

DUTY TO PROTECT, DUTY TO CONTROL AND THE DUTY TO WARN

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In this article the author addresses the question of liability for failure to prevent the risk of injury to another. Unlike the civil law and the statutory law of the state of Vermont the common law has not developed a general duty to warn of a risk and thereby prevent harm. Where such an obligation has been imposed it is possible to characterise the cases as very 'fact-sensitive' or as based on some specific relationship between the plaintiff and defendant. This essay presents the arguments for the acceptance of a generalised duty.

Dans le présent article, l'auteur aborde la question de la responsabilité d'une personne en raison de son omission à prendre les mesures adéquates afin d'éviter de causer tout préjudice corporel à un tiers. Contrairement au droit civil ainsi qu'au droit statutaire de l'état du Vermont, la common law n'a pas encore développé de théorie générale de dénonciation d'un risque ou d'un danger visant ainsi à prévenir de causer un préjudice. Dans l'hypothèse où une telle obligation a été imposée, on remarque que c'est dans des situations où l'impact des faits fut déterminant ou lorsque existait un lien particulier entre le demandeur et le défendeur. Le texte qui suit présente les arguments en faveur de l'acceptation d'un devoir généralisé de sécurité à l'égard des tiers.

I. Introduction.....	645
II. Duty to control.....	647
III. Duty to protect.....	657
IV. Duty to warn.....	673
V. Conclusion.....	680

I. Introduction

“There is no distinction more deeply rooted in the common law than that between misfeasance and nonfeasance, between active misconduct

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working positive injury to others and passive inaction”;² the common law does not impose liability for pure omissions. Generally, this rule works to exclude liability for the failure to prevent harms perpetrated by third persons, no matter how foreseeable.³” duty of care related to prevention of the acts of others may arise, however, where a special connection- or “proximity”- exists between the defendant and the events or acts in question. That connection may arise primarily through the underlying relationship between the defendant and the perpetrator (as where there is a duty to control) or through the underlying relationship between the defendant and the plaintiff/victim (supporting a duty to protect or a duty to warn); in all cases an underlying relationship is essential, arising outside of the chain of negligent events.⁴ These relationships may take different forms (fiduciary relationships, for example, or relationships of obligation rooted in statute or elsewhere in the common law), arising from different sources, but risk and reliance will be inherent and necessary characteristics of them all.

These underlying relationships do not in themselves give rise to the special or strong connection between one individual and the acts of another sufficient to carry responsibility (and so liability) regarding a failure to prevent those acts. In all cases foreseeability must be extra or high, accounting for the general unpredictability of other persons. Certain underlying relationships are especially strong in terms of closeness and the undertaking/expectation of responsibility (the parental relationship, for example). Others are less so, and extra elements of closeness and responsibility may be required to create the necessary”proximate” connection or nexus- actual reliance, for example, or the active creation of risk.⁵

These elements of proximity- underlying relationships of risk and reliance, kinds and degrees of foreseeability, and other”extra” factors and relationships- come together in different patterns and combinations, in different factual circumstances, to give rise to different kinds of (special or proximate) relationships between the parties and, on that basis, different kinds of duties. The duty to *protect*, for example, where no

² F.H. Bohlen, “The Moral Duty to Aid Others As a Basis of Tort Liability” (1908) 56 U. Pa. L. Rev. 217 at 219-21.

³ See *Smith v. Littlewoods Organisation Ltd. (Scotland)*, [1987] 1 All E.R. 710 (H.L.), eg.

⁴ See *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1 at 55-56 per Deane J. (Aust. H.C.); also *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 per McLachlin J. at 1151 [*C.N.R. v. Norsk*]. Unlike the classic negligence scenario wherein a sufficiently close situational relationship is created through “causal proximity”, the “closeness or directness of the causal connexion... between the particular act or course of conduct and the loss or injury sustained”;

⁵ See discussion of the duty to control intoxicated persons (*infra* p.653), for example; contrast the parental duty to control children (*infra* p. 658).

underlying duty to control can be established, and where the requirements of the duty go beyond a mere duty to warn, must be supported by a specific relationship of situational or actual reliance in addition to the underlying relationship; to be "foreseeable" the victim must be specific and identified, as he or she must be where actual reliance has been established and where acts of protection are required to discharge the duty. Understanding the conceptual distinctions between these duties- the duty to control, the duty to protect, and the duty to warn- facilitates the coherent development of these classes of negligence, preventing confusion and the inappropriate application in one context of rules developed in and for another.

Considerations of public policy may negative a duty of care where sufficient "proximity" has been shown on the basis of these factors.⁶ This "policy test" will be especially relevant where new affirmative (and therefore exceptional) duties are considered. Affirmative duties, especially duties to prevent harms perpetrated by third persons, may also raise questions about the scope of public authority liability, together with fundamental policy issues about the acceptable limits of a negligence duty of care. It is important to realise that, in making these policy determinations, we are making determinations about acceptable creation of risk, and on whom that risk should fall.

II. *Duty to control*

A formal pre-existing relationship of control, arising through statutory powers (custodial authority)⁷ or elsewhere in the common law (parent and child)⁸ is in itself a strong or super relationship of (relative) intimacy and responsibility giving rise to a duty to control.⁹ A duty of care regarding the exercise of that control is owed to the immediate object of control and to foreseeable third party victims where control is exercised

⁶ See *Anns v. Merton London Borough Council*; *Kamloops (City) v. Nielson*, [1984] 2 S.C.R. 2 [Anns/Kamloops] (this "test" will be particularly important where a "new" duty is alleged (in a factual situation where a duty of care has not previously been found to exist) or where the putative duty of care is owed by a public authority).

⁷ *Ellis v. Home Office*, [1953] 2 All E.R. 149; *Funk v. Clapp* (1986), 68 D.L.R. (4th) 229 (C.A.) [*Funk*].

⁸ See *Segstro (Guardian ad litem of) v. McLean (Guardian ad litem of)*, [1990] B.C.J. No.2477 (Q.L.) others in charge of children, such as teachers, have a similar duty of care; see *Moddejonge v. Huron Board of Education et al.*, [1972] 2 O.R. 437; *Taylor v. King*, [1993] 8 W.W.R. 92 (B.C.C.A.); *Myers v. Peel (County) Board of Education*, [1981] 2 S.C.R. 21 [*Myers*].

⁹ *Smith v. Leurs* (1945), 70 C.L.R. 256 per Dixon J. at 262; the general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature" and see *Home Office v. Dorset Yacht* [1970] A.C. 1004, [1970] 2 All ER 294 (H.L.) [*Dorset Yacht*].

carelessly. A person in control of a child, for example, owes a duty of care to foreseeable victims of the child who is out of control (as a consequence of the controller's carelessness)¹⁰ as well as to the child itself.¹¹ Protection is implicit here in the duty to control; discharge of the primary duty to control results in the protection of the controlled and of foreseeable third parties.¹²

Human beings are unpredictable; those human beings that we have a right to control are less unpredictable than others, but retain some degree of free agency nevertheless. Foreseeability must be high in terms of probability to find responsibility and, therefore, liability. Regarding the object of control, the pre-existing relationship of control itself contributes to the likelihood that a failure to discharge the duty may result in harm to the controlled. The control relationship is, at least partially, predicated on the assumption that the object of control either cannot (as with a child.) or should not (as with a prisoner) be permitted to control him or her self; in both circumstances self-control is presumed to be impaired. Where a duty of care is owed to a third person victim of the inadequately controlled, there must be a strong likelihood that what did happen *would* happen. "Mere possibility" is not enough.¹³ The class or group of potential victims must also be highly foreseeable or probable, further reducing in significance the inherently unpredictable "human element" in the course of events, but need not be identified or easily identifiable as an individual. The function of the duty to control- in terms of controlling risks to third parties- does not require identity of third party victims. The duty owed to third parties in this case is discharged through the control of the perpetrator; discharging the duty does not turn on the identity of the

¹⁰ *Carmarthenshire County Council v. Lewis*, [1955] A.C. 549, for example, (a nursery school was held to owe a duty of care to a passing lorry driver who was killed trying to avoid a four year old boy who had escaped onto the road). An accident of this kind and consequent damage to users of the road was a foreseeable consequence of failing to control this small child (resulting in his escape). See also *Taylor*, *supra* note 8.

¹¹ See *Aiken (Guardian ad litem of) v. Van Dyk* (2001), 93 B.C.L.R. (3d) 379 (S.C.); *Peter v. Anchor Transit Ltd.*, [1979] 4 W.W.R. 150 (B.C.C.A.); *Ducharme v. Davies*, [1984] 1 W.W.R. 699 (Sask. C.A.) (child); see also *Funk*, *supra* note 7 (prisoner).

¹² In other circumstances (see discussion of the "intoxication cases" under Duty to Protect, *infra* p. 24) a *diminished* duty to control which is associated with a diminished duty to protect may together create a "nexus" of proximity giving rise to an affirmative duty of care. The control exercisable by the tavern owner, for example, is weaker than the control exercised by the parent or the jailer (it is diminished); some extra element of proximity will be necessary to support the affirmative duty.

¹³ *Dorset Yacht*, *supra* note 9 per Lord Reid at 1030. "... for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing". See also *Palmer (Administratrix of Palmer) v. Tees Health Authority*, [2000] P.I.Q.R. P1 (C.A.) [*Palmer*]; *Robertson v. Adigbite*, [2000] B.C.J. No. 1192 (S.C.); *C.L.C. v. Lions Gate Hospital*, [2001] B.C.J. No.2285 (S.C.) (Q.L.) [*C.L.C. v. Lions Gate*].

victim (unlike the duty to protect, discussed, *infra*), although apprehending the *kind* of risk at issue (and so the kind of control required by the duty) will require that the victim(s) be the member(s) of a foreseeable class.

This relationship between foreseeability and control was explained by the House of Lords in *Home Office v. Dorset Yacht*, probably the most famous "control" case of all.¹⁴ The case concerned events following the escape of a group of borstal boys on an over-night outing. The plaintiffs argued that the prison officers in charge of the boys had been negligent in their failure to exercise control over their charges, as a consequence of which the boys had escaped and caused significant damage to the plaintiff's yacht, in which the boys had absconded. The House of Lords concluded that the officers' legislative entitlement to control the boys gave rise to duty of control (a formal pre-existing control relationship), and that the kind of events that in fact transpired- the boys' escape by water, and their subsequent damaging of the yacht- were the foreseeable consequence of the failure to discharge that duty." If someone chooses to keep a wild animal" Lord Morris reasoned in his decision, "it would, by common assent be assumed that he was under a duty to prevent its escape. If a person who is in lawful custody has made a threat, accepted as seriously intended, that, if he can escape, he will injure X, is it unreasonable to assert that in those circumstances a duty is owed to X to take reasonable care to prevent escape?"¹⁵ The analogy to one who "chooses" to keep a wild beast is rather disingenuous, as the officers did not "choose" to keep the boys in any similar sense. As professionals the officers clearly benefited from the control relationship, however, which provided them with their livelihoods. These officers were not volunteers, or Samaritans, but rather experts; professional controllers of risky people on society's behalf (and so the analogy to the jailer is better).

In this case, it was predictable not only that the boys would escape, but that they would escape by boat, given the physical location. The yacht owners, therefore, whose boats were readily available to the escaping boys, comprised a foreseeable class of victims in the circumstances, persons at a "particular risk" of damage, "different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public."¹⁶ It is foreseeable that an escaping borstal boy will damage the property of another to further his efforts of escape; but it won't always be foreseeable enough (so, for example, had the boys made it to shore and then traveled on inland causing damage to a farm along their way, the farmer would not be a member of a "foreseeable class" but rather, for the purposes of duty of care, a member of the general public to whom

¹⁴ *Dorset Yacht*, *supra* note 9.

