SUPREME COURT OF NOVA SCOTIA
Citation: *Walsh Estate v. Coady Estate*, 2015 NSSC 175

Date: 20150615
Docket: Pic No. 353685
Registry: Pictou; Halifax

Between:

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); and Tammy Walsh as Litigation Guardian for Savannah Walsh (an infant)

Plaintiff

and

The Estate of Ralph Michael Coady, Jr. and Coast Tire & Auto Services Ltd., a body corporate, and Attorney General of Canada, R.C.M.P. Cst. Katie Green and Unidentified R.C.M.P. Members

Defendants

AND IN THE MATTER OF:

2011 Hfx. No. 370332

SUPREME COURT OF NOVA SCOTIA

Between:

Newalta Corporation, a body corporate

Plaintiff

and

The Estate of Ralph Michael Coady, Jr. and Coast Tire & Auto Services Ltd., a body corporate, and Attorney General of Canada, R.C.M.P. Cst. Katie Green and Unidentified R.C.M.P. Members

Defendants

AND IN THE MATTER OF:

2012 Pic No. 390342

SUPREME COURT OF NOVA SCOTIA

Between:

Barneys River Fish Farm Ltd., a body corporate

Plaintiff

and

The Estate of Ralph Michael Coady, Jr. and Coast Tire & Auto Services Ltd., a body corporate, and Attorney General of Canada, R.C.M.P. Cst. Katie Green and Unidentified R.C.M.P. Members

Defendants

Judge: The Honourable Justice Joshua M. Arnold

Heard: November 13, 2014, in Pictou, Nova Scotia

Counsel: Christopher J. Nagle, for the plaintiffs Tammy Walsh, Estate of Christopher Walsh, Shamya Walsh, Savannah Walsh
D. Kevin Burke, for the plaintiff Newalta Corporation
Michael R. Brooker, for the defendant, the Estate of Ralph Michael Coady, Jr.
R. Gregory D. Hardy, for the defendant Coast Tire & Auto Services Ltd.
Susan Inglis, for the defendant applicants Attorney General of Canada, R.C.M.P. Cst. Katie Greene, and unidentified R.C.M.P. Members

By the Court:

Overview

[1] The Attorney General of Canada, RCMP Constable Kate Green and unidentified RCMP members ("applicants"), have made a motion for summary judgment on the pleadings in accordance with Civil Procedure Rule 13.03. The applicants argue that the plaintiffs' amended Statements of Claim each failed to disclose a cause of action against them. The applicants claim that no duty of care is owed by them to these plaintiffs. They say that the defects in these pleadings cannot be cured by an amendment. The applicants argue that the law simply does not recognize the plaintiffs' negligence claims. One defendant, Coast Tire & Auto Services Ltd., has submitted a brief in support of the plaintiff/respondents' position.

[2] In advance of the hearing, Barneys River Fish Farm Limited notified the Court that their claim against the Federal defendants would be withdrawn. Therefore, Barneys Fish Farm Limited did not file submissions on this application.

The Pleadings

[3] According to the amended Statement of Claim filed by Newalta:

> 1. The plaintiff, Newalta Corporation, ("Newalta") is a corporation incorporated under the laws of the Province of Alberta and registered as an extra-provincial corporation in Nova Scotia. Newalta carries on the business of industrial waste management including the recycling and recovery of products from industrial residues. This action is brought by Zurich Insurance in the name of Newalta by virtue of subrogation rights under an insurance policy issued to Newalta and under provisions of the *Insurance Act. R.S.N.S.1989. c. 231*.
>
> 2. Ralph Michael Coady, Jr. ("Mr. Coady") passed away on August 18, 2010 as a result of a motor vehicle accident which is the subject of this proceeding and accordingly The Estate of Ralph Michael Coady, Jr.is named as a defendant. At times material to this proceeding Mr. Coady was the owner and operator of a 2003 Chevrolet Silverado truck bearing Nova Scotia license plate EAD 105 (the "Coady vehicle").

3. The defendant Coast Tire & Auto Service Ltd. ("Coast Tire") is a corporation incorporated under the laws of the Province of New Brunswick. Coast Tire operates an automobile service centre at 230 Stellarton Road, New Glasgow, Nova Scotia.

4. The defendants Cst. Katie Greene ("Cst. Greene") and Unidentified R.C.M.P. Members were at the relevant time employed as members of the Royal Canadian Mounted Police (the "R.C.M.P.") working in or about Pictou County, Nova Scotia and in the course of their employment were also servants of the defendant Attorney General of Canada representing Her Majesty the Queen in the Right of Canada pursuant to s. 26 of the *Crown Liability and Proceedings Act, R.S. 1985 c. C-50. s.1: (1990), c. 8. s.21*.

5. In addition, prior to the Motor Vehicle Accident, the R.C.M.P. and Cst. Greene and/or the Unidentified R.C.M.P. Members were made aware that on August 18, 2010 Mr. Coady should not have been operating the Coady Vehicle or that the Coady Vehicle should not have been operated on the highway, and in fact had opportunity to have prevented Mr. Coady and the Coady Vehicle from being operated on the highway at the time of the Motor Vehicle Accident. Without limiting the generality of the foregoing, particulars of the aforesaid circumstances and information available to the R.C.M.P. and Cst. Greene and/or the Unidentified R.C.M.P. Members included that on or about August 18, 2010 and prior to the Motor Vehicle Accident:

   (a) Mr. Coady was observed appearing to be mentally or physically impaired and driving dangerously and erratically, and in such a state that a health care professional reported to the R.C.M.P. that Mr. Coady and the Coady Vehicle should not be operating on the highway;

   (b) Cst. Green and/or Unidentified R.C.M.P. Members in fact approached Mr. Coady and the Coady Vehicle in a convenience store parking lot and made or ought to have made similar observations first hand, and had opportunity to follow and further observe Mr. Coady and the Coady Vehicle;

   (c) Mr. Coady and the Coady Vehicle were observed to be driving in what appeared to be a dangerous and erratic manner, and in such a state that other observers reported to the R.C.M.P. that Mr. Coady and the Coady Vehicle should not be operating on the highway; and

   (d) such other matters as may appear.

6. Cst. Greene returned to her cruiser and along with the other police cruiser that had entered the parking lot of the variety store proceeded in a direction opposite and away from the direction Mr. Coady had left in the Coady vehicle.

7. Also, on or about August 18, 2010, as Mr. Coady was operating his 2003 Chevrolet Silverado truck bearing Nova Scotia license plate EAD 105 (the "Coady vehicle") in an easterly direction along the Trans Canada Highway #104 at or near Barney's River/Kenzieville, Pictou County, Nova Scotia on or about the same time August 18, 2010 a 2005 Sterling model Y110 tanker truck owned by Newalta bearing New Brunswick license plate PSY 911(the "Newalta vehicle") was being operated by its employee Christopher Walsh in a westerly direction along the Trans Canada Highway #104 at or near Barney's River/Kenzieville, Pictou County, Nova Scotia.

8. At the same time as Mr. Coady travelled in the Coady vehicle in an easterly direction on the Trans Canada Highway #104 one or more other motorists observed Mr. Coady and the Coady vehicle driving dangerously and erratically. One or more motorists did or were about to call the R.C.M.P. when suddenly, and without warning, the Coady vehicle crossed the centre line of the highway and collided head on with the Newalta vehicle causing the Newalta vehicle to catch fire and leave the highway whereupon it rolled down an embankment and spilled its cargo of waste oil

9. As a result of the above described collision, both Christopher Walsh and Ralph Michael Coady, Jr. were killed.

10. Newalta states that the motor vehicle collision was caused or contributed to by the negligence of Mr. Coady, the particulars of which include the following:

    (a) he failed to keep the Coady vehicle under proper or any control;

    (b) he failed to exercise proper or any care in the operation of the Coady vehicle;

    (c) he failed to keep and maintain proper or any lookout;

    (d) he caused or allowed the Coady vehicle to cross the centre line of the highway when he knew or ought to have known it was unsafe to do so;

    (e) he operated the Coady vehicle while impaired by fatigue or the consumption of drugs or alcohol;

    (f) he exceeded the speed limit;

    (g) he failed to keep the Coady vehicle maintained to acceptable mechanical standards;

    (h) he operated the Coady vehicle when he knew or ought to have known that it was mechanically unsafe;

    (i) such further and other particulars of negligence as may appear.

11. In late July, 2010, Mr. Coady attended Coast Tire for tire replacement and was advised that certain repairs were required involving the replacement of one or more parts including a tie rod end which repair was authorized and completed.

12. In the days following the repair, Mr. Coady observed the truck to be causing a noise and veering to one side and reported the problem to Coast Tire resulting in further diagnostics, inspection and a test drive on August 13, 2010, whereupon Coast Tire acknowledged the problems reported by Mr. Coady and attempted to fix them.

13. Newalta states that Coast Tire caused or contributed to the accident through negligence and failure to warn, the particulars of which include the following:

    (a) it failed to properly inspect the Coady vehicle;

    (b) it failed to properly repair the Coady vehicle;

    (c) it advised Mr. Coady to drive the Coady vehicle when it knew or ought to have known that it was unsafe to do so;

    (d) it failed to warn Mr. Coady not to drive the Coady vehicle when it knew or ought to have known that it was unsafe to drive the Coady vehicle;

    (e) such further and other particulars as may appear.

14. Newalta states that in the circumstances described in the preceding paragraphs Cst. Greene and the Unidentified R.C.M.P. Members owed a dutv of care to Christopher Walsh. Newalta and the public as police officers including at common law and by virtue of the *Royal Canadian Mounted Police Act*, 1985. c. R-10, and the *Police Act*, S.N.S. 2004.

15. Newalta states that Cst. Greene and the Unidentified R.C.M.P. Members breached the requisite standard of care in the circumstances by failing to perform their duties as would a reasonable police officer, acting reasonably and within the statutorv powers and duties imposed upon them and under common law, the particulars of which include:

    (a) they failed to properly investigate complaints related to Mr. Coady and the Coady vehicle;

    (b) they failed to properly interview Mr. Coady to determine whether he was fit and able to safely drive an automobile;

    (c) they failed to properly examine the Coady vehicle to ascertain whether it was fit for operation on a highway;

    (d) they failed to conduct appropriate or any field tests to determine if Mr. Coady was impaired by alcohol, drugs, medication or physical or mental problems;

(e) they failed to obtain a second opinion from a more senior colleague readily available for consultation when they had or should have had doubts about Mr. Coady's ability to drive;

(f) they allowed Mr. Coady to continue to drive the Coady vehicle when they knew or ought to have known that he and/or the Coady vehicle posed a danger or imminent threat to himself and other motorists on the highway;

(g) they advised Mr. Coady to continue to drive the Coady vehicle when they knew or ought to have known that it was unsafe to do so;

(h) they failed to warn Mr. Coady not to drive the Coady vehicle when they knew or ought to have known that it was unsafe to drive the Coady vehicle;

(i) having failed to prevent Mr. Coady from continuing to drive when he was at the variety store, they failed to act on the further information provided by the store clerk;

(j) they failed to follow Mr. Coady and the Coady vehicle to observe his manner of driving and/or the operation of the Coady vehicle;

(k) they failed to call for additional backup or assistance when they knew or should have known that such was required in order to prevent an accident on the highway;

(l) they failed to enforce the laws that she was duty bound to enforce;

(m) they failed to protect the person of Christopher Walsh and Ralph Michael Coady, Jr.;

(n) they failed to protect the property of Newalta and the public;

(o) such further and other particulars as may appear.

16. In addition to the loss of the Newalta vehicle and cargo, the fire and spill of waste oil caused property and environmental damage which required repair and remediation by Newalta in order to fulfill its obligations as a good corporate citizen and under the *Environment Act* for which Newalta incurred loss and expense of approximately $3.000.000.

17. Newalta pleads and will rely upon the *Royal Canadian Mounted Police Act*, 1985. c. R-10, the *Police Act*, S.N.S. 2004, the *Tortfeasors Act*, R.S.N.S. 1989, c. 471, the Motor Vehicle Act, R.S.N.S. 1989, c. 239, the *Crown Liability and Proceedings Act*, R. S. 1985 c. C-50, s . 1: (1990), c.8, s.21 and the *Criminal Code of Canada*.

18. Newalta repeats the forgoing paragraphs and states that Cst. Greene and the Unidentified R.C.M.P. Members caused or contributed to the accident and that the defendant Attorney General of Canada is liable for the damages in respect of the negligence or other tort committed by Cst. Greene and/or the

Unidentified R.C.M.P. Members, servants of the Crown, by virtue of s. 3 of the *Crown Liability and Proceedings Act*.

19. Newalta repeats the forgoing and states that the defendants are jointly and severally liable to Newalta for the damages and costs it has incurred arising out of this accident, and therefore claims against the defendants the following, particulars of which will be provided at or before trial:

    (a) special damages for the loss of the Newalta vehicle and cargo

    (b) special damages for the cost of property repair and reinstatement;

    (c) special damages representing the costs of the environmental cleanup and remediation;

    (d) special damages for the cost of emergency services charges;

    (e) prejudgment interest;

    (f) costs; and

    (g) such further and other relief as this Honourable Court deems just.

[4] According to the amended Statement of Claim filed by the Walsh Estate:

1. The Plaintiff Tammy Walsh is the Executor of the Estate of Christopher Walsh, and is the surviving widow of the late Christopher Walsh who was killed in a motor vehicle accident at Kenzieville, Nova Scotia on or about August 18th 2010~~1~~.

2. The Plaintiff Tammy Walsh also acts as Litigation Guardian of Shamya Walsh, born May 8th 1998 and Savannah Walsh, born September 8th 2004, both of whom are the natural daughters of both Tammy Walsh and the late Christopher Walsh.

