# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Canada (Attorney General) v. Walsh Estate* , 2016 NSCA 60

**Date:** 20160727
**Docket:** CA 440770
**Registry:** Halifax

**Between:**

Attorney General of Canada, RCMP Cst. Katie Green and Unidentified RCMP Members

Appellants

v.

Tammy Walsh as Executor for the Estate of Christopher Walsh; Tammy Walsh in her own right; Tammy Walsh as Litigation Guardian for Shamya Walsh (an infant); Tammy Walsh as Litigation Guardian for Savannah Walsh (an infant); Estate of Ralph Michael Coady, Jr.; Coast Tire & Auto Services Ltd.; and Newalta Corporation

Respondents

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| **Judges:** | Bryson, Saunders and Bourgeois, JJ.A. |
| **Appeal Heard:** | January 19, 2016, in Halifax, Nova Scotia |
| **Held:** | Leave for appeal is granted, and appeal is dismissed, per reasons for judgment of Bryson, J.A.; Saunders and Bourgeois, JJ.A. concurring |
| **Counsel:** | Angela J. Green, for the appellant Attorney General of Canada<br>J. Christopher Nagle, for the respondent Tammy Walsh as Executor for the Estate of Christopher Walsh (watching brief only)<br>Tia Silver Surette on behalf of Michael Brooker, Q.C., for the respondent Estate of Michael Coady, Jr. (watching brief only)<br>Franco Tarulli, for the respondent Coast Tire & Auto Services Ltd.<br>Jack Townsend and D. Kevin Burke, for the respondent Newalta Corporation |

**Reasons for judgment:**

**Introduction**

[1] "Who is my neighbour?" This question has vexed litigants and courts since the House of Lords introduced "neighbourhood" as a principle of proximity giving rise to a general duty of care in cases of alleged negligence, (*Donoghue v. Stevenson*, [1932] A.C. 562). Ms. Donoghue claimed she became ill after drinking some ginger beer containing a decomposed snail. She sued the manufacturer, although she had no contractual relationship with him. The action was challenged because no duty of care was allegedly owed to Ms. Donoghue. In words that have since become famous, Lord Atkin disagreed:

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

[2] Lord Atkin alludes to the biblical exchange between Jesus and a lawyer who questioned the injunction to "love thy neighbour as thyself". Jesus responded with the parable of the Good Samaritan who helps a man on the road, beaten and robbed by thieves, and then shunned by other passersby. In effect, Jesus is telling the lawyer that everyone he encounters who is in need, is his neighbour. Lord Atkin converts the moral obligation to provide help into a legal one to refrain from harm.

[3] That distinction resonates here because the appellants have not been sued for what they did, but what they allegedly failed to do. The respondents claim that a driver who caused a serious motor vehicle accident should have been prevented from driving by police. The appellants contend that an absence of foreseeability, proximity, and policy reasons all should counter a finding of any duty. Citing the Supreme Court of Canada "*Anns/Cooper*" test, they say that the claims against the RCMP are novel and that an application of the test would not favour imposition of any duty. They sought summary dismissal of the actions brought against them. The parties agree on the principles of summary judgment.

[4] Accordingly, it is necessary to consider the principles set out in the *Anns/Cooper* test, so called i.e.:

- Whether this case falls within categories of relationships giving rise to a recognized duty of care; if not:
    - Whether the injuries and damage claimed were foreseeable results of the alleged acts or omissions complained of;
    - Whether there was proximity between police and the victims of the driver who directly caused the accident;
    - Whether there are residual policy concerns that would negate any *prima facie* duty of care.

[5] Consideration of these issues will be prefaced with an overview of the facts, pleaded claims, and principles of summary judgment.

**Factual overview**

[6] On August 18, 2010, a Silverado pickup truck driven by Ralph Michael Coady, Jr. collided with a Sterling tanker truck driven by Christopher Walsh. The accident occurred on Trans-Canada Highway #104 near Barney's River/Kenzieville in Pictou County, Nova Scotia. Both Mr. Coady and Mr. Walsh were killed in the collision.

[7] The tanker truck driven by Mr. Walsh was owned by Newalta Corporation, which operates an industrial waste management business. The tanker truck contained a cargo of waste oil. Following the collision, it left the road and exploded, causing substantial property and environmental damage, which Newalta says approximated $3,000,000.

[8] In December of 2011, Newalta brought suit against Mr. Coady's estate and Coast Tire & Auto Services Ltd. Newalta claimed that Mr. Coady's vehicle crossed the centre line, colliding with Newalta's tanker truck driven by Mr. Walsh.

[9] Newalta also sued Coast Tire claiming that it had failed to properly repair the Coady vehicle when Mr. Coady brought it to them to correct steering problems, rendering it unsafe to drive.

[10] A second action was brought by Mr. Walsh's widow, Tammy Walsh on behalf of his estate, their children and in her own right against Mr. Coady's estate and Coast Tire & Auto Services Ltd., essentially echoing Newalta's allegations against Mr. Coady.

[11] In 2013, both actions were amended to add the Attorney General of Canada, RCMP Cst. Katie Green, and "unidentified RCMP members" as defendants. To paraphrase these new claims, the plaintiffs in both actions assert that the RCMP and Cst. Green knew or should have known that Mr. Coady was impaired and not fit to drive or that his vehicle was mechanically unsound and unsafe to drive. More will be said about these claims later in this decision.