¹⁵ See *Dorset Yacht*, *supra* note 9 per Lord Morris of Borth-Y-Gest at 1039.

¹⁶ *Ibid.*, per Lord Diplock at 1070.

the prison officers owed no private duty of care).¹⁷

Other, analogous relationships of formal control also create a general risk through the formal assignment of responsibility (to the controller) and subsequent reliance on the reasonable exercise of that responsibility, by the object of control and by the public. A third party duty of care arises where that general risk becomes focussed on the members of a foreseeable class.

Children are assumed legally to be incompetent; our society deals with the risk this incompetence poses for children themselves and for others by charging parents with responsibility for their control. This system is generally sensible but not inevitable, and because parents are presumed to be exercising this control, nobody else does. In control relationships between prisoners and their custodians, on the other hand, the adult prisoner's presumed autonomy is actively diminished; this diminished autonomy creates a danger to the prisoner,¹⁸ while his or her inherent dangerousness to others (predicating the relationship itself) goes to the duty of care owed to third persons.

Physical custody, while a strong indicator of a formal control relationship of this type, is not a necessary element. The parole system's structure and purpose as a mechanism for the control of dangerous individuals, and society's enforced reliance on that system, underlie a series of recent and controversial decisions in Washington state.¹⁹ The "control" relationship in these cases is shown by the guidance and supervision exercised by parole officers, and their ability to regulate the parolee's movements; the parole officer has "taken charge" of the parolee "who he knows or should know to be likely to cause harm to others if not controlled."²⁰ Members of the foreseeable class of "others" to which the duty of control is owed need not be specially foreseeable or identifiable as an individual victim. In the

¹⁷ See the American case of *Nelson v. Parish of Washington* 805 F.2d 1236 (5th Cir. 1986), setting out the requirements for proximity in terms of time, space, known propensity for violence (the victim was a child who had been sexually assaulted and murdered), and the condition that the crime be committed during (and not following) the escape. The foreseeable class would be broader or narrower depending on the circumstances; the foreseeable class of victims would be large where a dangerous convict escaped and ran at large in a city, and narrow where he escaped into the wilderness and was soon recaptured.

¹⁸ See M.J. Randall Robb, "School's Duty to Protect Students from Peer Inflicted Abuse" (1997) 22 U. Dayton L.Rev. 317. The analysis here is similar to the "special relationship" which will found a state's constitutional duty to protect its citizen's under section 1983 of the Civil Rights Code in the United States, which requires that the state have restrained a citizen's personal liberty.

¹⁹ Starting with the decision in *Taggart v. State of Washington*, 118 Wash.2d 195, 822 P.2d 243 (Wash. S.C. 1992) [*Taggart*].

²⁰ See *Restatement of Torts (Second)*, para.319 (1965).

Taggart case,²¹ for example, the Court concluded that the perpetrator's history of alcoholism and violent attacks against women, together with his poor prognosis for recovery from his mental illness, supported a reasonable foreseeability that he would commit another similar crime if not closely supervised; "[t]he fact that *Taggart* [the plaintiff] herself was not the foreseeable victim of *Broc's* [the perpetrator's] criminal tendencies does not establish as a matter of law that her injury was not foreseeable."²² Note that the *kind* of wrong committed by *Broc*- a violent sexual assault- was a predictable outcome of his "escape" from control in the same way that the *borstal* boys' use of the boats was the foreseeable outcome of the failure to control in that case.

A duty of care deriving from an underlying duty of control must be distinguished from liability arising from a (pure) failure to *warn* individuals subsequently harmed by escaped or escaping controllee-s. Obvious factual similarity and even overlap exists, however, and the cases themselves do not always clearly identify the ultimate source of the duty of care.²³

*J.S. v. Clement et al*²⁴ arguably involved a both duty to control (the defendants' liability arising from a failure to control the prisoner wrongdoer), and a duty to warn (the defendants' liability arising from a failure to warn the plaintiff). The plaintiff had been beaten and sexually assaulted by a prisoner escaping from a minimum security detention centre near the plaintiff's home, where the prisoner, a known violent sexual offender, was serving a life sentence for second degree murder. The facts showed that the prisoner was distressed prior to his escape, a distress known to officers at the prison and associated with his relationship to a female prison officer. There was a significant delay between prison official's initial detection of the escape, and their informing the Ontario Police; the attack on the plaintiff (*J.S.*) occurred during this period. The Court found that the prison authorities did owe a duty of care to *J.S.*; it was foreseeable that the escaping prisoner would attack any woman with whom he came into contact (that he would do just what he, in fact, did). Women residing in the area (such as *J.S.*) comprised a foreseeable class of victims, like the yacht owners in the *Dorset* case. On the one hand, the circumstances of the prisoner's escape and the failure to recapture through notification of the police was a failure to control and, through control, prevent the damage to *J.S.* The failure to respond appropriately

²¹ *Taggart*, *supra* note 19.

²² *Ibid.* at para. 10.

²³ See "Duty to Warn", *infra* at p. 12; *Palmer*, *supra* note 13 (the case provides a striking example; it is never clear on which basis the proximate relationship is alleged, and the applicable law is drawn from cases dealing with a duty to control (*Dorset Yacht*, *supra* note 8), a duty to protect (the *Tarasoff* case, *infra* note 96) and the duty to warn (*Alameda*, *infra*) without comment.

²⁴ (1995), O.J. No. 248 (Gen Div) (Q.L.).

to the prisoner's escape also resulted in a failure to warn J.S. and other women residing in the area so that they might take steps to protect themselves.

Where hospitals and/or hospital staff have control over the behaviour of psychiatric patients, the controller owes a duty of care to the controller,²⁵ and to foreseeable third party victims of the failure to exercise that control with due care. In both instances the event and the victim must be strongly foreseeable as set out in *Dorset Yacht*, but there is no requirement that a victim be identified, only foreseeable (in the *Dorset* sense). Physical custody (hospitalisation) is a strong indicator of control in this context, also, but, again, not determinative. In the case of *Molnar v. Coates*,²⁶ for example, a treating Mental Health Centre was found to owe a duty of care to the sister/victim of a psychiatric outpatient (the patient was staying in the sister's home). The patient, who had been receiving regular medical injections from the Centre to keep his symptoms under control, had been refused his regular medication by the nurse on staff prior to the attack. The Court found that the Health Centre had assumed responsibility for controlling the patient through its regular administration of the medication. Failing to exercise that control (through the failure to administer the medication), the Centre owed a duty of care to foreseeable third party victims, a class including the plaintiff. The Court found that the patient was the Centre failed to exercise its "pharmaceutical control" of the patient, whose residence at the home of the victim placed her "at much greater risk than the members of the community at large".²⁷

Parent/child, parolee/parole officer, prison/prison officer; all of the cases involve a pre-existing formal/legal relationship of control, in itself a strong proximate relationship structured for the management of risk which, together with special or high foreseeability of events and a foreseeable class of victims, will comprise the "special" relationship necessary to found a duty to control oweable to third party victims. The underlying formal control relationships in each instance may be understood as a mechanism for controlling demonstrably "risky" people—parolees, borstal boys, patients with certain mental symptoms, and even children—in a system that rewards professional controllers for their assumption of this responsibility on our behalf (parental rewards are considered "natural," in terms of sentiment and satisfaction). Authorisation of those relationships creates its own risk, however; that the controller's incompetence lead to the harms that the formal relationship was constructed to prevent. Control relationships create

²⁵ *University Hospital Board v. Lepine*, [1966] S.C.R. 561; *Stewart v. Extencicare Ltd.* (1986), 38 C.C.L.T. 67 (Ont. H.C.); *Skinner v. Royal Victorian Hospital*, [1993] O.J. No. 1054 (Q.L.).

²⁶ *Molnar v. Coates* (1991), 5 C.C.L.T. (2d) 236 (B.C.C.A.).

²⁷ *Ibid.* at para. 21.

expectations that, in turn, induce reliance. Certain legal relationships in fact compel this kind of reliance.

Knowledge and ability are also inherent, structural elements of this kind of formal control relationship. Control-ers have access to knowledge regarding the kind and scope of risk posed by the control-ee; that knowledge is at once one aspect of the formal/professional role and responsibility, and a byproduct of the relatively intimate relationship with the control-ee. The community has reposed knowledge of this kind in formal control-ees; it is their job to know about the individuals under their control so that others do not have to. This knowledge (and the corresponding lack of knowledge on the part of the public) together with formal powers on control conferred on formal control-ers (and not shared by others) makes the formal control-er uniquely able to act at relatively little expense to him or herself (given that the control-er receives regular compensation for carrying out this role, he or she is not a "volunteer", and the traditional concerns about voluntary conferral of benefit underlying a non-feasance rule have little resonance in this context).

Duties of control *outside* of formal control relationships turn on the construction of broadly analogous control relationships, including elements of knowledge and ability. The formal control relationship is effectively replaced, in this context, by a nexus of relationships and other relevant factors.

The intoxication line of cases have identified these kinds of situational (as opposed to formal and ongoing) relationships of control in both commercial and social situations. The commercial host exercises "control" over the situation and the patron in terms of alcohol supply (dispensed by the host as gatekeeper) and over the broader drinking environment (through the presence of bouncers, for example, or other staff charged with "policing" the bar-room). The commercial host derives economic benefit through risk creation- the supply of alcohol- within this environment, and should have both knowledge (it being the host's responsibility to be aware of a patron's level of drunkenness) and ability to control that risk. In that the relationship impairs the autonomy of the patron (through the host's supply of alcohol), the patron must rely on the host's competent exercise of control; through the supply of alcohol, the commercial host benefits economically both from the creation of danger and from the patron's impaired autonomy/reliance.²⁸

The social host, by contrast, derives no economic benefit from the relationship and presumably exercises less direct control over access to liquor and the drinking environment (then where liquor is dispensed by a bartender and the environment patrolled by bouncers or other staff). The

²⁸ *Jordan House v. Menow* (1973), 38 D.L.R. (3d) 105 (S.C.C.); *Crocker v. Sundance Northwest Resorts Ltd.* (1988), 44 C.C.L.T. 225 (S.C.C.); *Stewart v. Pettie* (1995), 23 C.C.L.T. (2d) 89 (S.C.C.).

duty to control has been extended in these cases, however, where a social host supplies or serves alcohol (the active creation of risk), and has knowledge of actual intoxication and of foreseeable damage causing behaviour (the intent to drive for example).²⁹ The social host under these circumstances will be uniquely able to do something about the risk that he or she has created- and so, these cases say, he or she has a duty to do so through control of the intoxicated guest. Protection of both guest and foreseeable third party victim may be incidental to discharge of the duty of care, but the primary duty is one of control not protection.

A handful of recent cases have described a “paternalistic relationship” between the social host and his or her intoxicated guest which will effectively replace the active creation of risk (through the supply of alcohol) in the nexus of proximity. Theoretically, the “paternalistic relationship” contains within it an inherent risk of harm if the responsible party does not exercise his or her “paternal” control.