3. ~~The deceased Defendant Ralph Michael Coady Junior passed away on August 18th 2010 at about 12:30 in the afternoon on the TransCanada Highway 104 at or near Kenzieville, Pictou County, Nova Scotia; in the same accident as set out above.~~ Ralph Michael Coady, Jr. ("Mr. Coady") passed away on August 18, 2010 as a result of a motor vehicle accident which is the subject of this proceeding and accordingly The Estate of Ralph Michael Coady, Jr. is named as a Defendant. At times material to this proceeding Mr. Coady was the owner and operator of a 2003 Chevrolet Silverado truck bearing Nova Scotia license plate EAD 105 (the "Coady vehicle").

4. The Defendant Coast Tire & Auto Services Ltd (hereinafter referred to as Coast Tire') operates an automobile service centre at 230 Stellarton Road, New Glasgow, Nova Scotia B2H 1M3. Coast Tire has its registered head office at Saint John, New Brunswick and at all times material hereto was the owner and occupier of land and building being Coast Tire & Auto Service Centre located at 230 Stellarton Road, New Glasgow.

5. The defendants Cst. Katie Greene ("Cst. Greene") and Unidentified R.C.M.P. Members were at the relevant time employed as members of the Royal Canadian Mounted Police (the "R.C.M.P. ") working in or about Pictou County, Nova Scotia and in the course of their employment were also servants of the defendant Attorney General of Canada representing Her Majesty the Queen in the Right of Canada pursuant to s. 26 of the *Crown Liability and Proceedings Act*, R.S. 1985 c. C-50,s. 1; (1990), c. 8, s. 21.

6. In addition, prior to the Motor Vehicle Accident, the R.C.M.P. and Cst. Greene and/or the Unidentified R.C.M.P. Members were made aware that on August 18, 2010 Mr. Coady should not have been operating the Coady Vehicle or that the Coady Vehicle should not have been operated on the highway, and in fact had opportunity to have prevented Mr. Coady and the Coady Vehicle from being operated on the highway at the time of the Motor Vehicle Accident. Without limiting the generality of the foregoing, particulars of the aforesaid circumstances and Information available to the R.C.M.P. and Cst. Greene and/or the Unidentified R.C.M.P. Members included that on or about August 18, 2010 and prior to the Motor Vehicle Accident:

   a) Mr. Coady was observed appearing to be mentally or physically impaired and driving dangerously and erratically, and in such a state that a health care professional reported to the R.C.M.P. that Mr. Coady and the Coady vehicle should not be operating on the highway;

   b) Cst. Green and/or Unidentified R.C.M.P. Members in fact approached Mr. Coady and the Coady Vehicle in a convenience store parking lot and made or ought to have made similar observations first hand, and had opportunity to follow and further observe Mr. Coady and the Coady Vehicle;

   c) Mr. Coady and the Coady Vehicle were observed to be driving in what appeared to be a dangerous and erratic manner, and in such a state that other observers reported to the R.C.M. P. that Mr. Coady and the Coady Vehicle should not be operating on the highway; and

   d) such other matters as may appear.

7. Cst. Greene returned to her police cruiser and along with the other police cruiser that had entered the yard of the Alma Variety, proceeded in a direction opposite and away from the direction Mr. Coady had left in his vehicle.

8. The Plaintiffs collectively state that on or about August 18th 2010 at approximately 12:00 noon, Christopher Walsh was the operator and sole occupant of a 2005 Sterling Model Y110 tanker truck bearing New Brunswick License registration PSY 911; said vehicle hereinafter referred to as the "Plaintiff Vehicle".

9. The registered owner of the Plaintiff Vehicle was Newalta Industrial Service, and Mr. Walsh was operating the said vehicle with the full knowledge and consent of the registered owner.

10. The deceased Defendant Ralph M. Coady Junior was the registered owner and operator of a 2003 Chevrolet Silverado truck bearing Nova Scotia registration EAD 105; said vehicle hereinafter referred to as the "Defendant Vehicle".

11. The Plaintiffs collectively state that at or about 12:00 noon on August 18th 2010, the deceased Plaintiff Christopher Walsh was operating the Plaintiff Vehicle in a westerly direction along Highway 104 at or near Kenzieville, Pictou County, Nova Scotia.

12. The deceased Defendant Michael Coady was the sole occupant and operator of the Defendant Vehicle, and was operating the Defendant Vehicle in an easterly direction along said Route 104, approaching the Plaintiff Vehicle.

13. ~~Suddenly and without warning the Defendant Vehicle crossed the centre line and collided head on with the Plaintiff Vehicle, which was pushed off the highway, rolled down an embankment and caught fire.~~ At the same time as Mr. Coady travelled in the Coady vehicle in an easterly direction on the Trans Canada Highway #104 one or more other motorists observed Mr. Coady and the Coady vehicle driving dangerously and erratically. One or more motorists did or were about to call the R.C.M.P. when suddenly, and without warning, the Coady vehicle crossed the centre line of the highway and collided head on with the Newalta vehicle causing the Newalta vehicle to catch fire and leave the highway whereupon it rolled down an embankment and spilled its cargo of waste oil.

14. The above-noted collision caused the deaths of both Christopher Walsh and Ralph Michael Coady.

15. The Plaintiffs state that the aforesaid motor vehicle collision was occasioned by the negligence of the late Ralph Michael Coady, particulars of which are as follows:

    a) Failing to keep the Defendant Vehicle under control;

    b) Failing to keep the Defendant Vehicle in the proper lane of traffic and on the right side of the paved Highway, and allowing it to cross the centre line of the highway as a result of inattention, fatigue or otherwise;

    c) Failing to keep and maintain a proper or any lookout;

    d) Failing to devote his full attention to the operation of the Defendant Vehicle;

    e) Failing to apply his brakes in time to avoid a collision when it appeared that a collision was imminent;

    f) Exceeding the posted speed limit;

g) Failing to operate the Defendant Vehicle in a careful and prudent manner in relation to all the circumstances existing at the relevant time;

h) Operating the Defendant Vehicle on a public roadway when it was in a mechanically unfit condition to do so;

i) Operating the Defendant Vehicle at a time when his ability to do so was impaired by alcohol or drugs or both;

j) Such other and further particulars of negligence as may come to the knowledge and attention of the Plaintiffs.

16. In late July 2010, the deceased Defendant Coady made an appointment with Coast Tire for the purpose of having four new tires installed. Mr. Coady then delivered his motor vehicle to Coast Tire. After replacing the tires, the Defendant Coast Tire called Mr. Coady and advised him that, upon inspection, his truck was also in need of a new tie rod end and Mr. Coady authorized this replacement.

17. In the days following this appointment, Mr. Coady observed the truck veering to one side and making noise emanating from the front end. Mr. Coady made an appointment with the Defendant Coast Tire for August 13th 2010 to have this problem remedied.

18. Employees of the Defendant Coast Tire then inspected the truck and told Mr. Coady that a computer diagnostic indicated that there was no problem. Upon leaving the service centre, Mr. Coady noticed that his vehicle was still veering to one side and promptly returned to Coast Tire service centre.

19. The Coady vehicle was then put on hoists, and once again employees told Mr. Coady there was no problem.

20. However, Mr. Coady insisted that a mechanic employed by Coast Tire go out on a "test drive" with him and it was at this time that the Defendant employee agreed with Mr. Coady that there was a problem.

21. At that point, the Coady vehicle was once again placed on hoists, and the two front tires were switched. Unfortunately, Mr. Coady still noted after driving away that the truck was still veering, so once again brought the vehicle back to Coast Tire.

22. However, by this time, employees of the Defendant Coast Tire advised Mr. Coady that since it was 5:00 pm they were closing. Defendant employees advised Mr. Coady to drive the truck to see if the problem would work itself out, and if not to return and make an appointment for sometime in the following week.

23. Mr. Coady followed the instructions of Defendant Coast Tire personnel and drove the truck to see if the problem would work itself out. Unfortunately, it was during this interim that Mr. Coady was operating his vehicle along the Highway 104 and ultimately lost control of his vehicle.

24. The Plaintiffs therefore claim against the Defendant Coast Tire for negligence in the inspection and repair of the Coady vehicle, and in failing to caution the deceased Defendant Coady against operating his motor vehicle on the roadway at a time when it was in an unsafe condition.

25. The Plaintiffs state therefore that the collision of August 18th 2010 resulted from the carelessness, negligent actions, and failure to warn, of the Defendant Coast Tire, particulars of which are as follows:

    a) Failing to properly inspect and repair the Coady Vehicle;

    b) Failing to meet the standard of care of an automotive shop in repairing and inspecting said truck;

    c) Imparting advice to the Defendant Coady that was grossly neglectful and not a result of reasonable diligence;

    d) Such other particulars of negligence as may appear.

26. The Plaintiffs state that in the circumstances described in the preceding paragraphs Cst. Greene owed a duty of care to Christopher Walsh, Newalta and the public as a police officer including under the common law, the Royal Canadian Mounted Police Act and the Police Act.

27. The Plaintiffs state that Cst. Greene breached the requisite standard of care in the circumstances by failing to perform her duties as would a reasonable police officer, acting reasonably and within the statutory powers imposed upon her and under common law, the particulars of which include:

    a) she failed to properly investigate complaints related to Mr. Coady and the Coady vehicle;

    b) she failed to properly interview Mr. Coady to determine whether he was fit and able to safely drive an automobile;

    c) she failed to properly examine the Coady vehicle to ascertain whether it was fit for operation on a highway;

    d) she failed to conduct appropriate or any field tests to determine if Mr. Coady was impaired by alcohol, drugs, medication or physical or mental problems;

    e) she failed to obtain a second opinion from a more senior colleague readily available for consultation when she had or should have had doubts about Mr. Coady's ability to drive;

    f) she allowed Mr. Coady to continue to drive the Coady vehicle when she knew or ought to have known that he and/or the Coady vehicle posed a danger or imminent threat to himself and other motorists on the highway;

    g) she advised Mr. Coady to continue to drive the Coady vehicle when she knew or ought to have known that it was unsafe to do so;

h) she failed to warn Mr. Coady not to drive the Coady vehicle when she knew or ought to have known that it was unsafe to drive the Coady vehicle;

i) having failed to prevent Mr. Coady from continuing to drive when he was at the Alma Variety, she failed to act on the further information provided by the store clerk;

j) she failed to follow Mr. Coady and the Coady vehicle to observe his manner of driving and/or the operation of the Coady vehicle;

k) she failed to call for additional backup or assistance when she knew or should have known that such was required in order to prevent an accident on the highway;

I) she failed to enforce the laws that she was duty bound to enforce;

m) she failed to protect the person of Christopher Walsh and Ralph Michael Coady, Jr.;

n) she failed to protect the property of Newalta and the public;

o) such further and other particulars as may appear.

28. The Plaintiffs plead and will rely upon the Royal Canadian Mounted Police Act.1985, c. R-10, the Police Act, S.N.S. 2004, the Tortfeasors Act, R.S.N.S. 1989, c. 471, the Motor Vehicle Act, R.S.N.S. 1989,c. 239,the Crown Liability and Proceedings Act, R.S. 1985 c. C-50, s. l; (1990), c.8, s. 21and the Criminal Code of Canada.

29. The Plaintiffs repeat the foregoing paragraphs and state that Cst. Greene caused or contributed to the accident and that the Defendant Attorney General of Canada is liable for the damages in respect of the negligence or other tort committed by Cst. Greene, a servant of the Crown, by virtue of s. 3 of the Crown liability and Proceedings Act.

30. The Plaintiffs repeat the proceeding paragraphs hereof and state that at the time of his injury and death, the deceased Plaintiff Christopher Walsh was 37 years of age (born November 19th 1972) and in good health.

31. The Plaintiffs state that, as a result of the death of Christopher Walsh, each of them, as the widow and children, respectively, of the late Christopher Walsh, have suffered pecuniary and non-pecuniary damages and losses including the loss of care, guidance and companionship.

32. The Plaintiffs state that the Estate of Christopher Walsh, and themselves personally, have suffered Special Damages Including, but not limited to, the following:

a) Funeral Costs;

b) Estate Administration Costs;

c) General Damages for Pain, Suffering, and Loss of Care and Companionship;

d) Damages for Loss of Earning Capacity and Loss of Future Wages;

e) Damages for loss of Valuable Services including but not limited to housekeeping and home maintenance;

f) Special Damages Including but not limited to damages for Lost Wages,

33. The Plaintiffs repeat the preceding paragraphs hereof and say that by reason of the negligence of the Defendant Ralph Michael Coady Junior in causing (or contributing to) the aforesaid accident causing the death of the late Christopher Walsh; the Plaintiffs have suffered injury, loss and damages, particulars of which include pain and suffering, loss of guidance, care and companionship, funeral related expenses, and other losses as may appear in a trial of this proceeding.

34. Further, and in the alternative, the Plaintiffs repeat the preceding paragraphs hereof and state that by reason of the negligence of the Defendant Coast Tire & Auto Services Ltd. in causing (or contributing to) the aforesaid accident causing the death of the late Christopher Walsh, the Plaintiffs have suffered injury, loss and damages, particulars of which include pain and suffering, loss of guidance, care and companionship, funeral related expenses, and other losses as may appear in a trial of this proceeding.

35. Further and in the alternative, the Plaintiffs repeat the forgoing paragraphs and state that Cst. Greene caused or contributed to the accident and that the Defendant Attorney General of Canada is liable for the damages in respect of the negligence or other tort committed by Cst. Greene, a servant of the Crown, by virtue of s. 3 of the Crown Liability and Proceedings Act.

36. The Plaintiffs plead and rely upon the *Joint Tortfeasors Act*, R.S.N.S. 1989, c. 471 as well as the *Contributory Negligence Act*, R.S.N.S. 1989, c. 95, both of the Province of Nova Scotia.

37 The Plaintiffs plead and rely upon the *Fatal Injuries Act*, R.S.N.S. 1989, c 163 as well as the *Motor Vehicle Act*, R.S.N.S., c. 293, both of the Province of Nova Scotia.

