**IS LORD ATKIN’S NEIGHBOUR PRINCIPLE STILL RELEVANT TO CANADIAN NEGLIGENCE LAW?**

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**INTRODUCTION**

Lord Atkin’s “neigbour principle” lay at the heart of twentieth century Canadian negligence law. The idea that there is “a general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances”[[1]](#footnote-1) excited Canadian tort law scholars and jurists. No-one expressed his enthusiasm more than Justice Allen M. Linden. On the 50th anniversary of *Donoghue v. Stevenson*, Justice Linden wrote a glorious tribute to the judgment, stating among other things that *Donoghue v Stevenson* was “not only alive and well, it is thriving, vigorous, lusty, youthful and energetic”. He opined that despite the efforts of some courts “to restrict the scope of the neighbour principle”, that this had been “a losing battle”. He noted that “the dominant sweep of history in negligence law has been toward expanding the neighbour principle into every nook and cranny of negligence law.”[[2]](#footnote-2) Illustrative of the enthusiasm of Canadians for *Donoghue v. Stevenson* was the first “pilgrimage to Paisley” led by Mr. Justice Martin Taylor, which was followed by a video and book of essays about the case.[[3]](#footnote-3)

In the first part of this paper, I will show that Justice Linden was correct about the effect of *Donoghue v Stevenson* on Canadian twentieth century negligence law. It propelled the law forward; areas which previously had been unreceptive to its reach, were quickly embraced by it. Canadian tort law extended the liability of public authorities, allowed greater recovery for purely economic losses, and imposed new duties of affirmative action. I will briefly review these three topics, in order to show how significantly they grew in this period, reflective of the importance of the neighbour principle to Canadian negligence law.

 In the second part of this paper, I will discuss how all of this changed in 2001, with the Supreme Court of Canada’s judgments in *Cooper v Hobart[[4]](#footnote-4)* and *Edwards v Law Society of Upper Canada*.[[5]](#footnote-5) The “general conception of relations giving rise to a duty of care” was replaced by discrete categories of duty relationships, quite specific to the facts of each dispute, with their unique “policy” considerations. Rather than the expansion of the neighbour principle “into every nook and cranny of negligence law”, twenty-first century negligence law witnessed the neighbour principle’s disappearing influence. Not only were the advances made in the previous century halted, ground which had been gained was lost.

 In his 1982 tribute to *Donoghue v Stevenson,* Justice Linden reminded readers of the prediction made by Heuston, ed., *Salmond on Torts*, in 1932. According to Justice Linden, Heuston predicted that on its 50th anniversary in 1982, *Donoghue v Stevenson* would be “little more than antiquarian interest, a mere repository of ancient learning”, tort law having been abolished and replaced by a social insurance scheme by then. Justice Linden exulted: “How wrong he was!” In this paper I suggest that although Heuston’s timing was off, and the reason for the predicted demise of *Donoghue v Stevenson* incorrect, that perhaps Heuston was right about its ultimate fate. On its 80th anniversary, Lord Atkin’s neighbour principle has become irrelevant to Canadian negligence law.

**THE EXPANSIONIST YEARS**

 The latter half of the twentieth century witnessed an explosion of Canadian negligence law fueled by *Donoghue v. Stevenson’s* neighbour principle. Even after the House of Lords in *Anns v. Merton London Borough Council[[6]](#footnote-6)* formally acknowledged that the *prima facie* duty of care based on a sufficient relationship of proximity or neighbourhood could be negated or limited by policy considerations, Canadian negligence law forged ahead, driven by the neighbour principle. Despite the fact that the House of Lords in the 1980’s retreated from the idea that there was a general formula for duty, based upon forseeability, and only then limited by policy,[[7]](#footnote-7) Canadian courts remained faithful adherents to the neighbour principle. Lord Atkin’s neighbour principle was the bed rock of Canadian negligence law. There was much about Canadian negligence law for enthusiasts to celebrate, and good reason to make a Canadian pilgrimage to Paisley.

Three areas in particular demonstrated the power of Lord Atkin’s principle for Canadian negligence law – recovery of purely economic losses, the liability of public authorities, and duties of affirmative action. It is interesting to see how much tort liability expanded in these areas based on Lord Atkin’s neighbour principle, and then to compare what has happened to them post-*Cooper*.

*Pure economic loss recovery*

Purely economic loss claims arise when individuals who have suffered neither personal injury nor property damage assert that another's negligence has resulted in their financial detriment and, even in the absence of contractual or fiduciary rights, seek compensation. This was generally seen to be the area of business and commerce, the traditional bailiwick of contract law. If Lord Atkin's concept of neighbourliness, with its obligation to take care, imposed not by agreement but by the common law, were to be extended here, this would surely be more cataclysmic than *Donoghue v. Stevenson* itself. Tort law's dominance over all of private law would be assured. A duty in tort to take reasonable care to protect the financial interests of foreseeable victims would relegate the law of contracts to protecting those who wished to bargain for more onerous obligations.[[8]](#footnote-8)

Yet that is what happened. From a generally accepted “exclusionary rule” which limited purely economic loss recovery in tort, grew a number of exceptions. The first break through came with *Hedley Byrne v Heller[[9]](#footnote-9)* which allowed for the recovery of purely economic losses suffered by non-privity claimants who relied on gratuitous advice. *Hedley Byrne* was quickly approved of by the Supreme Court of Canada,[[10]](#footnote-10) based on a “reasonable and foreseeable reliance” test.[[11]](#footnote-11) The acceptance of *Hedley Byrne* soon led to the Canadian adoption of “concurrent” contract/tort liability, whereby claimants could elect to sue in tort even if the misrepresentations upon which they relied, constituted breaches of express contractual terms.[[12]](#footnote-12)

