

Syl Apps Secure Treatment Centre v. B.D.: Looking for Proximity within Statutory Provisions

Lewis Klar*

Introduction

In *Syl Apps Secure Treatment Centre v. B.D.*¹ the Supreme Court of Canada reaffirmed its commitment to the refined test of duty which it first established in *Cooper v. Hobart*² and *Edwards v. L.S.U.C.*³ and has applied in subsequent judgments.⁴ As is well understood by now, there are three stages in the Canadian test for the establishment of a duty of care. The first stage asks whether the plaintiff was a reasonably foreseeable victim of the defendant's allegedly negligent conduct.⁵ The second asks whether there is "sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants."⁶ Together these two questions make up the first part of the duty test and, if answered in the plaintiff's favour, create a *prima facie* duty of care. Assuming a *prima facie* duty is established, the third stage considers whether there are "policy reasons to negate or otherwise limit that duty."⁷

Several intriguing and yet unresolved questions have emerged from the *Cooper* duty test. The first relates to when it should be used. The Supreme Court suggested in *Cooper* that it was unnecessary to go through

* Professor of Law, University of Alberta. I would like to thank my student, Zachary Bodmer, for his research assistance. As well, I would like to acknowledge the useful comments of my colleagues Russell Brown and David Cheifetz.

¹ 2007 SCC 38, [2007] S.C.J. No. 38 (QL) [*Syl Apps*].

² 2001 SCC 79, [2001] 3 S.C.R. 537 [*Cooper*].

³ 2001 SCC 80, [2001] 3 S.C.R. 562.

⁴ Most importantly *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 [*Odhavji*]; *Childs v. Desormeaux* 2006 SCC 18, [2006] 1 S.C.R. 643 [*Childs*]; and most recently *Hill v. Hamilton-Wentworth Regional Police* 2007 SCC 41, [2007] S.C.J. No. 41 (QL) [*Hill*].

⁵ In *Odhavji*, *ibid.* at para. 52, Iacobucci J. stated that the first stage asks whether "the harm complained of is a reasonably foreseeable consequence of the alleged breach." This phraseology conflates the duty question (Was the plaintiff a reasonably foreseeable victim of the defendant's negligence?) with the remoteness question (Was the type of harm which the plaintiff suffered reasonably foreseeable?). For analytical clarity, the two questions are best kept separate.

⁶ *Odhavji*, *ibid.*

⁷ *Ibid.*

the entire formula, and particularly the “proximity” and “policy” parts, when courts are facing disputes which fall into duty “categories” already recognized under Canadian law.⁸ The difficulty has been, however, to determine whether a factual dispute falls into an established category, a category analogous to an established category, or into a new category. The trend has been for courts to play it safe, to see every different factual dispute as a new category and to therefore apply the full duty analysis to the case.⁹ A second question relates to the difference between the policy concerns which go to “proximity” and those which fall into the “residual” policy stage of the test. Although in theory the distinction seems clear enough — policy concerns which are “internal” to the relationship between the parties are matters which go to proximity, and those which are “external” affect the legal system or society more generally fall into the residual stage — in practice this distinction is not easy to apply.¹⁰ A third question relates to the burden of proof. Can we assume that the plaintiff has the primary burden of proving foreseeability and proximity, and the defendant has the burden of proving that there are residual policy concerns which negate the *prima facie* duty? This is the approach which the Supreme Court supported in *Childs v. Desormeaux*,¹¹ although the point was not in issue in that case since the Supreme Court never did get to the stage of residual policy in its judgment. In addition, even if there is an evidentiary burden of proof resting on the defendant at this final stage of the test, how, as a pragmatic matter, is it to be discharged?

⁸ *Cooper*, *supra* note 2 at 555.

⁹ See, for example, the Alberta Court of Appeal’s decision in *Holtslag v. Alberta* 2006 ABCA 51, (2006), 265 D.L.R. (4th) 518, affg. [2005] 1 W.W.R. 504 [*Holtslag*], where the Court went to some effort to distinguish this government liability case from a series of earlier government liability cases where duties had been found.

¹⁰ In *Syl Apps*, *supra* note 1 at para. 33, Abella J. recognized this difficulty by noting that there is a possibility of “some blending of policy considerations” between the two stages. In *Hill*, *supra* note 4 at para. 31, McLachlin C.J.C. also stated that “in practice, there may be overlap between stage one and stage two considerations.” She went on to imply that this overlap is not a concern since the two stages “are merely a means to facilitate considering what is at stake” and that “the important thing is that in deciding whether a duty of care lies, all relevant concerns should be considered.” As I suggested, however, in “Foreseeability, Proximity and Policy” (2002), 25 *Advocates’ Q.* 360 [“Foreseeability”] at 363-64, allowing courts to deny a presumptive duty at stage one of the test, based on policy, rather than requiring them to use policy concerns at stage two to negate a *prima facie* duty, was a significant change in the law. Its predictable effect was to slow down the growth of negligence law. This is what has happened.