38. The Plaintiffs therefore claim against the Defendants jointly and severally, as follows:

(a) Funeral Costs;

(b) Estate Administration Costs;

(c) General Damages for Pain, Suffering, and Loss of Care and Companionship;

(d) Damages for Loss of Earning Capacity and Loss of Future Wages;

(e) Damages for Loss of Valuable Services including but not limited to housekeeping and home maintenance;

(f) Special Damages including but not limited to damages for Lost Wages;

(g) Pre-Judgment Interest; and

(h) Such other relief as this Honourable deems appropriate.

The Issue

[5] This motion for summary judgment on the pleadings raises the following issue:

> Does the Walsh Estate amended Statement of Claim or the Newalta amended Statement of Claim disclose a cause of action against the Federal defendants?

Summary Judgment on Pleadings

[6] *Civil Procedure Rule* ("*CPR*") 13.03 states:

> **Summary judgment on pleadings**
>
> **13.03 (1)** A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
>
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court;
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.
>
> **(2)** The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:
>
> (a) judgment for the plaintiff, when the statement of defence is set aside wholly;
>
> (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
>
> (c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;
>
> (d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.

> **(3)** A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.
>
> **(4)** A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.
>
> **(5)** A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:
>
> (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
>
> (b) the outcome of the motion depends entirely on the answer to the question.

Test for Summary Judgment on Pleadings

[7] In *R. v. Imperial Tobacco Canada*, 2011 SCC 42, Chief Justice McLachlin stated:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> [20] This promotes two goods—efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be—on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.
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> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v.*

> *Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
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> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the Supreme Court Rules (now r. 9-5(2) of the Supreme Court Civil Rules). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[8] Similar sentiments have been expressed by the Nova Scotia Court of Appeal when dealing with applications for summary judgment on pleadings. In *Cragg v. Eisener*, 2012 NSCA 101, Saunders J.A. stated:

> [9] The approach taken when deciding a motion for summary judgment "on the pleadings" is different. There, the judge's inquiry is limited to an examination of the pleadings. No evidence on the motion is permitted. The "test" is drawn from language found in the jurisprudence involving motions to strike out pleadings. In other words, to grant summary judgment on the pleadings, the judge must be satisfied that the claim (or defence, as the case may be) "is certain to fail" or "is absolutely unsustainable" or "discloses no cause of action or basis for a defence". …

[9] In *Nova Scotia (Attorney General) v. MacQueen*, 2007 NSCA 33, Hamilton J.A. said:

> [8] All parties agree that a pleading should only be struck if it is "plain and obvious" that the claim does not disclose a cause of action; that the action is "obviously unsustainable." This test was recently approved by this Court in **Mabey v. Mabey** (2005), 230 N.S.R. (2d) 272:

> [13] It is well settled that the test pursuant to Rule 14.25(1)(a) is that the application will not be granted unless the action is "obviously unsustainable". In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the action raises substantial issues it should not be struck out: **Vladi Private Islands Ltd. v. Haase et al.** (1990), 96 N.S.R. (2d) 323, 253 A.P.R. 323 (C.A.). An application for variation should not be struck out unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case: **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959, 117 N.R. 321.
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> . . .
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> [42] The success of any such arguments is yet to be determined. At this point it is only for us to consider whether there is an issue to be tried. Canada and Nova Scotia have not satisfied me, in light of their alleged contact with the respondents, that it is plain and obvious the respondents could not have reasonably expected that Canada and Nova Scotia would act in their best interests with respect to the operation of the plant and/or ovens, and especially with respect to the dissemination of information regarding the nature of the emissions (notwithstanding the statutory objectives in their respective enabling legislation).

[10] Other recent decisions from the Nova Scotia Supreme Court have reiterated this test. In *Shane v. Allen*, 2010 NSSC 484, Justice Murphy said:

> [11] On an application under Rule 13.03, the pleaded facts must be taken to be true in determining whether a cause of action is disclosed by the pleading. The test on a motion under Rule 13.03 was recently restated in **Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd.**, 2010 NSSC 25, at paras. 10-12, where the Court noted that authorities decided under the former Rule 14.25 are applicable to motions under Rule 13.03, and said:
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> > The Court of Appeal has recently re-affirmed the rule for the striking of pleadings, which I find is still applicable to motions under new Rule 13.03. Writing for the Court in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44 (N.S.C.A.), MacDonald, C.J.N.S. writes at para. 17 as follows:
> >
> > > [17] Rule 14.25 offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this

> assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action.

The Court further, reaffirms the standard as articulated by the Supreme Court of Canada in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), writing at para. 18 as follows:

> [18] In following Hunt, our court has recently confirmed that in order to strike pleadings under Rule 14.25 (1) (a), they must appear to be either "certain to fail" (2007 NSCA 70 at para.13) or "absolutely unsustainable" (*CGU Insurance Co. of Canada v. Noble*, 2003 NSCA 102 at para. 13).

[12] *Rule 38.02* requires a pleading to provide information sufficient that "the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing" (*R. 38.02(2)(a)*), and stipulates that material facts (but not evidence) must be pleaded (*R. 38.02(3)*). As to what constitutes a cause of action, in **3021386 Nova Scotia Ltd. v. Barrington (Municipality)**, 2010 NSSC 173, the Court cited **Letang v. Cooper**, [1964] 2 All E.R. 929 (Eng. C.A.), where Diplock J. said, at p. 935, that a cause of action "is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person" (**Barrington** at para. 13).

[11] Recently, in *Barton v. Nova Scotia (Attorney General)*, 2013 NSSC 121, Justice Wright stated:

> [11] Civil Procedure Rule 13.03(1) was preceded by s. 14.25 of the *Civil Procedure Rules (1972)*. The jurisprudence under the old rule remains applicable, however, to the present rule which was merely expanded somewhat to reflect that jurisprudence. The test therefore remains as enunciated by the Nova Scotia Court of Appeal in **Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)**, 2009 NSCA 44. In that decision, Chief Justice MacDonald wrote as follows:
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> > [17] *Rule* 14.25 offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action. In **Hunt v. Carey Canada Inc.**,1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 at p. 980, the Supreme Court of Canada, when considering the corresponding British Columbia provision:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

> [18] In following **Hunt**, our court has recently confirmed that in order to strike pleadings under Rule 14.25 (1)(a), they must appear to be either "certain to fail" (**Sable Offshore Energy Inc. v. Ameron International Corp.**, 2007 NSCA 70 (CanLII), 2007 NSCA 70 at para. 13) or "absolutely unsustainable" (**CGU Insurance Co. of Canada v. Noble**, 2003 NSCA 102 (CanLII), 2003 NSCA 102 at para. 13).

> [12] The Nova Scotia Court of Appeal suggested no modification to this test under the new Civil Procedure Rules in recently dismissing an appeal in **Mercier v. Nova Scotia (Attorney General)**, [2012] N.S.J. No. 498. It therefore remains incumbent upon the defendants to satisfy the court that even with the assumption that all pleaded facts are true, it is plain and obvious that the claim cannot succeed either because the pleadings on their face show no reasonable cause of action, or that the claim is absolutely unsustainable, or that it is certain to fail because of a radical defect.

[12] The general principles in Ontario were summarized in *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, [1990] O.J. No. 1584, where the Ontario Divisional Court, *per* Moldaver J. (as he then was) stated:

> **10** Before considering the several causes of actions pleaded, it may be helpful to review some of the principles relating to statements of claim generally. The following factors are significant:
>
> (1) The pleadings must disclose a cause of action founded in law. So long as this criterion is met, the novelty of the cause is of no concern. See *Johnson v. Adamson* (1981), 34 O.R. (2d) 236, 128 D.L.R. (3d) 470, 18 C.C.L.T. 282 (C.A.) [leave to appeal S.C.C. refused (1982), 35 O.R. (2d), 41 N.R. 447n].

> (2) In determining whether a cause of action exists, the material facts pleaded are to be taken as proved. However, this principle does not apply where the alleged facts are based on assumptive or speculative conclusions which are incapable of proof. See *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 13 C.R.R. 287, 12 Admin. L.R. 16, 18 D.L.R. (4th) 481, 59 N.R. 1.
>
> (3) If the facts, taken as proved, disclose a reasonable cause of action, that is, one with some chance of success, then the action may proceed. See *Operation Dismantle Inc.*, *supra*.
>
> (4) The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies. See *Operation Dismantle Inc.*, *supra*.

The Attorney General of Canada's Position

[13] The applicant argues that in this case in order to disclose a cause of action in negligence the plaintiffs must be able to establish on the facts pleaded in their respective claims that the Federal defendants owed each of them a duty of care. The applicant argues that no duty of care exists and that the claims are therefore untenable at law and must be dismissed. The applicant states that the question of whether the Federal defendants owe a private duty of care is one which may be properly addressed on a motion to strike. The existence of a duty of care can be determined on a pleadings motion where the only evidence before the court is the statement of claim.

Legislation

[14] The *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, states at s. 18:

> **Duties**
>
> **18.** It is the duty of members who are peace officers, subject to the orders of the Commissioner,
>
> (*a*) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;

> (*b*) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
>
> (*c*) to perform such other duties and functions as are described by the Governor in Council or the Commissioner.

[15] The common-law duties of police officers are now codified in ss. 30(1) and (2) of the *Police Act*, S.N.S. 2004, c. 31, state:

> **Duties**
>
> 30(1) A member of the Provincial Police is charged with the enforcement of
>
> (a) the penal provision of all the laws of the Province;
>
> (b) any penal laws in force in the Province, other than laws of a municipality; and
>
> (c) the laws of a municipality, where specified by the Minister.
>
> (2) Notwithstanding clauses (1)(b) and (c), where the Provincial Police provides policing services to a municipality, the members of the Provincial Police shall enforce the penal provisions of the by-laws of the municipality in accordance with an agreement entered into pursuant to the regulations for the provision of those services.

[16] Subsection 42(2) of the *Police Act* states:

> **42 (2)** Subject to this Act and the regulations, or any other enactment or an order of the Minister, the authority, responsibility and duty of a member of a municipal police department includes
>
> (a) maintaining law and order;
>
> (b) the prevention of crime;
>
> (c) enforcing the penal provisions of the laws of the Province and any penal laws in force in the Province;
>
> (d) assisting victims of crime;
>
> (e) apprehending criminals and offenders who may lawfully be taken into custody;
>
> (f) laying charges and participating in prosecutions;
>
> (g) executing warrants that are to be executed by peace officers;
>
> (h) subject to an agreement respecting the policing of the municipality, enforcing municipal by-laws within the municipality; and
>
> (i) obeying the lawful orders of the chief officer, and the person shall discharge these responsibilities throughout the Province.

[17] The *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, states at s. 83:

> **Direction of peace officer or traffic sign or signal**
>
> **83(1)** It shall be an offence for any person to refuse or fail to comply with any order, signal or direction of any peace officer.
>
> **(2)** It shall be an offence for the driver of any vehicle or for the motorman of any street car to disobey the instructions of any official traffic sign or signal placed in accordance with this Act, unless otherwise directed by a peace officer.

Analysis

[18] For the purpose of this motion, the facts as pleaded in the statements of claim filed by the Walsh Estate and Newalta must be treated as true. Therefore, the first issue to be determined is whether those facts bring the applicant's relationships with the Walsh Estate and Newalta within a settled category that gives rise to a duty of care. If they do a *prima facie* duty of care will be established, the analysis will be complete, the applicant's motion will fail and the matter will proceed to trial. At para. 37 of *Imperial Tobacco*, *supra*, the Supreme Court of Canada stated:

> [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: see *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15. However, it is important to note that liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and defendant, as discussed more fully below. 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.

[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.

[20] If the relationship as alleged in the statements of claim does not fall within a previously recognized category, the court must go on to consider whether a new duty of care should be recognized based on the two-stage test first articulated by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and adopted by the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79.

[21] In *Cooper v. Hobart*, at para. 43 the Supreme Court of Canada determined that in cases involving public bodies the factors giving rise to a tortious duty of care must arise from the statute governing the public body:

> [43] In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.

[22] Newalta, the Walsh Estate and the defendant, Coast Tire, all argue that the relationship between the plaintiffs and the applicant falls within a previously recognized category and therefore is not a novel claim.

[23] The plaintiffs agree that the RCMP does not owe a private law duty to the world-at-large. However, they argue that the law has recognized that a duty of care owed by the police to individuals can be found depending on the circumstances of a given case and on the application of the foreseeability and proximity tests. They further argue that one such circumstance is when RCMP members are dealing with highway patrol matters that could put users of the highway in danger. Because the plaintiffs argue that the case pleaded in this matter falls within a previously recognized category, it is necessary to review in some detail cases that may be analogous.

[24] In *O'Rourke et al. v. Schacht*, [1976] 1 SCR 53, Spence J. examined the Ontario Court of Appeal's decision on a similar issue and stated at pp. 65-66:

> Schroeder J.A. approached the problem with what I may, with respect, characterize as a forthright and enlightened manner, when he said:
>
> > Police forces exist in municipal, provincial, and federal jurisdictions to exercise powers designed to promote the order, safety, health, morals, and general welfare of society. It is not only impossible but inadvisable to attempt to frame a definition which will set definite limits to the powers and duties of police officers appointed to carry out the powers of the state in relation to individuals who come within its jurisdiction and protection. The duties imposed on them by statute are by no means exhaustive. It is infinitely better that the courts should decide as each case arises whether, having regard to the necessities of the case and the safeguards required in the public interest, the police are under a legal duty in the particular circumstances.
>
> and then concluded, after reference to certain cases, to the statutory provisions and to the evidence:

> Looked upon superficially the passivity of these two officers in the face of the manifest dangers inherent in the inadequately guarded depression across the highway may appear to be nothing more than non-feasance, but in the case of public servants subject not to a mere social obligation, but to what I feel bound to regard as a legal obligation, it was non-feasance amounting to mis-feasance. Traffic officers are subject to all the duties and responsibilities belonging to constables. The duties which I would lay upon them stem not only from the relevant statutes to which reference has been made, but from the common law, which recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the State to protect the life, limb and property of the subject.

