ONCE MORE UNTO THE BREACH: *JAMES V. BRITISH COLUMBIA* AND PROBLEMS WITH THE DUTY OF CARE IN CANADIAN TORT LAW

RUSSELL BROWN* AND SHANNON BROCHU**

I. INTRODUCTION

In the wake of the Supreme Court of Canada's reconfiguration in *Cooper v. Hobart*[1] of the test for establishing a duty of care in negligence law, commentators predicted[2] and have since described[3] a more conservative approach to imposing liability in the law of negligence. In general, a phenomenon of retrenchment seems indisputable. Both summarily[4] and after

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* Assistant Professor, Faculty of Law, University of Alberta.

** Student-at-Law, Weir Bowen LLP. We thank Lewis Klar and Jason Neyers for their comments on an earlier draft. We are also grateful for discussions with Karen Horsman and John Murphy, and for a helpful exchange on the University of Alberta Faculty of Law Blog with Gareth Morley, which can be seen online: <http://ualbertalaw.typepad.com/faculty/2007/08/pure-economic-l.html#comments>; <http://ualbertalaw.typepad.com/faculty/2007/08/proximity-and-s.html#comments>.

1 2001 SCC 79, [2001]3 S.C.R. 537 [*Cooper*].

2 Lewis Klar, "Foreseeability, Proximity and Policy," Case Comment, (2002) 25 Advocates' Q. 360 [Klar, "Foreseeability"]; Jason Neyers, "Distilling Duty: The Supreme Court of Canada Amends *Anns*," Note, (2002) 118 Law Q. Rev. 221; Philip H. Osborne, *The Law of Torts*, 3d ed. (Toronto: Irwin Law, 2007) at 70-72; Stephen G.A. Pitel, "Negligence: Canada Remakes the *Anns* Test," Case Comment, (2002) 61 Cambridge L.J. 252.

3 Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Butterworths, 2006) at 294 [Linden & Feldthusen, *Canadian Tort Law*]. See also Chelsey F. Crosbie, "SCC should clarify its reclarification in *Cooper*" *The Lawyers Weekly* (28 April 2006) 12.

4 Here we also include applications for certification of class proceedings. See e.g. *A.L. v. Ontario (Minister of Community and Social Services)* (2006), 83 O.R. (3d) 512 (C.A.); *Attis v. Canada (Minister of Health)* (2007), 157 A.C.W.S. (3d) 454 (Ont. Sup. Ct. J.); *Benaissa v. Canada (Attorney General)*, 2005 FC 1220, 142 A.C.W.S. (3d) 946 (T.D.); *Berg v. Saskatchewan*, 2004 SKCA 136, [2005] 2 W.W.R. 218; *Burgess (Litigation guardian of) v. Canadian National Railway* (2006), 85 O.R. (3d) 798 (C.A.), leave to appeal to S.C.C. refused, 31698 (8 February 2007); *Carlstrom v. Professional Engineers of Ontario* (2004), 134 A.C.W.S. (3d) 698 (Ont. C.A.); *Deep v. Ontario* (2005), 138 A.C.W.S. (3d) 572 (Ont. C.A.); *Eliopoulos v. Ontario (Minister of Health & Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.), leave to appeal to S.C.C. refused, 31783 (24 May 2007); *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115, 256 D.L.R. (4th) 674; *Exploits Valley Air Services Ltd. v. College of the North Atlantic*, 2005 NLCA 54, 258 D.L.R. (4th) 66, leave to appeal to S.C.C. refused, 31181 (16 March 2006); *Farzam v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1659, 284 F.T.R. 158 (T.D.); *Granite Power Corp. v. Ontario* (2004), 72 O.R. (3d) 194 (C.A.); *Holland v. Saskatchewan (Minister of Agriculture, Food and Rural Revitalization)*, 2008 SCC 42, [2008] S.C.J. No. 43 (QL) (as to all but one of the claims) [*Holland*]; *Holtslag v. Alberta*, 2006 ABCA 51, 380 A.R. 133, leave to appeal to S.C.C. refused, 31411 (14 September 2006); *Homburg Canada v. Halifax (Regional Municipality)*, 2003 NSCA 61, 216 N.S.R. (2d) 67; *Klein v. American Medical Systems* (2006), 84 O.R. (3d) 217 (Sup. Ct. J. (Div. Ct.)); *Kimpton v. Canada* (Attorney General), 2004 BCCA 72, 236 D.L.R. (4th) 324; *MacQueen v. Ispat Sidbec*, 2006 NSSC 208, 246 N.S.R. (2d) 213; *Mitchell Estate v. Ontario* (2004), 71 O.R. (3d) 571 (Sup. Ct. J. (Div. Ct.)); *Morgis v. Thompson Kernaghan & Co.* (2003), 65 O.R. (3d) 321 (C.A.); *Premakumaran v. Canada*, 2006 FCA 213, [2007] 2 F.C.R. 191, leave to appeal to S.C.C. refused, 31605 (16 November 2006); *Brady v. Canada (Minister of Health)* (2007), 159 A.C.W.S. (3d) 177 (Ont. Sup. Ct. J.); *Ribeiro v. Vancouver (City of)*, 2005 BCSC 395, 137 A.C.W.S. (3d) 1249; *Rogers v. Faught* (2002), 212 D.L.R. (4th) 366 (Ont. C.A.); *Wuttunee v. Merck Frosst Canada Ltd.*, 2007 SKQB 29, 4 W.W.R. 309.