In *Prevost (Committee of) v. Vetter*³⁰ the adult mother of the house was found to owe a duty of care to an intoxicated guest of her son’s who, after leaving the house, was injured in an automobile accident. The Court found that a “paternalistic” relationship had existed between the mother, who was present at the house, and the young people (friends of her son) who were “partying” and consuming alcohol on the premises. A duty to act (to protect/control the plaintiff) arose on the basis of this paternalistic relationship, the risk created through the defendants’ permitting parties on their property at which drinking took place (although alcohol was not supplied), and the foreseeable risk: incumbent upon the defendant’s failure to control the situation. Indeed, the paternalistic relationship had come about through the defendant’s awareness of this foreseeable risk; “In the past [the defendant] had... taken steps to prevent minors who were intoxicated at their home, driving from it. She failed to do so on June 20, 1998. The danger to minors who drove with an intoxicated driver was foreseeable. The [defendant] had a duty and they failed in that duty.”³¹

The evidence established that parties frequently took place at the house, and that alcohol was consumed by minors despite the “house rules” forbidding it. The adult was “protective” of minors at the home

²⁹ *Boadfoot v. Ontario (Minister of Transportation & Communication)* (1997), 32 O.R. (3d) 361 (Gen. Div.); *Alchimowicz v. Schram*, [1997] O.J. No. 135 (Gen. Div.) (Q.L.), aff’d. [1999] O.J. No. 115, leave to appeal denied [1999] S.C.C.A. No. 127; *Calliou Estate (Public Trustee of) v. Calliou Estate*, [2002] A.J. No. 74 (Q.L.). *Dryden v. Campbell Estate*, [2001] O.J.No. 829 (Gen. Div.) (Q.L.). There is a suggestion in the case law that a serving alcohol to an individual with a known habit of drinking to extreme intoxication may replace (for the purposes of establishing liability) ascertainable intoxication (where a known heavy drinker does not exhibit overt signs of drunken-ness) in this equation.

³⁰ (2001), 197 D.L.R. (4th) 292, 5 C.C.L.T. (3d) 266 (B.C.S.C.).

³¹ *Ibid.* at para. 71.

when it was discovered that they had, indeed, been drinking, and generally took steps to “protect” them by “offering to have them sleep over, asking them to give up their car keys to prevent them driving away, and on occasion, driving them home if they needed a lift.”³² On this occasion, the adult did none of those things, leaving her 17 year old son to control and disperse the uninvited guests in their home. The plaintiff got a ride with a drunken teen who had also been at the party, and was subsequently injured when her car left the road.

The British Columbia Court of Appeal has subsequently found that it was not possible for the summary trial judge in the *Vetter* case to determine the existence of a duty of care, the appropriate standard of care, or a breach of the standard of care, without a determination of facts on the basis of further and full evidence.³³ The conclusions of the summary trial judge might be “embarrassing” to the subsequent trial judge, and prejudicial to the defendant. Moreover, the question of social host liability was a “controversial and unsettled” question that may come before the Supreme Court of Canada. A new trial was ordered; the ultimate future of the “paternalistic relationship” theory, in British Columbia at least, is uncertain.

In the case of *John v. Flynn* the Ontario Court of Appeal reversed a lower court decision holding that an employer owed a duty of care to the victim of a third party employee with a known drinking problem, distinguishing the commercial host cases on the basis of economic benefit and creation of danger through the supply of alcohol (as opposed to acquiescing in its consumption).³⁴ The employee, who was receiving treatment for his alcoholism through a work sponsored plan, had become drunk while at work and subsequently (after returning home from work and then going out again) injured the plaintiff in a car accident. The lower court had found that a “paternalistic relationship” had been established between employer and employee which obliged the employer to control the employee’s drinking, giving rise to a duty of care owed to foreseeable third party victims of a failure to control.³⁵

“Apaternalistic relationship” was held to give rise to a duty of care to third party victims in another Ontario case, *Monteith v. Hunter* (citing to *Vetter*).³⁶ In that case the Court refused to dismiss an action in negligence brought against the director of a halfway house who failed to

³² *Ibid.* at para. 61.

³³ *Prevost (Committee of) v. Vetter* (2002), 210 D.L.R. (4th) 649, 100 B.C.L.R. (3d) 44 (C.A.).

³⁴ *John v. Flynn*, [2000] O.J. No. 2578 (C.A.) (Q.L.). [*Flynn*]. Application for leave to appeal to the Supreme Court of Canada dismissed, (2002), S.C.C.A. No. 394.

³⁵ *John v. Flynn*, [2000] O.J. No. 128 (Gen. Div.) (Q.L.).

³⁶ (2001), 8 C.C.L.T. (3d) 268 (Ont. S.C.) [*Monteith*]. Judgement in the *Monteith* case was given October 3rd, subsequent to the Ont. C.A. decision in *Flynn*, *supra* note 34 (June 28, 2001).

control a sometime tenant of the home, now deceased. The plaintiff had been injured when the deceased, driving while intoxicated, struck her car.

The proximate connection in this case was tenuous, and appears to derive wholly from the "paternalistic relationship" established. The defendant was the director of Jericho House (a halfway house). The deceased was an ex-convict, who had entered Jericho House on his release from prison; the director took the deceased into his own home after problems developed at the facility. Preceding the accident, the deceased arrived at Jericho House intoxicated, in violation of the house rules. The defendant asked the deceased to leave and suggested that he go home (to the director's house) or to a detox centre. The deceased refused and summoned a cab, whereupon the director followed the cab for several blocks to ensure that the deceased had left the area. Unknown to the director, the deceased returned to the halfway house, stole an employee's car, and had a further drink at a restaurant before driving down the wrong side of the road and striking the plaintiff's vehicle.

The plaintiff alleged that a "paternalistic relationship" existed between the defendant and the deceased, in view of their close relationship and the director's "supervision and counselling over the years", on the basis of which the defendant owed a duty of care to the foreseeable victims of the deceased's intoxicated behaviour. The Court agreed; "In my view, especially as a result of the special relationship which developed between Dods and Jones [the deceased and the director of Jericho House], the classification as to duty of care is not closed, it may be closer to the paternalistic duty referred to in *Prevost v. Vetter*".³⁷ The director "should have notified the Police or the probation officer rather than allowing Jones to leave the premises in an intoxicated condition".³⁸ The defendant here asserted no control over the drinking of the deceased, or the environment in which that drinking took place; he neither introduced nor tolerated alcohol consumption and cannot be understood to have created this particular risk; nor did he benefit in anyway from the drinking of the deceased.

Whether arising through pre-existing formal relationships or through the "host" relationship in certain commercial and social situations, the control relationship provides a strong connection between the controller and the acts of the controlled. In none of these cases is it essential that the victim be an identified individual- only that he or she be a member of a foreseeable class. The duty to *protect* arising outside of a control relationship (where protection is not incidental to or implicit in control) requires an extra element of connection or proximity between the defendant and the third party victim, to compensate for that "missing" element; the victim must be identified (or clearly identifiable), in the

³⁷ *Monteith, ibid.* at para. 28.

³⁸ *Monteith, ibid.* at para. 34.

sense that the defendant should have that victim *in mind*.

Moreover, and key to the distinction, control requires identity of the perpetrator for its effective exercise; true protection, on the other hand, requires and indeed turns on the identity of the one at risk.

III. *Duty to protect*

A duty to control may be closely associated with a duty to protect; the duty of care owed by a school teacher to his or her pupils, for example, has both aspects.³⁹ The duty to control may give rise to liability where a third person suffers harm as a result of an "out of control" child; liability in this instance clearly derives from the teacher's duty to control the child. A teacher may be liable in negligence where the out of control child causes harm to his or her self, or where one pupil is harmed by another; in both cases it is difficult to say whether a duty of control or a duty of protection is controlling or dominant (the one deriving from the other).⁴⁰ It is doubtful that a teacher will have a duty to protect a student from third party strangers (individuals over which the teacher has no control) which would seem to indicate that any duty to protect is not pure but an incident of the primary duty to control. In the United States, however, the teacher's duty to protect his or her students has been described on the basis of the student's placement in the care of the defendant with the resulting loss of the student's ability to protect himself or herself, the basis also of the "similar duty of an innkeeper to protect guests from the criminal actions of third parties".⁴¹ These relationships have been described as "protective in nature"- responsibility and reliance being inherent in the power structure of the relationship itself.

Parents generally owe a duty of care to their children which includes a duty to protect the child from self-harm resulting from inadequate control; again "control" and "protection" are entwined in these circumstances as two aspects of a parental duty of care. The parental duty of care also includes a duty to protect one's child from third parties where harm to the child is the foreseeable outcome of the failure to protect.⁴² In these circumstances the parent's duty to protect is "pure"- not associated with a duty to control either

³⁹ *Van Oppen v. Clerk to Bedford Charity Trustees*, [1990] 1 W.L.R. 235. The teacher's duty of care arises from a situation of *in loco parentis* requiring the standard of the "careful or prudent parent"; (*Myers, supra note 8*) and the teacher's special knowledge and responsibilities.

⁴⁰ See *Leah Bradford-Smart v. West Sussex County Council*, [2002] 1 F.C.R. 425 (Lexis) (C.A.).

⁴¹ *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn. 2d 316, (1953); *J.N. ex. rel. Hager v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, (1994).

⁴² *Peter v. Anchor Transit Ltd.*, [1979] 4 W.W.R. 150, (B.C.C.A.); *D.B. v. Carruthers*, [2001] 5 W.W.R. 617 (Sask. C.A.); [*D.B. v. Carruthers*] *R. v. Popen* (1981), 60 C.C.C. (2d) 232 (Ont. C.A.); see also *Arnold v. Teno*, [1978] 2 S.C.R. 287. See

child or third party, and ultimately arises from the fiduciary relationship between parent and child.⁴³ Risk is inherent in the parent-child relationship as it is in all fiduciary relationships- relationships of power imbalance in which the vulnerable party is placed "at the mercy of" the exercise of discretion by the stronger. The risk of exploitation and the danger to the weak where the strong does not exercise this power responsibly underlies equity's articulation of the fiduciary's duty which, in turn, underlies the fiduciary parent's duty to both control and to protect.⁴⁴ The underlying legal and normative relationship raises a presumption of both specific reliance- we presume that children rely specifically on their individual parents for protection- and the child's identified foreseeability as the individual victim of a failure to protect.

A "pure" duty to protect in other factual contexts will depend upon the presence of a similar underlying relationship of inherent or structural risk (because of enforced reliance and consequent vulnerability), together with specific or actual reliance and identifiability. This specific reliance must be in addition to, yet *derive from*, the underlying relationship of reliance.⁴⁵

In the case of parent and child the structural or legal relationship of dependence and reliance is supported by the child's presumed physical dependence and the intimate relationship of physical neighbourhood, by reason of which one's child should always be "foreseeable" as an identified victim of the failure to non-negligently carry out the parental duty of care.⁴⁶ Outside of the parent/child fiduciary obligation, some extra connection or relationship is required in addition to the underlying relationship of reliance/dependence to effectively replace the physical proximity and high degree of foreseeability presumed to be inherent in the parent/child relationship.

D.H. (Public Trustee of) v. S.A.H., [1998] B.C.J. No. 1388 (B.C.S.C.) (Q.L.), discussing the limits.

⁴³ See *M.(M.) v. F.(R.)* 52 B.C.L.R. (3d) 127 at 157, per Esson J.A. (The duty has been held only to arise with actual knowledge or wilful blindness); *J.(L.A.) v. J.(H.)* (1993), 13 O.R. (3d) 306 (Ont. Gen. Div); *Y.(A.D.) v. Y.(M.Y.)* (1994), 90 B.C.L.R. (2d) 145 (B.C.S.C.); but see *D.B. v. Carruthers*, *ibid.* ("knew or ought to have known") at para. 15).

⁴⁴ See paper presented to the Annual Conference of the Law and Society Association, Vancouver B.C., May 2002) [unpublished]. Margaret Isabel Hall, "Inherent Fiduciaries: The Equitable Structure of Family Life".

⁴⁵ *McGauley v. British Columbia*, [1990] B.C.J. No. 784 at 9, per Huddart J., appeal partially allowed on other grounds, (1991), 56 B.C.L.R. (2d) 1 (C.A.) (Q.L.). ("In other words one cannot impose liability on another simply by choosing to rely upon him. Nor will knowledge that one is being relied on be enough to create liability. The reliance must derive reasonably from the relationship said to be proximate if it is to create a duty of care").

