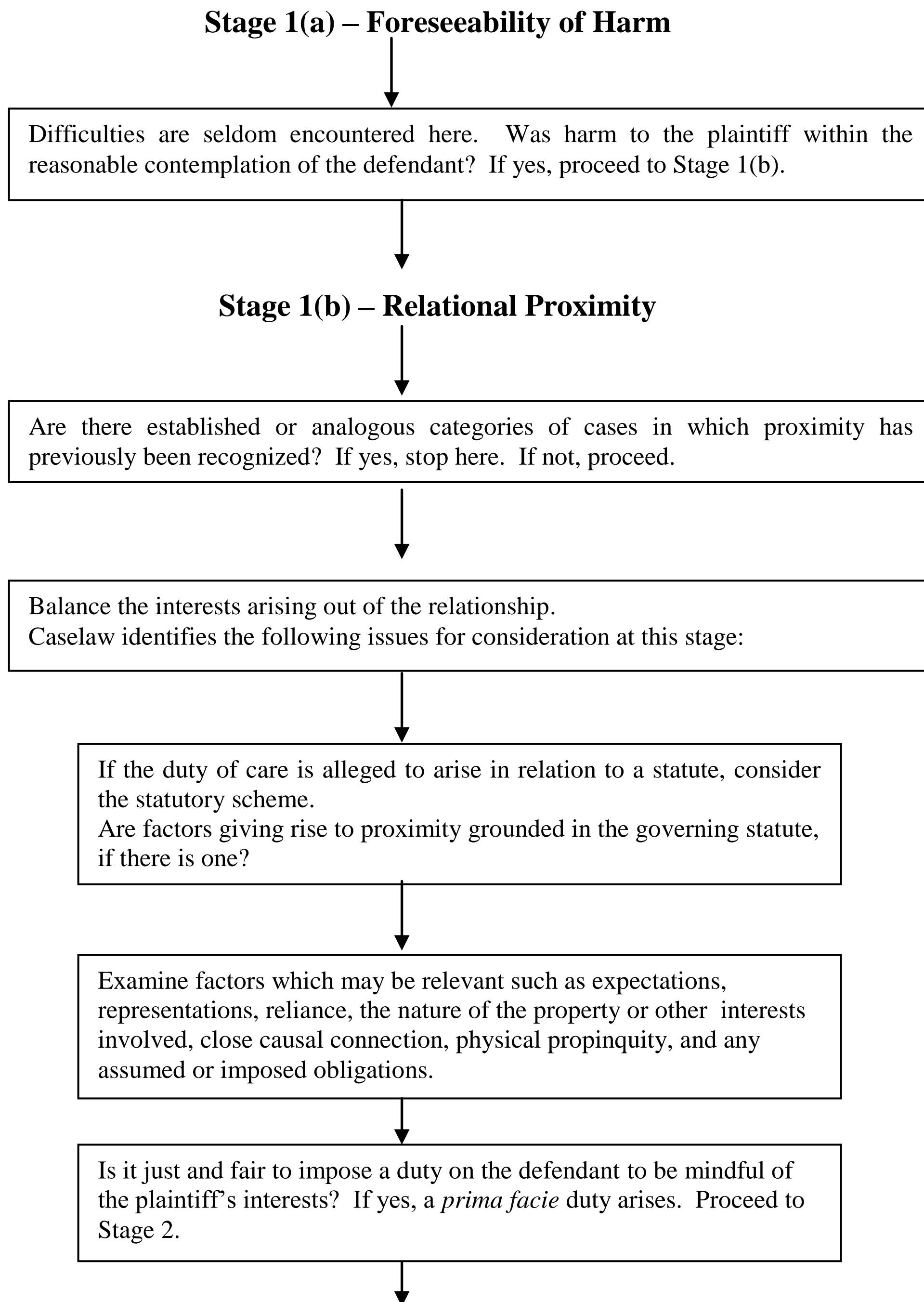
The Supreme Court's most recent application of the *Anns/Cooper* test provides a classic illustration of the truly novel situation the test was intended for. *Young v. Bella* was a case of "negligence causing economic loss" and did not involve personal injury or physical damage.[28] The situation might fall within the bounds of the tort of defamation, but there was no established or analogous duty of care in negligence. Young's professors had reported her to a child abuse registry, with wholly inadequate grounds for making the report. The case involved harm to the plaintiff's reputation and other damages arising from the defendant's negligence. The trial judge had allowed the case in negligence, but not in defamation, to be put to the jury. The Court applied *Anns/Cooper* and extended the reach of negligence actions to cases of foreseeable harm to reputation where relational proximity exists, and "the damages cover more than just harm to the plaintiff's reputation."[29] The case expanded the law of negligence to overlap with the law of defamation, by recognizing a new category of recovery for pure economic loss in negligence.