It was a short step from tort liability based on reliance on negligent statements to tort liability based on the reliance on gratuitous promises to perform services for the plaintiff.[[13]](#footnote-13) This duty extended to reliance on the competent performance of contractual services *for others,* illustrated by the tort liability of solicitors to disappointed “beneficiaries” of invalidly executed (or even not yet executed) bequests.[[14]](#footnote-14)

Another area of some success for plaintiffs was recovery for economic losses which they suffered as a result of property damage suffered by others – the relational economic loss cases. Thus in *C.N.R. v Norsk*,*[[15]](#footnote-15)* a plaintiff who had a contractual right to use a bridge owned by another party and damaged by the negligence of the defendant, was able to recover the economic losses which it suffered as a result of its inability to continue to use the bridge.[[16]](#footnote-16) The parties were in a sufficiently proximate relationship to allow them to recover – they were “neighbours”.[[17]](#footnote-17)

Tort law moved into the area of “quality” assurance of products and structures, by allowing a non-privity purchaser of a defective building to sue the original builder for negligence in its construction, in *Winnipeg Condominium Corp. No. 36 v Bird Construction Co.*[[18]](#footnote-18) Although an important factor in *Winnipeg Condominum* was that the defect in the structure posed a reasonably foreseeable risk of harm to persons or property, no such harm had yet occurred.[[19]](#footnote-19) Rather than limiting the purchaser to its contractual remedies against the vendor, reasonable foreseeability of the risk of harm allowed tort law to provide a remedy.

*Duties of affirmative action*

Although “ generally, 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”,[[20]](#footnote-20) the experience of *pre-Cooper* Canadian negligence law was the crafting of significant exceptions to this principle.

One can start off with the liability of “commercial hosts”. In *Jordan House Ltd. v Menow*,[[21]](#footnote-21) the Supreme Court of Canada held a tavern keeper liable for injuries suffered on a highway by a drunk patron after he had been ejected from the defendant’s commercial premises. This duty to protect was later extended to third parties who were injured by the intoxicated patron.[[22]](#footnote-22) The liability of commercial enterprises which involve the provision of alcoholic beverages to either their patrons or third parties injured by them is now well accepted in Canadian law.

The duty to prevent harm is not limited to commercial enterprises involving the provision of alcohol. Suppliers of other goods and services have tort law duties to ensure that otherwise safe products will not be misused and result in injuries to the users or to others.[[23]](#footnote-23) Those who control instruments of danger must intervene to prevent those objects from injuring others. An owner of a car or motorcycle, for example, has a duty to prevent incompetent friends from using these vehicles.[[24]](#footnote-24)

The list of relationships which include a duty to protect (and to prevent harm to others) is a long one. Some depend on contract or fiduciary relationships, but many on tort. Thus in Canadian tort law, parents owe duties with respect to their children, employers with respect to their employees, teachers with respect to their students, and institutions from hospitals, prisons, to nursing homes to their inmates and residents. The principle that there is no duty to protect others or to keep them from harming others often seemed more hypothetical than real.

*Public authority liability*

No area expanded more dramatically as a result of the neighbour principle than the liability of public authorities. And, as we will see, this has been the area most negatively affected by the move away from foreseeability to the new “proximity” approach to duty.

From the House of Lords’ decision in *Anns v Merton London Borough Council*[[25]](#footnote-25)until the Supreme Court of Canada’s refinement of the duty of care formula in *Cooper v Hobart*, a presumptive duty of care owed by public authorities to those injured by government’s failings was based on the neighbour principle.[[26]](#footnote-26) Despite the fact that the duties and powers of the public authorities emanated from statutes, despite the fact that these statutes did not expressly provide for private rights of action, and despite the fact that since 1983 Canadian tort law has rejected a nominate tort of breach of statutory duty,[[27]](#footnote-27) governments and other statutory authorities were frequently held liable to reasonably foreseeable victims of their negligent conduct. This liability applied to both cases of misfeasance and nonfeasance, and to purely economic losses, in addition to personal injury and property damage cases.

The highway maintenance and building inspection cases provide good examples of how presumptive duties of care were based on reasonable foreseeable harm. In *Just v British Columbia*,[[28]](#footnote-28) for example, it was held that the Crown owed a common law duty of care to protect highway drivers from hill side boulders which could become dislodged and fall onto the roads. The duty was not based on an express or even implied statutory private right of action but on the fact that the risks of injury were “readily foreseeable”. Users of the highway would be “eminently reasonable” in expecting that the highway would be reasonably maintained. In *Ingles v. Tutkaluk Construction Ltd.*,[[29]](#footnote-29) the City of Toronto was held liable to a homeowner for the negligence of its building inspector. What was the source of the duty? It was Lord Atkin’s neighbour principle. As explained by Bastarache J., it was “certainly foreseeable that a deficient inspection of the underpinnings of a home could result in damage to the property of the homeowners, or injury to the homeowners or others. As a result, I agree that there was a sufficient relationship of proximity between the appellant and the city such that the city owed the plaintiff a *prima facie* duty to conduct an inspection of the renovations of the appellant’s home and to do so with reasonable care.” In *City of Kamloops v. Nielsen*,[[30]](#footnote-30) the City was sued for failing to prevent the construction and subsequent occupancy of a house built with serious defects. The suit was brought be a subsequent purchaser of the house. The City was held liable by the majority of the Supreme Court of Canada. As to the source of the duty, Wilson J. referred to the *Anns* proximity test. She stated that “the plaintiff was clearly a person who should have been in the contemplation of the City as someone who might be injured by any breach of that duty”. The plaintiff’s “relationship to the City was sufficiently close that the city ought reasonably to have had him in contemplation”. That is, they were neighbours.