¹¹ *Supra* note 4 at para. 13. In *Hill*, *supra* note 4 at para. 31 McLachlin C.J.C. commented upon this and stated:

In accordance with the usual rules governing proof of a cause of action, the plaintiff has the formal onus of establishing the duty of care: *Odhavji* and *Childs*, at para. 13, should not be read as changing this fundamental rule.

This comment will be directed to the “proximity” part of the duty formula. In particular, it will critique the manner in which courts are determining proximity in negligence actions brought by plaintiffs against defendants whose duties, powers or responsibilities are based on statutes. While it is true that the refined duty formula is of fundamental importance to negligence law in general, nowhere has its impact been more dramatic than in the area of public tort liability. Negligence actions brought against public authorities for both economic losses and personal injuries suffered by plaintiffs have been failing miserably in Canada since *Cooper*. Not only have plaintiffs been losing their cases, a majority of them have not even been able to survive preliminary motions to strike out their claims.¹² The reason for the plaintiffs’ plight is the manner in which courts have been determining the proximity question. Rather than looking at the relationship between the parties to decide whether it would be just and fair to impose a duty of care upon the defendant, the courts have been looking to the statutory framework which defines the defendants’ responsibilities to see if proximity between the parties can be found therein.

As I have argued elsewhere,¹³ proximity between a public authority and a private person sufficient to support a private law duty, cannot and will not be found in statutes passed for promotion of the public interest. Thus to search for proximity within these statutes is to look for something which never was, and is not, there. Further, Canadian tort law has taken the position that private law duties of care cannot be construed from statutes which do not expressly provide for them. In *The Queen v. Saskatchewan Wheat Pool*,¹⁴ Dickson J. held that where a statute does not expressly provide for a private law remedy, it is fair to conclude that the legislature did not intend there to be a civil cause of action emanating from its breach. For a court to create such a remedy would involve the court in what might be called “judicial legislation.”¹⁵ Although the breach of a statute may be used as evidence of negligent conduct, a common law duty of care first

In *Childs*, the Court had stated that “the evidentiary burden of showing countervailing policy considerations” was on the defendant. In *Hill*, McLachlin C.J.C. noted at para. 48 that these considerations “must be more than speculative” and “must be apparent.” The question of burden of proof regarding policy considerations is one of the matters in issue in the *Holland* appeal, *infra* note 60, and hence some additional clarity on this matter should be provided then.

¹² In approximately 70 cases decided since *Cooper* where plaintiffs have sued public authorities in negligence, about 40 have been struck out in summary judgment proceedings based on no proximity between the parties. Only a small handful — probably less than five — have been successful in establishing proximity based on statutes.

¹³ Lewis Klar, “The Tort Liability of the Crown: Back to *Canada v. Saskatchewan Wheat Pool*” (2007) 32 *Advocates’ Q.* 293 [“Tort Liability”].

¹⁴ [1983] 1 S.C.R. 205 [*Saskatchewan Wheat Pool*].

¹⁵ *Ibid.* at 221.

must be found. Thus I will suggest that to look for proximity within statutory provisions is to be inconsistent with the spirit, if not the letter, of *Saskatchewan Wheat Pool*.¹⁶

A more appropriate approach for the courts to take when considering proximity in negligence actions brought against public authorities is to consider the actual relationship and interactions between the parties to determine whether proximity exists, examining the statutory framework as, at most, the context or explanation for these interactions. Using this approach, it may be found that although there is no private law duty of care created by the statute itself, the parties might have come into a proximate relationship as a result of their subsequent behaviour and course of conduct.¹⁷

Syl Apps Secure Treatment Centre v. B.D.

In *Syl Apps*,¹⁸ the Supreme Court of Canada utilized the refined duty formula of *Cooper*.¹⁹ It was an action brought by the members of the family of a young girl who had been apprehended by the Children's Aid Society and placed in a secure treatment centre. The statute which governed this matter was the *Child and Family Services Act (CFS)*.²⁰ After her release from the centre, the child did not return to her family and it was because of this failure at re-integration that the family sued. The actions were brought against several defendants including the Children's Aid Society itself, the Syl Apps Secure Treatment Centre, a social worker (D.B.), and a doctor. A motions judge dismissed the actions against the treatment centre, its social worker, and its doctor.²¹ The family appealed the dismissal of the action against the treatment centre and the social worker to the Ontario Court of Appeal. The

¹⁶ The plaintiff's suit in *Saskatchewan Wheat Pool*, *ibid.* was based on the defendant's breach of statute. It was not a negligence action. Thus one can argue that the judgment did not deal with whether a common law duty can emanate from a statute. Dickson J. did make it clear at 221 and 224, however, that, for a variety of reasons, civil law remedies should not be read into statutes by the courts. As I will argue below, finding proximity within a statute for the purposes of creating a common law duty of care is to effectively convert a statutory duty into a private law duty, even where there is no common law relationship between the parties to support it.