[25] Spence J. went on to add at p. 71:

> Applying these expressions of the modern view of liability to the facts of the present case, I point out that s. 3(3) of *The Police Act* makes it mandatory that the Ontario Provincial Police maintain a traffic patrol and, with respect, I agree with Schroeder J.A. when he said:
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> > There is a definite purpose in requiring the police to patrol the highways under their jurisdiction, namely, to ensure that traffic laws will be obeyed, to investigate road accidents, and to assist injured persons. All this is directed to the prevention of accidents and the preservation of the safety of road users.
>
> I have the same view as to the duty of a police officer under the provision of the said s. 3(3) of *The Police Act* in carrying out police traffic patrol. In my opinion, it is of the essence of that patrol that the officer attempt to make the road safe for traffic. Certainly, therefore, there should be included in that duty the proper notification of possible road users of a danger arising from a previous accident and creating an unreasonable risk of harm.

[26] Similarly, the highway patrol unit in the case at bar had a duty to make the road safe for traffic in their patrol area. The pleadings assert that police had Mr. Coady in their control and released him. Tragedy ensued. As Lord Diplock said in *Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004, at p. 1057:

> The three officers did not take any or any effective steps to prevent the youths from escaping from the island. Although it is not stated in express terms, it is implicit in the language of the pleading that by the time the youths committed the damage they had successfully eluded the custody and control of the officers and had reached a place where it was not physically possible for the officers or anyone concerned with the management of Borstals to exercise any control over the youths' actions.

> The only cause of action relied upon is the "negligence" of the officers in failing to prevent the youths from escaping from their custody and control.
>
> It is implicit in this averment of "negligence" and must be treated as admitted not only that the officers by taking reasonable care could have prevented the youths from escaping but also that it was reasonably foreseeable by them that if the youths did escape they would be likely to commit damage of the kind which they did commit to some craft moored in the vicinity of Brownsea Island.
>
> The specific question of law raised in this appeal may therefore be stated as: Is any duty of care to prevent the escape of a Borstal trainee from custody owed by the Home Office to persons whose property would be likely to be damaged by the tortious acts of the Borstal trainee if he escaped?

[27] Lord Diplock concluded by stating at pp. 1070-1071:

> 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.
>
> So to hold would be a rational extension of the relationship between the custodian and the person sustaining the damage which was accepted in *Ellis v. Home Office* [1953] 2 All E.R. 149 and *D'Arcy v. Prison Commissioners*, "The Times," November 17, 1955, as giving rise to a duty of care on the part of the custodian to exercise reasonable care in controlling his detainee. In those two cases the custodian had a legal right to control the physical proximity of the person or property sustaining the damage to the detainee who caused it. The extended relationship substitutes for the right to control the knowledge which the custodian possessed or ought to have possessed that physical proximity in fact existed.
>
> In the present appeal the place from which the trainees escaped was an island from which the only means of escape would presumably be a boat accessible from the shore of the island. There is thus material fit for consideration at the trial for holding that the plaintiff, as the owner of a boat moored off the island, fell within the category of persons to whom a duty of care to prevent the escape of the trainees was owed by the officers responsible for their custody.
>
> If, therefore, it can be established at the trial of this action (1) that the Borstal officers in failing to take precautions to prevent the trainees from escaping were acting in breach of their instructions and not in bona fide exercise of a discretion delegated to them by the Home Office as to the degree of control to be

> adopted and (2) that it was reasonably foreseeable by the officers that if these particular trainees did escape they would be likely to appropriate a boat moored in the vicinity of Brownsea Island for the purpose of eluding immediate pursuit and to cause damage to it, the Borstal officers would be in breach of a duty of care owed to the plaintiff and the plaintiff would, in my view, have a cause of action against the Home Office as vicariously liable for the "negligence" of the Borstal officers.
>
> I would accordingly dismiss the appeal upon the preliminary issue of law and allow the case to go for trial on those issues of fact.
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> Appeal dismissed with costs.

[28] In *Knox v. Eastman*, [1999] B.C.J. No. 586; 1999 CanLII 5940 (S.C.), the court had to consider allegations of negligence against the RCMP and others for failure to properly protect a motorist from a construction grader that had been left parked on the side of the highway. Mr. Knox was killed when his pickup truck collided with the rear of the grader. The police were aware that the grader had been parked at the curb of a busy roadway for a full day prior to the fatal accident. Collver J. discussed the special duty of care as it relates to police officers and stated:

> **15** In submitting that police officers are subject to statutory, moral and legal duties to protect the public by warning members of the public of hazards, plaintiffs' counsel cited *O'Rourke v. Schacht* (1975), 55 D.L.R. (3d) 96 (S.C.C.) where liability was based on both statutory duties and a common law duty of care owed to the plaintiff. At p. 116, Mr. Justice Spence quoted with approval the following passage from the lower court's reasons:
>
> > The duties which I would lay upon them [the police] stem not only from the relevant statutes to which reference has been made, but from the common law, which recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the State to protect the life, limb and property of the subject.
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> **16** With respect to common law duties, counsel for the plaintiffs referred to *Hill v. The Queen*, [1997] B.C.J. No. 409, (17 February 1997) Vancouver B952943 (B.C.S.C.). There, Madam Justice Morrison acknowledged a general duty of the police but also found liability (twenty percent) where the police failed to properly ensure safety by turning on emergency flashing lights when they stopped to assist a driver who had run out of gas.
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> **17** Counsel for the plaintiffs then went on to discuss specific duties imposed upon the R.C.M.P. by federal, provincial and municipal statutes.

[29] Collver J. went on to examine the general duty of care:

> **18** The two-part test in the Supreme Court of Canada's decision in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, provides that a private law duty of care will arise where there is a relationship of proximity between the plaintiff and the defendant such that it is within the reasonable contemplation of the defendant that its carelessness may injure the plaintiff. In *Ryan v. Victoria (City)*, [1999] S.C.J. No. 7 the court stated that the test presents a relatively low threshold.
>
> **19** I agree that a general duty of care existed between the R.C.M.P. and the plaintiff such that it was Const. Jost's duty to protect motorists on Winston Street (*O'Rourke v. Schact, supra*). This would include the duty to remove an obstruction on the roadway which puts the safety of motorists at risk. I also accept counsel's submission that, if I find carelessness on the part of the R.C.M.P., it was plainly foreseeable that such carelessness could cause injury to motorists on Winston Street. …
>
> **20** With respect to this second part of the test in Kamloops, I find no financial or policy-based limitations which would relieve the R.C.M.P. of its duty to take care. A phone call to a towing company would have accomplished the grader's removal.

[30] More recently, in *Bergen v. Guliker*, 2014 BCSC 5, the court found that the police owe a private law duty of care to individual users of the highway in the context of a high-speed vehicle pursuit. The RCMP were aware that Guliker was a flight risk, that he was suicidal and that he planned to kill himself by running into traffic. Officers approached Guliker while he was parked. Guliker evaded the police by accelerating away from them in his vehicle. The RCMP pursued creating a car chase that reached speeds far in excess of the posted speed limit. Eventually Guliker's vehicle collided with the Bergen vehicle killing Mr. Guliker and Mr. Bergen and injuring the passengers in the Bergen vehicle. In *Bergen*, the British Columbia court was faced with questions similar to those facing this court:

> **181** To establish liability in negligence, a plaintiff must prove: (a) that the defendant owed the plaintiff a duty of care, (b) that the defendant's actions or inaction breached the standard of care applicable to that duty, (c) that the plaintiff suffered compensable damage, and (d) that the defendant's breach of the standard of care caused the plaintiff's damage: *Ediger v. Johnston*, 2013 SCC 18 at para. 24; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 96.
>
> **182** In this case, the defendants dispute (i) that the RCMP owe the plaintiff a duty of care, (ii) if a duty of care exists, that the RCMP breached the requisite standard of care, and (iii) that the actions of the RCMP caused the Collision.

[31] While *Bergen* involved a high speed chase, in my opinion some of the general principles regarding the duty of care owed by the police as noted by the British Columbia court are applicable to this case:

> **184** To establish liability in negligence, the RCMP must be found to owe a private law duty of care to the plaintiff.
>
> **185** The duties and responsibilities of the RCMP conferred by statute and RCMP policy are, however, relevant to determining whether a private law duty of care exists. They are also relevant to determining the applicable standard of care if a duty is found to exist. For this reason, I set out here the statutory and policy provisions relevant to this case.
>
> **186** RCMP officers owe a statutory duty to the public under s. 18 of the *RCMP Act*:
>
> > **18.** It is the duty of members who are peace officers, subject to the orders of the Commissioner,
> >
> > (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody; ...
>
> **187** Similarly, provincial constables owe a statutory duty to the public under s. 7(2) of the *Police Act*:
>
> > **7** (2) The provincial police force, under the commissioner's direction, must perform the duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice assigned to it or generally to peace officers by the commissioner, under the director's standards or under this Act or any other enactment.
>
> As stated earlier in these reasons, the RCMP in this case were acting in their capacity as provincial constables pursuant to an agreement between British Columbia and Canada.

[32] As previously noted, the Nova Scotia *Police Act* states at s. 42(2):

> **42 (2)** Subject to this Act and the regulations, or any other enactment or an order of the Minister, the authority, responsibility and duty of a member of a municipal police department includes
>
> (a) maintaining law and order;
>
> (b) the prevention of crime;

(c) enforcing the penal provisions of the laws of the Province and any penal laws in force in the Province;

(d) assisting victims of crime;

(e) apprehending criminals and offenders who may lawfully be taken into custody;

(f) laying charges and participating in prosecutions;

(g) executing warrants that are to be executed by peace officers;

(h) subject to an agreement respecting the policing of the municipality, enforcing municipal by-laws within the municipality; and

(i) obeying the lawful orders of the chief officer, and the person shall discharge these responsibilities throughout the Province.

[33] In *Bergen*, Savage J. goes on to state:

> **194** The Supreme Court of Canada discussed the duties of the police in *O'Rourke et al. v. Schacht*, [1976] 1 S.C.R. 53. In that case the police failed to replace a sign warning motorists of an obstruction in the road after it had been knocked down. The plaintiff subsequently collided with the obstruction and suffered damages as a result. The Court adopted the following words of the Ontario Court of Appeal at 65-66:
>
> > Police forces exist in municipal, provincial, and federal jurisdictions to exercise powers designed to promote the order, safety, health, morals, and general welfare of society. It is not only impossible but inadvisable to attempt to frame a definition which will set definite limits to the powers and duties of police officers appointed to carry out the powers of the state in relation to individuals who come within its jurisdiction and protection. The duties imposed on them by statute are by no means exhaustive. It is infinitely better that the courts should decide as each case arises whether, having regard to the necessities of the case and the safeguards required in the public interest, the police are under a legal duty in the particular circumstances.
>
> **195** More recently, the Supreme Court of Canada re-visited first principles in considering whether a duty of care existed between the police and a suspect they are investigating: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129. Chief Justice McLachlin says at para. 20:
>
> > [20] The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a prima facie duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care? (See *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as affirmed

and explained by this Court in a number of cases (*Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 25 and 29-39; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80, at para. 9; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, at paras. 47-50; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18, at para. 47).)

196 In determining whether the relationship between a plaintiff and defendant gives rise to a prima facie duty of care, the first element that must be established is foreseeability. In *Hill*, McLachlin C.J. states at para 22:

> [22] ... In the foundational case of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), Lord Atkin stated:
>
> > 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. ... 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. [Emphasis added; p. 580.]
>
> Lord Atkin went on to state that each person "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (p. 580). Thus the first question in determining whether a duty in negligence is owed is whether it was reasonably foreseeable that the actions of the alleged wrongdoer would cause harm to the victim.

197 Foreseeability alone is insufficient to establish a prima facie duty of care. There must also be a close and direct relationship of proximity or neighbourhood between the plaintiff and defendant. In *Hill*, McLachlin C.J. states at paras. 24-25:

> [24] Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved: *Cooper*, at para. 34. Different relationships raise different considerations. "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic": *Cooper*, at para. 35. No single rule, factor or definitive list of factors can be applied in every case. "Proximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1151, cited in *Cooper*, at para. 35).

> [25] Proximity may be seen as providing an umbrella covering types of relationships where a duty of care has been found by the courts. The vast number of negligence cases proceed on the basis of a type of relationship previously recognized as giving rise to a duty of care. The duty of care of the motorist to other users of the highway; the duty of care of the doctor to his patient; the duty of care of the solicitor to her client -- these are but a few of the relationships where sufficient proximity to give rise to a *prima facie* duty of care is recognized, provided foreseeability is established. The categories of relationships characterized by sufficient proximity to attract legal liability are not closed, however. From time to time, claims are made that relationships hitherto unconsidered by courts support a duty of care giving rise to legal liability. When such cases arise, the courts must consider whether the claim for sufficient proximity is established. If it is, and the *prima facie* duty is not negated for policy reasons at the second stage of the *Anns* test, the new category will thereafter be recognized as capable of giving rise to a duty of care and legal liability. The result is a concept of liability for negligence which provides a large measure of certainty, through settled categories of liability -- attracting relationships, while permitting expansion to meet new circumstances and evolving conceptions of justice.

198 The words "close and direct" are not confined to describing physical proximity. Rather, they are concerned with whether the defendant's actions have a close or direct effect on the plaintiff, such that the defendant should have the plaintiff in mind as being potentially harmed by those actions. In *Hill*, McLachlin C.J. states at para. 29:

> [29] 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". This factor is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed. A sufficiently close and direct connection between the actions of the wrongdoer and the victim may exist where there is a personal relationship between alleged wrongdoer and victim. However, it may also exist where there is no personal relationship between the victim and wrongdoer. In the words of Lord Atkin in Donoghue:
>
> > [A] duty to take due care [arises] when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person

> alleged to be bound to take care would know would be directly affected by his careless act.
>
> [Emphasis in original]

199 The final stage of the duty of care analysis engages residual policy considerations. These are not concerned with the relationship between the parties per se but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. In *Hill*, McLachlin C.J. heard and rejected the following as policy reasons for negating a duty: "...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" (para. 48).

