

Cooper v. Hobart, [2001] 3 S.C.R. 537, 2001 SCC 79

Mary Francis Cooper

Appellant

v.

**Robert J. Hobart and Her Majesty the Queen in right of
the Province of British Columbia**

Respondents

and

**The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General for New Brunswick,
Her Majesty the Queen in right of Alberta,
the Minister of Justice and the Attorney General for Alberta,
the British Columbia Securities Commission,
the Ontario Securities Commission,
and the Alberta Securities Commission**

Interveners

Indexed as: Cooper v. Hobart

Neutral citation: 2001 SCC 79.

File No.: 27880.

2001: June 20; 2001: November 16.

Present: McLachlin C.J. and Gonthier, Major, Bastarache, Binnie, Arbour and
LeBel JJ.

on appeal from the court of appeal for british columbia

Torts -- Negligence -- Duty of care -- Statutory regulators -- Registrar of mortgage brokers -- Registered mortgage broker using funds for unauthorized purposes -- Investors alleging that losses would have been avoided or diminished if Registrar had acted sooner to suspend broker's licence -- Whether Registrar owed private law duty of care to members of investing public giving rise to liability in negligence for economic losses that investors sustained -- Role of policy concerns in determining scope of liability for negligence.

In October 1997, the Registrar of Mortgage Brokers, a statutory regulator, suspended a registered mortgage broker's licence and issued a freeze order in respect of its assets because funds provided by investors were allegedly used by the broker for unauthorized purposes. The appellant, one of over 3,000 investors who advanced money to the broker, brought an action against the Registrar alleging that he breached the duty of care that he owed to the appellant and other investors. The appellant asserted that by August 1996 the Registrar was aware of serious violations of the B.C. *Mortgage Brokers Act* committed by the broker and should have acted earlier to suspend its licence and to notify the investors that the broker was under investigation. According to the appellant, if the Registrar had acted more promptly, the losses suffered by the investors would have been avoided or diminished. The appellant applied to have the action certified as a class proceeding. The trial judge concluded that the pleadings disclosed a cause of action in negligence and that the plaintiffs should be permitted to bring a class action. The Court of Appeal reversed the trial judge's decision, holding that the pleadings did not disclose a cause of action against the Registrar.

Held: The appeal should be dismissed. The Registrar did not owe a duty of care to investors.

In assessing whether a duty of care should be imposed, the approach set out in *Anns* is still appropriate in the Canadian context. Different types of policy considerations are involved at each stage of *Anns*. At the first stage, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The proximity analysis focuses on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for the proximity analysis is to determine whether there are analogous categories of cases in which proximity has previously been identified. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. In order to recognize a new duty of care, mere foreseeability is not enough. The plaintiff must show proximity -- that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. They must be grounded in the governing statute when there is one.

If the plaintiff is successful in establishing a *prima facie* duty of care, the question at the second stage is whether there exist residual policy considerations which justify denying liability. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. The second stage of *Anns* will seldom arise, as questions of liability will be determined primarily by reference to established and analogous categories of recovery. Where a duty of care in a novel situation is alleged, it is necessary to consider the second stage of the *Anns* test.

Here, the circumstances do not disclose proximity sufficient to establish a *prima facie* duty of care. This case does not fall within, nor is it analogous to, a

category of cases in which a duty of care has previously been recognized. Furthermore, this is not a situation in which a new duty of care should be recognized. The *Mortgage Brokers Act* does not impose on the Registrar a duty of care to investors with mortgage brokers regulated by the Act. The regulatory scheme governing mortgage brokers provides a general framework to ensure the efficient operation of the mortgage marketplace. Even though to some degree the provisions of the Act serve to protect the interests of investors, the overall scheme of the Act mandates that the Registrar's duty of care is not owed to investors exclusively but to the public as a whole. Accordingly, although in this case the Registrar might reasonably have foreseen that losses to investors would result if he were careless in carrying out his duties under the Act, there was insufficient proximity between the Registrar and the investors to ground a *prima facie* duty of care.