[12] For ease of reference, the respondents in both cases will be collectively described as "plaintiffs" or by name. The appellants will be described as the "RCMP". In this appeal, the Walsh and Coady respondents maintained a watching brief only. The positions ascribed to them in this decision flow from their pleadings.

[13] No defence has been filed by the RCMP. Instead, they brought a motion seeking dismissal of the claims alleging they disclosed no cause of action against the RCMP and Cst. Green. The Honourable Justice Joshua Arnold disagreed, dismissing the motion because it was not "plain and obvious" that the claim against the RCMP was unsustainable, (2015 NSSC 175).

[14] The RCMP have sought leave to appeal, arguing that the judge erred in law in concluding that the pleadings disclosed a cause of action against them.

[15] The RCMP elaborate that the motions judge erred in his duty of care analysis and failed to properly apply the applicable *Anns*/*Cooper* test. In particular, the RCMP say that no duty was owed by them to the plaintiffs because:

(a) They simply could not have foreseen that owing to their conduct, the plaintiffs would be harmed in an accident caused by Mr. Coady;

(b) There was no proximity between the RCMP and the plaintiffs to make it just and fair to impose a duty of care on them;

(c) Even if a *prima facia* duty of care could be established, policy reasons preclude an imposition of a duty of care in this case.

[16] This is an interlocutory appeal requiring the Court's leave to proceed. There must be an "arguable issue" on appeal. The parties agree that arguable issues are raised. For reasons apparent in the analysis to follow, I agree that the appeal raises arguable issues. Leave should be granted.

**Principles on Motion to Strike Pleadings**

[17] The parties share common ground that:

1. The test for summary judgment on pleadings requires the Court to assume that the facts pleaded by the plaintiffs are true;
2. The motion can only succeed if the claims disclose "no cause of action", and are "clearly unsustainable", (*Civil Procedure Rule* 13.03(1), *Eisener v. Cragg*, 2012 NSCA 101 at ¶ 9).

[18] These principles are too well known to warrant extensive recapitulation. A recent example in the negligence context is *R. v. Imperial Tobacco Canada*, 2011 SCC 42, where Chief Justice McLachlin discussed the principles applicable to striking out claims on pleadings. They can be summarized:

- Claims should only be struck if it is "plain and obvious" that they cannot succeed.
- The power to strike out claims is "a valuable housekeeping measure which weeds out hopeless claims". This power promotes efficiency in the conduct of litigation and correct results, both serving the interests of litigants and the administration of justice.
- The power to strike should be used with care. The law evolves. The court should be generous and err on the side of permitting novel, but arguable, claims to proceed.
- The pleadings are assumed to be true, and no evidence is admissible on the motion. Claimants cannot rely on the possibility that new facts may turn up. They must plead facts material to the causes of action they assert.

[19] Whether a pleading should be struck as disclosing no cause of action is a question of law reviewed by this Court on a standard of correctness, (*Innocente v. Canada (Attorney General)*, 2012 NSCA 36, ¶ 23).

**The *Anns/Cooper* Test**

[20] The RCMP's fundamental submission is that the motions judge failed to properly apply the *Anns/Cooper* test. This test refers to two different cases: the decision of the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728 and the decision of the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79 by which the *Anns* decision was further modified in Canada (*Anns* had earlier been applied by the Supreme Court in *Kamloops v. Nielson*, [1984] 2 S.C.R. 2).

[21] More will be said on the elements of the *Ann/Cooper* test when considering the arguments of the parties. Here, it will be convenient to quote from *Cooper*:

> [30] 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. If foreseeability 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 considerations 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.
>
> [Emphasis added]

A more extensive discussion of the test and jurisprudence appears in *Burrell v. Metropolitan Entertainment Group*, 2011 NSCA 108 at ¶¶ 21-30.

[22] The RCMP complain that the motions judge applied a partial *Anns/Cooper* test, but then incorrectly decided that the test was not required. He performed an incomplete proximity analysis and decided that the duty of care alleged here fell within "the recognized class of cases involving a public authority's negligent failure to act within established policies". This case fell within the category of "previously recognized cause[s] of action".

[23] The RCMP say that the test is not whether *the case* falls within a previously recognized cause of action, but whether *the duty of care* does. Even so, the RCMP correctly point out that there was nothing before the court to suggest that the appellants had failed to act appropriately within "established policies" of any description.

**Duty of Care – Existing and Analogous Categories**

[24] A full *Anns/Cooper* test is not necessary if a case ". . . falls within or is analogous to a category of cases in which a duty of a care has previously been recognized", (*Cooper*, ¶ 41). This ". . . simply captures the basic notion of precedent: where a case is like another case where a duty has been recognized, one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise", (*Childs v. Desormeaux*, 2006 SCC 18).

[25] Following a lengthy review of case law, the motions judge concluded:

> [79] . . . The duty of care alleged in the case at bar falls within the recognized class of cases involving a public authority's negligent failure to act within established policies when it was foreseeable that the failure to do so might result in physical harm to a member of the community who was in geographic proximity. I do not feel it is necessary to undertake an *Anns* analysis as I am satisfied that the case does fall within a category of cases involving a previously recognized cause of action.