200 Specifically with respect to the discretion involved in police work, McLachlin C.J. says at paras. 51-54:

> [51] The discretion inherent in police work fails to provide a convincing reason to negate the proposed duty of care. It is true that police investigation involves significant discretion and that police officers are professionals trained to exercise this discretion and investigate effectively. However, the discretion inherent in police work is taken into account in formulating the standard of care, not whether a duty of care arises. The discretionary nature of police work therefore provides no reason to deny the existence of a duty of care in negligence.
>
> [52] Police, like other professionals, exercise professional discretion. No compelling distinction lies between police and other professionals on this score. Discretion, hunch and intuition have their proper place in police investigation. However, to characterize police work as completely unpredictable and unbound by standards of reasonableness is to deny its professional nature. Police exercise their discretion and professional judgment in accordance with professional standards and practices, consistent with the high standards of professionalism that society rightfully demands of police in performing their important and dangerous work.
>
> [53] Police are not unlike other professionals in this respect. Many professional practitioners exercise similar levels of discretion. The practices of law and medicine, for example, involve discretion, intuition and occasionally hunch. Professionals in these fields are subject to a duty of care in tort nonetheless, and the courts routinely review their actions in negligence actions without apparent difficulty.
>
> [54] Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals. An appropriate standard of

> care allows sufficient room to exercise discretion without incurring liability in negligence. Professionals are permitted to exercise discretion. What they are not permitted to do is to exercise their discretion unreasonably. This is in the public interest.

[34] The Court in *Bergen* determined that the police owe a duty of care to other users of the roadway when conducting a pursuit. In coming to this conclusion, Savage J. stated:

> **216** The case law is clear that the police owe a duty of care to other users of the roadway when conducting a pursuit. The defendants concede this.
>
> **217** I am not persuaded by the defendants' argument that this duty of care only exists when the police engage in a pursuit that meets the technical definition of the word. Rather, I find that this duty of care exists anytime the police pursue or chase a suspect, within the ordinary meaning of those words. I have already found as fact that the RCMP's actions in this case constituted a chase.
>
> **218** This is in line with the view of the Saskatchewan Court of Queen's Bench in *Nygaard v. Sears Canada Inc.*, 2002 SKQB 239. In that decision, Laing J. found that a Sears' store security officer owed a duty of care to the plaintiff, who was riding a bike when she collided with a suspect being pursued on foot by the security officer. Laing J. states at para. 13:
>
> > [13] Previous Canadian case law amply establishes that persons authorized by law to pursue persons suspected of crime nevertheless owe a duty of care to members of the public placed at risk by such pursuit. This duty of care applies to police officers who have a duty to apprehend suspected criminals, and it follows the same duty rests on persons who are authorized by law to pursue a suspected criminal, but do not have a duty to do so. The duty of care exists because it is reasonably foreseeable that a person who is being pursued will take risks in an attempt to escape apprehension. It is recognized that carelessness on the part of a pursuer that could cause damage to a member of the public establishes the necessary proximity between the pursuer, and the members of the public who are placed at risk.
>
> **219** The B.C. Court of Appeal decision in *Radke* demonstrates that this duty of care comes into play at the point at which it is reasonably foreseeable that a pursuit could occur. As such, the knowledge, decisions, and actions of the police leading up to the initiation of a pursuit are relevant to determining whether the police breached the required standard of care.
>
> **220** In this case I have found as fact that Constables Huff and Brand were both aware of the fact that Mr. Guliker was a flight risk at the time the BOLF was sent out. At this point, it was reasonably foreseeable that Mr. Guliker would flee when approached. The RCMP's additional knowledge that Mr. Guliker was suicidal and

> had stated an intention to jump into traffic only served to heighten the likelihood that Mr. Guliker would flee. Consequently, I find that the RCMP owed a duty of care to other persons using the roadway in their decisions and actions in relation to Mr. Guliker that preceded the actual chase.
>
> **221** I agree with the defendants that there is not a general or overarching private law duty owed by the police to individual members of the public. In my view, however, the cases cited by the defendants where no duty of care existed are distinguishable from the circumstances in this case.

[35] Savage J. went on to examine various cases where courts found a duty was not owed and stated:

> **222** In *Burnett*, Cullen J. found the plaintiff to be from a "large indeterminate pool of potential victims" at risk from "a non-specific threat" (para. 405). In *Project 360*, the threat was arguably more specific but the potential pool of victims was not. MacDonnell J. found the plaintiffs to be "in the same position vis à vis the police as every other member of the public" (para. 28). In *Callan*, Arnold-Bailey J. found that the "plaintiff was not within a discrete class of individuals reasonably known to be affected by the alleged failure" of the police (para. 63).
>
> **223** The findings in *Burnett*, *Project 360*, and *Callen* are not helpful here. Rather, in the words of Cullen J. in *Burnett*, there is in this case a "specific ascertainable [threat] to a particular class of victim" (para. 405).
>
> **224** As soon as it became clear to the RCMP that Mr. Guliker was a flight risk, he constituted a specific ascertainable threat to other users of the roadway, a determinate class of victim to whom it is already established that a duty of care is owed by the police in certain situations: e.g. *O'Rourke, Radke, Doern*.
>
> **225** In other words, because Mr. Guliker constituted a flight risk, the relationship between the RCMP and other users of the roadway was sufficiently close and direct that the RCMP ought to have them in mind as potentially harmed by their actions taken in respect of Mr. Guliker.

[36] In the case at bar, on the facts as pleaded, the police received information both before and after they dealt with Coady suggesting that he should not be driving. The complaints included descriptions of erratic and risky driving. I am satisfied that the relationship between the RCMP and other users of the roadway was sufficiently close and direct that the RCMP ought to have that class of persons (other users of that roadway) in mind as potentially harmed by RCMP actions or inactions taken in respect of Mr. Coady and his vehicle.

[37] In *Bergen* the defendants argued that even if a duty was owed to the roadway users by the RCMP, policy considerations negated any duty of care. In

the case at bar the applicants argue that there are conflicting obligations between the duty owed to Coady to not arbitrarily arrest or detain him and the duty owed to the roadway users. A similar argument was made in *Bergen* where Savage J. stated:

> **227** In *Hill*, McLachlin C.J. found "the potential for conflict between a duty of care in negligence and other duties owed by police" to be an unconvincing reason for rejecting a duty of care on police to a suspect under investigation (para. 48). I conclude similarly in this case.
>
> **228** It seems doubtful that incompatible obligations will result from recognizing that the police owe a duty of care to users of the roadway when dealing with an individual who is a known flight risk. Even if a conflict can reasonably be posited, it must give rise to a real potential for negative policy consequences. I see no such potential on the evidence before me.

[38] In *R. v. Storrey*, [1990] 1 S.C.R. 241, the Supreme Court of Canada detailed the obligations on the police in arresting an individual. At pp. 250-251, Cory J. stated:

> There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. …
>
> In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

[39] Section 83 of the *Motor Vehicle Act* gives the police general statutory authority over vehicles on public roadways. The powers available to the police when dealing with traffic stops were canvassed in *R. v. McLennan (J.W.)* (1995), 138 N.S.R. (2d) 369, [1995] N.S.J. No. 77 (C.A.) where Freeman J.A. stated:

> **[27]** The ALERT demand is not the only price to be paid for the privilege of driving. It is also necessary to comply with the provincial motor vehicle legislation. Relevant provisions of the Nova Scotia **Motor Vehicle Act** R.S.N.S.

1989, c. 293 must be examined. It was first necessary for Constable Byrne to bring the respondent's motor vehicle to a stop. Her authority to do so is found in s. 83 (1) (formerly s. 74(1)) which provides:

> "83(1) It shall be an offence for any person to refuse or fail to comply with any order, signal or direction of any peace officer."

[28] When this is read in the context of the common law authority of police to control traffic on the highways, other provisions of the **Motor Vehicle Act** and provisions of the **Criminal Code**, and note is taken of long standing customary practices, I am left in no doubt that s. 83(1) authorizes peace officers to require vehicles on the highway to come to a stop in response to an appropriate order, signal or direction.

[29] Comparable provisions in other provinces have been held not merely to impose a duty upon drivers but to provide peace officers with a corresponding authority. S. 119 of the Alberta **Highway Traffic Act** was considered by the Supreme Court of Canada in **R. v. Wilson**, [1990] 1 S.C.R. 1291; 108 N.R. 207; 107 A.R. 321; 56 C.C.C. (3d) 142, where it was argued that it did not grant statutory authority for random stops. The court did not accept that contention. That section reads:

> "119 A driver shall, immediately upon being signalled or requested to stop by a peace officer in uniform, bring his vehicle to a stop and furnish any information respecting the driver or the vehicle that the peace officer requires and shall not start his vehicle until he is permitted to do so by the peace officer."

[30] The court held:

> "Though s. 119 imposes duties upon motorists rather than conferring powers on the police, the language of this section is broad enough to authorize random stops of motorists by police officers. In contrast to the legislative provisions considered in **Dedman v. The Queen**, [1985] 1 S.C.R. 2,], supra, s. 119 requires a driver not merely to surrender his licence on demand, but when 'signalled or requested to stop', to 'bring his vehicle to a stop and furnish any information respecting the driver or the vehicle that the peace officer requires'. Constable MacFarlane's actions in stopping the appellant were therefore statutorily authorized by s. 119 of the **Highway Traffic Act**."

[31] While s. 83(1) of the Nova Scotia **Motor Vehicle Act**, which is under Part V of the **Act** respecting Traffic on the Highway, authorizes police officers to stop vehicles, it does not require drivers to furnish information. Once a vehicle comes to a halt further authorization must be sought elsewhere in the **Act**. It was held in **R. v. Baroni** (1989), 91 N.S.R. (2d) 295; 233 A.P.R. 295 (C.A.) at p. 301:

> "I do not find that, after a vehicle has effectively ceased to be part of the traffic moving on the highway and the driver has been detained, s. 74 can

> justify a requirement that the driver perform coordination tests which conscript him against himself through evidence other than a confession emanating from him."

[32] While a randomly stopped driver cannot be conscripted against himself by way of statements or unauthorized tests, he or she can be properly asked to produce his license, permit and insurance. This provides an opportunity for a police officer to make observations of the indicia of impairment passively emanating from the driver.

[33] Section 78 (2) of the **Motor Vehicle Act** provides:

> "78 (2) Every person shall have a valid driver's license in his immediate possession at all times when driving a motor vehicle and shall display the same at all reasonable times on demand of a peace officer."

[34] (A provision similar to s. 78(2) was considered in **R. v. Dedman**, [1985] 2 S.C.R. 2; 60 N.R. 34; 11 O.A.C. 241; 46 C.R. (3d) 193; 20 C.C.C. (3d) 97; 34 M.V.R. 1, and found insufficient, in itself, to justify random stops. Ontario did not have a statutory provision similar to our s. 83(1) authorizing police to stop vehicles until the enactment of s. 189a(1) subsequent to **Dedman**.)

[35] S. 18 of the **Motor Vehicle Act** is a similar provision with respect to vehicle permits. Proof that the driver carried liability insurance must also be produced. Police also have the right to stop a vehicle to check its equipment and mechanical condition.

[36] In my view the authority of peace officers in Nova Scotia under ss. 83(1), 78(2) and s. 18 of the **Motor Vehicle Act** is equivalent to that of peace officers in Alberta under s. 119 of the **Highway Traffic Act**. Therefore I consider **Wilson** to be binding authority in Nova Scotia.

[37] I am also of the view that the authority of peace officers under s. 83(1) is essentially similar to that flowing from Section 189a(1) of the **Ontario Highway Traffic Act**, which provides:

> "189a(1) A police officer, in the lawful execution of his duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop."

[38] Therefore the pronouncements of the Supreme Court of Canada in such definitive cases as **R. v. Dedman, R. v. Hufsky** [1988] 1 S.C.R. 621; 84 N.R. 365, 27 O.A.C. 103; 40 C.C.C. 398; 63 C.R. (3d) 14; 4 M.V.R. (2d) 170; 32 C.R.R. 193 and **R. v. Ladouceur**. [1990] 1 S.C.R. 1257; 108 N.R. 171; 40 O.A.C. 1; 77 C.R. (3d) 110; 56 C.C.C. (3d) 22; 21 M.V.R. (2d) 165, are of binding authority with respect to the relevant provisions of the Nova Scotia Motor Vehicle Act.

[40] *McLennan* was confirmed subsequently in *R. v. Cooper*, 2005 NSCA 47, where Fichaud J.A. found:

> [36] On this point, I note that the police officers did not require objective justification to conduct a traffic stop. **A genuine traffic stop which is authorized by law to check matters such as** sobriety, licensing which includes curfew conditions of license, ownership, insurance **and mechanical fitness of the vehicle**, though it may be arbitrary, is justified under s. 1 of the *Charter*. A detention loses its justification if the police conduct surpasses these "traffic stop" objectives to become a pretext for criminal investigation. *R. v. Hufsky*, [1988] 1 S.C.R. 621, at pp. 636-37; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, at pp. 1288-9; *R. v. Mellenthin*, [1992] 3 S.C.R. 615, at pp. 622, 624; *R. v. MacLennan* (1995), 97 C.C.C. (3d) 69 (N.S.C.A.), at para. 46; *Byfield* at paras. 15-19.
>
> [emphasis added]
>
> [37] Traffic stops are authorized by statute in Nova Scotia. The police power focuses principally on s. 83(1) of the *Motor Vehicle Act*. The leading authority is *MacLennan*, …

[41] In *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, McLachlin C.J., speaking for the majority, stated at para. 98 that "[d]riving automobiles on highways is not a right, but a privilege." Therefore, in the case at bar, even if the police did not have reasonable grounds to detain Mr. Coady for a *Criminal Code* violation (and I make no finding either wayin this regard), they nonetheless would have had the authority to have him park his vehicle while they exercised their powers and duties under the *Motor Vehicle Act*. Considering the low threshold imposed on an application for summary judgment on pleadings, exactly what authority the police could have relied on to deal with Mr. Coady is not relevant to this analysis. It may be more pertinent at a later stage.