Even if a *prima facie* duty of care had been established under the first branch of the *Anns* test, it would have been negated at the second stage for overriding policy reasons. The decision of whether to suspend a broker involves both policy and quasi-judicial elements. The *prima facie* duty of care is also negated on the basis of the distinction between government policy and the execution of policy. Further, the spectre of indeterminate liability would loom large if a duty of care were recognized as between the Registrar and investors in this case. Finally, to impose a duty of care in these circumstances would be effectively to create an insurance scheme for investors at great cost to the taxpaying public.

Cases Cited

Considered: *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Hercules*

Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165; **referred to:** *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Endean v. Canadian Red Cross Society* (1998), 48 B.C.L.R. (3d) 90; *Dorman Timber Ltd. v. British Columbia* (1997), 40 B.C.L.R. (3d) 230; *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12; *Donoghue v. Stevenson*, [1932] A.C. 562; *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241; *Yuen Kun Yeu v. Attorney-General of Hong Kong*, [1988] 1 A.C. 175; *Davis v. Radcliffe*, [1990] 2 All E.R. 536; *Alcock v. Chief Constable of the South Yorkshire Police*, [1991] 4 All E.R. 907; *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80.

Statutes and Regulations Cited

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4.

Mortgage Brokers Act, R.S.B.C. 1996, c. 313, ss. 4, 5, 6, 7, 8, 14, 20.

Authors Cited

Street, Harry. *The Law of Torts*, 6th ed. London: Butterworths, 1976.

APPEAL from a judgment of the British Columbia Court of Appeal (2000), 184 D.L.R. (4th) 287, [2000] 6 W.W.R. 8, 135 B.C.A.C. 266, 75 B.C.L.R. (3d) 54, 49 C.C.L.T. (2d) 148, [2000] B.C.J. No. 426 (QL), 2000 BCCA 151, allowing the

respondents' appeal from a decision of the British Columbia Supreme Court (1999), 68 B.C.L.R. (3d) 274, [1999] B.C.J. No. 690 (QL). Appeal dismissed.

David P. Church, Andrew J. Pearson and Ian G. Schildt, for the appellant.

D. Clifton Prowse, Karen Horsman and Keith L. Johnston, for the respondents.

Donald J. Rennie, for the intervener the Attorney General of Canada.

Sara Blake, for the intervener the Attorney General for Ontario.

Written submissions only by *Cedric L. Haines, Q.C.*, for the intervener the Attorney General for New Brunswick.

Tim Hurlburt, for the interveners Her Majesty the Queen in right of Alberta and the Minister of Justice and Attorney General for Alberta.

James A. Sasha Angus and Lorne Herlin, for the intervener the British Columbia Securities Commission.

Neil Finkelstein and Johanna M. Superina, for the interveners the Ontario Securities Commission and the Alberta Securities Commission.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND MAJOR J. –

1 The present appeal revisits the *Anns* test (from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.)) and, in particular, highlights and hones the role of policy concerns in determining the scope of liability for negligence. The appellant is an investor who alleges that the Registrar of Mortgage Brokers, a statutory regulator, is liable in negligence for failing to oversee the conduct of an investment company which the Registrar licensed. The question is whether the Registrar owes a private law duty of care to members of the investing public giving rise to liability in negligence for economic losses that the investors sustained. Such a duty of care is as yet unrecognized by Canadian courts. For the reasons that follow, we find that this is not a proper case in which to recognize a new duty of care. In the course of these reasons, we attempt to clarify the distinctive policy considerations which impact each stage of the *Anns* analysis.

I. Facts

2 Eron Mortgage Corporation (“Eron”) was registered as a mortgage broker under the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313 (“the Act”), from early 1993 until 1997. On October 3, 1997, the respondent, Robert J. Hobart, in his capacity as the Registrar under the Act, suspended Eron’s mortgage broker’s licence and issued a freeze order in respect of its assets.

3 Eron acted as a mortgage broker for large syndicated loans. It arranged for numerous lenders (or investors) to pool their funds for the purpose of making a single loan to a borrower, which was typically a developer of commercial real estate. The syndicated loans were made in the name of Eron or one of its related companies, which held the security in trust for the investors.

4 It is alleged that the funds provided by the investors were used by Eron for several unauthorized purposes, such as funding interest payments on other non-performing mortgages and paying for personal items for the benefit of the principals of Eron. It is currently estimated that \$222 million is outstanding to the investors on these loans. Investors will likely realize only \$40 million from the security taken from the loans, leaving a shortfall of \$182 million.