[26] The RCMP is correct that the question is not whether there is a category of cases involving the previously recognized cause of action, but rather whether a duty of care has been recognized in a particular relationship. As the Supreme Court expressed it in *Imperial Tobacco*:

> [37] The first question is whether the facts as pleaded bring Canada's ***relationships*** with consumers and the tobacco companies within a settled category that gives rise to a ***duty of care***. If they do, a *prima facie* duty of care will be established . . . However, it is important to note that liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and defendant . . . ***The question is not whether negligent misrepresentation is a recognized tort, but whether there is a reasonable prospect that the relationship alleged in the pleadings will give rise to liability for negligent misrepresentation.***
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> [Emphasis added]

[27] To similar effect is *Childs*, which emphasizes that the inquiry relates to ". . . categories of *relationships* giving rise to a duty of care . . ." (¶ 15)

[28] In fairness to the motions judge, he correctly stated the first step of the *Anns/Cooper* test earlier in his decision:

> [19] The first question to be answered then is not merely whether negligence is a recognized tort but whether a relationship of the kind alleged to exist between the plaintiffs and the applicant has been previously recognized, such that liability in negligence arises.

[29] Either way, the question remains whether such a relationship creating a duty of care as alleged here has previously been settled or is analogous to a category that has been settled. Resolution of this question will require review of the jurisprudence. Before doing so, we need to return to the allegations against the RCMP.

**Nature of the claims against the RCMP**

[30] The motions judge quotes Newalta's pleading at length. Here it will suffice to summarize the allegations against the RCMP:

- On the day of the accident, Mr. Coady was observed to be mentally or physically impaired and driving dangerously;
- Mr. Coady's dangerous driving was reported to the RCMP;
- Members of the RCMP, including Cst. Green approached Mr. Coady while in his vehicle at a convenience store parking lot;
- Following contact with Mr. Coady, the RCMP left the area and allowed Mr. Coady to do so in his own vehicle. The RCMP failed to prevent him from driving or using his vehicle when the RCMP knew or should have known that it was unsafe either for him to drive or for his vehicle to be driven;
- In all the circumstances, the RCMP owed a duty of care to Mr. Walsh, to Newalta, and to Mr. Coady himself which they breached by failing to prevent Mr. Coady from driving, causing or contributing to loss to the plaintiffs.

[31] In brief, the plaintiffs are claiming that the RCMP failed to act on evidence that either Mr. Coady should not drive or that his vehicle should not be driven;

alternatively, the RCMP failed to make a proper investigation which would have revealed to them the compromised state of Mr. Coady or his vehicle. (Although the plaintiffs allege contact between the RCMP and the convenience store clerk, there is no account of what was said, so there is no basis on which to found any alleged duty of the police to do more).

**Is this a similar or analogous case?**

[32] Do the pleaded facts describe any relationship between the police and the plaintiffs within a settled category giving rise to a duty of care, (*Imperial Tobacco*, ¶ 37)? The plaintiffs say yes, relying on a number of cases in which the police were found to owe a private duty to users of public roads. In the first two cases cited by the plaintiffs, the police failed to remove allegedly impaired drivers from the road: *Smith Estate v. Ahmad*, [1987] O.J. No. 1218 (QL), 1987 CarswellOnt 1819 (WL) (Ont. S.C. (H. Ct. J.)) and *Lafleur v. Maryniuk* (1990), 48 B.C.L.R. (2d) 180.

[33] The RCMP point out that *Smith Estate* is a 30 year old case that has never been cited. In fact, *Smith Estate* contains no duty of care analysis because the point was conceded. It does not "settle the category".

[34] Similarly, *Lafleur* is unpersuasive because the police duty there was equivocal and *obiter*:

> [59] It may be that a police officer who refrains from exercising his discretionary power to arrest or otherwise control A could be held accountable to B for harm done him by A if the circumstances were such that it would be just and reasonable to impose upon the police officer a duty of care to B (cf *Wills v. Sexsmith* (unreported No. B830828 Vancouver Registry November 14, 1986) where a claim by B was dismissed. . . .

[35] Moreover, *Smith Estate* did not mention *Kamloops*, the predecessor to the *Anns/Cooper* test. *Lafleur* mentioned *Anns*, but there was no necessity to apply it.

[36] These are also cases of first instance and do not settle the category.

[37] Alternatively, the plaintiffs argue – and the motions judge agreed – that there were analogous cases in which the relationship gave rise to a duty of care. The plaintiffs rely on: *O'Rourke et al. v. Schacht,* [1976] 1 S.C.R. 53; *Knox v. Eastman*, [1999] 86 A.C.W.S. (3d) 647 (B.C.S.C.); and *Vitti v. Nantais*, [1991] 27 A.C.W.S. (3d) 896 (Ont. Gen. Div.).

[38] In *Schacht*, a construction barrier had been knocked over in an accident. The police were aware of the missing barrier, but did not replace it. The Supreme Court commented that ". . . it is of the essence of [a highway] patrol that the officer attempt to make the road safe for traffic", (¶ 32). This included a duty to notify "possible road users of a danger arising from a previous accident and creating an unreasonable risk of harm", (¶ 32). *Schacht* collapses a general duty to the public into a private tortious duty to injured motorists. *Schacht* does not discuss issues of foreseeability and proximity. It precedes the *Anns/Cooper* test and does not address the policy concerns raised by that test.