¹⁷ This would be a factual determination, and if it did nothing else, it would at least get the plaintiff a trial on the merits and past a motion to strike.

¹⁸ *Supra* note 1.

¹⁹ *Supra* note 2.

²⁰ R.S.O. 1990, c. C.11.

²¹ Hoilett J., 2004 CarswellOnt. 8102.

Ontario Court of Appeal allowed the appeal, with one dissent,²² and the defendants appealed to the Supreme Court of Canada.

The focus of the Court of Appeal was on the issue of proximity between the centre, its social worker and the family. Both the majority and dissenting judgments looked to the provisions of the *CFSA* and various court orders made pursuant to it to determine whether they provided for proximity between the parties. In Laskin J.A.'s view, the statutory purposes, the statutory duties, and the fact that no statutory immunity provision existed supported the plaintiffs' argument for proximity. Laskin J.A. rejected the defendants' argument that a statutory scheme cannot create a duty of care unless it does so specifically. Relying on *Cooper, Edwards and Odhavji*, Laskin J.A. stated that the court should examine "the statutory scheme as a whole, including the purpose and wording of the relevant provisions, to determine whether a duty of care arises."²³ He also rejected the contention that the residual policy concerns raised by the defendants were sufficient to negate the *prima facie* duty if one were found to exist.²⁴ These concerns related to a conflict of interest for the defendants if they owed duties both to the apprehended child and her family, and the difficulties this would create for service providers.

Sharpe J.A. dissented, but did not take issue with the approach of the majority. He essentially concluded that it was plain and obvious that the statute did not give rise to proximity. He also thought that there were policy reasons to negate a duty of care. Sharpe J.A. stated that he did not think that there was anything in the statute or in the court orders capable of supporting a common law duty of care. The essence of Sharpe J.A.'s judgment was that imposing a duty upon the defendants would "carry with it a serious and significant interference with the capacity of the respondents to fulfil their primary and paramount duty" to the child's best interests.²⁵

The Supreme Court of Canada's judgment was written by Abella J. As noted above, Abella J. reaffirmed the Supreme Court of Canada's commitment to the refined three-stage duty test. The stumbling blocks to the plaintiffs' case for Abella J. – as they were for Sharpe J.A. in the Court of Appeal — were the issues of proximity and residual policy concerns. Abella J. held that it was plain and obvious that an argument for proximity could not be made in this case. The "deciding factor" for this conclusion was the potential for conflicting duties if a service provider owed duties to

²² (2006), 264 D.L.R. (4th) 135. The majority judgment was written by Laskin J.A.; Sharpe J.A. dissented.

²³ *Ibid.* at para. 37.

²⁴ *Ibid.* at paras. 41-51.

²⁵ *Ibid.* at para. 89.

both the child in care as well as its family.²⁶ Because “the [Act’s] overall and determinative emphasis” was to protect the child and promote its interests, it was clear that a potential for conflict that would ensue from recognizing duties owed to both parties could not be allowed.²⁷

Other considerations led to Abella J.’s conclusion. These included her approval of jurisprudence which has established that professionals who provide treatment cannot be subject to a duty of care owed to both the patient and the patient’s family, the existence in the statute of alternative remedies for families who are unhappy with aspects of the treatment of their apprehended children, and statutory immunity provisions in legislation for officers or employees of a Children’s Aid Society, as well as for employees of the Ministry of Community and Social Services.

Analysis

As with many of the other judgments which have been brought against public authorities, I have no difficulty with the result reached in the *Syl Apps* judgment. Abella J.’s reasons for finding that a treatment provider responsible for protecting and promoting a child’s interests should not be held to a duty of care to the child’s family are cogent and persuasive. My problem lies with the method by which the Court arrived at its decision. As noted above, the stumbling block to the plaintiffs’ claim was their failure to establish that proximity existed between themselves and the defendants. In concluding that proximity was absent, the “overall and determinative emphasis” and the intent of the governing statute was the focus of the Court’s attention.

The cornerstone of the refined duty formula in Canadian negligence law is “proximity.” The question is what is meant by proximity.

As a preliminary point, I would note that whether or not there was proximity between the parties sufficient to support the recognition of a *prima facie* duty of care is a question of law for a judge to answer. It is based on whether, in the court’s opinion, it would be “just and fair” to impose a duty of care on the defendant for the plaintiff’s protection. A finding of proximity is a *conclusion* which a judge arrives at after considering the appropriate factors. What are those factors?

As explained by the Supreme Court in *Cooper*, “the proximity analysis involved at the first stage of the *Anns* test focuses on factors *arising from*

²⁶ *Syl Apps*, *supra* note 1 at para. 41.