⁴⁶ Although structural reliance and dependence will significantly outlast the child's period of physical dependence.

Statutory and common law⁴⁷ obligations comprise an underlying relationship of dependence and obligation where a public authority is charged with the protection of the public from “private” third parties; to create a relationship of proximity sufficient to support a *private* law duty of care that underlying relationship must in the specific instance be joined by a particular reliance and foreseeability to create a nexus roughly equivalent (in terms of proximity) to the relationship between parent and child. The “general” or public duty does not in itself give rise to a private duty, but there would be no private duty to protect in the absence of that underlying general obligation.

Like the parent/child fiduciary relationship, the reposing of responsibility for activities such as child protection and protection from crime creates a risk of harm if that responsibility is not carried out with reasonable care; risk is created through the community’s reliance on the designated public authority (and consequent abdication of any personal responsibility).

Justice Brennan of the United States Supreme Court, dissenting in *DeShaney v. Winnebago County Department of Social Services*,⁴⁸ described this quality of reliance with regard to the obligations of the State under section 14 (the due process clause) of the American Constitution. In that case, the State authority had failed to respond to reports that the child Joshua DeShaney was being abused by his father; Joshua’s final beating left him institutionalised with severe brain damage. Justice Brennan, explaining the basis of the State’s obligation, concluded that the child welfare system established by the State of Wisconsin effectively “directed” citizens and other professionals and governmental entities to depend on that system to protect children from abuse:

Through its child welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin’s child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney’s violent home until such time as DSS took action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program where the persons and entities charged with carrying it out fail to do their jobs.⁴⁹

⁴⁷ See *Haynes v. Harwood*, [1935] 1 K.B. 146 (C.A.) [*Hayes*].

⁴⁸ 489 U.S. 189, 109 S. Ct. 998.

⁴⁹ *Ibid.* at p. 219; Elsewhere I have suggested that an implicit function of modern child protection systems is to increase privacy around the family by decreasing “communal” interference, in accord with other structures supporting individualism; see M.I. Hall, (1998) 12:2 *Int’l J.L. Pol’y & Fam.* 121 “A Ministry for Children: Abandoning the Interventionist Debate in British Columbia”, *International Journal of Law, Policy and the Family*.

While directed to the constitutional obligation, the analysis here applies equally to the relationship of “general reliance”⁵⁰ underlying a private duty of care; where this general reliance underlies a relationship of *particular* reliance (as where a police officer assumes responsibility for the protection of an identified individual who has in turn relied on that assurance) a private duty of care may exist.⁵¹

The duty of protection arising in this way is “pure,” and does not derive from or in any way rely on an underlying duty to control. In the case of the child in need of protection, for example, the child protection officer has no authority or responsibility to control a parent (just as the parent has no authority or responsibility to control or the spouse who abuses his or her child). A similarly “pure” duty of protection owed by police can arise only in situations where the police have no authority or responsibility to control the perpetrator (in other kinds of situations, as in the parole cases discussed above, a duty of protection or warning may be incidental to the underlying duty to control).

A “pure” duty to protect was at issue in the case of *Hill v. Chief Constable of West Yorkshire*, where the perpetrator remained at large at the time of the victim’s murder (and so outside of any police control).⁵² The plaintiff was the mother of a victim of the Yorkshire Ripper, a notorious serial killer of women in the North of England in the 1980s. The mother alleged that the negligent police investigation in the case was a cause of her daughter’s death. The House of Lords confirmed that a duty of care to enforce the criminal law (a duty to protect) is owed by the police to the general public in common law but held that no enforceable duty was owed to individual members of the general public, unless a special relationship existed which lifted the individual out of the general public class and into a class of proximate and foreseeable victims. A special relationship could arise where the defendant had a right (and corresponding duty) to control the wrongdoer, as in *Dorset Yacht Co. v.*

⁵⁰ *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 at 464 per Mason J. as arising “out of a general dependence on an authority’s performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on the one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realisation that there is a general reliance or dependence on its exercise of power...”; see also *Giuskud v. Kavanaugh* (1994), N.B.R. (2d) 1 (Q.B.).

⁵¹ See discussion below; see also *Cowan v. Chief Constable for Avon and Somerset* [2001] WL 1346977 (C.A.), per Keene L.J. at para 34; *Costello v. Chief Constable of Northumbria Police*, [1999] 1 All E.R. 550 per May L.J. at 557 [Costello]; *Mullaney v. Chief Constable of West Midlands Police*, [2001] WL 482953 (C.A.).

⁵² *Hill v. Chief Constable West Yorkshire*, [1989] A.C. 53 (H.L.) [Hill].

the Home Office, and where the plaintiffs were members of a limited and foreseeable group (such as yacht owners in the vicinity). In the *Yorkshire* case the killer was still at large and so no relationship of control existed between the defendant and the wrongdoer. Nor was the victim, as a young woman in the general area of Ripper's activity, a member of a foreseeable and limited class of victims analogous to the yacht owners in *Dorset*; as Lord Keith of Kinkel explained in *Hill*, "All householders are potential victims of an habitual burglar and all females those of an habitual rapist."⁵³

The English Court of Appeal distinguished *Hill* in the case of *Swinney v. Chief Constable of Northumbria*⁵⁴ to find that a special relationship of actual reliance existed between the police and the victim giving rise to a duty of protection; as in *Hill*, there was no underlying duty to control. The plaintiff in that case had passed on information to the police regarding the identity of a person implicated in killing a police officer. The plaintiff had requested and received assurances that her information be kept confidential as she was concerned for her safety should she be identified as the source. A record of her information was subsequently stolen from an unattended police vehicle. Consequently, the plaintiff's identity became known and she was threatened with violence and arson, suffering psychological damage as a result. The Court found that the plaintiff's reliance on the assurance of the police (and her acting on that reliance by providing information) created a special relationship of proximity, and that the policy considerations in favour of protecting informants (thereby encouraging them) justified a duty of care in the circumstances.⁵⁵

There is a substantial body of American case law establishing and explaining the "special relationship" rule (that a "special relationship" and private duty of care will come into being where an obligation has been assumed by the protection authority and relied on by the victim)⁵⁶ and the kinds of circumstances in which that relationship will arise.

In *Hamilton v. City of Omaha*⁵⁷ a victim of assault alleged that a police officer had been negligent in failing to protect her from her former

⁵³ *Dorset Yacht*, *supra* note 9 at 62; citing to *R. v. Commissioners of Police and the Metropolis*, [1968] 2 Q.B. 118.

⁵⁴ [1997] Q.B. 464 [*Swinney*].

⁵⁵ England had used *Swinney*, *ibid.* in the European Court to argue that the English Court had considered the "policy balance" in *Osman v. U.K.*, discussed below, note 84, to conclude that (unlike *Swinney*) there were no countervailing policy interests in favour of a duty. The European Court rejected that argument, concluding that the English Court had not in fact applied a "balance" in this way in the *Osman* case.

⁵⁶ This is also the basis of the exception to California's legislated police immunity; see *Restatement of Torts* (Second) (1975) para. 315 (b).

⁵⁷ 243 Neb. 253, 498 N.W. 2d 555 (C.A.) (1993) [*Omaha*].

husband, after repeated assurances that she would be so protected. The Nebraska Court of Appeal split, four to three. The majority held that the plaintiff had failed to establish any special duty existing between herself and the police which would sustain an exception to the general "no duty" rule. An exception to the rule would be found in two situations: where the person alleging a duty had assisted the police as informers or witnesses, and where the police had "expressly promised to protect specific individuals from precise harm."⁵⁸ More than "general reliance" would be necessary.⁵⁹ The plaintiff must specifically act or refrain from acting so as to demonstrate a "particular reliance" upon actions of the police to provide protection. The examples cited are where a plaintiff, relying on the presence of a crossing guard, stops walking her son to school⁶⁰ and where a plaintiff was restrained by the police by taking action to provide for her own protection.⁶¹ There was no evidence of "action" of this sort by the plaintiff in reliance on the police.⁶²

The dissenting judgement in the case found that the officers action in the case- visiting the plaintiff in addition to assuring her of protection, induced a reliance on the basis of which she chose to stay in her own home (believing she would receive protection) rather than leaving.

A failure to protect was found in the more recent Nebraska (Appeal Court) case of *Brandon v. County of Richardson*.⁶³ The suit was brought by the estate of Teena Brandon. The deceased had been the victim of a rape, after her attackers discovered her true identity as a female (Ms. Brandon had been living as a male). After the rape, the victim had gone to the police to report the crime, despite her attackers' threat to kill her if she did so. Ms. Brandon told the police that she was afraid for her life, and was reassured that the perpetrators would be arrested. Ms. Brandon agreed to co-operate with the investigation; the perpetrators were not, in fact, arrested, and Ms. Brandon was killed along with two others. The Supreme Court of Nebraska held that a "special relationship" was created between the police officers and Ms. Brandon as a result of her reliance on the officers' assurances, and subsequent decision to remain living in the area and to assist with the investigation, offering to testify against her attackers. That special relationship gave rise to a particular duty of care owed to the deceased which required the officers to take reasonable steps

⁵⁸ Omaha, *ibid.* at para. 8, per Hastings C.J.

⁵⁹ See also *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. C.A. 1983) at para. 8 [*Morgan*].

⁶⁰ *Florence v. Goldberg* 44 N.Y. 2d 189, 375 N.E. 2d 763 (N.Y.S.C. App. Div.) (1978).

⁶¹ *Bloom v. City of New York*, 357 N.Y.S. 2d 979.

⁶² See also, *Morgan*, *supra* note 59, "Suits against the police for failure to protect victims of violent crime: a feminist perspective on the use of dichotomies" (1997) 26 *Anglo-American Law Review* 37 [*Handsley*].

⁶³ No. S-00-022 (Neb.S.C. 2001).

for her protection; liability flowed from this failure to protect, and not from the unreasonableness of the investigation into the crime.

In *Chambers-Castanes v. King Country*⁶⁴ a Washington State Appeals Court found that an explicit assurance of protection giving rise to reliance would create a duty private duty of care to an individual member of the public without the requirement of "action" described in *Hamilton*. In that case the police received 11 telephone calls for help starting within 2 minutes of the beginning of the attack on the plaintiffs, and continuing for an hour and 4 minutes. Despite their assurances of immediate assistance, no police officers in fact attended until 1 hour and 20 minutes after the initial telephone call. If the plaintiffs had not relied on the supposed imminent help of the police, they may have been able to call on alternate assistance.⁶⁵

A New York Appeals Court decision decided the same year *DeLong v. County of Erie*,⁶⁶ reached a similar conclusion. The deceased, the victim of a burglar, (the suit was brought by her estate) had placed an initial call for assistance from 911 at 9:29; by 9:42 she had been assaulted, later dying of her injuries. The victim had been assured that help would arrive "right away"- but it did not. The special relationship was created by the victim's reliance on 911; people seeking emergency help had been encouraged to use 911 rather than to call their local police station. In fact, the victim's local police station was very close, and had she called there directly or left the house, she may have avoided the assault.

In *Warren v. District of Columbia*,⁶⁷ however, a Washington D.C. Appeals Court came to a very different conclusion, regarding a similar and shocking factual scenario. An 911 dispatcher delayed reporting the initial 911 call reporting a burglary in progress despite assuring the caller that assistance was coming immediately; when the call was reported the dispatcher assigned it the wrong code (lower in priority than crime in progress). When police officers finally did arrive at the scene, they failed to check the building thoroughly and failed to find the burglars who by this time had committed serious sexual crimes on the female victim of the burglary and her four year old daughter. The officers left without discovering the burglars, who were still at the scene. The victims' neighbours made a second 911 call, again receiving assurance that help was on the way; no help ever arrived, and for the next 14 hours the burglars held all occupants of the building captive including the neighbours who made the second call. All were raped, beaten, robbed and subjected to numerous sexual indignities. The court found that, despite

⁶⁴ 100 Wash. 2d 275, 669 P.2d 451 (Wash. C.A. 1983).