5 Soon after Eron's mortgage licence was suspended, it went out of business. The appellant Mary Francis Cooper ("Cooper"), one of over 3000 investors who advanced money to Eron, brought an action against the Registrar. The Statement of Claim alleged that the Registrar breached the duty of care that he allegedly owed to the appellant and other investors. The appellant asserted that by August 28, 1996, the Registrar was aware of serious violations of the Act committed by Eron but that he failed to suspend Eron's mortgage broker's licence until October 3, 1997 and failed to notify investors that Eron was under investigation by the Registrar's office. According to the appellant, if the Registrar had taken steps to suspend or cancel Eron's mortgage broker's licence at an earlier date, the losses suffered by the investors would have been avoided or diminished.

6 The appellant applied to have the action certified as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. Pursuant to s. 4(1)(a), in order to certify an action as a class proceeding, a court must first determine whether the pleadings disclose a cause of action. The cause of action alleged in the Statement of Claim is negligence which requires, among other things, that a duty of care in tort law be owed by the Registrar to the appellant investor. Therefore, the question was whether the Registrar of Mortgage Brokers, a statutory regulator, owes a private law

duty of care to members of the investing public for alleged negligence in failing to properly oversee the conduct of an investment company licensed by the regulator.

II. Judicial History

A. *British Columbia Supreme Court* (1999), 68 B.C.L.R. (3d) 274

7 Tysoe J. held that the plaintiffs should be permitted to bring a class action. He applied the test cited in *Endean v. Canadian Red Cross Society* (1998), 48 B.C.L.R. (3d) 90 (C.A.) that unless it is plain and obvious that no reasonable cause of action is disclosed, the plaintiff will have met the requirement set out in s. 4(1)(a) of the *Class Proceedings Act* that there is a cause of action.

8 In determining whether there was clearly no cause of action, the trial judge turned to the test set out by the House of Lords in *Anns* as restated by the British Columbia Court of Appeal in *Dorman Timber Ltd. v. British Columbia* (1997), 40 B.C.L.R. (3d) 230, at p. 247:

- (a) Should the defendant have foreseen that damage was likely to result from the negligent actions? If yes, then there is a *prima facie* duty of care.
- (b) Are there any considerations which would negative or limit the *prima facie* duty of care?

9 The trial judge answered the first question in the affirmative, as the Registrar would have reasonably contemplated that carelessness on his part was likely to cause damage to the plaintiff, a person dealing with a mortgage broker. He went on to answer the second question in the negative, holding that there were no

considerations negating or limiting the *prima facie* duty of care on the basis of four sub-questions:

- i) Was the defendant's action the result of a policy decision of a public body?
- ii) Is the defendant protected by statute or the common law?
- iii) Is the defendant exempted from liability by a 'good faith' clause in a statute?
- iv) Is the relationship between the parties so distant and tenuous, or is the plaintiff unknown to the defendant, so that it can be said that to impose liability would be unjust?

10 The trial judge found that, in order to answer the first three sub-questions, an appreciation of the "full factual matrix" would be required. Therefore, a trial was needed. The fourth sub-question raised the potential problem of indeterminate liability. The trial judge stated that the prospect of indeterminate liability should negative the *prima facie* duty of care unless it is determined that one of the purposes of the Legislature in enacting the Act was to protect a class of persons, of which the plaintiff is a member. He concluded that it was not plain and obvious that the Legislature did not intend to create a private law duty of care owed by the Registrar in favour of investors dealing with mortgage brokers. In reaching this conclusion, the trial judge referred to various powers and duties of the Registrar which suggested that the Act was intended to protect investors.

11 The trial judge concluded that the pleadings disclosed a cause of action. On June 10, 1999, he certified the action as a class proceeding and stayed the third party proceedings until the conclusion of the trial on the common issues.

12 The Court of Appeal reversed the trial judge’s decision, holding that the pleadings did not disclose a cause of action against the Registrar.