Decision Matrix for Duty of Care

The following diagrammatic decision matrix is taken from the duty of care test as explicated by *Martel Building Ltd. v. Canada*[30], *Cooper*, *Edwards*, and *Woodhouse*, and the distribution of policy factors laid down by those cases as appropriate to each stage. It may be of assistance in

[27] Linden, Supplement, *supra*.
[28] *Young, supra,* para. 65.
[29] *Young, supra*, para. 56.
[30] *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860.

analyzing the prospects of new claims of duty, based on what the Supreme Court has stated so far:



Stage 2 – Residual Policy

Balance the fairness of imposing a duty against the effect on other legal obligations, the legal system and society as a whole. Caselaw identifies the following issues for consideration at this stage:

Does the law already provide an adequate remedy? (A complaint procedure is not an adequate substitute.)

Does the spectre of indeterminate liability arise?

Is this a policy decision of government, or a quasi-judicial decision?

Is the decision maker required to balance public and private interests?

If the complaint is against a governmental entity, did the legislature intend to create an insurance scheme funded by taxpayers?

Would imposition of a tort duty of care based on previous relationship, on pre-contractual negotiation, or on a contractual process such as tendering, create uncertainties and result in unfairness to others?

Pure Economic Loss

As to the realm of pure economic loss, the Supreme Court has borrowed from the writings of Feldtheusen, and accepted five separate categories of pure economic loss which typically demand separate consideration. These are (i) the independent liability of public authorities, (ii) liability for negligent misrepresentations, (iii) liability for the negligent performance of services, (iv) liability for the negligent production of shoddy goods or buildings, and (v) liability for relational economic loss suffered by a third party as a result of physical damage caused by the defendant to another. *Young* appears to have established one other category, namely liability for negligent damage to reputation associated with other economic losses.

The division of types of pure economic loss into these separate categories is thought to be justified by the presence in each category of distinctly different policy considerations. A unanimous Court in *Martel* stated:

> The reason for the broader five categories is merely to provide greater structure to a diverse range of factual situations by grouping together cases that raise similar policy considerations.[31]

Martel indicated it was “important” to understand that contractual relational economic loss was unique among the established categories of pure economic loss in that it “continues to operate under a presumption against recovery with three narrowly defined exceptions.”[32] Any addition to these exceptions would “likely” be approached by application of the *Anns* test. However, the *Anns* test was not relevant to the other four categories, where a presumption in favor of recovery continued to operate. Extension of these categories was to be “approached incrementally and on a case-by-case basis.”[33]

[31] *Ibid.,* para. 45.
[32] *Ibid.*, para. 44.
[33] *Ibid.*, para. 64.

Thus at this stage of development of the law of negligence, the Supreme Court's test for recognition of a new duty of care in a pure economic loss case requires categorizing of the relationship, and if it fits into a recognized category of recovery or an analogous one, that is normally the end of the enquiry.

The question at the proximity stage is whether considerations of fairness and justice arising out of the relationship incline to incremental inclusion in a category of recovery. However, if the case is genuinely novel and does not fit into one of the recognized or analogous categories of recovery of pure economic loss, *Cooper* analysis must be applied: *Young*.

The categories approach laid down in *Cooper* recognizes for general negligence law, an approach which the Supreme Court has already adopted, after some debate, in confronting claims for pure economic loss. However, the independent liability of public authorities is a unique category of pure economic loss, in that recoverability does not depend on whether the loss is economic or physical. That is why it is called "independent". It is independent of the type of loss. According to Feldtheusen, "Economic Loss in the Supreme Court of Canada", at the proximity stage, the nature of the loss is irrelevant:

> If the act or omission in question is not immune, and if the statutory power pertains to economic protection, the duty extends to economic loss. It would be incoherent to hold otherwise and no court has ever done so.[34]

It remains true that no court at the highest level has held that the nature of the loss – physical or economic – weighs against recovery, if the scope of the statute protects economic loss, and the decision is operational, as distinguished from a true policy decision. The claim for pure economic loss brought by a large and anonymous group of investors in *Cooper* failed for reasons which arose both at the relational proximity and broader sociolegal policy stages, but the nature of the loss as economic was not one of the reasons.