⁶⁵ See *Omaha*, *supra* note 57; and *Sinks v. Russell* 34 P.3d 1243 (Wash. C.A. 2001).

⁶⁶ 60 N.Y. 2d 296, (N.Y.S.C. App. Div. 1983).

⁶⁷ 444 A.2d 1 (D.C. C.A. 981).

the incompetence of the police, there was no "special relationship" between the officers and the victims, despite the assurances of assistance, and despite the attendance of the officers on the scene.

A "special relationship" of specific obligation and reliance has been found to exist between the state (Department of Social and Health Services) and disabled individuals in receipt of in home care paid and arranged for by the Department; the state's duty to protect, discharged through the case manager was breached when the case manager failed to act to protect a severely disabled man from abuse and neglect perpetrated by his caregiver (the continuing abuse was highly foreseeable, as it was ongoing).⁶⁸ In this case, unlike the previous cases discussed, "special reliance" arose through the *structure* of the relationship between the Department and the client, and not through any "extra" series of actions, assurances, and events. The "protective nature" of that relationship, involving elements of "entrustment" (in that "one party was, in some way, entrusted with the well being of the other party")⁶⁹ gave rise to a particular and individual reliance: "Profoundly disabled persons are totally unable to protect themselves and are thus completely dependent not only on their caregivers but also their case managers for their personal safety".⁷⁰ The case manager/client relationship, in that context, would always be a relationship of "particular reliance."⁷¹

The rule or formula that has been developed through both the UK and American jurisprudence is relatively clear, and has been applied consistently in a range of situations and (state) jurisdictions. The position in Canada is more ambiguous, with the relatively scanty case law on this particular issue- a public authority's private duty of protection from a third party perpetrator- suggesting a more expansive duty that may exist with or without the tight nexus of assurance and actual reliance.

In the *Jane Doe* case,⁷² for example, the courts found that the police authority's (private) duty of protection included in the circumstances of that case a duty to warn, owed to a foreseeable class of victims. The

⁶⁸ *Caulfield v. Kitsap County*, 108 Wn. App. 243 (Wash. App. Div.).

⁶⁹ *Ibid.* at para. 19, citing to *Lauritzen v. Lauritzen*, 74 Wn. App.432, 874 P.2d 861.

⁷⁰ *Ibid.* (there was evidence suggesting that the case workers had knowledge of the victim's serious neglect and that, therefore, his continuing neglect was foreseeable. In response to a growing number of similar case resulting in a series of high profile settlements, and the parole cases discussed under "Duty to Control," Bill 5355 currently before the Washington Senate will codify negligence liability in these situations. A "Washington State Risk Management Task Force" was also formed to mitigate loss and damage related to state services and to "better protect the public"; see *Report of the Washington State Risk Management Task Force* October 9, 2001.

⁷¹ See also *Niece v. Elmview*, 929 P.2d 420 (Wash. S.C. 1997); *Shepard v. Mielke*, 877 P.2d 220 (1994); *Hunt v. King County*, 481 P.2d 593, review denied, 79 Wash. 2d 1001 (1971).

⁷² See discussion, *infra*, "Duty to Warn".

victim was not an identified individual and there was no specific relationship of reliance (the perpetrator in that case was at large, and so not under the defendants control, at the time of the events causing harm to Ms. Doe). The extension of a private duty protection to a *class* of individuals in *Jane Doe* was justified on the basis of the *Air India* case; the officers' duty of care in that case quite clearly arose on the basis of a primary duty of *control*, however, (protection being implicit in that control) an element missing in the circumstances of *Jane Doe*.⁷³ The plaintiffs in the *Air India* case alleged that the R.C.M.P. constables assigned to the task had failed to carry out adequate security measures prior to the *Air India* flight in question; a bomb was placed on board the airplane, which subsequently exploded. The plaintiffs' action was allowed. The bomb planting terrorists were not in the control of the officers (a point noted in *Jane Doe* as analogous to the officers' lack of control over the perpetrator in that case), but the Court stressed the control of the constables over the loading process and environment and the passengers and baggage that were allowed on the plane, together with their knowledge of threats made against *Air India* flights. The *Air India* court concluded that passengers were a limited, defined and proximate group regarding whom it was reasonably foreseeable that a breach of the duty of care would result in harm.⁷⁴

Air India was really a case about the duty to control, and *Jane Doe* should be understood as a case about a duty to warn; a "pure" duty to protect was recently considered in *Mooney v. British Columbia (A.G.)*⁷⁵ The plaintiff had brought an action in negligence brought against the police, concerning a third party perpetrator's murderous shooting spree at the home of his estranged common law wife. The wife's best friend was shot and killed; her daughter was shot and wounded (the wife was able to flee). The wife (the plaintiff) alleged that the police had failed to properly investigate her complaint regarding threats made by the perpetrator, thereby failing to discharge their duty to protect her and her family. Pursuant to section 11 (1) of the *Police Act* the Province of British Columbia would be vicariously liable if a constable failed to meet an acceptable standard of care concerning his or her duty "to protect life and property"; a failure to act would be actionable in circumstances imposing a duty to act.⁷⁶ Did a duty to protect arise in these circumstances?

The court found that the constable taking the plaintiff's complaint knew of the threat and should have been aware of its seriousness; the Court accepted evidence of the plaintiff's intense and visible fear on

⁷³ (1987), 62 O.R. (2d) 130 [*Air India*].

⁷⁴ *Jane Doe v. Metropolitan Police of Toronto* (1989), 48 C.C.L.T. 105 (H.C.J.); (1990), O.R. (2d) 225 (Div. Ct.); (1998), 39 O.R. (3d) 487 (Gen. Div.) [*Jane Doe*]; see "Duty to Warn" at 61.

⁷⁵ [2001] B.C.J. No. 1160 (S.C.) (Q.L.) [*Mooney*].

⁷⁶ *Lafleur v. Maryniuk* (1990), 48 B.C.L.R. (2d) 180 (S.C.) at 190.

making the complaint. Had he inquired into the history of their relationship, the constable would have established that the plaintiff's fear was well founded. The constable's handling of the complaint failed to comply with a recent policy directive concerning investigations of relationship violence, of which the constable was well aware. He knew that the perpetrator had been "flagged" as a violent person, and that he was on probation for assaulting the plaintiff three months earlier. The Court concluded "[a] careful investigation was warranted", the Court concluded "but not undertaken"; a private duty of care had been owed to the plaintiff, and that duty had been breached. The breach was not the cause of the plaintiff's damage, however, and the action was dismissed.

There is no evidence in *Mooney* that the constable had assured the plaintiff that he would protect her, nor that the plaintiff "actually relied" on any such assurance by acting on that reliance in a way that increased her own risk (as Teena Brandon did, for example, leading to her murder). Note that the plaintiff in this case was an identified individual, the protection required here (the investigation) flowing from her knowledge of her identity (like Teena Brandon, but unlike Jane Doe).

In all of these cases the private duty is supported by the underlying relationship of general reliance which makes it both fair and reasonable that a public "protector" be required to take action for the protection of another, where it would be less fair, and contrary to the fundamental principles of tort law, to require a private individual to take similar action. "Unlike an individual, a public authority is not an indifferent onlooker", as Lord Nicholls of Birkenhead explained (dissenting) in *Stovin v. Wise*, "... [and] [c]ompelling a public authority to act does not represent an intrusion into private affairs in the same way as when a private individual is compelled to act".⁷⁷ Professional individuals benefiting (in the form of salary and benefits) from the general reliance system (ie. systems for public protection) are less burdened, in a proportionate sense, by a corresponding "duty to protect" with due and reasonable care than my friend who may ultimately not provide the protection he promised. I have a choice, moreover, about whether to rely on my friend or on my own resources for my protection in a given situation; prohibited from "taking matters into my own hands", I have no choice about whether or not I wish to rely on the police or (if I am a child) state systems for child protection. My reliance is mandated by my membership in civil society.⁷⁸

Special rules about the liability of public authorities will apply and need to be taken into consideration where the authority's "duty to protect" is in question. Provincial statutes relating to police investigation will apply in Canadian jurisdictions, for example.⁷⁹ In California, the liability

⁷⁷ *Stovin v. Wise*, [1996] 3 All E.R. 801, as per Lord Nicholls of Birkenhead, dissenting at para. 36; see also *Haynes*, *supra* note 46.

⁷⁸ See Handsley, *supra* note 62.

of police officers regarding any “duty to protect” is limited by statute.⁸⁰ Anglo-Canadian common law also “immunizes” police officers to a certain degree through the distinction between “operation” and “policy”⁸¹ and through the “policy branch” of the *Anns* test,⁸² above and beyond any “special relationship” of proximity.

In the *Hill* case, the House of Lords appeared to confer a negligence immunity on police officers regarding the conduct of investigations, for reasons of policy (as directed by the “second branch” of *Anns*).⁸³ Potential liability would not make the police any more efficient than they already were (the plaintiff’s avowed motive in bringing the case) as the police were already motivated by a general sense of public duty which would not be increased by a “private” duty of care, but would distract officers from the proper performance of that general duty, and divert resources from essential police tasks while (in the event of litigation) exposing police investigations to an inappropriate level of factual scrutiny.⁸⁴

The European Court of Human Rights found that the “blanket immunity” created by *Hill* was an effective violation of plaintiff’s access to justice rights under Article 6 of the European Convention on Human

⁷⁹ *Jane Doe*, *supra* note 74.

⁸⁰ See *Mooney*, *supra* note 75; Government Code, Chapter 3 (“Police and Correctional Activities”) s. 845: “Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise to provide police protection services or, if police protection is provided for failure to provide sufficient police protection service”. The immunity conferred by the statute is not absolute, however, and a duty will be found where a “special relationship” involving the voluntary assumption of a special duty and a plaintiff’s reliance on that assumption can be shown (in effect, the common law “general duty” exception). See *John E. Hartzler (Administrator) v. City of San Jose*, 46 Cal. App. 3d 6 (1975); *Carpenter v. City of Los Angeles*, 230 Cal. App. 3d 923 (1991); *Williams v. State of California*, 34 Cal. 3d 18 (1983).

⁸¹ *Anns/Kamloops v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); see *supra* note 51); (public authorities cannot owe a duty of care regarding policy decisions or matters as these involve the carrying out of statutorily conferred discretion and are immune from judicial review); (unless the decision is “so unreasonable that no reasonable authority could have made [it]” (*X and others (minors) v. Bedfordshire County Council*, [1995] 3 All E.R. 353 (H.L.) at 380) (taking the matter outside the scope of properly exercised discretion and outside the scope of immunity).

⁸² *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at para 30, per McLachlin J. (at this stage a duty of care otherwise owing may be negated by the balance of “residual policy considerations outside the relationship of the parties”).

⁸³ *Hill*, *supra* note 52 per Lord Keith, Lord Templeman concurring (the policy analysis was made subsequent to the finding of no proximity in that case).

⁸⁴ *X. v. Bedfordshire*, *supra* note 81; *Hussain v. Lancaster City Council*, [2000] Q.B. 1 [*Bedfordshire*] (in that case the Court of Appeal held that the local authority had no duty of care to prevent the “atrocious” racial harassment of the plaintiff tenants by other tenants on a housing estate).