[39] Nor is *Schacht* analogous to this case where the rights and obligations of a third party—Mr. Coady—intervene between the police and the plaintiffs. Ironically, Mr. Coady's rights—and the obligations of police—have now been augmented by a finding of a private duty of care to suspects in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41. The presence of a third party may affect the proximity analysis by weakening the directness of connection between the defendant and victim-plaintiff, (*Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, ¶¶ 40-41).

[40] In *Fullowka*, replacement miners were killed by a mine explosion at the instance of a disaffected striking miner. Amongst others, the government of the Northwest Territories was sued for alleged failure by mine inspectors to prevent the tragedy. Primary responsibility for statutory compliance rested with the owner, manager, and workers at the mine. Unlike the mine inspectors in *Fullowka*, the police in *Schacht* were not regulating anybody. Accordingly, *Schacht* is not an apt analogy.

[41] Similarly, *Knox* and *Vitti* involved the alleged failure of police to remove or warn of obstructions dangerous to motorists. They are not analogous to any duty police owed to third parties through the medium of a potentially dangerous Mr. Coady.

[42] Then the plaintiffs argue the analogy of a relationship between victims and government or police, citing *Haggerty Estate (Litigation Administrator of) v. Rogers*, 2011 ONSC 5312; *Just v. British Columbia*, [1989] 2 S.C.R. 1228, and *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*, [1988] O.J. No. 2681.

[43] These cases were not decided because the plaintiffs were "victims" but based on a proximity analysis peculiar to the facts of each. One cannot work

backwards from their status of victims to impose a duty of care on police towards plaintiffs generally who have suffered a loss.

[44] *Haggerty* was a case of the police allegedly failing to prevent a homicide. The perpetrator was known to police as a violent offender. There was an outstanding warrant for his arrest. He allegedly called the police and advised them of his location and asked to turn himself in. He was told to come to the police station. When he did not, police attended at the residence from which he had called, but he was no longer there. In concluding that there may be a duty of care, the court said:

> [72] In reviewing the record before this court, I find that the case at bar falls closer to the *Jane Doe* end of the spectrum of cases. The duty of care alleged in the case at bar falls within the recognized class of cases involving a public authority's negligent failure to act within established policies when it was foreseeable that failure to do so may result in physical harm to a member of the community who is alleged to have had a pre-existing relationship with Mr. Rogers or who arguably was in geographic proximity with Rogers.

[45] Respectfully, *Haggerty* is unpersuasive. It does not adequately explain how the general duty of police to apprehend people with outstanding warrants was elevated to a private duty of care in respect of Mr. Haggerty. The victim, timing, and venue of the crime were all unknown to the police. It also relies on breach of "established policies" not pleaded in this case. *Haggerty* appears to be a classic case of potentially indeterminate harm to an indeterminate class. That would have been fatal to any duty of care owed by the government mine inspectors in *Fullowka* but for the proximity between the government's mine inspectors who had regularly inspected the mine, and the specific group of miners working there.

[46] The motions judge also referred to other cases of first instance where a potential duty of care was arguably owed to victims of crime and their families. In each instance the police knew of the perpetrators' criminal predilections and likely victims. That was thought sufficient to establish proximity where the police apparently contributed to the risk of harm to those particular victims (i.e. *Castle v. Ontario*, 2014 ONSC 3610; *McClements v. Pike*, 2012 YKSC 84—where perpetrator told police she would burn down her home when they left and then did so). Whether decided correctly or not, they are not binding on this Court.

[47] *Just* is an older case in which British Columbia was found negligent in its maintenance of the Vancouver-Whistler highway, because a motorist was injured and his daughter tragically killed when a boulder rolled onto the highway. The

case turned on the negligent application of a highway maintenance policy. Justice Sopinka wrote a strong dissent, arguing that this was a case of policy, and not negligent conduct. His view found support in the later case of *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 in which a municipality was absolved of responsibility for an accident arising from an unsalted road. *Just* – and the policy/operational distinction on which it relies – is not an apt analogy here.

[48] Practical difficulties in applying this theoretically attractive distinction of policy/operational decisions have led to its rejection, resurrection, and refinement: see discussion in *Imperial Tobacco*, ¶¶ 28-41. The application of this distinction is extremely unpredictable—see discussion in Klar, *Tort Law*, 5th ed, pp. 317-20.

[49] Finally *Jane Doe* is of no assistance. That highly unusual case imposed liability on police for not warning of the potential danger to a young woman from a serial rapist in a particular Toronto neighbourhood. The trial judge had made specific findings of the small class of potential victims known to the police. The Supreme Court did not find *Jane Doe* compelling when imposing a duty of care on police towards accused persons in *Hill* saying:

> [27] . . . I note that *Jane Doe* is a lower court decision and that debate continues over the content and scope of the ratio in that case. I do not purport to resolve these disputes on this appeal. In fact, and with great respect to the Court of Appeal who relied to some extent on this case, I find the *Jane Doe* decision of little assistance in the case at bar.

[50] In finding a duty of care in this case, the motions judge relied on the British Columbia decision of *Bergen v. Guliker Estate*, 2014 BCSC 5, where the court imposed a private law duty upon police to motorists when pursuing a suicidal suspect who killed himself and Mr. Bergen in a collision. Relying on many of the cases cited by the plaintiffs here, the trial judge in *Bergen* found an analogy to the duty owed by police to highway users in a high-speed chase. *Bergen* has since been overturned by the British Columbia Court of Appeal which ordered a new trial because the Court disagreed with the trial judge's "analogous case" assessment and no full *Anns/Cooper* analysis was performed by the trial judge (2015 BCCA 283).