(1) Newbury J.A. (Southin J.A. concurring)

13 Newbury J.A. for the majority considered the *Anns* test as it was applied by the Supreme Court of Canada in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2. First, “is there a ‘sufficient relationship of proximity or neighbourhood’ such that, in the reasonable contemplation of the Registrar, carelessness on his part might be likely to cause damage to the latter; and if so, are there considerations that ought to negative, reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which it may give rise?” (para. 32)

14 Under the first branch of the *Anns/Kamloops* test, Newbury J.A. was not satisfied that the test for a *prima facie* duty of care was met. Even though the Registrar might reasonably have foreseen that losses to investors would result if he was careless in carrying out his duties under the Act, it cannot be said that there was a sufficiently close relationship between the parties. In fact, according to Newbury J.A., there was “no ‘relationship’” between the plaintiff Cooper and the Registrar as the plaintiff was not even aware of the Registrar’s existence.

15 Newbury J.A. turned to the second branch of the *Anns/Kamloops* test in the event that she erred on the first branch of the test. She concluded that there are substantial factors that militate against finding a duty of care in this case. Specifically, the statutory scheme was not intended to create a private law duty of care owed by the Registrar to investors. If it were otherwise, the potential liability would be virtually indeterminate given that the Act imposed no limit on, and the Registrar had no means

of controlling, the number of persons who could invest or lend money via a mortgage broker or the amount of money that could be advanced.

(2) Huddart J.A.

16 While Huddart J.A. agreed with the result reached by Newbury J.A., she approached the conclusion from a slightly different perspective. The starting point for her analysis was the nature of the Registrar’s office, an office created and defined by statute.

17 The Registrar’s responsibilities under the Act require him to make difficult discretionary decisions in the public interest. The public interest is not synonymous with the interest of investors. The Registrar’s decisions must be “multi-factorial”, taking into account various interests.

18 The question to be answered was whether the Act itself indicates that the taxpayers through their elected representatives agreed to be responsible for private loss to persons in the situation of the investors. Huddart J.A. could not find that intention in the Act, particularly in the face of s. 20 which precludes an action against the Registrar for the performance of duties under the Act or Regulations “unless it was done in bad faith” (para. 82).

19 Huddart J.A. concluded that the only duty that the Registrar owed to the plaintiff Cooper was the duty to exercise due care in ascertaining the scope of his authority (from *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, at paras. 52-54). He interpreted his statutory authority correctly.

III. Issue

20 Does a statutory regulator owe a private law duty of care to members of the investing public for (alleged) negligence in failing to properly oversee the conduct of an investment company licensed by the regulator?

IV. Analysis

21 Canadian courts have not thus far recognized the duty of care that the appellants allege in this case. The question is therefore whether the law of negligence should be extended to reach this situation. While the particular extension sought is novel, the more general issue of how far the principles of liability for negligence should be extended is a familiar one, and one with which this Court and others have repeatedly grappled since Lord Atkin enunciated the negligence principle in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), almost 70 years ago. That case introduced the principle that a person could be held liable only for reasonably foreseeable harm. But it also anticipated that not all reasonably foreseeable harm might be caught. This posed the issue with which courts still struggle today: to what situations does the law of negligence extend? This case, like so many of its predecessors, may thus be seen as but a gloss on the case of *Donoghue v. Stevenson*.

22 In *Donoghue v. Stevenson* the House of Lords revolutionized the common law by replacing the old categories of tort recovery with a single comprehensive principle – the negligence principle. Henceforward, liability would lie for negligence in circumstances where a reasonable person would have viewed the harm as

foreseeable. However, foreseeability alone was not enough; there must also be a close and direct relationship of proximity or neighbourhood.

23 But what is proximity? For the most part, lawyers apply the law of negligence on the basis of categories as to which proximity has been recognized in the past. However, as Lord Atkin declared in *Donoghue v. Stevenson*, the categories of negligence are not closed. Where new cases arise, we must search elsewhere for assistance in determining whether, in addition to disclosing foreseeability, the circumstances disclose sufficient proximity to justify the imposition of liability for negligence.

24 In *Anns, supra*, at pp. 751-52, the House of Lords, *per* Lord Wilberforce, said that a duty of care required a finding of proximity sufficient to create a *prima facie* duty of care, followed by consideration of whether there were any factors negating that duty of care. This Court has repeatedly affirmed that approach as appropriate in the Canadian context.