Rights⁸⁵ in the case of *Osman v. UK*.⁸⁶ *Osman* was revisited by the European Court in the case of *Z v. United Kingdom*,⁸⁷ a majority of the Court finding on this occasion that subsequent case law⁸⁸ had clarified the *Hill* criteria as policy issues to be considered in each individual case, rather than providing for any blanket immunity. It seems rather disingenuous to suggest that this "subsequent case law" did not develop in response to *Osman* itself; but whatever the source, any suggested "policy based" immunity is no longer tenable⁸⁹ (except, it seems, regarding decisions whether to "intervene" for the protection of children).⁹⁰

In all of the cases discussed above, the foreseeable victim must be individually identifiable. From a theoretical perspective, this is right in that a strong relationship of intimacy, responsibility, and foreseeability should be required if one will be held legally accountable for the failure to protect another- to take positive action on another's behalf. From a

⁸⁵ Eur. Ct. H.R. Oct. 28 1998, [2000] 29 Eur. H.R. Rep. 245. (Providing that "In the determination of his civil rights and obligations... everyone is entitled to a...hearing... by [1] tribunal").

⁸⁶ Which concerns a Death in Venice situation with a tragic and violent ending. A school teacher, obsessed with his young student began to stalk him in a series of disturbing incidents. The school and the police were aware of the teachers bizarre and threatening behaviour, and the police had interviewed all parties on several occasions. The teacher finally killed the boy's father, attempting to kill the boy in the same attack. The mother's action in negligence against the commissioner of police was struck out for lack of cause; leave to appeal to the House of Lords was denied. The Court of Appeal (*Osman v. Ferguson*, [1993] 4 All E.R. 344) concluded that, although the a relationship of proximity existed giving rise to a duty to protect, that duty was negated on the basis of the policy analysis or balance set out by the House of Lords in *Hill* (recall that in *Hill*, *supra* note 52 (there was no relationship or special proximity)).

⁸⁷ Eur. Ct. H.R. May 10 2001, [2001] 10 B.H.R.C. 384. European Court of Human Rights.

⁸⁸ See *Barrett v. London Borough of Enfield*, [1999] 3 W.L.R. 79 (H.L.); *Swinney*, *supra* note 54.

⁸⁹ See the discussion in *Brooks*, *supra* note 55 at para.73; also, *Costello*, *supra* note 51 at 563.

⁹⁰ See M. Hall "Child neglect and the right to protection: *Z and Others v. United Kingdom*" [2002] J. Soc. Welfare Fam. L. (The outcome of *Z* was to uphold the decision in *X v. Bedfordshire*, *supra* note 80; (Note that in the United States, a "special relationship" and private duty of care requiring intervention to protect has been found on the basis that child protection legislation gives rise to a special duty owed to neglected children after the filing of a specific report concerning that child (whereupon the child's condition became known). *Turner v. District of Columbia*, 532 A.2d 662 (D.C. Appeals 1986); see also, *Mammo v. State*, 675 2d 1347 (Ariz. App. 1983); *Nelson v. Freeman*, 537 F.Supp. 602 (W.D. Mo. 1982), *aff'd*. 706 F.2d 276 (8th Cir. 1983). *A.J. v. Cairnie Estate*, [2001] M.J. No. 177 (Q.L.). (In Canada, a private law duty to protect owed by a social worker to a child disclosing sexual abuse was upheld by the Manitoba Court of Appeal).

functional perspective, the identified victim is a necessity; how can I protect a victim I cannot identify, given that I have no control over the perpetrator? Protecting Ms. Sweeney, for example, meant keeping *her* information safe from exposure; protecting Teena Brandon meant keeping *her* assailants in custody, as promised; protecting the disabled man in Kitsap County meant that *his* case manager had to be aware of *his* particular situation. Protecting Ms. Mooney meant responding adequately and appropriately to her complaint. Where a duty of care requires mere warning for discharge, on the other hand, identity will not be necessary and the formula (in terms of proximity and the special relationship) will be rather different (see discussion, *infra*).

One situation is exceptional, from both perspectives: the duty of the occupier to the tenant, which may, in certain circumstances, include a duty of protection. Where a landlord's failure to provide adequate security on windows and doors has been a cause of the perpetrator's entrance into the apartment of the victim, the failure to "protect" the victim may be incidental to the landlord's general duties of maintenance and upkeep. Preventative security measures, on the other hand, will be associated with a "pure" duty to protect. The pre-existing relationship between landlord and tenant is relatively intimate, governed by statute, and a relationship from which the landlord derives commercial benefit. The landlord's degree of control over the property and its condition gives rise to the tenant's reasonable reliance on the proper exercise of that control; he or she can do things for the protection of the tenant that the tenant cannot do independently. Where the risk to the tenant is sufficiently foreseeable, a (limited) duty of protection will arise:

The landlord is no insurer of his tenant's safety, but certainly he is no bystander. And where, as here, the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises under his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventative action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimise the predictable risk to tenants.⁹¹

In the Canadian case of *Q v. Minto Management Ltd.*,⁹² for example, a landlord was found liable in negligence for not taking additional security measures in regards to the master key system of his apartment block in question after a rape had occurred in the complex. The evidence suggested an "inside job" with entrance to the victim's apartment being obtained through access to the master keys. The attack on the plaintiff, also through the perpetrator's access to the master keys, was the foreseeable consequence of the landlord's failure to improve security over

⁹¹ *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) at 482; Bateman & Thomas "Landlord Liability- Criminal Acts" 43 ALR 5th 207.

⁹² (1985), 49 O.R. (2d) 531 (H.C.J.); aff'd (1986) 57 O.R. (2d) 781 (C.A.).

the keys. The American jurisprudence has established that "substantial similarity" of past events will establish the future likelihood of (and foreseeability) of risks; the landlord is not a guarantor, and is responsible to protect only against those risks he or she can reasonably foresee.⁹³

Unlike the other "duties of protection" considered, however, there may or may not be a requirement that the victim be specifically identified as an individual. In *Minto*, as in the majority of American cases surveyed,⁹⁴ identity is not required.⁹⁵ This exception makes sense on various levels. On a theoretical level, the landlord tenant relationship might imply a foreseeability of each tenant, as a child is presumed to be always foreseeable to his or her parent. On the functional level, the landlord's ability to protect his or her tenant does not require identification- the situation, in which the landlord has control over the tenant's environment, to a certain extent, allows for the protection of all tenants, without individual identification. Improved security measures over the key system in *Minto*- keeping Ms. Q safe- depended in no way on knowledge of her identity; indeed, keeping Ms. Q safe in this way required actions improving the safety of all tenants.

A further, exceptional "duty of protection" was found to exist in the famous and controversial case of *Tarasoff v. Regents of the University of California*.⁹⁶ The defendant in the case was a psychologist at the University of California. A patient informed the defendant that he intended to kill his former girlfriend (easily ascertainable from the description given as the victim Tatiana Tarasoff). The defendant, understanding and appreciating the danger to the victim, contacted campus police. He did not notify the victim or her parents. The campus police picked up the perpetrator, briefly detained him, and then released him. Two months after his release, the perpetrator killed the victim as he had stated he would. Her parents brought an action in negligence against the psychiatrist, on the basis of his failure to inform either them or their daughter about the threat to Ms. Tarasoff's life.

Unlike the psychiatric patient cases considered under the "Duty to Control", the defendant had assumed no obligation to control his patient,

⁹³ See *Sharon P. v. Arman Ltd.*, 530 U.S. 1243 (U.S.S.C. 2000); *Sturbridge Partners, Ltd. v. Walker*, 482 S.E. 2d 339 (1997); *Savannah College of Art and Design, Inc. v. Roe*, 409 S.E.2d 848 (1991); *Nola M. v. University of Southern California*, 16 Cal. App. 4th 421 (1993); Bateman & Thomas, *supra* note 91.

⁹⁴ See Bateman & Thomas, *supra* note 91.

⁹⁵ But see *N.W. v. Anderson*, 478 N.W. 2d 542 (Minn. App. 1991) (the Minnesota Court of Appeal held that a sexual assault on a child living in the landlord's trailer complex was not "foreseeable" in that she was not a specifically targeted victim or the subject of a specific threat, although her attacker (another tenant in the complex) was a convicted child molester. The landlord was therefore under no duty to warn the child, her parents, or any other tenants about the particular risk posed by the resident).

⁹⁶ 17 Cal. Rptr. 3d 425 (U.S. 1976) [*Tarasoff*].

and a failure to control was not alleged. Unlike the police cases, no underlying relationship- and no general duty of protection- existed between the defendant and the victim, and no "special" or particular reliance had come about through acts of assurance and reliance. Indeed, the defendant and Ms. Tarasoff had never met or spoken, although he was aware of her identity. There was no structural or formal relationship between them- analogous to the relationship between a case manager and a disabled client, for example, or to the landlord tenant relationship- that might imply either reliance or foreseeability. The plaintiffs alleged that the psychologist's duty of care arose on the basis of his knowledge of the particular threat to the (clearly identifiable) victim, and the connection between that knowledge and his professional relationship with the patient/perpetrator.

The Court agreed with the Tarasoffs, characterising the duty in this case as a duty to *protect*, and not merely a duty to warn (warning being subsumed within protection):

[W]hen a therapist determines that his patient poses a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may take various forms depending on the circumstances. It may call for him to warn the intended victim or others likely to apprise [her] of danger, to notify the police or to take whatever other steps are reasonably necessary under the circumstances.⁹⁷

The threat of action in this case was specific, as was the victim. The relationship between the psychologist and his patient- while not a relationship of control- was a "special relationship" affording the defendant special knowledge about the particular threat posed by the perpetrator. Together these elements created a relationship of proximity between the defendant and the victim which, in the circumstances, gave rise to a duty of protection. Policy considerations in favour of psychiatrist/patient confidentiality did not outweigh or negate this duty.⁹⁸

The *Tarasoff* principle was discussed and explicitly adopted in the Alberta case of *Wenden v. Trikha* (per Murray J.):

⁹⁷ *Ibid.* at 340 the duty to protect outlined in *Tarasoff* may also include a duty to control, alongside a duty to warn as an aspect of this duty to protect- controlling (through hospitalisation and/or commitment) as a means of protection where no pre-existing duty of control exists; Alan R. Felthous and Claudia Kachigian, "To Warn and To Control: Two Distinct Legal Obligations or variations of a Single Duty to Protect?" (2001) 19:3 *Behav. Sci. & Law* 355-373. Cf. *Tanner v. Norys*, [1980] 4 W.W.R. 33 (Alta. C.A.).

⁹⁸ See discussion, *Bradley v. Ray*, 904 S.W. 2d 302 (Mo. Ct. App. 1995) (re states following "*Tarasoff* duty"); but see *Nasser v. Parker*, 455 S.E.2d 502 (Va. 1995); *Boynton v. Burglass*, 590 So.2d 446 (Fla. Dist. Ct. App. 1991); and Peter F. Lake, "Revisiting *Tarasoff*" (1994) 58 *Alta. L. Rev.* 97.