[51] The Supreme Court has acted cautiously about imposing new duties on police "by analogy". In *Hill*, Chief Justice McLachlin remarked that:

> [27] . . . It might well be that both the considerations informing the analysis of both proximity and policy would be different in the context of other relationships involving the police, for example, the relationship between the police and a victim, or the relationship between a police chief and the family of a victim. This decision deals only with the relationship between the police and a suspect being investigated. ***If a new relationship is alleged to attract liability of the police in negligence in a future case, it will be necessary to engage in a fresh Anns analysis, sensitive to the different considerations which might obtain when police interact with persons other than suspects that they are investigating.*** Such an approach will also ensure that the law of tort is developed in a manner that is sensitive to the benefits of recognizing liability in novel situations where appropriate, but at the same time, sufficiently incremental and gradual to maintain a reasonable degree of certainty in the law. Further, ***I cannot accept the suggestion that cases dealing with the relationship between the police and victims or between a police chief and the family of a victim are determinative here***, although aspects of the analysis in those cases may be applicable and informative in the case at bar. . . .
>
> [Emphasis added]

[52] I agree with the RCMP that the case law has not clearly established that a private law duty of care was owed by police to members of the public in the position of the plaintiffs in this case and that a full *Anns/Cooper* analysis should have been performed.

[53] Since the jurisprudence does not settle the duty of care question, the *Anns/Cooper* test requires consideration of:

- Foreseeability/proximity
- Residual policy concerns

**Foreseeablity/Proximity**

[54] The modern law of negligence has a long pre-history before its emergence as an independent tort in *Donoghue v. Stevenson*. Prior to 1932, negligence was constrained by procedural and substantive limitations. Often negligence was a manner of committing a tort. It was not itself tortious, (see, for example, Milsom, *Historical Foundations of the Common Law*, Butterworths, 1969, pp. 344–52).

[55] Once negligence acquired its independence, the challenge became containing a potentially indefinite form of liability. Justice Cromwell put it this way in *Fraser v. Westminer Canada Ltd.*, 2003 NSCA 76:

> [41] Negligence is the failure to take reasonable care for those to whom one owes a duty of care. Unlike most other torts, negligence is not defined by reference to a particular type of activity or harm. ***The scope of protection afforded by negligence suits is thus virtually unlimited***: John G. Fleming, *The Law of Torts*, 9th ed. (LBC Information Services, 1998), at 149. It is necessary, therefore, to impose limits on liability in negligence. As Fleming put it, to impose liability "... for any loss suffered by anyone as the result of carelessness would [be to impose] too severe and indiscriminate a restriction on individual freedom of action by exposing the actor to the prospect of unpredictable liability. ***Hence, the pervasive problem in ... negligence is that of limitation of liability.***" (at p. 150)
>
> [ . . . ]
>
> [43] While Lord Atkin's remarks focus on the nature of the relationship between the parties that will give rise to a duty of care, ***the underlying policy concern is that the concept of the duty of care must serve as a check on the potentially unlimited scope of liability in negligence***. In order for it to do so, the proposed duty of care must be assessed not only in relation to the specific facts of the particular case, but also in light of the implications for other cases if such a duty of care were to be imposed. In other words, the proposed duty of care must be considered not just as between the parties to the present case, but in light of the various sorts of situations in which the duty, if adopted, would apply.
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> [Emphasis added]

[56] It is immediately obvious that the private law foundation of negligence championed by the House of Lords in *Donoghue v. Stevenson* is of limited analytical assistance in this case for two reasons. First, generally there is no proximity between the police and members of the public based on any private relationship. Members of the public are not in law "neighbours" of the police. Police owe their duties to the public as a whole, not to specific members of the public, (*Wellington v. Ontario*, 2011 ONCA 274; *Thompson v. Webber*, 2010 BCCA 308, *Spencer v. Canada (Attorney General)*, 2010 NSSC 446). Second, the private law duty described in *Donoghue v. Stevenson* does not generally require anyone to do anything. No member of the general public encountering Mr. Coady on the day in question would owe any obligation to him or anyone else to do anything.

[57] Generally speaking, the *Donoghue v. Stevenson* analysis is intended to prevent harm, not impose obligations requiring positive conduct.

[58] Omission does not imply a positive duty to act outside very restricted circumstances. As Linden and Feldthusen, *Canadian Tort Law*, 10th edition, argue at ¶ 9.85:

> The common law has treated the Good Samaritan with uncommon harshness over the years, while the priest and the Levite have been treated with uncommon generosity. Those who attempt in good faith to assist someone in peril expose themselves to potential civil liability if they bungle the attempt, but those who stand idly by without lifting a finger incur no liability, although the latter conduct is probably more reprehensible and more deserving of a civil sanction.

[59] To similar effect is Chief Justice McLachlin in *Childs*, at ¶ 31:

> . . . Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. 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.