25 The importance of *Anns* lies in its recognition that policy considerations play an important role in determining proximity in new situations. Long before *Anns*, courts in Canada and elsewhere had recognized that the decision of how far to extend liability for negligence involved policy considerations. As H. Street put it in *The Law of Torts* (6th ed. 1976), at p. 108, citing a Canadian case, *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241 (N.S.C.A.), at pp. 254-55:

. . . it cannot be too strongly stressed that the use of [the] test of foreseeability in order to determine whether there is a duty-relationship between the parties conceals the true judicial process -- that test is in fact a conclusion embracing within it, and yet concealing the identity of, the

several considerations of policy, and the balancing of interests which have led the court to decide that a duty is owed.

26 The House of Lords in *Anns* for the first time expressly recognized the policy component in determining the extension of the negligence principle. However, it left doubt on the precise content of the first and second branches of the new formulation of the negligence principle. This gave rise to debate -- debate which the submissions in this case revive. Was the first branch concerned with foreseeability only or foreseeability and proximity? If the latter, was there duplication between policy considerations relevant to proximity at the first stage and the second stage of the test?

27 To some extent, these concerns are academic. Provided the proper balancing of the factors relevant to a duty of care are considered, it may not matter, so far as a particular case is concerned, at which "stage" it occurs. The underlying question is whether a duty of care should be imposed, taking into account all relevant factors disclosed by the circumstances. *Anns* did not purport to depart from the negligence test of *Donoghue v. Stevenson* but merely sought to elucidate it by explicitly recognizing its policy component.

28 We continue in the view, repeatedly expressed by this Court, that the *Anns* two-stage test, properly understood, does not involve duplication because different types of policy considerations are involved at the two stages. In our view, *Anns* continues to provide a useful framework in which to approach the question of whether a duty of care should be imposed in a new situation.

29 Nevertheless, it is important from the point of view of methodology and clarity in the law to be clear on what falls to be considered at each stage of the *Anns*

test. In this connection, it is useful to consider the leading English case on that question. The Judicial Committee of the Privy Council held in *Yuen Kun Yeu v. Attorney-General of Hong Kong*, [1988] 1 A.C. 175, that to find a *prima facie* duty of care at the first stage of the test there must be reasonable foreseeability of the harm plus something more. As will be seen, we agree with this conclusion. The Privy Council went on to opine that *Anns*' second branch, negation for policy reasons, would seldom come into play. If this is read as a suggestion that policy is not important in determining whether the negligence principle should be extended to new situations, we would respectfully differ. As Street points out, the *Donoghue v. Stevenson* foreseeability-negligence test, no matter how it is phrased, conceals a balancing of interests. The quest for the right balance is in reality a quest for prudent policy. The difference in the two positions, if there is one, may turn on how one defines policy; the Privy Council in *Yuen Kun Yeu* appears to regard policy as confined to practical considerations dictating immunity despite a close relationship and foreseeability.

30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may

be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

31 On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that “proximity” is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

32 On the first point, it seems clear that the word “proximity” in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. “Proximity” is the term used to describe the “close and direct” relationship that Lord Atkin described as necessary to grounding a duty of care in *Donoghue v. Stevenson, supra*, at pp. 580-81:

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.

...

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.]

33 As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24, *per* La Forest J.:

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

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.

35 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. As stated by McLachlin J. (as she then was) in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1151: “[p]roximity 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” (cited with approval in *Hercules Managements, supra*, at para. 23). Lord Goff made the same point in *Davis v. Radcliffe*, [1990] 2 All E.R. 536 (P.C.), at p. 540:

. . . it is not desirable, at least in the present stage of development of the law, to attempt to state in broad general propositions the circumstances in

which such proximity may or may not be held to exist. On the contrary, following the expression of opinion by Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43-44, it is considered preferable that 'the law should develop categories of negligence incrementally and by analogy with established categories'.

36

What then are the categories in which proximity has been recognized?