[42] The applicants also raise the possibility of indeterminate liability if a possible duty is recognized. Dealing with this argument in *Bergen*, Savage J. stated:

> **229** The defendants submit that recognizing a duty of care in this case will expose the RCMP to indeterminate liability as the duty would extend to anyone who is hurt by a person who sees the police and flees.
>
> **230** First, I have no evidence before me as to how large a class of potential claimants this is. Second, I have already stated that the duty is limited to situations where the police are aware that a suspect is flight risk. Third, this argument ignores the important filtering role played by the standard of care analysis in police negligence claims. For liability to ensue, the police must undertake action or inaction that falls outside the behaviour of a reasonable police officer in the

> circumstances. With all these considerations in mind, I fail to see any spectre of indeterminate liability.

[43] Many cases have held that the statutory and common-law duties of police officers are owed to the public at large and not to particular individuals. As Turnbull J. noted in *Haggerty Estate v. Rogers*, 2011 ONSC 5312:

> **75** It has been consistently held that the statutory and common law duties of police officers are owed to the public at large, and not to particular individuals. In *Project 360 Investments Ltd. (c.o.b. Sound Emporium Nightclub) v. Toronto Police Services Board*, [2009] O.J. No. 2473 at para. 19 (Sup. Ct.), MacDonnell J. of this court stated:
>
> > [I] it is manifest from the statement of the principles governing the delivery of police services set forth in s. 1 of the [*Police Services Act*], the duties of police officers set forth in s. 42(1), and the common law powers and duties incorporated by s. 42(3), that the duty of the police is to the public as a whole and not to specific individuals. To paraphrase language used by the Supreme Court of Canada in *Edwards v. Law Society of Upper Canada*, *supra*, and borrowed by the Court of Appeal in *Williams*, *supra* in fulfilling their duties the police are required to act in the general public interest and to balance "a myriad of competing interests the nature of which are inconsistent with the imposition of a private law duty of care".

[44] In *Haggerty*, Turnbull J. concluded the claim could proceed against the Hamilton Police Service but not the individual police officers:

> **86** While I am not satisfied here that there is sufficient proximity to establish a private duty of care on the part of the individual officers or the civilian employees in their personal capacity, this does not exclude the possibility of a private duty of care being owed by the HPS to an individual. The negligence of an employee who individually does not have a private duty of care can create a private duty of care between the employer implementing the policy and the victim of the incident. I cannot say that based on the proposed pleading, it is plain and obvious the plaintiffs' action cannot succeed.

[45] Turnbull J. was dealing with a motion to strike a statement of claim. In that case the Hamilton Police Service received two 911 calls from someone claiming to be Corey Rogers, an individual wanted for violent crimes in Hamilton. The caller said there was a warrant outstanding for his arrest and provided his exact location. Instead of immediately dispatching the police to arrest Rogers those taking the call advised him that he should come to the police station to turn himself in. A short time later police went to the stated location but Rogers was gone. No warrant was obtained to enter the house. There was no follow up investigation. Six days after

the calls were made Rogers stabbed and killed another man in a bar. The estate sued Rogers, the Hamilton Police and various civilian employees and police officers of the Hamilton Police Service.

[46] Turnbull J. reviewed other cases addressing whether a governmental regulatory authority can owe a private duty of care to someone suffering damage due to the actions of a party who is subject to that regulatory authority. The Court reviewed the distinction between policy decisions and their implementation as discussed by the Supreme Court of Canada in *Just, supra*. *Just* confirmed that the Province owes a private law duty of care to those using roadways. The Court in *Haggerty* then went on to say:

> **56** The applicability of that case to the one at bar is evident in my view. In *Just*, the specific identity of the victims was not known to the Ministry or its employees. Nevertheless, the Court held that if the inspection policy was negligently implemented by the Ministry workers responsible for the inspections, a private law duty of care could arguably exist. In the case at bar, while the specific identity of the victim, Mr. Haggerty, was not known by police at the time of the receipt of the 9-1-1 call, in my view it is not plain and obvious that the Plaintiff cannot succeed in showing that the failure to establish and/or implement procedures to deal with 9-1-1 calls from violent offenders or other known people who may pose a significant risk to members of the community may not found a valid cause of action. The case is a difficult one for the Plaintiff, but not impossible. I further note that in its present Statement of Claim and Cross Claim, the Hamilton Defendants pleaded that Mr. Haggerty knew that the HPS was looking for Mr. Rogers and despite that knowledge, he not only failed to notify the HPS of Rogers' presence at the Dizzy Weasel but he wilfully engaged in a physical altercation with Mr. Rogers knowing of the violent propensities of Rogers. The question of any contributory negligence is best left for trial.
>
> . . .
>
> **58** The *Jane Doe* decision was finalized in 1991, two years after the *Just* case. In reaching her decision in that case, McFarlane J. (as she then was) stated that based on the evidence, she found that the plaintiff had established a private law duty of care.
>
> **59** Clearly, the degree of proximity of the victim to the perpetrator of the crime and the police investigating the matter is relevant in the judicial analysis of any such case. Obvious examples are where the police have a particular suspect under investigation as in *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, *Beckstead v. Ottawa (City) Chief of Police* (1997) 37 O.R. (3d) 62 (C.A.).

> **60** It is clear that in some cases, a duty of care will be recognized in respect of persons who are the complainants or the victims of crime. *Odhavjii v. Woodhouse*, [2003] 3 S.C.R. 263.
>
> **61** In 2007, in *Hill, supra*, McLachlin C.J., writing for the majority of the Supreme Court, stated at para. 27 that her analysis of the issue of proximity and duty was only concerned with "the very particular relationship ... between a police officer and a particularized suspect that he was investigating." However, that was written in the context of the Supreme Court of Canada recognizing a new and distinct cause of action, namely, negligent investigation of a suspect.

[47] In distinguishing cases in which the courts failed to find a duty of care, Turnbull J. stated:

> **69** I have had the opportunity to review each of those cases and they contain significantly different facts from the case at bar. In *Thompson v. Webber*, the plaintiff sued the police for damages he alleged he suffered because of their failure to charge his wife with assault of their children, which he alleged resulted in their alienation from him. In *Fockler*, Marrocco J. of this court dealt with a plaintiff's unusual claim for negligence of the police in investigating his allegations that police officers were influenced to act in a given way because of food and other benefits given to them by a tavern owner who was seeking a liquor licence in the plaintiff's neighbourhood. In *Project 360*, the owner of a night club was not permitted to proceed against the police with his action for damages for interruption of his business allegedly caused by the police allowing a man they were actively investigating and following to enter the plaintiff's night club where he discharged a gun. As in *Wellington*, the plaintiffs were indirectly affected by the alleged negligence of the police. In *Spencer v. Canada (Attorney General)*, the Plaintiff alleged negligence against the RCMP arising from the destruction of her residence by her husband's arson. The Plaintiff had reported to the RCMP that her husband had assaulted her. The Plaintiff's husband was arrested and held overnight. After his release, the Plaintiff's husband returned to the Plaintiff's home and burned it down. In dismissing the Plaintiff's claim against the RCMP on a preliminary motion, the court held that the act of arson was not reasonably foreseeable as all the evidence that the RCMP has on the date of Mr. Spencer's release related to domestic assault allegations and not concerns re property damage.
>
> **70** In the case at bar, Mr. Haggerty was directly affected in the worst way possible by the alleged negligence of the police. Therefore, I find that these cases are distinguishable and that there is a possibility that the HPS and HPSB owed a private duty of care to Mr. Haggerty.

[48] In *Lafleur v. Maryniuk* (1990), 48 B.C.L.R. (2d) 180, 1990 CarswellBC 184 (S.C.), following trial (not a summary judgment application), the Court found as facts that the plaintiff biker was evicted from a party in the early morning hours and was heard revving his motorcycle up and down a roadway. The police arrived and observed that the bikers at the scene had been drinking. It was later determined that the bikers were extremely intoxicated. The bikers were told by the police not to drive. It was recommended by the police that they sleep outside for the night. The police determined that there was nothing more they could do even though they considered it likely the bikers would drive. The bikers did in fact drive away on their motorcycles. The plaintiff biker collided with a pickup truck on a public highway and was seriously injured. The biker sued the RCMP and the driver of the truck for damages. In determining whether the police owed a private duty of care to the injured biker, the Court in *Lafleur*, stated at p. 55 (para. 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…

[49] This was not found to be the case on the facts in *Lafleur*.

[50] In *Barton v. Nova Scotia (Attorney General)*, 2013 NSSC 121, Wright J. decided a motion for summary judgment on pleadings. The plaintiff pleaded malicious prosecution and negligent investigation against both defendants. The statement of claim was essentially directed at the investigation side by the RCMP and the prosecution side by the Crown attorney. Both defendants argued that the pleadings were deficient and failed to disclose a cause of action, whether framed in negligent investigation or malicious prosecution. Wright J. discussed the tort of negligent investigation by the police and stated:

> [31] The tort of negligent investigation by police was recognized in the seminal case decided by the Supreme Court of Canada in **Hill v. Hamilton-Wentworth Regional Police Services Board**, 2007 SCC 41. It was established in that case that police officers owe a duty of care to a suspect when conducting their investigations. That requires them to meet the standard of care of a reasonable police officer in similar circumstances (see para. 74). The other essential elements of a successful negligence action are, of course, the establishment of causation of damages that are compensable in law. As was further stated in **Hill** (at para. 94), the police will not necessarily be absolved of responsibility just because another person, such as a prosecutor, may have contributed to a wrongful conviction causing compensable damage.

[51] In determining that the action could proceed against the Attorney General of Nova Scotia with respect to the tort of malicious prosecution only, and against the Attorney General of Canada with respect to the tort of negligent police investigation only, Wright J. stated:

> [33] Again, while these material facts are sparsely pleaded, I am satisfied that on their face, they are sufficient to disclose a reasonable cause of action. I am not persuaded, notwithstanding the able arguments of counsel, that it is plain and obvious that this aspect of the claim cannot succeed, or that it is absolutely unsustainable or certain to fail. In the result, the summary judgment motion with respect to the cause of action for negligent investigation by the RCMP is dismissed.
>
> [34] Lastly, I turn to the cause of action pleaded against this defendant for the tort of malicious prosecution.
>
> [35] During the course of oral submissions, I queried counsel whether or not the cause of action of malicious prosecution as against the police has ever been recognized in law. Counsel informed the court that in recent years, there have been a few cases in which plaintiffs have combined a cause of action for malicious prosecution together with that of negligent investigation by the police, but that so far as is known, a claim for malicious prosecution has never been successfully made as against the police in this jurisdiction.
>
> [36] For purposes of this motion, it cannot be said that the law is so clear as to deny any possibility that such a cause of action might be successful in the evolution of the common law. This aspect of the motion must therefore be decided on the sufficiency of the plaintiff's pleadings.

[52] In *Castle v. Ontario*, 2014 ONSC 3610, Lederman J. considered an action for damages against the Ontario Provincial Police by family members of an individual ("Low") who was stabbed and killed by his friend ("Reid"). Reid was on probation, having been convicted of assault causing bodily harm less than one year before the incident. A condition of his probation was to keep the peace and be of good behavior. Additionally, Reid had been charged just a couple of months before the incident with failing to report an accident. Following an altercation involving Reid the police attended the scene and observed Reid to be severely intoxicated. Instead of charging Reid, the police took him to his father's residence and released him into his father's custody. Shortly thereafter Reid left the house, became involved in a dispute with Low and stabbed Low to death. In considering the duty of care issue, Lederman J. stated:

> **22** It is apparent that in exceptional circumstances where a special relationship of proximity exists, courts have found that police can owe a private

> law duty of care to individual members of the public. As a result, I find that it is not plain and obvious that the duty of care alleged by the Plaintiffs has been rejected by the courts. I am aware that the *Project 360* and *Patrong* cases demonstrate that police will usually not owe a duty of care to individuals, absent special circumstances. As a result, I am of the view that in order to determine whether the Plaintiffs' claim discloses a reasonable cause of action, I must determine whether their pleading establishes a *prima facie* duty of care under the *Cooper-Anns* test.
>
> **23** Both parties agree that the starting point for determining whether a duty is owed in the circumstances is the governing statutory scheme. The Plaintiffs concede that courts have held that under the *Police Services Act*, R.S.O. 1990, c. P.15 (the "PSA"), police owe duties to the public at large. However, as noted, they argue that courts have nonetheless held that a duty is owed by police to individuals in exceptional circumstances.
>
> **24** The parties agree that if an alleged duty of care has not been recognized or rejected previously, a court must determine whether the foreseeability of harm and proximity between the parties give rise to a *prima facie* duty of care. If such a duty is found, the court must then determine whether there are residual policy considerations that would negate the duty of care: see *Cooper*, at paras. 21-39.

[53] With respect to foreseeability, Lederman J. found:

> **27** I find that it is not plain and obvious that the Plaintiffs' pleading does not demonstrate that Low's harm was foreseeable. The pleading alleges that the OPP knew that Reid was violent and dangerous, that he lived with Low and that he had assaulted him in the past. It also alleges that the police knew that Meecham, a drug addict, could not and had not controlled Reid in the past. In the circumstances, it is not plain and obvious that the harm to Low was not foreseeable.