[60] Unlike private citizens, police have statutory and common law duties that require them to take positive steps. But to found a private duty of care, the circumstances must transcend a police officer's obligations to the general public. Something more is needed to establish a private duty of care. The inadequacy of the *Donoghue v. Stevenson* test in actions against public authorities resulted in the Supreme Court revisiting foreseeability and the *Anns/Cooper* test. In *Cooper's* companion case, *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, the court decided that the Law Society was not liable to a lawyer's former clients for his misappropriation of trust funds. The court described the threshold test as:

> [9] . . . whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care . . . Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity — that the defendant was in a close and direct relationship . . . such that it is just to impose a duty of care in the circumstances. . . .

[61] Foreseeability alone is not enough to find a duty. It is a necessary, but not always sufficient, condition of such a finding.

[62] Where public authorities are defendants, relevant statutes are often used to contextualize a proximity analysis. The RCMP rely on these authorities to argue that no duty arises here, because none is imposed by the relevant statutes:

> 30. When the defendant is a public authority, the governing statute is the focus of the proximity inquiry. . . .
>
> [Appellant's Factum, citing *Burrell*, ¶ 32, *Cooper*, ¶ 34 and *Edwards* at ¶ 9]

[63] Certainly, *Edwards* would sustain this view because the court said:

> [9] . . . Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.

[64] Notwithstanding judicial comment to the contrary, it is hard to see how a public statute, empowering public actors to accomplish public goals, could alone give rise to a private duty between those public actors and a particular member of the public. Unless the statute conferred a right of action or limited such a right or any remedy, one would expect the statute to be a neutral factor in the analysis. Statutes generally do not create a private law duty of care: *Reference re Broome v. Prince Edward Island*, 2010 SCC 11 at ¶ 13.

[65] To impose a private duty of care on public actors, one needs to overcome the generic relationship and establish a private one, although it need not be personal. There may be interaction between public defendants and plaintiffs, such as to give rise to a relationship between them, (*Hill*, ¶ 29).

[66] In *Imperial Tobacco*, the court described three ways in which a private duty of care could arise with respect to public actors. First, explicitly or by implication from the statutory scheme. Second, from interactions between the parties which the statute does not nullify. Thirdly, through a combination of interaction between the parties and statutory duties, (at ¶¶ 43-45).

[67] That happened in *Fullowka* owing to the interaction between the government inspectors and miners at a specific location over which the inspectors exercised considerable control. Alternatively—and importantly for this case—proximity can also be grounded in a close causal relationship between the alleged negligence of the defendant and injury to the plaintiff absent any personal relationship, (*Hill*, ¶ 29).

[68] The question of foreseeability in this case can readily be dispensed with. Assuming, as pleaded, that the RCMP knew or should have known that Mr. Coady or his vehicle were not safe to be on the road, it is reasonable to foresee that users of the road in proximity to Mr. Coady may be injured in an accident caused by the compromised state of Mr. Coady or his truck which the police did nothing to prevent Mr. Coady from driving. Indeed, it would be a rare case in which physical damage caused by a defendant's unchecked negligence would not be foreseeable.

[69] Foreseeability is a low threshold, which is why it may be an inadequate basis for imposing a duty and consequent liability. As we have seen, a plaintiff must also establish "proximity". At a practical level, what that means is a "close and direct" relationship between victim and wrongdoer. Proximity is not simply a matter of physical closeness, but extends to those who foreseeably would be directly affected by the wrongdoer's careless act.

[70] In one sense, there is no relationship between the police and the plaintiffs in this case. There was no interaction with the plaintiffs. They had no connection whatsoever, except for the tragic coincidence of the accident itself. But the police are connected to that accident through their alleged knowledge of and dealings with Mr. Coady. He is the link connecting the RCMP with the plaintiffs.

[71] But then the RCMP protest that policy reasons should preclude imposition of a duty. They say that recognizing a duty of care would create conflicting duties and risk indeterminate liability. There would be a conflict between duties owed to Mr. Coady as a "person of interest" and any alleged duty to the plaintiffs. Absent lawful grounds, the police could not arrest Mr. Coady, and so they could not owe a duty of care to the plaintiffs. The RCMP complain that the plaintiffs have not pleaded "reasonable and probable grounds" for an arrest. The motions judge was satisfied that the RCMP had sufficient grounds to make inquiries of Mr. Coady and exercise their powers under the *Motor Vehicle Act*, short of arresting him. So the "conflict" is not as stark as the RCMP submit.

[72] Nevertheless, this argument has some attraction—and there may be just reason to be concerned about a potentially deleterious effect on police efficiency by superimposing private duties on the public duties already owed—*Hill* seriously weakens that argument. In *Hill* the conflict was even more direct–by imposing an obligation on police towards a suspect, the court discounted any negative effect on the general public that such a tension appears to create. Surely the recognition of a private duty to a suspect risks compromising the duty owed to the general public. Justice Charron eloquently explained how this could be so in *Hill*. But the Supreme Court majority in *Hill* did not think so. The conflict is less direct here, because a common interest can be discerned between investigating Mr. Coady and protecting the public; so the policy argument based on conflicting duties diminishes. More will be said about this argument under "Residual Public Policy" below.