²⁷ *Ibid.* at para. 46.

the relationship between the plaintiff and the defendant.”²⁸ The term proximity “characterizes the type of relationship in which a duty of care arises”.²⁹ The Court explained that

defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are the factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.³⁰

In other words, and it could not have been spelled out more clearly, proximity is about relationships.³¹ Relationships arise through the conduct of parties; through their interactions, legitimate expectations, or other factors which courts consider sufficient to impose a duty of care on one party for the protection of another.³²

²⁸ *Supra* note 2 at para. 30 [emphasis added].

²⁹ *Ibid.* at para. 31 [emphasis added].

³⁰ *Ibid.* at para. 34 [emphasis added].

³¹ This has always been well understood. In *Odhavji*, *supra* note 4 at para. 49, Iacobucci J. quoted from the Supreme Court of Canada’s judgment in *Hercules Managements v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 24:

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

Another classic explanation of proximity is found in *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 at para. 52, where McLachlin J. stated:

[A] consideration of proximity requires that the court review all of the factors connecting the negligent act with the loss; this includes not only the relationship between the parties but all forms of proximity — physical, circumstantial, causal or assumed indicators of closeness. While it is impossible to define comprehensively what will satisfy the requirements of proximity or directness, precision may be found as types of relationships or situations are defined in which the necessary closeness between negligence and loss exists.

In *Hill*, *supra* note 4, the point that proximity concerns the relationship which existed between the parties was stressed repeatedly throughout the judgment. The relationship that existed between the alleged wrongdoer and the victim was described by McLachlin C.J.C. at para. 29 as “the most basic factor upon which the proximity analysis fixes.”

³² In *Hill*, *ibid.*, McLachlin C.J.C. made it clear that there need not be “a personal relationship” between the parties for them to be in a proximate relationship. This is clearly so. The fact that the parties did not directly interact with each other does not mean that the conduct of one did not have a sufficient impact upon the other to create proximity. As stated by the Chief Justice the question is “whether the actions of the alleged wrongdoer have a close or direct effect on the victim, so that the wrongdoer ought to have had the victim in mind as a person potentially harmed.” She did add, however, at para. 30 that “while not

It is also clear that not all relationships are relationships of proximity which give rise to private law duties of care. The Supreme Court implicitly made this point in *Cooper* when it outlined those relationships which courts have already considered proximate and hence have imposed duties of care. Despite my difficulties with the list and with the wisdom of even attempting to compile one,³³ the point that not all interactions between parties give rise to duties of care is an important one. Thus the critical questions in each negligence case are to determine what the nature of the relationship between the parties was and to decide, as a matter of law, whether this relationship was sufficiently “proximate” to give rise to a duty of care. The answer to this latter question will depend upon common law principles and their application to the relationship of the parties to the dispute. It may be, as indicated by the Supreme Court in *Cooper*, that the courts have, in earlier jurisprudence, recognized proximity in this type of case. Alternatively, it may be clear that the common law has refused to impose a duty of care for acts or omissions of the sort which present themselves to the court. Courts, and particularly final courts of appeal, are also free to extend the boundaries of negligence law by recognizing proximity in cases where it was previously denied or in truly novel types of disputes.³⁴

The point of this general *excursus* is to explain why I disagree with the reasoning used not only in *Syl Apps*, but in *Cooper* as well and in almost all of the public authority negligence cases since, which I believe has inevitably led to the negative results which plaintiffs have experienced,

necessarily determinative, the presence or absence of a personal relationship is an important factor to consider in the proximity analysis.”

³³ For example, some categories are overly broad (e.g. “the defendant’s act foreseeably causes physical harm to the plaintiff or to the plaintiff’s property”) and others extremely narrow (e.g. “municipality’s duty to prospective purchasers of real estate to inspect housing developments without negligence”); see *Cooper*, *supra* note 2 at 553-54. As noted above, it has been difficult for courts to determine whether a dispute falls into a recognized category or not; see Klar, “Foreseeability,” *supra* note 10.

³⁴ The idea that there are recognized types of discrete relationships which have attracted a duty of care in the past is elaborated upon in *Hill*, *supra* note 4 at para. 25. A number of recognized relationships are noted; for example, motorist/user of highway; doctor/patient; solicitor/client. The issue in *Hill* was whether a police officer owed a duty of care to a crime suspect. McLachlin C.J.C. noted that this relationship was novel, and thus she went through a proximity and policy analysis. The majority found duty. The judgments are intriguing and are worthy of a full commentary. This breaking down of duty into discrete relationships will provide more fodder for those, such as Professor Weinrib, who have argued that the contemporary approach of “disintegrating duty” into discrete relationships has “undermined the most notable achievement of negligence law in the twentieth century,” namely Lord Atkin’s general formulation of duty; see Weinrib, “The Disintegration of Duty” (2005) Legal Studies Research Paper, University of Toronto Faculty of Law, at 4.