Having found a *prima facie* duty based on the neighbour principle, Canadian courts then turned their attention to stage two of the *Anns* test, namely policy considerations which might negate or limit the duty. With respect to the liability of public authorities, their main concern focused on the “policy/operational” dichotomy, although “indeterminate liability” was also frequently raised, particularly in cases involving purely economic losses.

**THE NEW PROXIMITY**

In view of Canadian negligence law's long allegiance to the two-stage test, it was surprising to see the Supreme Court of Canada reformulating its approach to the duty issue in two important judgments. In *Cooper v. Hobart[[31]](#footnote-31)* and *Edwards v. Law Society of Upper Canada*,[[32]](#footnote-32) the court altered its analysis and took the opportunity to “highlight and hone the role of policy concerns in determining the scope of liability for negligence”.[[33]](#footnote-33) The cases involved negligence actions brought against regulators — in one case a Registrar of Mortgage Brokers and in the other a law society — by investors who believed that their losses were caused in part by the failure of the regulators to reasonably protect them from dishonest third parties. Motions were brought by the defendants to strike out the respective statements of claim on the basis that they disclosed no cause of action.

 The Supreme Court struck out the claim in each case on the basis that there was no duty of care owed by the regulators to private individuals for the protection of their interests. Rather, however, than utilizing a simple two-stage duty formula, with foreseeability comprising stage one and policy stage two, the court asserted that stage one of the test is based not only on foreseeability, but also on questions of policy. The court put the matter thusly:

In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. Ifforeseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy concerns outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.[[34]](#footnote-34)

 In a nutshell, a new step was added to the formula. At stage one, the courts must consider (i) foreseeability and (ii) policy concerns that arise from the relationship between the parties. If a *prima facie* duty of care based on these factors arises, the courts can then consider residual policy concerns, extraneous to the relationship between the parties, which can reduce or negate the *prima facie* duty. Based on this analysis, the Supreme Court held that despite the fact that the negligence of regulators could have foreseeably affected the economic interests of the claimants, policy concerns prevented there from being a proximate relationship between the parties. There was therefore no *prima facie* duty owed.[[35]](#footnote-35)

Another feature of the refined duty formula, was that the “proximity” analysis was to apply only to new categories of duties. As explained by the Supreme Court in *Cooper*, the concept of “proximity” is generally used “to characterize the type of relationship in which a duty of care may arise”, and added that these types of sufficiently proximate relationships “are identified through the use of categories.” Thus, the first task of a court in determining whether the relationship of the plaintiff and defendant in any specific case is sufficiently proximate to support the existence of a *prima facie* duty of care is to decide whether that relationship constitutes a novel duty category or falls into a recognized category, or into a category analogous to a recognized category. Although the Supreme Court conceded that the categories are not closed and new ones can be introduced, it attempted to illustrate its proposition by identifying those categories in which proximity has been recognized in earlier cases.

The decision to identify proximate relationships by the use of “categories of duties” clearly undermines Lord Atkin’s idea that there “is a general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances”. What we have seen in Canadian negligence law post-*Cooper* is a dissection of a general conception of duty into a multitude of small, separate duty categories. [[36]](#footnote-36) There appears to no longer be a general duty of care based on a neighbour principle, but identified duty relationships; for example, the duty owed by an investigating police officer to a particular suspect, the duty owed by a motorist to a user of the highway, the duty owed by a doctor to a patient, the duty owed by a solicitor to a client, the duty owed by a municipality to a prospective purchaser of real estate with respect to the inspection of housing developments, the duty owed by a child welfare agency to the family of an apprehended child, the duty owed by a doctor to a child born with disabilities as a result of a doctor’s prenatal negligence, and so on. These are not hypothetical examples; all of these have been identified by courts as specific duty relationships. Moreover, courts have been prepared to sub-categorize duty relationships within accepted duty categories. Thus, although the *Hedley Byrne* duty respecting negligent statements has long been recognized by Canadian law, the Supreme Court of Canada in *R v Imperial Tobacco[[37]](#footnote-37)* held that the allegations by tobacco companies that the Government of Canada negligently had misrepresented the health benefits of low tar cigarettes to both the tobacco industry and to consumers “did not fall within a settled category of negligent misrepresentation”. Thus this case represented a new category of a negligent statement case and required a full *Cooper* analysis.[[38]](#footnote-38)

*Foreseeability*

Before turning to the issue of proximity, a brief word about “foreseeability”. While defining the notion of foreseeability always has been a challenge, prior to the injection of proximity and policy into the duty formula, the foreseeability requirement made conceptual sense. It allowed the courts to acknowledge that a duty of care is owed to all of those who fall within a reasonably foreseeable risk of harm, however defined, notwithstanding the novelty of the facts in dispute, while at the same time giving the common law a mechanism to ensure that the neighbour principle was not extended too far. It was a legal mechanism which allowed judges to expand the neighbour principle “into every nook and cranny of negligence law” while at the same retaining the common law’s right to control this expansion, under the guise of lack of foreseeable harm.