[34] Feldtheusen, "Economic Loss in the Supreme Court of Canada", 1991 Can.B.L.J. 17, 356, 362.

Once a case is properly categorized as involving the liability of public authorities, the nature of the loss – whether economic or physical – becomes irrelevant. This category is more than a collection of discrete instances of liability, and does have a unifying principle. The *unifying principle is the intent of the particular underlying statute*. If the scope of the statute comprehends economic protection, then proximity must be ascertained in the usual way. This first-stage enquiry requires the court to focus on factors that allow an evaluation of the closeness of the relationship, as identified above. And as identified above, the general conception behind this evaluation was stated by LaForest, J. in *Hercules Managements Ltd. v. Ernst & Young* to be whether:

> … the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.[35]

If it is fair and just, having regard to the policy factors inhering in the relationship, to impose a *prima facie* duty of care, then *the onus should shift to the defendant to negative that duty at stage two*. It is submitted that this is what the Court intended in *Just v. British Columbia* in considering the policy/operational distinction in the context of a statutory duty to inspect highways:

> The duty of care should apply to a public authority unless there is a valid basis for its exclusion.[36]

Burden of Proof

The issue of burden of proof conditions the judicial attitude toward expansion of the duty of care to new situations, and may determine the outcome. This effect exists, whether the burden is considered to be a true legal burden, or merely a practical burden. An example may be found in *Exploits Valley Air Services Ltd. v. Board of Governors of the College of the North Atlantic*, in which the statutory duty to follow the *Public Tender Act* was held not to create a private law duty

[35] *Hercules Managements Ltd., supra*, para. 24.

of care to a disappointed supplier, despite the absence of an immunity provision, and the finding that such a duty of care was consistent with the objects of the Act. The lower courts found that the plaintiff, who had lobbied for the work and who was the only supplier capable and qualified to do the work, had not proved proximity. As stated by the Court of Appeal:

> [21] However, in cases such as this one, where the very existence of a duty of care is in dispute, the *Anns/Cooper* test must be applied and that involves consideration of the nature of the relationship between the parties as well as policy matters, all of which requires evidence, some of which may be disputed. The Court in *Cooper* and *Edwards* implicitly recognized this by placing a burden of proof as to proximity on the plaintiff.[37] [Emphasis added]

Feldtheusen, "The *Anns/Cooper* Approach to Duty of Care for Pure Economic Loss", recognized that the distribution of policy factors between the proximity and residual policy stages is more than an academic issue:

> Although the Supreme Court made little of this, according to *Anns*, a plaintiff who satisfies stage 1 establishes a *prima facie* case. For that reason, it may well matter whether a concern is addressed at stage 1 or 2. Formally at least, "policy" issues of relation carry more weight than other policy issues.[38]

In *Cooper,* it was stated that the plaintiff must "show" or "establish" proximity. The issue of burden or onus was not fully discussed. Linden, Supplement, has correctly stated at p. 17:

> There is no onus on the plaintiff to prove that there is a duty; it is a question of law for the Court. However, facts providing a foundation for the legal determination must be pleaded and eventually proved.[39]

---

[36] *Just, supra*, at 706.
[37] *Exploits Valley Air Services Ltd. v. Board of Governors of the College of the North Atlantic*, 2005 NLCA 54.
[38] Feldtheusen, "The *Anns/Cooper* Approach to Duty of Care for Pure Economic Loss", 18 C.L.R. (3d) 67, pp. 2-3.
[39] Linden, Supplement, *supra*.