[54] In determining the question of proximity Lederman J. cited the following comments of the Ontario Court of Appeal:

> **30** In *Williams v. Canada (Attorney General)*, 2009 ONCA 378, 95 O.R. (3d) 401 [*Williams*], the Ontario Court of Appeal discussed the concept of proximity in the following terms, at para. 14:
>
> > Proximity, explained the court in *Cooper*, at para. 31, "is generally used in the authorities to characterize the type of relationship in which a duty of care may arise." Two parties are in proximity with one another if their relationship is sufficiently close and direct that it is fair to require the defendant to be mindful of the legitimate interests of the plaintiff: *Cooper*, at paras. 32-34. The evaluation of whether a relationship is sufficiently proximate to ground a duty of care entails a consideration of the

> "expectations, representations, reliance, and the property or other interests involved. Essentially...factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care": *Cooper*, at para. 34.

[55] Lederman J. went on to review various cases dealing with policy duty of care. He referred to *Jane Doe*, where the court held that proximity was established because the plaintiff was one of a "narrow and distinct group of potential victims."

[56] In *Project 360, supra*, on the other hand, there was found to be no proximity where a night club claimed damages on account of a shooting on its premises by a man who was under police observation; there was no pleading that the police knew of any prior connection between the shooter and the club.

[57] Similarly, in *Patrong v. Banks*, 2013 ONSC 5746, the Court found the police had no knowledge of any particular danger to the plaintiff that was distinct from a threat to the public. Recently, the Ontario Court's view in *Patrong* changed and in *Patrong v. Banks*, 2015 ONSC 3078, Myers J. dismissed a similar motion to strike the statement of claim, the pleadings having been amended after the 2013 summary judgment ruling.

[58] In *Castle*, Lederman J. also discussed *Haggerty*:

> **37** Turnbull J.'s decision in *Haggerty* constitutes, to a certain extent, a departure from *Project 360* and *Patrong*. In that case, he held that Hamilton Police Services ("HPS") owed a duty of care to Haggerty, who was stabbed by his friend Rogers. Rogers, who was on Hamilton's "Most Wanted List" for violent crimes, had called 9-1-1 twice to advise the authorities that he wished to turn himself in. He was told to attend a police station. One hour later, two officers attended at the address from which Rogers had called; however they were unable to locate him. Approximately one week later, the suspect stabbed his friend in the neck at a pub, killing him. An action was brought by the victim's estate and several of his family members. They alleged, *inter alia*, that the police were negligent by failing to act within established policies. They pleaded that the HPS knew of Rogers' propensity to commit "outrageous" violent crimes, and that their claim was analogous to that in *Jane Doe*.
>
> **38** Turnbull J. noted there was a spectrum of cases discussing whether a government regulatory body owes a private law duty of care to an individual. At one end, courts have held that no such duty exists (e.g. *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.); and *Williams, supra*). At the other end, courts have found a

sufficient link between the regulatory authority and the plaintiff that has created a specific proximity of relationship to ground a cause of action. Turnbull J. noted that in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 [*Just*], the Supreme Court held that the provincial government, in carrying out its highway inspection policy, owed a duty of care to the victims of a falling boulder despite the fact that the specific identity of the victims was not known to the province.

39 Turnbull J. also referred to *Heaslip Estate v. Mansfield Ski Club Inc*., 2009 ONCA 594, 96 O.R. (3d) 401 [*Heaslip*]. In that case, the Ontario Court of Appeal found proximity between a victim suffering from a tobogganing accident and the provincial government, which was alleged to have not followed established policies in the delivery of air ambulance services. The court found that the plaintiff's relationship with the government authority was direct, rather than mediated by a party subject to the regulatory control of a governmental authority.

40 Justice Turnbull ultimately held that a *Cooper-Anns* analysis was unnecessary, as the plaintiffs' claim against the HPS fell within an established category. He stated the following, at para. 72:

> 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 geographical proximity with Rogers.

41 It is possible that Turnbull J.'s decision is not a departure from *Project 360* and *Patrong* to the extent that his finding was grounded in the government's failure to follow established policies. In any event, the answer to this is not required for the purposes of this decision. After considering these cases, I find that it is not plain and obvious that the facts alleged by the Plaintiffs do not establish a special relationship of proximity between the OPP and Low.

42 The Plaintiffs allege the following facts in their Amended Statement of Claim:

> * That the OPP officers personally knew Reid and his family. They knew that Reid was a troubled youth with anger problems and knew he was a dangerous individual, particularly when intoxicated;
>
> * That they knew Reid was severely intoxicated, and had reasonable and probable grounds to suspect that he had assaulted a group of youths at the fair;
>
> * That they knew that Reid had been convicted of assault causing bodily harm, and was in breach of his probation terms;
>
> * That they knew that Low was a resident of Meecham's house, where Reid was dropped off;

> * That they knew Reid had attacked and assaulted Low on two prior occasions;
>
> * That they knew that Meecham had failed to control Reid in the past; and
>
> * That they knew that Reid and Low had been together earlier in the day, and ought to have known that Reid would likely rejoin Low.
>
> **43** The OPP's knowledge that Low was previously assaulted by Reid, and that the two lived together, arguably creates a "close and direct" relationship between the OPP and Low. If these facts are true, the police would arguably have known that Low was in a narrow group of Reid's potential victims, similar to the cases in *Jane Doe* and *Haggerty*. Importantly, this knowledge distinguishes the present case from *Project 360* and *Patrong*.
>
> **44** In *Project 360*, MacDonnell J. found that the plaintiff nightclub had not pleaded that the police had any knowledge that the shooter had any link with the nightclub, or that the police had any relationship with the plaintiffs prior to the shooting. In *Patrong*, a key aspect of Chiappetta J.'s reasoning was that the police had no knowledge of Patrong prior to the shooting, and he had no greater claim to police protection than other residents of Malvern or the general public. Justice Chiappetta noted that in *Jane Doe*, the plaintiff pleaded that she was readily identifiable as a potential victim, that the police specifically decided not to warn her, and that the police also admitted that they should have issued a warning in the circumstances. Unlike in *Jane Doe*, the police did not know that Patrong was a specific and likely target. The pleadings did not contain allegations that sufficiently distinguished the relationship between the police and Patrong from that between the police and the general public.
>
> **45** In the instant case, the Plaintiffs have pleaded that the police officers were aware of Reid's relationship with Low, and more importantly, that Low had been a victim of Reid's in the past. The extent to which police knew Reid posed a danger to Low is a factual issue that ought to be explored further. It could be that the OPP's knowledge in this regard will be insufficient to ground a duty of care. However, at this stage of the action - on a pleadings motion - it is not plain and obvious that proximity has not been established.

[59] In *Spencer v. Canada (Attorney General)*, 2010 NSSC 446, Pickup J. dealt with a motion for summary judgment on evidence. One of the plaintiffs, Pamela Spencer, reported to the RCMP that her husband, Bruce Spencer, had assaulted her. Bruce Spencer was arrested and held in custody overnight. The next day he was released from custody and driven back to the family home by one of the RCMP officers, who did not remain on scene. Shortly thereafter, Bruce Spencer set fire to the family home, was arrested and was charged with arson. The plaintiffs commenced an action pleading, *inter alia*, negligence on the part of named RCMP officers.

[60] As Pickup J. noted, the test for summary judgment on evidence is more onerous than that in the instant case of summary judgment on pleadings. Since there were no material facts in issue between the parties, Pickup J. found that the burden shifted to the plaintiff to show that their claim was one with a real chance of success. He noted that the plaintiffs were required during a summary judgment on evidence application to put their best foot forward or risk losing. The plaintiffs did not submit any affidavit evidence and did not otherwise call evidence. Instead they merely cross-examined one of the police officers on his affidavit.

[61] In determining whether the plaintiffs had met their burden to show their case had a real chance of success, Pickup J. examined the allegation of negligence and the individual liability of the RCMP officers in the context of the agreed material facts and the evidence on the motion. In concluding that the RCMP do not owe a duty of care to victims of crime, Justice Pickup broke the question down into issues of foreseeability and proximity:

> [42] With respect, all of the evidence that the RCMP had on the day of Mr. Spencer's release related to the domestic assault allegations. There was no evidence before them to suggest property damage. What would be expected would be a physical confrontation with Ms. Spencer, and the RCMP took action to deal with that in consultation with Ms. Spencer.
>
> [43] On all of the evidence, I am not satisfied that it would be reasonably foreseeable that Bruce Spencer would burn down the family home upon his release. On the first part of *Anns* test, I am not satisfied that the plaintiffs have a real chance of success, that is, there is no real chance of success in establishing that a duty of care existed. However, in the event I am wrong in this determination, I will go on to determine whether or not there is proximity between the parties.

[62] In relation to the proximity issue Justice Pickup reviewed the applicant's position:

> [45] The Attorney General says the plaintiffs have not provided any basis to suggest that the relationship between the RCMP and the plaintiffs is within an established category of proximity or analogous to one. They say that the starting point for an analysis in relation to whether a duty between the RCMP and the plaintiffs ought to be recognized is in the legislation under which the RCMP operate. In the case of actions of a statutory authority, Abella, J. held in *Syl Apps Treatment Centre (D.B.) v. Children's aid Society of Halton (Region)*, 2007 SCC 38, [2007] S.C.J. No. 38 at para. 27:
>
> > When the relationship occurs in the context of a statutory scheme, the governing statute is a relevant context for assessing the sufficiency of the

> proximity between the parties .... As this Court said in [*Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80]: "Factors giving rise to proximity must be grounded in the governing statute when there is one" (para. 9).

[63] Pickup J. also noted that the applicants claimed that there was no proximity because of the conflict between the RCMP's public duty and a possible private duty of care owed to victims of crime. He went on to consider the plaintiff's argument on proximity:

> [51] The plaintiffs say that this case falls within the categories of cases in which proximity has already been recognized by the courts. They refer to *Neilsen v. Kamloops*, [1984] 2 S.C.R. 2, where the court found a duty of care by a municipality to prospective purchasers of real estate to inspect housing developments without negligence, and *Just v. British Columbia*, [1989] 2 S.C.R. 1228, where the court found a duty of care on government authorities who had undertaken a policy of road maintenance, finding that they were required to do so in a non-negligent manner. As a result, the plaintiffs says the RCMP owe the requisite duty "where they have undertaken the responsibility to non-negligently administer their own operational decisions in their broad criminal jurisdiction".

[64] In determining that no courts had previously recognized proximity in these circumstances, Justice Pickup stated:

> [52] With respect, I do not agree that these cases would support the plaintiffs' position that proximity, in these circumstances, has been recognized by the court.
>
> [53] Moreover, in *Project 360 Investments Ltd. v. Toronto Police Services Board*, 2009 CarswellOnt 3418 (Ont. Sup. Ct. J.), [2009] O.J. No. 2473, the court held that police do not owe a duty to individual victims, MacDonnell J. said, at para. 19:
>
> > In my opinion, it is manifest from the statement of the principles governing the delivery of police services set forth in s. 1 of the PSA, the duties of police officers set forth in s. 42(1), and the common law powers and duties incorporated by s. 42(3), that the duty of the police is to the public as a whole and not to specific individuals. To paraphrase language used by the Supreme Court of Canada in *Edwards v. Law Society of Upper Canada, supra*, and borrowed by the Court of Appeal in [*Williams v. Canada (Attorney General)*, 2009 ONCA 378] in fulfilling their duties the police are required to act in the general public interest and to balance "a myriad of competing interests the nature of which are inconsistent with the imposition of a private law duty of care".
>
> [54] The plaintiffs say that the RCMP were the only organization or person to whom they could turn for support and protection and that this created a very clear

> proximity between the RCMP and victims of crime. The plaintiffs' counsel concludes by saying that the foreseeable criteria has been met and that the RCMP would fall within one of the judicially recognized categories of proximity.
>
> [55] The Attorney General says there is no case law that would support a duty of care by police officers to victims of crime. In *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] S.C.J. No. 41, the Supreme Court of Canada recognized a duty of care between a police officer and a suspect they are investigating. However, the court made it clear that it was not determining a duty of care in the case of other relationships. McLachlin, C.J.C. said, for the majority, at para. 27:
>
> > Before moving on to the analysis of proximity in depth, it is worth pausing to state explicitly that this judgment is concerned only with a very particular relationship - the relationship between a police officer and a particularized suspect that he is investigating. There are particular considerations relevant to proximity and policy applicable to this relationship, including: the reasonable expectations of a party being investigated by the police, the seriousness of the interests at stake for the suspect, the legal duties owed by police to suspects under their governing statutes and the *Charter* and the importance of balancing the need for police to be able to investigate effectively with the protection of the fundamental rights of a suspect or accused person. 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, ...
>
> [56] I am satisfied after reviewing the *Royal Canadian Mounted Police Act* that the primary purpose of this legislation is to impose a duty on the RCMP to protect the public. I am not satisfied that the courts have recognized a relationship of proximity between the RCMP and victims of crime, nor am I prepared to implement such a duty of care in this case.

[65] Justice Pickup then went on to determine that even if there was a duty of care owed to the plaintiffs, the RCMP had not breached the standard of care and found their actions were reasonable in the circumstances. He concluded the plaintiffs had no real chance of success at trial on this issue.

[66] Regarding the individually named RCMP officers, Justice Pickup determined that there was no duty of care owed by the individual members who were acting within their scope of employment. He went on to say that even if he did find a duty of care he was not satisfied that they breached the standard of care in these circumstances.

[67] The *Spencer* decision was considered in *McClements v. Pike*, 2012 YKSC 84. In that case the plaintiff had called the RCMP because her daughter had started a fire in her home. An officer arrived to conduct an investigation. The plaintiff's daughter was highly and visibly intoxicated. She said she would burn down the house when the officer and the member of the fire department left. Instead of removing the daughter from the home, the RCMP took the plaintiff to another location for the night. That evening the daughter set fire to the house and destroyed it.