The task of controlling the expansion of negligence law now has been totally given over to the notion of “proximity”, supplemented by the ability of courts to deny duties based on “residual policy considerations”. Foreseeable harm has become, in my view, irrelevant to the existence of duty. It still has a role to play, not as a matter of duty, but as a factor to be taken into consideration at the standard of care and remoteness of injury stages of the negligence action. Its irrelevance to the duty inquiry is borne out by the fact that it is difficult to find any modern cases where duty has been denied based on the lack of reasonably foreseeable harm, as a matter of law. Although there are cases where the lack of foreseeable harm was used as reason to deny the existence of duty, these were essentially findings of fact, which ought to have been left to the issue of breach of duty.[[39]](#footnote-39)

*What is “proximity”?*

“Proximity” has replaced Lord Atkin’s neigbour principle as the cornerstone of the duty formula. What is “proximity”?

There is no good answer. The Supreme Court has encapsulated the idea of proximity by noting that a presumptive duty will exist where it would be “just and fair” or “just and reasonable” to recognize one. This is obviously unhelpful as a guiding principle. Digging deeper, courts have identified factors which ought to be considered; things such as “expectations, representations, reliance and the property or other interests involved”. “The physical propinquity of the parties, “assumed or imposed obligations”, the closeness of the “causal relationship” between the act done and the harm suffered”, have been noted as being relevant. Or as asserted by Chief Justice McLachlin in *Hill v Hamilton-Wentworth:*

 “the most basic factor upon which the proximity analysis fixes is whether there is a relationship between the alleged wrongdoer and the victim, usually described by the words ‘close and direct’”.[[40]](#footnote-40)

 We were also told in *Cooper*, that these factors “include questions of policy, in the broad sense of that word”.

Whatever “proximity” means or how it can be explained, it is clear that proximity supplements foreseeability as a requirement of duty and thus includes factors which extend far beyond Lord Atkin’s notion of neighbour. While efforts to explain what these factors are in the abstract may not be helpful, examining the *post-Cooper* jurisprudence which utilized the concept, is instructive. It demonstrates that proximity is not merely, if at all, about the “closeness and directness” of the relationship between the parties, but about other unrelated policy matters. The jurisprudence also demonstrates how the addition of proximity to the duty analysis has halted the expansion of Canadian negligence law.

Let us revisit the three areas of negligence law discussed previously in relation to the expansionist years – pure economic loss recovery, duties of affirmative action, and public authority liability, to see how they have fared under this new proximity requirement.

In relation to the recovery of purely economic losses, the Supreme Court has decided two significant cases. In *Design Services Ltd. v. R.,[[41]](#footnote-41)* sub-contractors associated with a contractor who had submitted a bid for a proposed construction project, sued the project owner for its decision to award the contract to a non-compliant bidder. Rothstein J., writing for the Supreme Court, accepted that although it was reasonably foreseeable that the sub-contractor would suffer financial losses as a result of the defendant’s decision, and was in a close relationship with the project owner, that policy reasons dictated against a finding of proximity. According to the Court, the sub-contractor should have protected itself by entering into a joint venture with the contractor in the submission of the contractor’s bid. Having chosen not to do so, the Court held that it would be inappropriate to allow the subcontractor to avoid the consequences of that decision, by suing in tort. This would be, according to Rothstein J., “an unjustifiable encroachment of tort law into the realm of contract”. Thus, there was no proximity. Even had a presumptive duty been found, the Court would have negated it based on indeterminate liability concerns.

The second case is *R. v Imperial Tobacco.*[[42]](#footnote-42) Tobacco companies which had been sued by the Government of British Columbia for the reimbursement of the health care costs of tobacco related illnesses, and by consumers for the refund of the costs of low tar cigarettes purchased by them, third partied the Government of Canada for contribution. Among the allegations made against the Government was that it had negligently misrepresented the health benefits to smokers who switched to mild or low tar cigarettes. As pointed out above, although negligent statement was a recognized duty category, the Supreme Court treated this case as a new type of negligent statement category, requiring a full *Cooper* analysis. Despite a finding of foreseeable harm, the Court denied that there was proximity between the Canadian government and the purchasers of low tar cigarettes. This finding was based both upon both the interpretation of the statutes involved in the government regulation of the tobacco industry ( see discussion below) and the lack of “specific interactions” between the Government and consumers. This finding was made, despite the fact that for the purposes of the motion to strike, the Court accepted that the government had negligently made inaccurate representations concerning the health benefits of low tar cigarettes, which representations were relied upon by consumers, to their detriment. The Court did find that there were sufficient interactions between the Government and the tobacco companies to support a finding of proximity, but that the presumptive duty of care so created was negated by residual policy concerns.[[43]](#footnote-43)