Many courts have lost sight of the fact that the burden on the plaintiff at the foreseeability and proximity stage is not great. In *Exploits Valley, supra*, each of the trial and appeal courts imposed unrealistic demands on the plaintiff for evidence of relationship with the governmental defendant, and for evidence of the policy issues arising. Only two years before *Cooper*, Major, J., who was joint author with McLoughlin, C.J. of the *Cooper* reasons, described the onus in *Ryan v. Victoria (City)*, as "relatively low":

> 23 The first step of the *Anns/Kamloops* test presents a relatively low threshold. In order to establish a *prima facie* duty of care, it must be shown that a relationship of "proximity" existed between the parties such that it was reasonably foreseeable that a careless act by the Railways could result in injury to the appellant.[40]

In *Snell v. Farrell*, the Supreme Court summarized the principles governing allocation of the burden of proof of facts in civil cases:

> [I]t has long been recognized that the allocation of the burden of proof is not immutable. The legal or ultimate burden of proof is determined by the substantive law "upon broad reasons of experience and fairness": J.H. Wigmore, *Evidence in Trials at Common Law*, 4th ed., vol. 9 (Boston: Little, Brown & Co., 1981) s. 2486, at p. 292. In a civil case, the two broad principles are:
>
> 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
>
> 2. that where the subject-matter of the allegations lies particularly within the knowledge of one party, that party may be required to prove it.[41]

The burden of proof on the plaintiff at the proximity stage is to demonstrate the factual nature of a relationship with a defendant, which allows the court to conclude as a matter of law, that it is fair and just to posit a *prima facie* duty of care. The party who asserts material facts of relationship sufficient to ground a presumptive duty must prove those facts, although the courts

---

[40] *Ryan v. Victoria (City)*, [1991 1 S.C.R. 201.

[41] *Snell v. Farrell,* (1990), 72 D.L.R. (4th) 294-295.

must not be too exacting in their expectations, because the burden is "relatively low". However, even this relatively low burden is not immutable, and where the defendant has particular knowledge of the facts of the relationship and the policy elements that surround it, and the power to produce those policy-grounding facts, the defendant should be required to produce them.

But it is the defendant who should be required to prove the second branch of the *Cooper* test, namely that there exist no broader policy reasons to negative or otherwise restrict the duty. The Supreme Court has not discussed onus at the second stage of the *Cooper* test, except in a brief and perhaps inadvertent reference in *Woodhouse*, which has not found favour in *Young*. To place the onus on the plaintiff would be to require him or her to anticipate, plead, and eventually prove a negative. It would also require the plaintiff to prove matters of residual policy which are within the particular knowledge of the defendant, particularly where specialized governmental defendants are concerned. Feldtheusen, *Economic Negligence*, supports the imposition of an onus on public authorities who wish to claim policy immunity at the second stage:

> However, in order to invoke this immunity the authority should be required to prove that the act or omission which caused the plaintiff's damage resulted from the actual exercise of such discretion.[42]

Some courts, although not expressly imposing on the defendant a burden of proof of negating a *prima facie* duty of care at the second stage, have leaned in that direction. As stated by Feldman, J.A. in *Haskett v. Equifax Canada Inc.*, in the context of whether pleadings disclose a reasonable cause of action:

> In that context, the court may well recognize potential policy concerns at the second stage but should be circumspect in using those policy concerns to determine, without a Statement of Defence and without any evidence, that it is plain and obvious that there is no cause of action….[43]

---

[42] Feldtheusen, *Economic Negligence*, 4th ed. (2000), p. 296.
[43] *Haskett v. Equifax Canada Inc.,* 2003 CanLII 32896 (ON C.A.), para. 24.

The Ontario Court of Appeal made a strong suggestion as to onus, later in the judgment:

> [A]t trial the parties will be able to lead evidence on the effectiveness of the statutory procedures, how often they are used, how quickly they proceed and with what results. This information will be available from the Ministry and can form the factual background necessary to weigh the necessary policy considerations. A court should be reluctant to dismiss a claim as disclosing no reasonable cause of action based on policy reasons at the motion stage before there is a record on which a court can analyze the strengths and weaknesses of the policy arguments.[44] [Emphasis added]

Relying on the counsel of circumspection in *Haskett*, Winkler, J. in *Sauer v. Canada (Minister of Agriculture)* considered the adequacy of pleadings that alleged that the federal government was negligent in failing to enact regulations in a timely fashion.[45] The statement of claim alleged that had regulations been enacted timely, they might have prevented contamination of Canadian cattle by bovine spongiform encephalopathy. The foreseeable consequence was economic loss to Canadian farmers. Winkler, J. properly found that *the defendant had not provided a record* on which he could base a conclusion that the failure to enact a regulation was clearly a policy decision immune from the reach of tort of negligence. *Sauer* is also noteworthy for its refusal to accept an unsubstantiated argument based on the second stage policy consideration of indeterminate liability. Although the class of those injured – cattle ranchers – might be large, and potential liability extensive, "extensive liability is not the equivalent of indeterminate liability".[46]