[73] Finally, the RCMP claim that imposing a duty in this case raises the spectre of indeterminate liability. They submit that Mr. Coady could encounter undetermined drivers in an undefined area for an indeterminate time. This is really a variation of the foreseeability submission. Two responses can be made. First, these indeterminacy arguments are usually advanced in the context of claims for pure economic loss, and with good reason, (i.e. *Cooper; Fraser*). But here the damage that could be foreseen was discrete and physical. Any economic loss would be linked to the physical damage. So there is no real concern about an indeterminate loss. Second, questions of geography and time are better addressed at trial when deciding whether, and to what extent, a duty of care may arise. The motions judge cited the House of Lords in *Dorset Yacht Co. v. Home Office*, [1970] AC 1004, at 1070. That is a good example. This is what Lord Diplock said:

> I should therefore hold that ***any duty*** of a Borstal officer to ***use reasonable care*** to prevent a Borstal trainee from escaping from his custody ***was owed only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention*** of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture. Whether or not any person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped.
>
> [Emphasis added]

Like Lord Diplock, I think these questions are matters of fact for trial.

**Residual Policy Considerations**

[74] The Court will consider policy issues peculiar to the relationship between the parties at the foreseeability/proximity stage of the analysis. But it will also consider policy issues that transcend the relationship. These are known as "residual" policy considerations.

[75] The law may not recognize a duty of care owing to an undesirable impact on the legal system generally. In practice, there may be some overlap between policy considerations in the first and second stages of the duty of care analysis, (*Hill*, ¶ 31).

[76] These policy considerations fall outside the relationship between the parties. They address broader concerns, asking such questions as:

> Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?
>
> (*Cooper*, ¶ 37)

[77] Residual policy considerations include:

> [10] . . . the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.
>
> [*Edwards*]

[78] To reiterate, the RCMP argue against imposition of a duty because:

- Recognizing a duty has potential to create conflicting duties between existing duties owed to Mr. Coady and the alleged duty owed to the plaintiffs.
- Any duty of care raises the spectre of indeterminate liability to an indeterminate class for an indeterminate period.

[79] In a somewhat different context, these concerns were addressed by the Supreme Court in *Hill*, when deciding whether a duty of care was owed by police to a suspect:

> [48] The respondents and interveners representing the Attorneys General of Ontario and Canada and various police associations argue that the following policy considerations negate a duty of care: the "quasi-judicial" nature of police work; the potential for conflict between a duty of care in negligence and other duties owed by police; the need to recognize a significant amount of discretion present in police work; the need to maintain the standard of reasonable and probable grounds applicable to police conduct; the potential for a chilling effect on the investigation of crime; and the possibility of a flood of litigation against the police. ***In approaching these arguments, I proceed on the basis that policy concerns raised against imposing a duty of care must be more than speculative***; a real potential for negative consequences must be apparent. Judged by this standard, none of these considerations provide a convincing reason for rejecting a duty of care on police to a suspect under investigation.
>
> [Emphasis added]

[80] Linden and Feldthusen put it this way:

> Residual policy considerations negativing duty, the second stage, may include, as listed in *Cooper*, a negative effect on other legal obligations, the legal system and society generally, but these policy considerations should be relied on only if they are "serious", "overriding", "convincing" or "compelling" matters justifying a no duties decision. These policy concerns "must be more than speculative . . . a real potential for negative consequences . . . must be apparent (citing *Hill*) . . . moreover, these weighty policy concerns must be sufficiently established by evidence to merit the grant of an immunity to a potentially negligent person. A list of *possible* negative effects of creating a new duty cannot be enough for a court to deny any redress. [emphasis in original]
>
> ¶ 9.62

[81] These authorities imply that judicial consideration of policy issues may be constrained on a motion to strike by the absence of evidence. For example, in *Hill*, the Supreme Court talked about a "lack of evidence of a chilling effect" (¶ 58) on police behaviour and no basis in the "record" for concerns about a flood of litigation. All of this suggests that policy reasons negating a duty of care can also be argued at a trial, where evidence on these points can be called to determine not simply whether a duty of care exists in fact but whether it should exist in principle, given policy concerns about which the parties might lead evidence. (This point was made by the British Columbia Court of Appeal in *Bergen* at ¶ 101, although that appeal followed a full trial.)

[82] There are many cases where the Supreme Court has refused to recognize a duty of care for policy reasons, absent any evidence. *Cooper* – involving potential liability of the British Columbia Registrar of Mortgage Brokers – was such a case. So was *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 (potential liability of Children's Aid Society to parents of seized child). In *Edwards*, the Supreme Court said *obiter* that it would have refused a duty on residual policy grounds, following *Cooper*. And, of course, *Imperial Tobacco* involved rejection of a *prima facie* duty of care on policy grounds absent any evidence.

[83] One could argue that policy considerations are easier to entertain in regulatory settings where the decision maker is more readily associated with implementation of legislative policy. In other words, the regulator's duty to the public acquires greater prominence against which policy reasons are more easily measured than with a street level policing decision.

[84] In any event, the implication of *Hill* and like authorities is that an alleged duty of care that survives a motion to strike may yet be defeated by an evidence-

based policy analysis at trial, or on a motion that permits the entertaining of evidence.