In the *post-Cooper* period, the Supreme Court considered the issue of the duty of affirmative action, in the context of social host liability. The facts of the case, *Childs v. Desormeaux*,[[44]](#footnote-44) are as follows. The defendants hosted a New Year's Eve party, to which the guests brought their own alcohol. The inebriation of one of those attending the party led to a serious traffic accident in which the plaintiff, who was a passenger in another car unrelated to the party, became a paraplegic. Although Canadian law had long recognized the duty imposed upon commercial hosts with respect to the provision of alcohol, the Supreme Court had not considered the law concerning social hosts, and thus regarded this case as representing a novel duty category. The Court denied liability in this case. Although the lack of foreseeable harm was a factor in denying the duty, the issue of proximity lay at the heart of the Supreme Court’s judgment. The Court reaffirmed the common law principle that there is no general duty to assist others or intervene to control the activities of a third person. The common law respects the autonomy of a risk-taker to engage in risky activities (such as drinking and driving) without the intervention of others, as well as the autonomy of these others to choose not to get involved. Unless the defendant was materially implicated in the creation of the risk, or had assumed responsibility for controlling the wrongdoer, the defendant is regarded as a mere bystander who has no duty to assist or prevent harm. The facts of *Childs* did not in the Court’s view satisfy these criteria and thus there was no proximity between the social hosts and the plaintiff who had been injured.[[45]](#footnote-45)

The public authority liability cases illustrate more than any other area the impact that the new proximity requirement has had on negligence law. Whereas, as discussed above, presumptive duties of care between public authorities and private persons harmed by their actions frequently were found to exist based upon a relationship of reasonably forseeable harm, the *post-Cooper* period has been a very difficult one for plaintiffs suing government. Almost all cases have been unsuccessful, many of them being struck out in preliminary motions.

At the core of the plaintiffs’ difficulties has been the proximity requirement. Foreseeable harm has not been the issue. In determining whether there is proximity between public authorities and claimants, the courts first look to the statutes, which empower the authorities and define their responsibilities, to determine whether private law duties were intended to be imposed on the public authorities in addition to their public duties. As I have long argued, this approach appears to me to be inconsistent with Canadian tort law which expressly has rejected a tort of breach of statutory duty, based on the unexpressed intention of legislatures.[[46]](#footnote-46) Notwithstanding my entreaties, however, it is the approach which was adopted by the Supreme Court of Canada in *Cooper v Hobart* and consistently applied subsequently by the Supreme Court and lower courts in cases involving statutory authorities. It invariably fails for plaintiffs.[[47]](#footnote-47) The Supreme Court recently has acknowledged this, remarking that “it may be difficult to find that a statute creates sufficient proximity giving rise to a *prima facie* duty of care” because “more often statutes are aimed at public goods”. This makes it “difficult to infer that the legislature intended to create private law tort duties to claimants”. This is particularly so where recognition of private law duties of care would potentially conflict with the authority’s public duties.[[48]](#footnote-48)

In the alternative to inferring proximity from statutory provisions, courts increasingly have been more willing to look for proximity within the relationships or interactions which existed between the public authorities and the claimants. This is where I believe proximity is located. Up until recently this approach has not helped plaintiffs to establish proximity because a “close and direct” relationship must be found; that type of relationship generally does not exist between government and individual claimants. Although the Supreme Court did find that such interactions did exist in two recent cases,[[49]](#footnote-49) the actions still failed. In *Fullowka*, the Court held that the public authority had not been negligent, and in *Imperial Tobacc*o*,* the actions of the authority were deemed to have been “core policy” decisions. In addition, of course, as discussed above, even if there is a close and direct relationship other policy factors, having nothing to do with the closeness of that relationship, have been used to deny proximity.

*Residual policy concerns*

Even if a plaintiff can succeed in demonstrating to the court that there she was a reasonably foreseeable victim of harm, *i.e.* a neighbour who should have been in the defendant’s contemplation, *and* that it would be “just and reasonable” to impose a duty of care on the defendant for her protection, a duty *can still be denied* based on so-called ”residual policy concerns”. What are “residual policy” concerns?

The first point which should be noted is that although initially the Supreme Court distinguished between those policy concerns which are internal to the parties themselves and are matters of “proximity” (stage one), and those policy concerns which are external to the parties, going to such things as “the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally” (stage two),[[50]](#footnote-50) it soon became obvious that in practice it was difficult to make this distinction.[[51]](#footnote-51) For example, the proximity policy concerns discussed above, such as the encroachment of tort into the area of contract, the conflict of private duties with public duties, and respect for the autonomy of risk takers in a duty to prevent harm scenario, seem to be more logically characterized as “residual policy” concerns. Chief Justice McLachlin acknowledged this problem of distinguishing between the two types of policy concerns, but minimized the concern on the basis that as long as there is consideration of a “proper balancing of the factors relevant to a duty of care”, it “may not matter.. at which stage policy is considered”.

Although residual policy concerns differ being particular to their context, certain ones frequently are raised. The first is “indeterminate liability”, the fear of exposing defendants to liability “in an indeterminate amount for an indeterminate time to an indeterminate class”.[[52]](#footnote-52) This concern has been raised in relation to claims involving purely economic losses, negligent statements, nervous shock, and government liability, among others. Is it a real fear? I would argue not. Liability in tort for negligent conduct is never indeterminate. It is determined by the requirements of the negligence action, the elements of duty, breach, compensable injury, factual cause, proximate cause. These are all *limiting* devices. As I have discussed in this paper, the existence of duty itself is strictly determined by the requirements of reasonably foreseeable harm, proximity, and policy.

It has been noted that with respect to the activities of legislative or judicial bodies, liability for negligence may not be appropriate. There are political constraints on the types of decisions courts can make, as well as legitimate questions concerning the ability of judges to weigh and investigate those matters necessary for a proper determination of some public issues. Thus, Canadian law distinguishes between the “true” or “core” policy decisions of public authorities, and their operational activities.[[53]](#footnote-53) Public authorities are immune from negligence liability for their policy decisions and activities, subject to a good faith requirement.