[68] The plaintiff commenced an action against the RCMP for negligent investigation. The defendant applied for summary judgment on pleadings claiming that there was no basis in law to find that the RCMP owed the plaintiff a private law duty of care. Gower J. found:

> **80** Based on my review of the case law, I am not satisfied that it is absolutely beyond doubt that the plaintiff will not be able to establish that the defendants owed her a private duty of care to conduct a diligent investigation into her initial arson complaint. While the authorities are divergent, the principles enunciated by the Supreme Court in *Hill v. Hamilton-Wentworth* may well be capable of supporting a conclusion that such a duty existed in these particular circumstances. Any doubt in that regard should be resolved in favour of the plaintiff. Therefore, the application to strike is dismissed.

In limiting the decision in *Spencer* to its specific facts, Gower J. stated:

> **58** In *Spencer*, the first question addressed by the trial court was foreseeability. Not surprisingly, the court held that all of the evidence acquired by the RCMP, as of the day of the husband's release from custody, related to domestic assault allegations. They had no evidence to suggest that the husband would inflict property damage. Consequently, the court was not satisfied that it would be reasonably foreseeable that the husband would burn down the family home on his release. Therefore, the *ratio* of the case turned on foreseeability and in that regard the court concluded that the plaintiff had no real chance of success in establishing that a duty of care existed.
>
> **59** While the trial judge in *Spencer* went on to consider proximity, he did so only in the event he was wrong on foreseeability. Thus, his determinations with respect proximity were *obiter dicta*. In any event, he relied heavily upon *Project 360*, which I have already found to be distinguishable, in concluding that the legislation governing the RCMP created a duty to the public as a whole and not to specific individuals (para. 53). Further, he found that *Hill v. Hamilton-Wentworth* was restricted to "suspects" and did not determine a duty of care in the case of other relationships (para. 55). I have not found *Hill* to be so restrictive and indeed

> I suggest there is much language in the case capable of supporting a duty of care *vis-à-vis* specific victims. Finally, the trial judge in *Spencer* seemed to accept the RCMP's arguments that there were compelling policy reasons to refuse to find proximity where an alleged private duty of care would conflict with the discharge of a statutory or public duty (para. 57). Counsel for the defendants made similar arguments in the case at bar, which I will return to shortly.

[69] In *Patrong v. Banks*, 2015 ONSC 3078 Myers J. dismissed the motion to strike. The pleadings had been amended following the 2013 decision in *Patrong*, *supra*. In dismissing the second motion, Myers J. found:

> **74** The plaintiffs in this case are not trying to turn the police into an insurer of private regulated market conduct or of all victims of police public policy decision-making. They were hurt, they say, because police officers negligently failed to fulfil an order with foreseeable consequences -- a person was shot exactly when and where the senior police officials who ordered the arrest feared. There was a close causal connection between the misconduct and the harm. Although Mr. Patrong was a random victim, he was "close and direct" as the actions of the police had a close or direct effect on him as victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed. They did not necessarily know that he would be shot that day but they knew that a small number of random victims is always an inherent risk in drive-by shootings. There is no risk of indeterminate liability in an indeterminate amount for an indeterminate time to an indeterminate class. There could only be a handful of victims in a known location. There is no limit on the government's ability to govern threatened by this case. On the contrary, if the facts as pleaded are true, it is fair and reasonable for the government to compensate the Patrongs and the failure of the court to require the police to do so would be among the "intolerable outcomes" predicted in *Imperial Tobacco*.
>
> **75** Efforts by the plaintiffs to try to fit this case into the precedents, while successful in my view, remain largely beside the point. The issue that occupied pages of pleading and days of court time before Chiappetta J. and me, - the minute analysis of the degree of contact between the police and Mr. Patrong - have little bearing on the real issue -- should the police compensate the plaintiffs if their story is true. *Hill* says expressly that proximity does not require actual knowledge of the plaintiff by the defendant. Every case is different. The forest grown from the broad, qualitative analysis of proximity, has been lost for the trees of *Jane Doe*. The subjective moral judgment needed to answer that question of proximity does not turn on just the narrowest analysis of the degree of knowledge of the victim by the wrongdoer. The considerations have to be broader in public authority liability cases where we know that government serves the public at large under public law duties.

[70] Myers J. also determined:

> **77** Stratas J.A. suggests that rather than suing a public authority for negligence, the appropriate analytical tool is an application for judicial review involving remedial discretion and a remedial monetary mandate. Just as surgeons can be expected to first recommend surgery rather than medical treatment, perhaps the most likely approach of a statutory court is a statutory remedy. However, in my view, Stratas J.A. is absolutely correct in pointing out, with much authoritative support, the inaptness of making decisions in these cases based solely on narrow private law factors. The fact that government is involved necessarily broadens the scope of the inquiry.
>
> 78 The common law is flexible enough to develop principles that fit cases brought against government actors before the Her Majesty's courts of inherent jurisdiction. I accept that under a private law analysis on the amended pleading liability should be available. First, Mr. Patrong pleads that he was known to the police and used as bait to fit *Jane Doe* if read as a statutory prescription. Second, in my view, the harm pleaded was reasonably foreseeable and the parties were sufficiently close so that police ought to have been considering the Patrongs as being within the recognizable class of people who should be entitled to claim compensation. They are among a very limited class of people in a very defined and limited area where the defendants' alleged neglect would most foreseeably cause injury -- just like *Jane Doe* and just like a negligent airplane engine manufacturer. But, the third and best approach, in my view, is balancing the justice and fairness of liability in light of the nature and quality of the wrong, the interests of the victims that were affected, the causal link between the negligent act and the injuries alleged, the public nature of the defendants, whether their wrongful acts were policy based or operational, whether the decisions that they took were mandatory or discretionary, whether there is a statutory prohibition against a damages award, whether harm was imminent, whether the harm was located in a defined area or at large, whether harm was likely to a limited number of individuals as opposed to society at large, whether a finding of liability might be inconsistent with the defendants' public duties, and any other factor that is properly germane to the common law's ultimate question of *whether it is fair and reasonable that the police ought to compensate the plaintiffs for the losses alleged*.

[71] I agree that *Spencer* must be read in the context of cases such as *Kamloops*, *Bergen*, *Knox*, *Just*, *Hill* and *Patrong*. *Spencer* supports the general rule that the police do not owe a duty to victims of crime. I do not believe that this is inconsistent with the law regarding police powers and the duty to ensure highway safety. In the case at bar I find that the plaintiffs, being users of the highway heading in the direction of Mr. Coady, were within an identifiable group of people whom the RCMP would or should reasonably have in mind as persons potentially

harmed by their actions. The plaintiffs definitely had significant legal interests in the RCMP investigation of Mr. Coady. The safety of Mr. Walsh and the Newalta vehicle were directly at stake. As the Supreme Court of Canada said in *Cooper*, at para. 34:

> [34] Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[72] In *Attis et al. v. Her Majesty the Queen in Right of Canada* (2008), 93 O.R. (3d) 35 (C.A.), the plaintiffs alleged that their breast implants leaked or ruptured, causing catastrophic medical consequences. They further alleged that the *Food and Drug Act* imposed a duty on Health Canada to ensure that individual members of the Canadian public were protected from devices that may cause them harm. The Ontario Court of Appeal agreed the legislation provided that the government duty was owed to the public as a whole and not to the individual consumer. However, the court allowed that once a government actor has direct communication or interaction with an individual in the operational implementation of government policy, a duty of care may arise, particularly where individual safety is at risk and stated:

> [65] When the government interacts with an individual in the context of an ordinary accident, the relationship is obviously both close and direct. In contrast, when government decides what laws to enact or how to allocate limited resources for the general good, it has neither a close nor direct relationship with the individual. The job of the government is to govern and, in the course of doing so, to make broad-based policy decisions for the benefit of the public collectively, even if those decisions may not have positive implications for all individuals. It would severely curtail the government's ability to govern if it were found to have the necessary direct and close relationship to an individual member of the public to support a claim in tort for bad government policy decisions. It is accepted that, if the government fails to make good decisions in these areas, the public will demonstrate its displeasure at election time. Thus, the law is clear that the government does not have a proximate relationship to an individual Canadian when it makes decisions of a political, social or economic nature: see *A.O. Farms Inc. v. Canada*, [2000] F.C.J. No. 1771, 28 Admin. L.R. (3d) 315 (T.D.).
>
> [66] However, once the government has direct communication or interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk. If, for example,

> a government decides to issue a warning about a specific danger, in this case medical devices, or to make representations about the safety of a product, the government may be liable for the manner in which it issues that warning, or the content of those representations, especially where the government disseminates the warning or representation knowing that the individual consumer will rely on its contents and the individual does so. [page 57]
>
> [67] For example, Goudge J.A. found that a proximate relationship was pleaded in *Sauer* on the basis of specific public representations made by Canada that it was acting to protect the interests of the commercial cattle farmers. The Supreme Court in *Finney* also found a duty of care where a clearly identifiable complainant directly interacted with the *Barreau* in the context of its professional complaints process. Accordingly, a duty of care can be assumed and evidenced by the interaction between the parties, depending on the closeness of the relationship.

[73] In *Jane Doe, supra*, the Ontario Divisional Court, *per* Moldaver J. (as he then was) determined that the plaintiff, who was the victim of a serial rapist, was owed a duty of care by the police. At para. 19, Moldaver J. determined:

> **19** The plaintiff further alleges that by the time she was raped, the defendants knew or ought to have known that she had become part of a narrow and distinct group of potential victims, sufficient to support a special relationship of proximity. According to the allegations, the defendants knew:
>
> (1) that the rapist confined his attacks to the Church-Wellesley area of Toronto;
>
> (2) that the victims all resided in second or third floor apartments;
>
> (3) that entry in each case was gained through a balcony door; and
>
> (4) that the victims were all white, single and female.

[74] The proximity arose from the police's prior knowledge that the rapist confined his attacks to a specific area of Toronto, that the victims all lived in second or third floor apartments, that the entry in each case was gained through the victim's balcony door and that the victims were all white single females. This was an identifiable class of potential victims. In the case at bar the plaintiffs were highway users headed toward Mr. Coady on the same highway. This is also an identifiable class of victims. Although Mr. Walsh did not have direct contact with the RCMP he was still a person who had a need for protection as a potential victim. As someone traveling on the highway toward Mr. Coady he was within a distinct class of persons. The plaintiffs do not fall into a large indeterminate class of victims. Rather they are persons with a special and distinctive risk.

[75] In *B.M. v. British Columbia (Attorney General)*, 2004 BCCA 402, the court dealt with a situation where the plaintiff was in an abusive relationship with R.K., who had a criminal record for violence. R.K. had a previous assault conviction in relation to the plaintiff. During the meeting between the plaintiff and R.K. a dispute erupted. The plaintiff went to the police but the officer she spoke to did not investigate her complaint. The provincial attorney general had a policy requiring officers to be proactive in investigating complaints of domestic violence. Subsequently, R.K. telephoned the plaintiff and an argument ensued. That night R.K. broke into the plaintiff's house, shot and killed the plaintiff's friend, wounded one of her daughters, set the house on fire, and shot himself.

[76] The plaintiff in *B.M.* claimed that the named police officer was negligent in failing to take steps to adequately investigate her complaint. The British Columbia Court of Appeal determined that the police owed the plaintiff a private duty of care. Two of the three judges on appeal agreed that there was a duty of care arising in the circumstances. Two of the judges however found no causation on the evidence.

[77] In the case at bar, the applicants argue that in the context of the *Anns* test I must still decide whether the duty of the police to the public at large narrows to a private duty to an individual in these circumstances. As noted by McLachlin C.J. in *Hill v. Hamilton-Wentworth*, *supra*, the proximity analysis involves a determination of whether the relationship between the alleged wrongdoer and the victim was close and direct:

> **29** 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". This factor is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the *actions* of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed. A sufficiently close and direct connection between the actions of the wrongdoer and the victim may exist where there is a personal relationship between alleged wrongdoer and victim. However, it may also exist where there is no personal relationship between the victim and wrongdoer. In the words of Lord Atkin in *Donoghue*:
>
> > [A] duty to take due care [arises] when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close

> and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. [Emphasis added; p. 581.]
>
> . . .
>
> **33** Other factors relating to the relationship suggest sufficient proximity to support a cause of action. The relationship between the police and a suspect identified for investigation is personal, and is close and direct. We are not concerned with the universe of all potential suspects. The police had identified Hill as a particularized suspect at the relevant time and begun to investigate him. This created a close and direct relationship between the police and Hill. He was no longer merely one person in a pool of potential suspects. He had been singled out. The relationship is thus closer than in *Cooper and Edwards*. In those cases, the public officials were not acting in relation to the claimant (as the police did here) but in relation to a third party (i.e. persons being regulated) who, at a further remove, interacted with the claimants.

[78] In *Knox* and *Bergen*, although the victims were not particularized, they were within a geographically proximate and identifiable class of individuals and as such were owed a duty of care. In the case at bar, the police knew or should have known that highway users who might potentially encounter Mr. Coady would be directly affected by their actions regarding him.

Conclusion

[79] I am not satisfied that it is plain and obvious that the plaintiffs' claim against the RCMP and the individual officers cannot succeed. Despite the fact that they may have a difficult case, the plaintiffs should be permitted to move forward with their cause of action. 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.

[80] The essential questions in this case will likely be:

- Have the plaintiffs adduced evidence that Mr. Coady and/or his vehicle posed a danger calling for his and/or its removal from the highway?

- Was it unreasonable for the RCMP to allow Mr. Coady to continue down the highway?

- Was there a special relationship of proximity between the police and the plaintiffs at the time of the collision?

[81] I have concluded that it is not plain and obvious that the pleadings are unsustainable. Of course, it may be that the plaintiffs' claims will not succeed at a later stage of the proceedings, but at the pleadings stage, the statements of claim will be upheld. The applicants' motion is dismissed.

Arnold, J.