particularly with respect to summary motions to strike.³⁵ Courts have not been looking for proximity within the actual relationships which may have existed between the parties to the disputes. They have been looking for private law duty relationships within the statutory provisions which provided for the responsibilities of the public authority defendants. These statutes, passed for the most part for the protection of the greater public good, or, as in the *Syl Apps* case, for the protection of a defined segment of the public, cannot be interpreted or construed to give rise to private law duties of care between the plaintiffs and the public authorities. A statute may be the catalyst or impetus for the creation of a relationship between the parties to a dispute. The common law may recognize that the relationship so entered into is one of proximity giving rise to a private law duty of care. Thus, for example, in the *Syl Apps* case, if it were the child who had sued the secure treatment centre for its alleged negligence in treating her, there is little question that proximity and a duty of care would have been recognized. This would be so, however, not because the purpose or intent of the statute was to create a private law duty of care, but because the statute led to the child being placed in a particular relationship with the centre which the common law clearly recognizes as a proximate relationship, a relationship of parental control and supervision. The relationship would have come about as a result of the statutory responsibilities of the defendant, but that is a matter only of context or explanation.³⁶

One need only read any of the numerous judgments dealing with negligence claims against public authorities to realize that courts have not been looking to the relationships between the parties to determine if they are relationships of proximity, but to the statutory provisions to see if *they* could be construed to create private rights of action. One can begin with the Supreme Court of Canada's judgment in *Cooper* itself. In deciding whether there was proximity between the Registrar of Mortgage Brokers and the private investors sufficient to give rise to a duty of care, the Court stated:

³⁵ I am not suggesting that the plaintiffs would have established proximity and hence a duty had there been an examination of the relationships, on the merits of these cases. They might still have lost. But at least the courts would have been looking at the appropriate factors.

³⁶ For example, a manufacturer of a defective product is in a relationship of proximity with a consumer of that product. This relationship of proximity exists not because one party is a manufacturer and the other is a consumer, but because of what the manufacturer *actually does* — puts into circulation a defective product which injures a consumer. The context of the relationship is manufacturer/consumer, but it is the relationship of “doer” and “sufferer” (to borrow terminology from Weinrib, *supra* note 34 at 5) which the common law recognizes as a relationship of proximity giving rise to a duty of care.

In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.

In this case, the statute does not impose a duty of care on the Registrar to investors with mortgage brokers regulated by the Act. The Registrar's duty is rather to the public as a whole. Indeed, a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public.³⁷

The Court reviewed the relevant powers and duties of the Registrar under the Act, and concluded that there was insufficient proximity between the parties to ground a *prima facie* duty of care.³⁸ The Court did not refer to nor consider what the actual relationship between the investors and the Registrar may have been, and whether proximity could have been found within this relationship.³⁹

In view of this, it is not surprising to see that virtually all subsequent judgments dealing with negligence actions against defendants whose responsibilities emanate from statute, have had an almost exclusive focus on the statutory provisions to determine the issue of proximity. A good illustration of this is the Alberta Court of Appeal judgment in *Holtslag*.⁴⁰ The claimants in this case were persons in Alberta who used untreated pine shakes as roofing material on their homes. The shakes were unsuitable for their purpose and within a short period of time they discoloured and disintegrated, ultimately needing to be replaced. The claimants sued the Alberta Director of Building Standards, an appointee under the *Uniform Building Standards Act*,⁴¹ alleging his negligence in approving these materials for use. The defendant's application for a nonsuit was granted at trial and the plaintiffs appealed. The appeal was dismissed.

Consistent with *Cooper*, the search for proximity between the parties

³⁷ *Supra* note 2 at 556-57.

³⁸ *Ibid.* at 559.

³⁹ It could very well have been that there was no actual relationship between the parties and that nothing was pleaded outside of the statutory provisions themselves to support a duty of care. Thus, all the Court had were the statutory provisions. If this were the case, my submission would be that absent an express liability provision in the statute, and in the absence of any alleged relationship between the parties, the action could have been summarily dismissed without regard to an analysis of what the statutory purpose was. To try to create civil liability from a statutory duty, without a common law justification, is, in my opinion, inconsistent with *Saskatchewan Wheat Pool*, *supra* note 14.

⁴⁰ *Supra* note 9.

⁴¹ R.S.A. 1980, c.U-4, since replaced by the *Safety Codes Act*, R.S.A. 2000, c.S-1.

sufficient to give rise to a duty of care focused on the statutory provisions relevant to this matter. The following quotes from the Court of Appeal judgment illustrate this point:

The enabling statute here must be examined on the issue of proximity. What must be considered is whether the statute contemplates a private law duty of care to homeowners in respect to the fitness of building materials used in the construction of their houses.⁴²

In this case, there is nothing in the statute that can be said to give rise to a private duty, as opposed to a general public duty. The provisions of the Code are technical requirements relating to minimal health and safety standards and the use of safe and adequate building materials. As the respondent submitted, the Code cannot be said to be a textbook on building design. There are no provisions within it which address or provide for warranty of fitness or durability. The statute establishes a regulatory scheme for building products and is intended only as a set of minimum standards for the benefit of the public at large. The statute cannot be construed to impose a duty of care on the Director to consumers of building products.⁴³