 In relation to some actors and activities, such as lawyers, judges and other professionals, there has been the concern that the fear of tort liability will impede their work and result in protracted litigation. The concern, for example, of a “chilling effect” on the police, should they be held liable for the manner in which they conduct their investigations has been expressed.

 The administrative difficulty of adjudicating certain types of disputes has affected the growth of negligence law. If there are difficult questions of proof, or the possibility exists of fraudulent claims being made, courts have resisted the imposition of tort liability.

 A wide category of concerns involves the court's assessment of societal values and needs, and the extent to which these can be furthered or hindered by the imposition of tort liability. Questions concerning the value to be given to concepts such as “individual responsibility” and the “individualistic” nature of society have been raised. As well, the effect that liability might have on social relationships, for example, social gatherings involving alcohol consumption, has been a factor. More contemporary issues involving economic factors, such as who is the best loss avoider or cheapest cost bearer, have been argued as being relevant. The wide use of insurance, whether first-party or third-party liability, is said to be important. The availability of liability insurance has been an issue, the suggestion being that an unjustifiably wide extension of tort liability will jeopardize the affordability of and accessibility to liability insurance, thereby putting useful activities out of business. The rules of tort law and the availability of a remedy must be seen in the wider juridical context. The courts must ask whether the issue in dispute is best resolved by a private law tort rule, by the use of contract or equity, or by public law or legislative intervention.

**CONCLUSION**

Lord Atkin’s neighbour principle along with *Donoghue v Stevenson’s* “general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances” has given way in Canada to discrete duty categories, based on the facts of particular cases, infused with a host of policy considerations. Whether a duty of care is owed is based not only on reasonably foreseeable harm, (which is invariably found), but on whether the courts consider that it would be “just and reasonable” to recognize it. This in turn is based on considerations of policy both internal to the relationship between the parties and external to it; things such as legislative intent, concerns for the autonomy of risk takers and would be rescuers, the relationship between tort and contract, the conflict between public and private duties, the respective roles of courts and legislatures, fears for indeterminate, *i.e.* extensive liability, the chilling effect of judgments, the availability of insurance, the efficient allocation of risks and losses, the ease of administering case loads, and so forth. Although one should celebrate the 80th anniversary of *Donoghue v Stevenson* here in Paisley, for its important role in releasing negligence law from the fetters of privity of contract and Lord Atkin’s bold attempt to discover the unifying principle underlying tort liability, I question whether 21st century Canadian negligence law has gone too far in abandoning the general concept in an effort to overly particularize each factual dispute. Is Lord Atkin’s neighbour principle still relevant to Canadian negligence law? It appears to me, not.

1. [1932] A.C. 562 at 580. [↑](#footnote-ref-1)
2. Linden, “The Good Neighbour in Trial: A Fountain of Sparkling Wisdom” (1983), 17 U.B.C.L.Rev. 509. [↑](#footnote-ref-2)
3. See *Donoghue v. Stevenson and the Modern Law of Negligence* (1991). [↑](#footnote-ref-3)
4. (2001), 206 D.L.R. (4th) 193. [↑](#footnote-ref-4)
5. (2001), 206 D.L.R. (4th) 211. [↑](#footnote-ref-5)
6. (1977), [1978] A.C. 728 (H.L.). [↑](#footnote-ref-6)
7. This approach was well articulated by Lord Bridge in *Caparo Industries plc v. Dickman,* [1990] 1 All E.R. 568 at 574.:

“Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and limits of the varied duties of care which the law imposes.”

Lord Bridge stated that it was time to recognize the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1 at 43-44, where he said:

“It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable “considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.” [↑](#footnote-ref-7)
8. See Klar *Tort Law*, 5th edition (2012), Chapter 7 (forthcoming). [↑](#footnote-ref-8)
9. [1963] 2 All E.R. 575 (H.L.). [↑](#footnote-ref-9)
10. There are several important judgments. See, for example, judgments in *Rivtow Marine Ltd. v. Washington Iron Works*, [1973] 6 W.W.R. 692; *The Pas v. Porky Packers Ltd.*, [1976] 3 W.W.R. 138; *Haig v. Bamford*, [1976] 3 W.W.R. 331; *Fletcher v. M.P.I.C.* (1990), 5 C.C.L.T. (2d) 1; *Edgeworth Construction Ltd. v. N.D. Lea & Assoc. Ltd.* (1993), 17 C.C.L.T. (2d) 101; and *Queen v. Cognos Inc.* (1993), 14 C.C.L.T. (2d) 113. In the latter case, at 133, Iacobucci J. stated that the action for negligent statement first recognized in *Hedley Byrne* is “now an established principle of Canadian tort law”. [↑](#footnote-ref-10)
11. This was *pre-Cooper*. As I will later discuss, even this well accepted duty “category”, has been subjected to the rigors of a post-*Cooper* world. [↑](#footnote-ref-11)
12. See *BG Checo International v. B.C. Hydro & Power Authority* (1993), 14 C.C.L.T. (2d) 233 (S.C.C.). [↑](#footnote-ref-12)
13. This has occurred principally in undertakings by insurance agents. [↑](#footnote-ref-13)
14. One of the first Canadian cases to so hold was *Whittingham v Crease* (1978), 6 C.C.L.T. 1 (B.C.S.C.). [↑](#footnote-ref-14)
15. (1992), 11 C.C.L.T. (2d) 1 (S.C.C.). [↑](#footnote-ref-15)
16. The Supreme Court denied recovery in a subsequent and very similar case – *Bow Valley Husky (Bermuda) Ltd. V Saint John Shipbuilding Ltd.* (1997), 40 C.C.L.T. (2d) 235 (S.C.C.). [↑](#footnote-ref-16)
17. There were several factors identified as creating this proximity – the plaintiff owned property in proximity to the bridge, it was dependent on the bridge for its business, it had maintenance responsibilities for the bridge, and it was the main user of the bridge. Allowing it to recover would not result in “indeterminate” liability. [↑](#footnote-ref-17)
18. (1995), 23 C.C.L.T. (2d) 1 (S.C.C.). [↑](#footnote-ref-18)
19. It should also be noted that the Supreme Court did not rule out the possibility that a tort remedy would be available even where there was no threat of physical harm, although threatened harm has become a requirement for a successful suits in all subsequent lower court applications of the judgment. [↑](#footnote-ref-19)
20. McLachlin C.J. in *Childs v Desormeaux*, [2006] 1 S.C.R. 643 para. 29. [↑](#footnote-ref-20)
21. (1974), 38 D.L.R. (3d) 105 (S.C.C.). [↑](#footnote-ref-21)
22. *Stewart v Pettie* (1995), 121 D.L.R. 222 (S.C.C.). [↑](#footnote-ref-22)
23. See for example *Good-Wear Treaders Ltd. v. D & B Hldg. Ltd.* (19789), 8 C.C.L.T. 87 (N.S.C.A.). [↑](#footnote-ref-23)
24. See, for example, *Hall v. Hebert*, [1993] 4 W.W.R. 113 (S.C.C.). [↑](#footnote-ref-24)
25. [1978] AC 728 (HL). [↑](#footnote-ref-25)
26. See Klar, “The Tort Liability of Public Authorities: The Canadian Experience” in Degeling, Edelman, Goudkamp eds.,  *Torts in Commercial Law* (Lawbook Co. 2011), Chapter 12. [↑](#footnote-ref-26)
27. *Queen v Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. [↑](#footnote-ref-27)
28. [1989] 2 SCR 1228. [↑](#footnote-ref-28)
29. [2000] 1 SCR 298. [↑](#footnote-ref-29)
30. [1984] 2 SCR 2. [↑](#footnote-ref-30)
31. (2001), 206 D.L.R. (4th) 193. [↑](#footnote-ref-31)
32. (2001), 206 D.L.R. (4th) 211. [↑](#footnote-ref-32)
33. See Klar, “Foreseeability, Proximity and Policy” (2002), 25 Adv. Q. 360 for my analysis of these two judgments. There have been a number of commentaries on this significant development. See, for example, Pitel, “Canada Remakes the *Anns* Test” [2002] Camb. L.J. 252; Rafferty, “Developments in Contract and Tort Law: The 2001-2002 Term” [2002] S.C.L.R. 153; Feldthusen, “The *Anns/Cooper* Approach to Duty of Care” (2002), 18 Constr. L.R. 67; Brown, “Still Crazy After All These Years” (2003), 36 U.B.C. L. Rev. 159; Neyers & Gabie, “Canadian Tort Law since *Cooper v. Hobart* , Parts 1 and 11” (2005), 13 Tort Law J. 302, (2006), 14 Tort Law J. 10; Weinrib, “The Disintegration of Duty” (2006), 31 Advocates' Quarterly 212; and Linden and Feldthusen, *Canadian Tort Law*, 9th ed (2011) at 290 and following. [↑](#footnote-ref-33)
34. *Cooper v. Hobart*, above, at para. 30. [↑](#footnote-ref-34)
35. The court examined the scope and purpose of the legislative provisions that established the Registrar of Mortgage Brokers in the *Cooper* case and concluded that to impose a private duty of care would “come at the expense of other important interests, of efficiency and finally at the expense of public confidence in the system as a whole.” A similar analysis of the legislation dealing with the Law Society of Upper Canada was undertaken in *Edwards.* The court determined, in other words, that the legislative purpose was not to create a proximate relationship between the defendants and private individuals. [↑](#footnote-ref-35)
36. See Weinrib, “The Disintegration of Duty” (2006), 31 Advocates’ Quarterly 212 for his theoretical critique of the duty formula. Weinrib argues that the disintegration of duty is attributable to the two stage test of *Anns v Merton* whereby courts could circumscribe or cancel *prima facie* duties, founded on the nature of the relationship between the parties, by extrinsic policy concerns independent of this relationship. He suggests, in fact, that the *Cooper* approach which, at least semantically, makes the relationship between the parties the essence of proximity might move the courts “back to a more coherent jurisprudence”. I doubt that this was the Court’s intention, or that it will happen. As I will indicate, the Court conceded that distinguishing between policy concerns which go to “proximity” and those which go to stage 2, is a difficult exercise and ultimately unimportant. A number of policy concerns extrinsic to the internal relationship between the parties have been considered in stage one. Weinrib hopes that with the focus back on the relationship between the parties, stage two of the test will atrophy. Although this has happened in certain areas, eg public authority liability, there is little gain in terms of conceptual coherence, if all the courts are doing is importing into stage one proximity, policy concerns independent of the parties’ relationship. [↑](#footnote-ref-36)
