Tort Law Update: 2009

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TOPIC ONE: DUTY OF CARE: POST - *COOPER V. HOBART*

The most significant development in Canadian tort law in the last decade was the Supreme Court of Canada's decisions in *Cooper v. Hobart* (2001), 206 D.L.R. (4th) 193 and *Edwards v. L.S.U.C.* (2001), 206 D.L.R. (4th) 211. These decisions, with their "refined" duty of care formula, have affected not only the negligence liability of public or governmental authorities, but all of negligence law.

The new duty formula consists of three elements:

(i) The plaintiff must be a "foreseeable" victim of harm;
(ii) There must be a relationship of "proximity" between the plaintiff and the defendant;
(iii) There must not be any residual policy concerns which either limit or negate a *prima facie* duty of care.

In determining when and how this duty of care should be applied, counsel and courts have to resolve the following issues.

To which types of negligence cases does this new duty of care formula apply?

The Supreme Court in *Cooper* indicated that the refined duty of care formula, which added the elements of "proximity" and "policy" to the "foreseeability of harm" requirement, normally need only be used when the relationship between the parties is a "novel" one. Where the relationship falls into a recognized duty category, or into an analogous category, proximity can be presumed. The Court illustrated this point by referring to a number of categories in which proximity has been recognized in previous cases.

The difficulty with this approach has become evident in the recent jurisprudence. Courts are uncertain as to whether a relationship has already been judicially recognized as one of "proximity" and hence tend to complete a full *Cooper* analysis in most cases. For example, the Supreme Court of Canada itself saw the following disputes as novel ones, which did not fall into judicially recognized proximity relationships - the relationship between the Registrar of Mortgage Brokers and defrauded investors (*Cooper v Hobart*); the relationship between the Law Society of Upper Canada and defrauded clients of a lawyer (*Edwards v Law Society of Upper Canada*); the relationship between a social host and a passenger injured in a car accident caused by an inebriated guest *(Childs v Desormeaux* [2006] 1 S.C.R. 643); the relationship between Child Welfare officials and the family of an apprehended child (*D.(B.) v. Children's Aid Society of Hamilton* (2007), 40 C.C.L.T. (3d) 1); the relationship between investigating police and a

suspect (*Hill v Hamilton-Wentworth Police Services Board* (2007), 50 C.C.L.T. (3d) 1; and the relationship between a project owner and sub-contractors (*Design Services Ltd. v. R.* 2008 SCC 22). Courts of Appeal and lower courts also invariably do full *Cooper* analyses in the cases that come before them.

A plaintiff is clearly advantaged if the court can be convinced that a duty claimed for falls into a recognized duty category. A good example of this is found in the New Brunswick Court of Appeal judgment in *Adams v Borell* [2008] NBCA 62 (CanLII). In that case, potato farmers were suing the government for its alleged negligence in preventing and managing a virus outbreak. This type of case has typically failed to meet the proximity requirement of the duty formula (see for example cases involving the spread of SARS, West Nile Virus, the regulation of building materials, the regulation of medical devices and so on). Because, however, the plaintiffs were able to convince the court that the case was analogous to pre-*Cooper* negligent inspection cases, relating to highways and buildings, proximity was accepted.

Is foreseeability of harm ever an issue?

Almost invariably foreseeability of harm, the first element of the duty formula, is found to have existed. It is my view that the issue of foreseeability, when considered in reference to duty, should be approached at a high level of generality. The question should not be whether on the facts of the specific case, the plaintiff was a foreseeable victim of harm, but whether in this type of case, it is foreseeable that negligence on the part of the defendant could cause harm to a class of victims, which includes the plaintiff. Fact specific concerns relating to a specific plaintiff, are best considered at the standard of care or remoteness of injury stages of the duty analysis. It was therefore surprising to me to see that the Supreme Court of Canada was prepared to dismiss the action brought by an injured plaintiff against a social host because it found that on the facts of that case, harm to the plaintiff was not foreseeable (see *Childs v Desormeaux*). It is foreseeable in a general sense that negligence on the part of a social host could result in a car accident caused by an inebriated guest, and this should have been acknowledged by the Supreme Court in the *Childs* case.

What is "proximity"?

It is impossible to define "proximity". The best that the Supreme Court has done is to explain what the purpose of this requirement is. It is to limit a *prima facie* duty relationship to cases where it would be "just and fair" to impose it. Courts have said they would look at the following factors in determining this - the expectations of the parties, representations, reliance, the existence of property interests, the propinquity of the parties, and the closeness of the causal relationship between the act done and the harm suffered. The Supreme Court has said that proximity deals with policy concerns that go to the "internal" relationship between the parties. If it would not be "just and fair" to impose a duty of care on the defendant, there is no proximity.

The best one can do in trying to understand what proximity is, is to examine what courts have been doing. Look at the Supreme Court of Canada judgments, for example. In the public authority cases, such as *Cooper*, the Court denied proximity because it did not think that recognizing a duty between the Registrar of Mortgage Brokers and defrauded clients would be