As with *Cooper*, the Court did not examine the actual relationship which might have existed between consumers and the Director of Building Standards to see if it was a relationship of proximity giving rise to a private law duty of care. In all likelihood, other than for the fact that the consumers used building materials which had been approved for use by the department, no other relationship existed. Unless the Court was prepared to recognize that minimal level of interaction as giving rise to a relationship of proximity, no common law duty of care could have existed on the facts in this case. On the other hand, had the Director of Building Standards, while undertaking his statutory responsibilities, done something more to place himself in a relationship of proximity with the consumers, which the common law would recognize as giving rise to a duty of care, an argument for a duty might have been made.⁴⁴ It is unclear from the judgment whether such facts were pleaded, although I suspect that, as in *Cooper*, these factors did not exist and the only source of the duty argued for was the statute itself. The result of the case was therefore inevitable.⁴⁵

⁴² *Supra* note 9 at para. 33.

⁴³ *Ibid.* at para. 35.

⁴⁴ For example, representations, reliance, and active creation of risk are all factors which can justify the imposition of a duty of care.

⁴⁵ I refer the reader here to recent Ontario judgments dealing with the liability of the Crown for injuries suffered by plaintiffs allegedly due to the insertion of “TMJ” implants into the joints of their jaws, and in particular, to Cullity J.’s decisions in *Taylor v. Health Canada*, 2007 Can LII 36645 [*Taylor*] and *R. v. Drady*, 2007 Can LII 27970. Both cases involved allegations that Health Canada negligently failed to regulate and monitor the importation and use of these devices. Although Cullity J. first looked to the relevant statutes

When considering whether the facts of a case support an argument for proximity, certain important things must be kept in mind. As noted above, some, but not all, relationships are relationships of proximity. In particular, as a matter of general principle, the common law does not require persons who are in a position to assist others, or to prevent harm from a source of danger not created by them, to do so. In other words, the common law does not recognize a general duty to rescue or assist. This important principle was reaffirmed by the Supreme Court of Canada in the social host case of *Childs*.⁴⁶ In cases involving failures to act to prevent harm, there must be a nexus between the parties that makes their relationship “special,” and takes it out of the “no duty to assist” rule. As explained by McLachlin C.J.C. in *Childs*, “the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved.”⁴⁷ There must be a “special link or proximity” between the parties. Three situations were noted by McLachlin C.J.C. where this link can be established. First, where the defendant intentionally attracts and invites third parties to an inherent and obvious risk that the defendant has created or controls. Second, where there exist between the parties paternalistic relationships of supervision and control. Third, where the defendants exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large.⁴⁸ As explained by McLachlin C.J.C., it is “the defendant’s material implication in the creation of the risk, or his or her control of a risk to which others have been invited”⁴⁹ which underpins a duty to assist. Thus, in *Childs*, although there was a “relationship” between the social host and

to determine whether they gave rise to or exempted the Crown from a private law duty of care (he found that they did neither), he *also looked to the conduct of Health Canada and the effect of this conduct on the plaintiffs to determine the proximity and duty issue*. For example, in *Taylor* he asked at para. 39 whether Health Canada’s failures “facilitated the continued sale of the devices and thereby created a risk to the health of the intended recipients.”

Cullity J. clearly expressed the essence of this argument at para. 44:

Inaction by governmental bodies with statutory powers conferred for the protection of the public will not ordinarily engage a duty of care even though harm to individuals is reasonably foreseeable. Absent a statutory provision, or implication, to the contrary, any duty to exercise the powers will be owed to the public and not to private individuals. The missing element — proximity — may, however, be supplied if, by a course of conduct in a purported exercise of the powers, the agency creates, or contributes to, a foreseeable risk of harm to a discrete group.

Based on the possibility that proximity was created by the defendant’s course of conduct, Cullity J. allowed the negligence claim to proceed to trial. This approach is an excellent illustration of the argument being put forward in this commentary.

⁴⁶ *Supra* note 4.

⁴⁷ *Ibid.* at para. 31.

⁴⁸ *Ibid.* at paras. 35-37.

⁴⁹ *Ibid.* at para. 38.

the party who was injured by the drunk patron's driving,⁵⁰ it was not a relationship of proximity. In other words, in the opinion of the Supreme Court of Canada, it would not have been "just and fair" to have imposed a duty of care on the social host for the protection of the plaintiff on the facts of the *Childs* case.

Transferring this principle to many of the recent public authority liability cases, including *Cooper*, *Holtslag* and, the West Nile virus and SARS cases,⁵¹ it is arguable that the common law could not have recognized a relationship of proximity between the parties to those cases, on their facts. For the most part, the allegations against them were that the public authority defendants failed to prevent harm occurring to the plaintiffs from risks which the defendants themselves had not created. Unless the plaintiffs could have developed an argument that the defendants in those cases were sufficiently implicated in the creation of the risks or controlled the risk, a relationship of proximity could not have been recognized by the common law.