37. 2011 SCC 42. [↑](#footnote-ref-37)
38. The reverse is also true. Courts can avoid the *Cooper* requirement of proximity, by finding that the dispute before them falls into a recognized duty category or is analogous to one. This can happen even if superficially the disputes seem very different. Thus in *Fullowka v. Pinkerton’s of Canada Ltd.,* [2010] 1 S.C.R. 132, the Supreme Court drew an analogy between cases involving negligent building inspection with the negligence of mine safety inspectors who failed to prevent a third party from deliberately setting a bomb off in a mine, killing nine workers. The failure of the government in dealing with a potato virus was analogized in another case to the negligent road maintenance and building inspection cases. [↑](#footnote-ref-38)
39. See, for example, *Childs v Desormeaux* (2006), 266 D.L.R. (4th) 257 (SCC), discussed more fully below. McLachlin CJ held that because the trial judge did not expressly find that a guest was visibly intoxicated when he left a house party, the social host did not owe a duty of care to the plaintiff injured in a subsequent car accident. The trial judge had found that based on other factors, there was foreseeable harm. In effect, McLachlin CJ reversed a trial judgment’s factual findings. [↑](#footnote-ref-39)
40. (2007), 50 C.C.L.T. (3d) 1, at para. 29. [↑](#footnote-ref-40)
41. 2008 SCC 22. [↑](#footnote-ref-41)
42. 2011 SCC 42. [↑](#footnote-ref-42)
43. There were two. First the Court held that the Government’s activities were matters of government “policy” as opposed to the execution of policy. Second, the spectre of indeterminate liability negated the duty. [↑](#footnote-ref-43)
44. [2006] 1 S.C.R. 643. [↑](#footnote-ref-44)
45. The Court denying the duty based on lack of proximity, did not go on to consider whether other residual policy concerns would limit or negate the duty if one had been found. [↑](#footnote-ref-45)
46. See, for example, Klar, “Tort Liability of the Crown: Back to *Canada v Saskatchewan Wheat Pool*” (2007), 32 Advocates’ Quarterly 293; Klar, “Case Comment on *Syl Apps Secure Treatment Centre v. B.D.*” (2007), 86 Can. Bar Rev. 337; Klar, “Breach of Statute and Tort Law”, in Neyers, Chamberlain, Pitel, eds., *Emerging Issues in Tort Law*, (England, Hart Publishing 2007), and Klar, “The Tort Liability of Public Authorities: The Canadian Experience” in Degeling, Edelman, Goudkamp, eds. *Torts in Commerial Law* (Thomson Reuters, Australia 2011), Chapter 12. [↑](#footnote-ref-46)
47. The list of cases is long and varied. They have dealt with actions against public authorities relating to outbreaks of West Nile Virus and Severe Acute Respiratory Syndrome, the protection of children, the education of children with special needs, the public tendering process, the approval of building materials, the inadequacy of health care funding, the regulation of schools, the approval and licensing of irrigation projects, the regulation of medical devices, the closing of a pulp mill, the regulation of chiropractic services, the enforcement of rules relating to workers’ compensation coverage, the regulation of unsafe food products, and the regulation of the tobacco industry. Since *Cooper*, there has been no shortage of claimants prepared to sue government, frequently in class action law suits, although very few plaintiffs have been rewarded for their efforts. See Klar, *Tort Law*, 5th ed. (2012) (forthcoming) for a reference to these cases. [↑](#footnote-ref-47)
48. Weinrib, “The Disintegration of Duty”, above, argues that proximity is correctly rejected if the Court’s construction of the statute leads to the conclusion that a private law duty was not intended. Thus there would be no correlative right and duty; no proximity. He refers specifically to *Cooper*. My problem with this is three-fold. First, Canadian law rejects interpreting statutes to determine legislative intent re: private law duties. We do not have criteria or guidelines to do so, since Canadian law long ago rejected a nominate tort of breach of statutory duty. Second, other than reciting the statutory provisions, why the Court thought a private law duty was not intended in *Cooper* is not clear. Third, why a private law duty was considered to be inconsistent with the overall purpose of the statute was not at all obvious. The statute was designed to protect investors; the investors who sued were not protected. It was not explained how negligently failing to curtail the activities of a dishonest mortgage broker was consistent with the overall regulatory purposes. [↑](#footnote-ref-48)
49. *Fullowka v. Pinkerton’s*, cited above, and *R v Imperial Tobacco*, cited above. [↑](#footnote-ref-49)
50. *Cooper,* at para.37. [↑](#footnote-ref-50)
51. This “blending” of policy factors between the two stages has been acknowledged by the Supreme Court of Canada itself; see, for example, *Syl Apps Secure Treatment Centre v B.D.*, [2007] 3 S.C.R. 83, at para. 33. [↑](#footnote-ref-51)
52. To use the oft cited words of Cardozo C.J. in *Ultramares Corp. v. Touch*, 174 N.E. 441 at 444 (N.Y.C.A. 1931). [↑](#footnote-ref-52)
53. The Supreme Court recently dealt with this issue in *R. v Imperial Tobacco*, above. In its judgment the Supreme Court expanded the ambit of “core policy” by including not only initial decisions to pursue a course of action, but as well those activities undertaken pursuant to this policy. See Klar, “ *R v Imperial Tobacco Ltd:* More Restrictions on Public Authority Tort Liability” (2012), 50 Alberta Law Review (forthcoming). [↑](#footnote-ref-53)