[85] In *Hill*, the majority of the Supreme Court rejected concerns that imposing a private law duty on police would have a negative impact on the discharge of their public duties:

> [57] ***The record does not support the conclusion that recognizing potential liability in tort significantly changes the behaviour of police.*** Indeed, some of the evidence suggests that tort liability has no adverse effect on the capacity of police to investigate crime. This supports the conclusion of the majority in the Court of Appeal below that ***the "'chilling effect' scenario" remains speculative*** and that concern about preventing a "chilling effect" on the investigation of crime is not (on the basis of present knowledge) a convincing policy rationale for negating a duty of care (para. 63). (For a sampling of the empirical evidence on point, see e.g.: A. H. Garrison, "Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers" (1995), 18 *Police Stud*. 19; T. Hughes, "Police officers and civil liability: 'the ties that bind'?" (2001), 24 *Policing: An International Journal of Police Strategies & Management* 240, at pp. 253-54, 256 and 257-58; M. S. Vaughn, T. W. Cooper and R. V. del Carmen, "Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views" (2001), 47 *Crime & Delinquency* 3; D. E. Hall et al., "Suing cops and corrections officers: Officer attitudes and experiences about civil liability" (2003), 26 *Policing: An International Journal of Police Stategies & Management* 529, at pp. 544-45.) Whatever the situation may have been in the United Kingdom (see *Brooks v. Commissioner of Police of the Metropolis*, [2005] 1 W.L.R. 1495, [2005] UKHL 24; *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (H.L.)), ***the studies adduced in this case do not support the proposition that recognition of tort liability for negligent police investigation will impair it.***
>
> [Emphasis added]

[86] The Chief Justice concluded:

> [58] The lack of evidence of a chilling effect despite numerous studies is sufficient to dispose of the suggestion that recognition of a tort duty would motivate prudent officers not to proceed with investigations "except in cases where the evidence is overwhelming" (Charron J., at para. 152). . . .

[87] For similar reasons in *Hill*, the Chief Justice dismissed the "flood of litigation" policy concern, (at ¶ 61).

[88] The foregoing summary of the literature is problematic for several reasons. First, the cited studies are American and describe a different legal and social environment. Second, the studies are not entirely consistent. But most importantly, there is much in them that supports a concern that private law duties may negatively affect performance of duties the police owe to the public generally, either in their day-to-day contact with the public, or in terms of the diversion of resources to address potential civil liability.

[89] This makes sense. It is simply counter-intuitive to suggest the police would ignore potential tort liability when planning, resourcing, or implementing their public duties. But, absent evidence, the nature and degree of any adverse impact on discharge of public duties is difficult to gauge.

[90] With respect, the articles cited in *Hill* are no cause for complacency. There is much in them that should raise policy concerns. For example, the Garrison study entitled, "Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers", concludes:

> . . . On a day to day basis the thought of civil liability does not impact on the police officers thinking. ***The officers were almost evenly divided on the issue of whether the possibility of being sued interfere with the commission of their duties.*** Thus although the threat of civil liability is performing the tasks it was intended to do, namely give a remedy to the citizen and deter police misconduct, ***a strong minority of police officers believe civil liability is an impediment to effective law enforcement.***
>
> [Emphasis added]

[91] The Vaughn/Cooper/del Carmen study, "Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views", begins:

> Civil liability is a major concern for law enforcement officials and local governmental entities. Some police lament liability litigation because it may limit aggressive police actions, giving law enforcement officers pause before engaging in activities that might violate citizens' rights. . . .

[92] These studies do note an apparent discrepancy between concern over civil litigation and an expressed view that litigation does not affect how police perform their duties. This is hardly surprising, since it is unlikely that police would admit they were failing their public duty out of concern for private liability. At a policy level, much concern about private liability persists. One thing the American

studies make clear is that extensive public resources are diverted to dealing with civil suits. The Hughes study, "Police officers and civil liability: 'the ties that bind'?" (2001), notes:

> . . . Data indicate a sharp increase in civil suits against the police beginning in the 1960s . . . Suits against the police rose from 1,741 in 1967 to over 6,000 in 1975 . . . Currently, it has been estimated that there are over 30,000 civil suits against the police annually . . .

[93] Although the legal environment is different in the United States, some of the trends are similar, such as increased diminution of state immunity and broadening tortious liability ("constitutional" torts). The Hughes study goes on to note:

> Civil suits cause many negative consequences for departments. Suits impose a variety of costs that leech resources.

These include defence costs, settlement costs, the time and expense of discoveries, and insurance costs. The Hughes report also describes the trend of increasing damage awards against police, with predictable consequences for government policing budgets.

[94] It is obvious that directing scarce public resources to resolution of private lawsuits—meritorious or not—diverts resources from the performance of the duties which police owe to the general public. "Justice" for a particular plaintiff may be an injustice to many others deprived of those resources.

[95] But a motion to strike is a weak foundation for such arguments. For that reason I would not give effect to residual policy arguments in this case, at this time, and on these pleadings. There is an insufficient record to assist our policy analysis.

## Conclusion

[96] It is not "plain and obvious" that the RCMP do not owe a duty to the plaintiffs on the pleadings. Harm to the plaintiffs was foreseeable. The locating of Mr. Coady and RCMP interaction with him establishes potential proximity between them and the plaintiffs. Whether a duty of care arises in fact in all the circumstances is a triable issue.

[97] There may be residual policy considerations that would negate a *prima facie* duty of care. These would be better addressed at trial or on a motion that permitted evidence.

[98] I would grant leave, but would dismiss the appeal, with costs of $4,000, inclusive of disbursements, payable by the appellants to the respondents, Coast Tire and Newalta, ($2,000 to each respondent).

Bryson, J.A.

Concurred in:

Saunders, J.A.

Bourgeois, J.A.