To my mind, it [follows from *Dorset Yacht*] that it is only fair and reasonable that both a hospital and a psychiatrist who becomes aware that a patient poses a serious threat to the well being of a third party or parties owe a duty to take reasonable steps to protect such a person or persons if the requisite relationship of proximity exists between them... I have no doubt that the psychiatrist in *Tarasoff* owed such a duty to Tatiana *Tarasoff* [the victim]. She was clearly the person who was exposed to a particular risk of danger and harm from *Poddar* [the perpetrator]... Whether or not a person or persons fall within the necessary category will depend upon the particular nature of the risk posed by the patient, the predictability of future behaviour giving rise to the risk, and the ability to identify the person or class of persons at risk.⁹⁹

Discharging the duty of protection would require “such reasonable degree of skill, knowledge and care possessed by members of the profession” (as stated in *Tarasoff*). In this case, the acts of the patient were not foreseeable, however, and a duty of care was insupportable.¹⁰⁰

A “*Tarasoff* duty” of protection was applied in the case of *J.S. v. R.T.H.*,¹⁰¹ to find that a wife, having actual knowledge or special reason to know that her husband was likely to engage in sexual abuse, had a duty to take reasonable steps to protect potential victims (including, but not be limited to, warning). The victims in that case were not the children of the defendant, and were not under the parental control of the defendant, although the abuse occurred in the home shared by the defendant and the perpetrator (the victims were neighbour children). The Court found that a spouse was in a special position to know of this particular kind of threat, and was in a unique position to observe signs of abuse and to prevent it, given that most sexual abuse occurs “behind closed doors” within a perpetrator’s or a victim’s home. The Court also considered the competing policy interests in the case- the protection of children from sexual abuse and society’s interest in promoting marital privacy and stability- before concluding that a duty of care was fair and justified.¹⁰²

Conceptual categories and abstract rules are important: they bring coherence and consistency to the development of the law, and to its

⁹⁹ (1992), 8 C.C.L.T. (2d) 138 (Alta. Q.B.) at 161 at para. 63; affd. (1993) 14 C.C.L.T. (2d) 25; and see *Robertson v. Adigbite*, [2000] B.C.J. No. 1192 (S.C.) (Q.L.); *C.L.C. v. Lions Gate*, *supra* note 13.

¹⁰⁰ *Wenden*, *ibid.* (a patient, voluntarily admitted to the hospital for psychiatric reasons, escaped from the hospital, driving away at a high speed, whereupon he crashed into the plaintiff. The patient had given no indication that he was about to do such a thing, nor had he committed similar acts in the past, nor did his behaviour indicate that he was likely to commit such an act).

¹⁰¹ 714 A.2d 924 (N.J. S.C. 1998).

¹⁰² See also *S.P. v. Collier High School*, 725 A.2d 1142 (N.J. S.C. 1999). See Damon Muir Walcott, Pat Cerundolo & James C. Beck “Current Analysis of the *Tarasoff* Duty: an Evolution towards the Limitation of the Duty to Protect” (2001) 19:3 *Behav. Sci. & Law* 325-343. (Note that some recent American jurisprudence indicates a retreat from the *Tarasoff* principle, however; a “limitation of the duty to protect,” with

application. Rules and their outcomes must be fair, however, and sensible in terms of tort law's overarching principles: deterring loss and harm, and attributing loss fairly.

The *Tarasoff* duty seems to make sense from this perspective. The psychologist, a professional obtaining knowledge of a real threat in his expert capacity, could have easily mitigated (if not entirely prevented) the threat to the victim by simply picking up the phone. He knew something that Ms. *Tarasoff* did not, and her ignorance cost her her life. The duty of care that would lead to this outcome seems intuitively right.

Yet characterisation of the psychologist's duty of care as a "duty to protect" seriously undermines the conceptual clarity of that duty as it has been developed in other contexts- where a body of sensible and coherent rules has emerged clearly through both the American and the English jurisprudence. We want the psychologist to do something, however, because he- and only he- *can*.

Both coherence and fairness are met through understanding the psychologist's duty in these circumstances as a duty to *warn*.

IV. *Duty to warn*

A duty to protect one person from another- like a duty to control- may require positive action as intervention of some kind. The duty may be discharged by mere warning, but a relationship giving rise to a duty to protect must be capable of sustaining something more. An affirmative duty of protection from a third party is several steps away from the classic negligence paradigm, and raises the fundamental issues of policy and philosophy underlying tort doctrine: respect for autonomy, as well as issues of fault and causation. Relationships and situations giving rise to a duty to protect will be always be "special", and always be limited.

A duty to *warn* is a less drastic deviation from the more familiar negligence scenarios. A relationship of proximity beyond physical neighbourhood, for example, is required, but looser than the tight nexus required of the duty to protect. It is one thing to ask an individual to actually intervene in events to effect protection, quite another to ask him to open his mouth (literally or figuratively) and *warn*.

The duty to *warn*, like protection and like control, can arise only on the basis of a special kind of underlying relationship together with other elements of "proximity", including high degrees of predictability and foreseeability- the broad rubric of the "special relationship" that covers all three of the duties. The general rule is that "no action will lie against a spiteful man who, seeing another running into a position of danger, merely

the concurrent enactment in some states of legislation explicitly codifying the "*Tarasoff* duty" and its discharge).

omits to warn him".¹⁰³ "Exceptions" to the rule have been found where a special relationship of control or of a fiduciary nature exists between the parties; where the defendant has control over dangerous property or land or has created the danger or threat to the plaintiff; or where the defendant has assumed an obligation to take action, on which the plaintiff has relied ("actual reliance").¹⁰⁴ In these "exceptional" circumstances the circumstances and relationship between the parties create the nexus of proximity. In the first instance, a duty to warn should be understood as an incident or aspect of the duty to control, perhaps as part of the larger duty to protect implicit in the control (or fiduciary) relationship. In the second instance, the creation of danger might be understood as the initiation of a course of action of which warning is a part (and not an "affirmative" action).¹⁰⁵ In the third instance, it has been suggested that "actual reliance" (as a set of actions) *initiates* the chain of events (as in the duty to rescue).¹⁰⁶

A "pure" duty to warn arises in the context of structural reliance where that reliance is associated with the possession and control of knowledge. The paradigm example is the relationship between manufacturer and consumer and the manufacturer's duty to warn. Unlike the duty to protect, no additional "actual" or specific reliance is necessary; the mischief a duty to warn is intended to prevent in this context does not arise through actual reliance and the mechanics of warning consumers would become impossible were such a requirement to be imposed. The duty was explained by the Supreme Court of Canada in *Bow Valley Huskey (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*:

¹⁰³ See *Gautret v. Egerton* (1867), L.R. 2 C.P. 371 at 375 per Willes J.; see also *Yuen Kun-Yeu v. Attorney General of Hong Kong*, [1988] A.C. 175 at 197; James G. Logie "Affirmative Action in the Law of Tort: The Case of the Duty to Warn" (1989) 48 *Cambridge L.J.* n1 115-134 [Logie].

¹⁰⁴ See Logie, *Ibid.*

¹⁰⁵ *Kimber v. Gas Light & Coke Company*, [1918] 1 K.B. 439 at 447, per Scrutton LJ; ("it is A's duty to carry on his work with due precautions for the safety of those whom he knows or ought to reasonably to know may be in the lawful vicinity of his work; the most obvious precaution would be to warn B, who is going towards a hidden danger which A has created"). See also *Hawkins v. Thames Stevedore Co.* (1936), 2 All E.R. 472 per Atkinson LJ at 476; *Fisher v. Ruislip-Northwood UDC*, [1945] 1 K.B. 584; *Bord v. Pearce* (1979) 75 L.G.R. 753; but cf. *Murray v. Nichols* 1983 S.L.T. 194; *Yachetti v. John Duff & Sons Ltd.*, [1953] 1 D.L.R. 194; *Haley v. London Electricity Board*, [1964] 3 All E.R. 185; *Jauffar v. Akbar*, *The Times* 10 February 1984, *Lorenz v. Winnipeg (City)*, [1994] 1 W.W.R. 558 (Man. C.A.).

¹⁰⁶ Deakin and Markensinis draw an analogy between the failure to warn and the failure to rescue, subject to the special duty of the manufacturer to the ultimate consumer (at 133); see also *McPherson's Inc. v. State of Washington*, 86 Wash. 2d 293, 545 P.2d 13; *R. v. Nord-Duetsche*, [1971] S.C.R. 849; *Parkland (County) No. 31 v. Stetar*, [1975] 2 S.C.R. 884.

Liability for failure to warn is based not merely on a knowledge imbalance. If that were so every person with knowledge would be under a duty to warn. It is based primarily on the manufacture or supply of products intended for the use of others and the reliance that consumers reasonably place on the manufacturer and supplier. Unless the consumer's knowledge negates reasonable reliance the manufacturer or supplier remains liable. This occurs where the consumer has so much knowledge that a reasonable person would conclude that the consumer fully appreciated and willingly assumed the risk posed by the use of the product, making the maxim *volenti non fit injuria* applicable.¹⁰⁷

The class of foreseeable "neighbours" to whom the duty is owed is (relative to the duty to protect, certainly) fairly wide, extending to "all those who may reasonably be affected by potentially dangerous products"¹⁰⁸ whether or not a person is party to the contract for sale.¹⁰⁹ The potential use and danger must also be reasonably foreseeable "manufacturers and suppliers...do not have a duty to warn the world about every danger that can result from improper use of their product".¹¹⁰ Unlike the duty of protection, a requirement of identity is neither necessary nor sensible. A warning cannot sensibly be issued to the world, but can be fairly easily conveyed to a limited and discrete class; where identity is not ascertained prior to an act, warning can only be effectively conveyed to a class.

The relationship between manufacturer and consumer is "special" in several important ways pertaining to both reliance and foreseeability, and the underlying fairness of a duty of care. Manufacturers are not bystanders; while a manufacturer almost certainly does not enjoy an individual relationship with each identified consumer, he will have the class of "consumers" in mind when the product is produced and marketed. Manufacturers benefit commercially from the relationship and have the unique ability to control risk to consumers through warning; the manufacturer will have special knowledge of potential dangers associated with certain products or procedures, of which the "lay" user is presumed to be ignorant, and the ability to warn the class at risk (having both knowledge of and access to that class).

A "pure" duty to warn is not exclusive to the manufacturer/consumer relationship, however. Other, analogous relationships may also give rise to

¹⁰⁷ [1997] 3 S.C.R. 1210 at para 22 per McLachlin J.; see also *Rivtow Marine Ltd. v. Washington Iron Works* [1974] S.C.R. 1189.

¹⁰⁸ *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634.

¹⁰⁹ *Rivtow Marine*, *supra* note 107.

¹¹⁰ *Rivtow Marine*, *ibid.* at para 19, see also *Leckie v. Caledonian Glass Co.*, 1957 S.C. 89; *Esso Petroleum Co Ltd v. Mardon* [1976] Q.B. 801; *Cornish v. Midland Bank Plc.*, [1985] 3 All E.R. 513; *Banque Fiananciere de la Cite SA*, *The Times*, 24 August 1988; *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp*, [1979] Ch. 384; *IBA v. EMI and BICC*, [1980] 14 B.L.R. 1; *Argy Trading Development Co. Ltd. v. Lapid Developments Ltd.*, [1977] 3 All E.R. 785.

a "pure" duty to warn.¹¹¹ A police officer may owe a duty to warn foreseeable victims where he or she has knowledge, through discharge of the (generally owed) common law duty of public protection, of danger to that person or group.¹¹²

In *Beutler v. Bueller*,¹¹³ for example, the Court considered whether police officers had a duty to warn people in the vicinity of the potential explosion of gas escaping as the consequence of a car accident. The Court held that the relationship between the police officers and the class of foreseeable plaintiffs was capable of founding a duty to warn in this context and that a duty would have existed in this case but for the missing element of knowledge: the officers did not believe that an explosion was imminent, and so had no knowledge of the risk to the people in the area.