Reasons of experience and fairness support the conclusion that the onus is on the defendant to negate a *prima facie* case by leading clear evidence, or by relying on justifiable judicial notice of fact. The defendant should demonstrate facts which substantiate the policy grounds sufficient to negate a new duty at the second stage. As Linden, p. 18 Supplement has aptly put it, "idle speculation about possible negative effects of a new duty should not be countenanced."

[44] *Haskett, op.cit*., para. 52.
[45] *Sauer v. Canada (Minister of Agriculture),* 2006 CanLII 74 (ON S.C.), para. 91.
[46] *Ibid.*, para. 84.

Clarification of the issue of onus, as with other issues, awaits the Supreme Court's next discussion of *Anns*.

Government Liability and the Purposes of Tort

Before *Cooper* and its aftermath, learned observers thought that Canadian tort law was moving progressively into the public domain as a check on government behavior. This restraining and educating function is thought to run parallel to the responsibilities of the judiciary under the Canadian *Charter of Rights and Freedoms*. Linden, *Canadian Tort Law*, has been an expositor of the emergent role of the courts in counterbalancing government activities:

> It is clear that the Canadian trend is toward increased liability for government institutions. The phenomenon is not limited to tort. In Canada, a whole new era of government accountability began with the introduction of the *Charter of Rights and Freedoms* …. Over the last century there has been a shift away from absolute government immunity toward the recognition that the administration should be held accountable, much like other organizations in society. After all, other professionals must abide by tort law's counsel of caution, even though they would prefer to be left alone. Government officials, who are also professionals, should be treated no differently, except where true policy decisions are involved, that is, where matters of governing are at issue.[47]

The trend Linden described in his 2001 textbook may be contrasted with the situation Linden described only three years later in his 2004 Supplement, p. 12:

> [I]t is becoming almost impossible nowadays to successfully attack negligent government conduct through tort law, despite the universal legislation indicating that governments are to be liable in the same way as if they were private persons and despite the fact that this same conduct may often be challenged through judicial review on administrative law or constitutional law grounds.

[47] Linden, *Canadian Tort Law*, 7th ed. (2001), 635.

> Negligence law is becoming an even more infrequent visitor in the halls of government.

Since *Cooper*, lower court willingness to impose accountability for government and corporate negligence has been on the ebb. Time will tell whether the recent conservative tendency in the lower courts represents a short term reversal in Canadian tort jurisprudence or a long term trend. Many courts have failed to understand the Supreme Court's intentions in *Cooper*. Indeed, the Supreme Court's two most recent applications of the *Anns/Cooper* test have been expansionary, not contractionary, in their results, and enlightened decisions such as *Sauer, supra*, suggest that the post-*Cooper* conservative trend in the lower courts may be losing momentum. Informed advocacy at all levels of court will help to determine which force, the demand for transparency and accountability, or the desire for obscurity and immunity, is the force which prevails.

Those who advocate for transparency and accountability have sound jurisprudential grounds to advance the following precepts:

(a) at this stage of maturation of the law, the Supreme Court has directed a marriage of the established and analogous categories approach, with the generalizing and principled *Anns* approach;

(b) *Anns/Cooper* analysis should not be applied unless a case clearly falls outside the established and analogous categories and is truly novel;

(c) an established category approach is not a case-by-case approach, and the established categories of duty must not be narrowly drawn, or the benefit of the approach will be lost;

(d) for the truly novel case, the new proximity analysis requires merely that in the circumstances of the relationship, it is fair and just for the defendant to be under an obligation to be mindful of the plaintiff's legitimate interests in the conduct of its affairs;

(e) although the onus may be on the plaintiff at the proximity stage, this presents a low threshold, and the burden is not immutable;

(f) at the second stage, the onus should be on the defendant to negate any duty which may be posited at the first stage;

(g) the two occasions on which the Supreme Court itself has applied *Cooper* have resulted in an expansion of the duty of care;

(h) negligence law remains a bulwark of accountability in our complex and evolving, free and democratic society, and expansion of the duty of care remains both possible and necessary.