It is, of course, important to recognize that common law does not stand still and that new relationships of proximity can be recognized, or existing ones can be extended to accommodate new factual situations. Despite the result in *Childs*, for example, future courts are free to decide that under certain circumstances social hosts become sufficiently implicated in the creation of risks and are, therefore, in a relationship of proximity with persons injured by drunk drivers. There may be cases where public authority defendants do have a duty to prevent harm to private persons emanating from risks not primarily caused by them, due to their actions or inactions which exacerbated or heightened the risks.⁵² My argument is not

⁵⁰ For example, the plaintiff was injured by a driver who had been a guest at the defendant's house, the defendant allowed alcohol to be consumed at the party, and the plaintiff herself had been a guest of the defendant's. Thus, one cannot say that there was no "relationship" between the plaintiff and the defendant. The key issue was whether it was a relationship of "proximity" for the purposes of a duty of care.

⁵¹ These are referenced and discussed in Klar, "Tort Liability," *supra* note 13.

⁵² As explained by Cullity J. in *Taylor*, *supra* note 45. One may also explain the Quebec case of *Finney v. Barreau du Quebec*, 2004 SCC 36, [2004] 2 S.C.R. 17 in that way. In this case, and despite *Edwards*, *supra* note 3, the Bar of Quebec was found civilly liable to a private complainant for failing to protect her from an incompetent lawyer. In contrasting this case with *Cooper* and *Edwards*, Lebel J. stated at para. 46 that "[t]he decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. The common law would have been no less exacting than Quebec law on this point." This judgment should be compared with *755165 Ontario Inc. v. Parsons* (2006), 273 D.L.R. (4th) 11 (N.L.S.C. (T.D.)). In this case, Green C.J.T.D. allowed an action to proceed against the Law Society by an unhappy client of a disbarred lawyer. The judge noted at para. 61

intended to suggest that public authorities should never be held liable to private persons for their negligent failings in carrying out their responsibilities. Their liability should be based, however, on relationships of proximity recognized by the common law, and not on the purported intention of legislation with respect to the creation of duties of care.⁵³

In deciding whether or not a statute's purpose or intent was to create a duty of care, courts occasionally refer to the existence or absence of statutory immunity provisions. Thus, for example, in *Syl Apps*, statutory immunity provisions in the *CFSA*,⁵⁴ the *Ministry of Community and Social Services Act*,⁵⁵ and the *Courts of Justice Act*⁵⁶ were used by Abella J. to "lend further support to the conclusion that there is no proximity in the relationship between the family of a child in care and those directed by a court to protect that child's best interests."⁵⁷ The idea underlying Abella J.'s reasoning is that by employing immunity provisions, legislatures are signalling their intention to deny the existence of a duty of care. Conversely, where there are no statutory immunity provisions, courts have argued that this evidences a legislative intention to impose a duty. Thus, in the Court of Appeal decision in *Syl Apps*, Laskin J.A. used the absence of a statutory immunity for employees of a secure treatment centre, as opposed to officers or employees of a children's aid society, as "one factor supporting an arguable case for proximity between the plaintiffs and the defendants."⁵⁸

It is my view that the existence or absence of statutory immunity provisions is irrelevant to the question of proximity and common law duty. As a matter of logic, putting an immunity provision into a statute would only make sense if there is a potential of a common law duty of

that even if there had been no contact between the plaintiff and the defendant, a duty owed to the plaintiff might be construed from the legislative intent of the *Law Society Act*, SNL 1999, c.L-9.1. This would be to read a private right of action into the legislation, an approach which I do not favour.

⁵³ For example, even in *Cooper*, an argument for proximity based on reliance, or representations, could have been made, if the facts supported it. Had the court decided that the investors were entitled to rely upon the Registrar to control mortgage brokers, or that the Registrar's decisions were sufficiently serious to have materially implicated him in the creation of the risk that the investors would lose their money, one could not criticize the court's reasoning, even if one disagreed with its conclusion.

⁵⁴ *Supra* note 20, s. 15 (6).

⁵⁵ R.S.O. 1990, c. M.20, s. 4 (3).

⁵⁶ R.S.O. 1990, c. C.43, s.142.

⁵⁷ *Supra* note 1 at para. 62.

⁵⁸ *Supra* note 22 at para. 29.

care and, hence, liability being found against the defendant. Without such proximity, and hence, a duty, there would be nothing to immunize the public authority against. Thus, the argument that the existence of an immunity provision signals the legislature's intent that there is no relationship of proximity between the parties is unconvincing. Similarly, the absence of an immunity provision should not be used as an excuse to impose a private law duty, based on the presumed legislative intent. As emphasized in this comment, a private law duty must be based on a relationship of proximity. The fact that the legislature did not intend to protect the authority against such a finding should not logically be used as a factor in deciding that such a relationship of proximity did in fact exist.