First, of course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. This has been extended to nervous shock (see, for example, *Alcock v. Chief Constable of the South Yorkshire Police*, [1991] 4 All E.R. 907 (H.L.)). Yet other categories are liability for negligent misstatement: *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), and misfeasance in public office. A duty to warn of the risk of danger has been recognized: *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189. Again, a municipality has been held to owe a duty to prospective purchasers of real estate to inspect housing developments without negligence: *Anns, supra*; *Kamloops, supra*. Similarly, governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner: *Just v. British Columbia*, [1989] 2 S.C.R. 1228, *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445, etc. Relational economic loss (related to a contract's performance) may give rise to a tort duty of care in certain situations, as where the claimant has a possessory or proprietary interest in the property, the general average cases, and cases where the relationship between the claimant and the property owner constitutes a joint venture: *Norsk, supra*; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited.

37 This brings us to the second stage of the *Anns* test. As the majority of this Court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in *Hercules Managements, supra*, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

38 It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons – more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. Similar considerations may arise where the decision in question is quasi-judicial (see *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80).

39 The second step of *Anns* generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations that would negative the duty of care. In this sense, we agree with the Privy Council in *Yuen Kun Yeu* that the second stage of *Anns* will seldom arise and that questions of liability will be determined primarily by reference to established and analogous categories of recovery. However, where a duty of care in a novel situation is alleged, as here, we believe it necessary to consider both steps of the *Anns* test as discussed above. This ensures that before a duty of care is imposed in a new situation, not only are foreseeability and relational proximity present, but there are no broader considerations that would make imposition of a duty of care unwise.

V. Application of the Test

40 The appellants submit that the Registrar of Mortgage Brokers owed them, as investors with a firm falling under the Registrar's administrative mandate, a duty of care giving rise to liability for negligence and damages for losses that they sustained. The investors allege that the Registrar should have acted earlier to suspend Eron or warn them of Eron's breaches of the Act's requirements, and that their losses are traceable to the Registrar's failure to act more promptly.

41 The first question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The first inquiry at this stage is whether the case falls within or is analogous to a category of cases in which a duty of care has previously been recognized. The answer to this question is no.

42 The next question is whether this is a situation in which a new duty of care should be recognized. It may be that the investors can show that it was reasonably foreseeable that the alleged negligence in failing to suspend Eron or issue warnings might result in financial loss to the plaintiffs. However, as discussed, mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiffs must also show proximity – that the Registrar was in a close and direct relationship to them making it just to impose a duty of care upon him toward the plaintiffs. In addition to showing foreseeability, the plaintiffs must point to factors arising from the circumstances of the relationship that impose a duty.

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.

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

45 A brief review of the relevant powers and duties of the Registrar under the Act confirms this conclusion. Part 1 sets out the Registrar’s regulatory powers with respect to the operation of mortgage brokers and submortgage brokers in British Columbia. Specifically, s. 4 provides that the Registrar must grant registration or renewal of registration to an applicant if, in his opinion, the applicant is “suitable” for

registration and the proposed registration is “not objectionable”. He may also attach such conditions and restrictions to the registration as he considers necessary. Once registered, a mortgage broker must comply with s. 6 of the Regulations which mandates that registrants maintain proper books and records and file annual financial statements with the Registrar.

46 Sections 5 and 6 of the Act cover the investigatory powers of the Registrar. Pursuant to s. 5, the Registrar may, and on receipt of a sworn complaint must, investigate any matter arising out of the Act or Regulations. In pursuit of this purpose, the Registrar may examine any records and documents of the person being investigated. He may summon witnesses and compel them to give evidence on oath or otherwise and to produce records, property, assets or things in the same manner as the court does for the trial of civil actions. Section 7 allows the Registrar to “freeze” funds or securities where he has made or is about to make a direction, decision, order or ruling suspending or cancelling the registration of a person under the Act. He may also apply to the court for an appointment of a receiver, or a receiver and manager, or trustee of the property of the person.