The *Bueller* case seems to establish a distinct duty to warn in this context, apart from any (private) duty of protection, although in certain factual scenarios may bring them together. The relatively well developed English and American jurisprudence is clear (subject perhaps to the limited *Tarasoff* exception in the United States);¹¹⁴ a private duty to protect will only arise where the general (and generally owed) duty of protection underlies a specific or actual relationship of obligation and reliance, which can be owed only to an identified (and so foreseeable) victim. A pure duty to warn, on the other hand, carries no such requirements, and is rooted in a specific dynamic of knowledge and reliance. The manufacturer's duty to warn is owed to individual consumers by reason of their membership in a foreseeable class; and warning is accomplished through the class. The police officer's duty to warn is discharged in the same way, and for the same reasons. The public presumes that a police authority, as a professional "protector", holds special "expert" or professional knowledge (like the manufacturer) and relies on the police to use that knowledge for the control of risk. This dynamic of knowledge and reliance is inherent in the relationship between protection authorities and the public,¹¹⁵ the public funds protection authorities to manage risks on their behalf. In their role as expert risk controllers- as protectors- the police acquire knowledge that no-one else has, a gap which may be highly dangerous to certain people in certain circumstances and which the police are uniquely and effectively able to fill through warning.

In the case of *Jane Doe v. Metropolitan Police of Toronto*,¹¹⁶ the Ontario Court seemed to suggest that warning was part of a larger duty of

¹¹¹ *Phillipott v. Murphy*, [1987] B.C.J. No. 530 (B.C.C.A.) (Q.L.).

¹¹² *Schacht v. R.*, 30 D.L.R. (3d) 641 (C.A.), aff'd. *Schacht v. O'Rourke*, [1976] 1 S.C.R. 53; *Bueller v. Bueller* (1983), 26 C.C.L.T., 229 (Ont. H.C.) [*Bueller*].

¹¹³ *Beutler*, *ibid.*

¹¹⁴ See discussion, *infra* at 71.

¹¹⁵ Although in some situations actual reliance will in itself give rise to a duty to warn apart from the pure duty discussed here; see footnote x; see also "general reliance", above at p. 61.

¹¹⁶ *Jane Doe*, *supra* note 74.

protection; if policy reasons had mitigated against warning, therefore, some other form of protection would have been necessary for discharge of the duty. If this is so, *Jane Doe* marks a sharp deviation from the UK/US jurisprudence; Jane Doe was not an identified victim, but the member of a foreseeable class.

The plaintiff Jane Doe was the victim of a rapist who had been active in the area of Toronto where she was living. The rapist had been preying on women in the area who- like Jane Doe- lived in second or third floor apartments with balconies. Ms. Doe argued that, by failing to warn her and similarly situated women living in the area, the police had failed to discharge their duty of care.¹¹⁷ Police had failed to warn potential victims (according to the plaintiff) because they had decided that a warning might act to scare the perpetrator away; the women were being used, in essence, as bait. The plaintiff alleged that, had she been warned, she could have taken further steps to ensure her own safety. She also argued that her fear and suffering would have been less intense had she been aware that the rapist did not (according to his pattern of behaviour) kill his victims. The police brought a motion to strike out the statement of claim and dismiss the action as showing no reasonable cause.

The action was allowed. The victim (unlike Miss Hill in *Hill v. Chief Constable of West Yorkshire*) was not a member of the general public, but of a more limited and identifiable class of potential victims, given the rapist's patterns and methods.¹¹⁸ Citing to the *Air India* case,¹¹⁹ a case in which protection was incidental to a primary duty based in control, the Court concluded that neither identity of the victim nor specific reliance were necessary.¹²⁰

The mechanics of warning the class of women of which Jane Doe was a member would seem straightforward. It is more difficult to imagine what other means of protection, beyond the protection owed to and provided for

¹¹⁷ *Jane Doe*, *ibid.* (the plaintiff also argued that the actions of the police had breached her constitutional rights under the *Canadian Charter of Rights and Freedoms*).

¹¹⁸ See also *Schact*, *supra* note 112, *Beutler*, *supra* note 112.

¹¹⁹ *Air India*, *supra* note 73, under "Duty to Control." (*Air India* did not involve control of the perpetrators but did involve significant control of the boarding and loading process and the physical environment in which the bomb entered the plane, together with knowledge of the threat. Warning would have been totally inadequate as a response, and it is easy to ascertain what other effective actions the officers could have used).

¹²⁰ *C.N.R. v. Norsk*, *supra* note 4; see C. Moroz, "Jane Doe and police liability for failure to apprehend: The Role of the Anns Public Policy principle in Canada and England" (1995) 17 n3 *Advocate's* 261. (The "policy branch" of the *Anns* test (as incorporated in *Nielson*) was not considered; it has since been adopted into Canadian law). (The English cases after the European decision in *Osman* *supra* note 84 suggest that, following on a finding of sufficient proximity, the policy balance will be determined on the individual facts of each case where the duty alleged is owed by the police).

the general public, could have been accomplished by the police *vis a vis* this special class. The functional purpose of a private duty of protection in this context is not apparent. Intuitively, it makes sense that police officers should have a duty to use their knowledge of a threat to a clearly foreseeable class of persons to prevent harm to those persons. We want the police officers in *Jane Doe* to do something, but a "pure" duty of protection is inappropriate in practical and in conceptual terms.

In other cases, where warning is clearly the relevant preventative act, the requirement that a victim be identified as an individual (as where the duty is one of protection) can seem shockingly unnecessary, leading to intuitively wrong outcomes. In the infamous case of *Thompson v. County of Alameda*,¹²¹ for example, parents of a child murdered by a juvenile offender who had been released into the custody of his mother sued the county in negligence on the basis of their failure to warn individuals in the mother's neighbourhood. The county officials responsible for the youth's release knew of his latent, extremely dangerous and violent propensities regarding young children; the youth had indicated that he would kill a child living in his neighbourhood if he were released. The deceased child and his parents were neighbours of the youth and his mother; within twenty four hours of the perpetrator's release, he had sexually assaulted and murdered the child. The Supreme Court of California dismissed the action on the grounds that the victim was not a "known and specifically foreseeable and identifiable victim of the [perpetrator's] threats" unlike the victim in *Tarasoff*; "public entities with employees have no affirmative duty to warn of the release of an inmate with a violent history who has made non specific threats of harm directed at non specific victim".¹²² The youth had threatened to kill a child in the neighbourhood, but no specific or particular child had been identified. This approach was followed in the case of *Brady v. Hopper*¹²³ to dismiss an action in negligence brought against the psychiatrist of John Hinckley.

Alameda makes no sense- the children in the neighbourhood were members of an identifiable class clearly put at grave risk through their ignorance of knowledge which the county possessed, through the discharge of its professional task of managing and controlling the risks posed to the community by dangerous individuals. The county here was no bystander, and through a simple act of which it alone was capable the risk to that foreseeable class of victims would have been considerably lessened.¹²⁴ Both *Alameda* and *Tarasoff* itself are, at the conceptual level, cases about a duty to warn arising out a knowledge imbalance in the

¹²¹ 614 P.2d 728 (Cal. S.C. 1980).

¹²² *Ibid.* at 744.

¹²³ 751 F.2d 329 (D.Colo. 1984). See also *Emerich v. Philadelphia Centre for Human Development*, 720 A.2d 1032 (Penn. S.C. 1998).

¹²⁴ *Owens v. Garfield*, 784 P.2d 1187 (Utah 1989) (the court finding that neither the state nor the county had a duty to warn parents that the babysitter they hired to provide daycare for their child was under investigation for child abuse, on the basis that no

context of structural reliance, in which professional individuals have been charged with the control of risky individuals and situations. On the facts of *Alameda*, sufficient proximity existed to support a duty to warn if not a duty to protect- a warning which may well have prevented, at little cost, the horrible assault and murder of young child.¹²⁵ On the facts of *Tarasoff*, the class of foreseeable victims happened to be particularly narrow- Tatiana Tarasoff. Ms. Tarasoff was identified in that case, but her identity should not have been essential to a duty to warn.¹²⁶

The Supreme Court of Canada seems, implicitly, to have accepted this conclusion in the case of *Smith v. Jones*.¹²⁷ In that case, an accused charged with aggravated assault had been referred by his counsel to a psychiatrist. During psychiatric consultation, the accused described in considerable detail his plans to kidnap, rape and kill prostitutes. The psychiatrist, believing the accused was a threat to the safety of these women, brought an action for a declaration that he was entitled to disclose this information; issues of both doctor/patient and solicitor/client privilege were involved. The Court considered both *Alameda* and *Tarasoff* as approaches to the general issue of privilege and the public interest, and whether an identified/able victim was necessary to trigger a duty to warn, without drawing a distinction between a duty to warn and a duty to protect. Finding the approach in *Alameda* to be overly restrictive, the Court concluded that identification of a specific individual as victim will not always be necessary- "it may be sufficient to engage the duty to warn if a class of victims, such as little girls under five living in a specific area, is clearly identified".¹²⁸ The potential victims in this case- prostitutes living in the Downtown Eastside of Vancouver- were a readily identifiable class of persons for the purpose of a duty to warn.

The distinction between warning and protection, implied here, is key to the future coherent development of this area of the law.

"special relationship" existed to support a duty to *protect*); see, Lucy Knight, "Owens v. Garfield: Evidence of an inadequate state child protection system" (1991) 17 J. Contemp. L. 345.

¹²⁵ But see Frederic White, "Outing the madman: fair housing for the mentally handicapped and their right of privacy versus the landlord's duty to warn and protect" (2001) 28 Fordham Urb. L.J. 783 for discussion of relevant considerations.

¹²⁶ Gregory M. Fliszar, "Dangerousness and the duty to warn: *Emerich v. Philadelphia Center for Human Development Inc.* brings *Tarasoff* to Pennsylvania" (2000) 62 U. Pitts. L.Rev. 201; (A *Tarasoff* duty has been interpreted in some states as requiring an identified victim to trigger the duty to act (to "protect"), in others as requiring only a foreseeable class of victims). Stuart A. Afong & Paul S. Appelbaum, "Twenty years After *Tarasoff*: Reviewing the Duty to Protect" (1996) 4 Harv. Rev. of Psychiatry 67.

¹²⁷ [1999] 1 S.C.R. 455.

¹²⁸ *Ibid.* at para. 68, per Cory J.

V. Conclusion

The old categories of negligence have been, by now conclusively, replaced with the idea of incremental development through the theoretical mechanisms of proximity and foreseeability. New proximate relationships will be analysed and ultimately proven through a process of analogy with established duties of care and the proximate relationships from which they flow.¹²⁹

Of the affirmative duties, a duty of care owed to the third party victim of another person deviates most sharply from the classic negligence paradigm.¹³⁰ The dramatic factual nature of these cases, which sets them apart from more normal negligence scenarios, can obscure the conceptual distinctions between them: the duty to control, the duty to protect, and the duty to warn. Understanding these conceptual differences, the sub-doctrines emerge as logical, coherent, and fair. The duty to control is rooted in the strong and responsible relationship of proximity between the defendant and the controlled; the relationship between the defendant and third party plaintiff must also be of a high degree, but less so than where a "pure" duty to protect is found, where the underlying control relationship is missing.¹³¹ Finally, while a duty to warn may be a part of the duty to protect, the "pure" duty to warn requires still less, and rests on the dynamic between knowledge and reliance. The parameters of a "true" duty to protect remained undefined in Canadian law, but recognising and distinguishing the (pure) duty to warn is a necessary step in the process of clarification, and understanding.

¹²⁹ See *Cooper v. Hobart*, *supra* note 80; *Caparo v. Dickman* *supra* note 50.

¹³⁰ *Knight v. Wal-Mart Stores, Inc.*, 889 F. Supp. 1532 (S.D. Ga. 1995) 1539. (Where there is no "creation" of third party risk by the plaintiff- by supplying a firearm in circumstances suggesting its irresponsible use).

¹³¹ A constitutional duty of protection is (to varying degrees) a developing area of the law in the United States, the United Kingdom and Canada; a future article (currently in progress) will address this issue.