As a final point, I note that although foreseeability and proximity will create a *prima facie* duty, the Court can still limit or negate the duty at the final stage of the *Cooper* test. Thus, for example, the policy/operational dichotomy, which, prior to *Cooper*, was the predominant focus of courts in determining the negligence liability of public authorities still remains as a limiting factor for a duty. If recognizing a duty would implicate courts in second guessing "political" decisions of public authorities, or would result in indeterminate and over burdensome liability, a *prima facie* duty can be denied. Thus, taking *Syl Apps* as an example, even if the family of an apprehended child and the treatment providers were in a relationship of proximity, the court, for the various reasons persuasively argued by Abella J., could still have denied a duty at the residual policy concern stage of the *Cooper* test. Moreover, let us not forget that liability in negligence involves much more than merely proving duty. The plaintiff must also establish that the duty was breached, and that the breach was both the factual and proximate cause of the plaintiff's injuries. There is the danger that an overemphasis on "proximity" and whether it would be just and fair to impose a duty on the defendant can swallow up other elements of the negligence claim. In other words, it may not be "just and fair" to find liability against a defendant, for reasons other than lack of proximity.

Conclusion

If common law principles, and not the construction of statutory provisions, were applied in negligence actions against public authorities, plaintiffs suing public authority defendants would have a far greater chance of success. Courts would be given the opportunity to examine the relationship which existed between the parties to determine whether it was a relationship of proximity. The common

law's ability to apply negligence law principles relating to the interaction between parties to new types of factual disputes, which has led to the remarkable growth of negligence law in the years since *Donoghue v. Stevenson*⁵⁹ was decided, remains strong. If courts continue, however, to search for proximity within statutory provisions, by attempting to construe whether the intent and purpose of the statute was to give rise to a private right of action, plaintiffs will continue to fail. Not only is this approach inconsistent with the way Canadian negligence law approaches the issue of statutory breach, but it is a fruitless search.

It has been the thesis of this comment that proximity derives from relationships, and relationships look at the interactions between the parties. While statutes can explain why the parties might be in a relationship, they cannot convert this relationship into one of proximity and private law duty. Only the application of common law principles can do that.

Some, but not all, relationships are relationships of proximity. In particular, there is normally no proximate relationship between a person in need of assistance and a person who is in a position to provide that assistance, but fails to do so. Public authority actions frequently relate to this type of dispute. If courts take seriously the proposition that the common law should apply to public authorities as it does to private persons, then absent a special nexus between the plaintiff and the public authority, proximity should not be found to exist in this type of case. Courts are free to find that special nexus or to relax the common law's reluctance to impose duties to assist in public authority cases. If they do so, they should do so clearly and with justification.

Alternatively, if Canadian tort law now contemplates that certain types of statutes should give rise to private rights of action, and that the *Saskatchewan Wheat Pool* decision should be modified to allow for this, this should be stated clearly. In my opinion, this would complicate Canadian negligence law and involve the courts in the problems sought to be avoided by Dickson J. in *Saskatchewan Wheat Pool*, but this approach should not necessarily be ruled out. Courts will then have to provide appropriate guidelines for construing statutes to determine which ones are meant to create relationships of proximity for the purpose of private law duties. I personally would not favour this development, and much prefer the private party analogy. Whatever route is chosen, however, it seems to

⁵⁹ [1932] A.C. 562 (H.L.).

me that the question of the negligence liability of public authorities should be revisited by the Supreme Court of Canada in this post-*Cooper* era.⁶⁰

⁶⁰ This will come in *Holland v. Saskatchewan (Minister of Agriculture, Food and Rural Revitalization)*, [2007] S.C.C.A. No. 180 (QL) [*Holland*]. Game farmers sued the Government of Saskatchewan for negligence, intimidation, and misfeasance in a public office. The actions related to losses suffered by the claimants as a result of the government's regulatory regime set up to deal with chronic wasting disease in elk. The chambers judge refused to strike out the negligence claim, although the intimidation claim was struck. The Saskatchewan Court of Appeal in 2007 SKCA 18, (2007), 281 D.L.R. (4th) 349 at para. 44 struck out the negligence claim. The Supreme Court has granted leave. Although there are a variety of issues involved in this appeal, the interaction between breach of a statutory duty and a negligence action is one of them. It should be noted, however, that the *Holland* claim seeks damages arising from the government's implementation of an invalid regulatory scheme. The claimants were not seeking damages due to the government's negligent failure to prevent their elk from being struck with chronic wasting disease. This is quite a different type of claim from those considered in cases such as *Cooper*, *supra* note 2; *Holtslag*, *supra* note 9; and *Taylor*, *supra* note 45. In those cases, the public authorities acted lawfully; their negligence lay in their alleged failure to accomplish the objectives of the legislation. It will be interesting, therefore, to see how the Supreme Court of Canada deals with this difference.