47 Under s. 8, the Registrar may, after giving a person registered under the Act an opportunity to be heard, suspend or cancel any registration if, in his opinion, any of the following or other conditions apply: the person would be disentitled to registration if the person were an applicant under s. 4; the person is in breach of a condition of registration; the person is a party to a mortgage transaction which is harsh and unconscionable or otherwise inequitable; or the person has conducted or is conducting business in a manner that is otherwise prejudicial to the public interest. Section 14 prohibits a broker from making any false, misleading or deceptive statements in any advertisement, circular or similar material. Part 2 of the Act is

directed towards the protection of borrowers, investors and lenders, mandating in part specific disclosure requirements by mortgage lenders and their agents. Section 8 of the Regulations provides that every direction, decision, order or ruling of the Registrar refusing registration, refusing to renew registration, suspending registration or cancelling registration shall be made in writing and shall be open to public inspection.

48 Finally, s. 20 exempts the Registrar or any person acting under his authority from any action brought for anything done in the performance of duties under the Act or Regulations, or in pursuance or intended or supposed pursuance of the Act or Regulations, unless it was done in bad faith.

49 The regulatory scheme governing mortgage brokers provides a general framework to ensure the efficient operation of the mortgage marketplace. The Registrar must balance a myriad of competing interests, ensuring that the public has access to capital through mortgage financing while at the same time instilling public confidence in the system by determining who is “suitable” and whose proposed registration as a broker is “not objectionable”. All of the powers or tools conferred by the Act on the Registrar are necessary to undertake this delicate balancing. Even though to some degree the provisions of the Act serve to protect the interests of investors, the overall scheme of the Act mandates that the Registrar’s duty of care is not owed to investors exclusively but to the public as a whole.

50 Accordingly, we agree with the Court of Appeal *per* Newbury J.A.: even though the Registrar might reasonably have foreseen that losses to investors in Eron would result if he was careless in carrying out his duties under the Act, there was insufficient proximity between the Registrar and the investors to ground a *prima facie* duty of care. The statute cannot be construed to impose a duty of care on the Registrar

specific to investments with mortgage brokers. Such a duty would no doubt come at the expense of other important interests, of efficiency and finally at the expense of public confidence in the system as a whole.

51 Having found no proximity sufficient to found a duty of care owed by the Registrar to the investors, we need not proceed to the second branch of the *Anns* test and the question of whether there exist policy considerations apart from those considered in determining a relationship of proximity, which would negative a *prima facie* duty of care, had one been found. However, the matter having been fully argued, it may be useful to comment on those submissions.

52 In our view, even if a *prima facie* duty of care had been established under the first branch of the *Anns* test, it would have been negated at the second stage for overriding policy reasons. The decision of whether to suspend a broker involves both policy and quasi-judicial elements. The decision requires the Registrar to balance the public and private interests. The Registrar is not simply carrying out a pre-determined government policy, but deciding, as an agent of the executive branch of government, what that policy should be. Moreover, the decision is quasi-judicial. The Registrar must act fairly or judicially in removing a broker's licence. These requirements are inconsistent with a duty of care to investors. Such a duty would undermine these obligations, imposed by the Legislature on the Registrar. Thus even if a *prima facie* duty of care could be posited, it would be negated by other overriding policy considerations.

53 The *prima facie* duty of care is also negated on the basis of the distinction between government policy and the execution of policy. As stated, the Registrar must make difficult discretionary decisions in the area of public policy, decisions which

command deference. As Huddart J.A. (concurring in the result) found, the decisions made by the Registrar were made within the limits of the powers conferred upon him in the public interest.

54 Further, the spectre of indeterminate liability would loom large if a duty of care was recognized as between the Registrar and investors in this case. The Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system.

55 Finally, we must consider the impact of a duty of care on the taxpayers, who did not agree to assume the risk of private loss to persons in the situation of the investors. To impose a duty of care in these circumstances would be to effectively create an insurance scheme for investors at great cost to the taxpaying public. There is no indication that the Legislature intended that result.

56 In the result the judgment of the British Columbia Court of Appeal is affirmed and the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Church & Company, Vancouver.

Solicitor for the respondents: The Ministry of the Attorney General, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the interveners Her Majesty the Queen in Right of Alberta and the Minister of Justice and Attorney General for Alberta: The Minister of Justice and Attorney General for Alberta, Edmonton.

Solicitor for the intervener the British Columbia Securities Commission: The British Columbia Securities Commission, Vancouver.

Solicitors for the interveners the Ontario Securities Commission and the Alberta Securities Commission: Blake, Cassels & Graydon, Toronto.