trial,[5] courts have dismissed claims that might arguably have passed muster under the more relaxed "foreseeability" test for a prima facie duty of care first articulated in *Anns v. Merton London Borough Council*[6] and later endorsed in *Kamloops (City of) v. Nielsen*.[7] Even the Supreme Court of Canada's own pronouncements confirm *Cooper*'s constrictive effect on negligence liability.[8] Such developments have led Allen Linden and Bruce Feldthusen to lament that *Cooper* has "largely halted the expansion of negligence law in Canada."[9]

There are, however, exceptions to this litany of woe for plaintiffs.[10] In this comment, we propose to examine one of the more remarkable and, in our view, unfortunate examples — the pronouncement of the British Columbia Court of Appeal in *James v. British Columbia*,[11] certifying the class proceeding brought by an unemployed sawmill worker against the Minister of Forests. As we will demonstrate, *James* instantiates the very mischief that *Cooper* was intended to overcome in failing to give appropriate regard to the requisite "proximity" between a plaintiff's loss and a statutory public authority's impugned conduct. We will also consider how *James* implicates *Cooper*'s prevailing conception of duty of care in Canadian negligence law, both generally and in cases against statutory public authorities. Specifically, we will argue that the outcome in *James* affirms earlier arguments[12] that

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5 *Canadian Taxpayers Federation v. Ontario (Minister of Finance)* (2004), 73 O.R. (3d) 621 (Sup. Ct. J.); *Canus Fisheries Ltd. v. Canada (Customs and Revenue Agency)*, 2005 NSSC 283, 237 N.S.R. (2d) 166; *Tubal Cain Properties Ltd. v. Halifax (Regional Municipality)*, 2002 NSSC 277, 208 N.S.R. (2d) 206; *Wynberg v. Ontario* (2005), 252 D.L.R. (4th) 10 (Ont. Sup. Ct. J.), rev'd on other grounds (2006), 82 O.R. (3d) 561 (C.A.), leave to appeal to S.C.C. refused, 31713 (12 April 2007).

6 [1977] UKHL 4, [1978] A.C. 728, [1977] 2 All E.R. 492 [*Anns* cited to All E.R.]. There, Lord Wilberforce prescribed (at 498) his famous two-stage test for the recognition of a duty of care:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a *prima facie* duty of care arises. Secondly ... it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

7 [1984] 2 S.C.R. 2.

8 *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83 [*Syl Apps*]; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 [*Odhavji*].

9 Linden & Feldthusen, *Canadian Tort Law*, *supra* note 3 at 294.

10 The exceptions, however, consist mostly of successful resistance to summary dismissal applications. See e.g. *Abarquez v. Ontario* (2005), 257 D.L.R. (4th) 745 (Ont. Sup. Ct. J.) [*Abarquez*]; *Baric v. Tomalk* (2006), 146 A.C.W.S. (3d) 387 (Ont. Sup. Ct. J.); *Grant v. Canada (A.G.)* (2005), 77 O.R. (3d) 481 (Sup. Ct. J.) [*Grant*]; *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (C.A.); *V.M. v. Stewart*, 2003 BCSC 1292, 229 D.L.R. (4th) 342, aff'd 2004 BCCA 458, 245 D.L.R. (4th) 162, leave to appeal to S.C.C. refused, 30595 (24 February 2005); *Law Society of Newfoundland and Labrador v. 755165 Ontario*, 2006 NLCA 60, 273 D.L.R. (4th) 1; *Odhavji*, supra note 8 (but only as against the defendant police chief); *Ogden v. Gulf Log Salvage Co-Operative Association*, 2004 BCSC 53, 128 A.C.W.S. (3d) 38; *Sauer v. Canada (Attorney General)*, 2007 ONCA 454, 159 A.C.W.S. (3d) 306, leave to appeal to S.C.C. refused, 32247 (17 July 2008); *Swift Current (City of) v. Saskatchewan Power Corp.*, 2007 SKCA 27, 5 W.W.R. 387; *Williams v. Canada (Attorney General)*, [2005] O.J. No. 3508 (Sup. Ct. J.) (QL) [*Williams*] (but only as against the defendant Province of Ontario); *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108; *Holland*, *supra* note 4 (but only on one of three claims). Interestingly, the decisions in *Abarquez*, *Grant*, and *Williams* were all rendered by the same judge, Cullity J.

11 2005 BCCA 136, 8 W.W.R. 417 [*James*].

12 See especially Russell Brown, "Still Crazy After All These Years: *Anns*, *Cooper v. Hobart* and Pure Economic Loss" (2003) 36 U.B.C. L. Rev. 159 [Brown, "Still Crazy"]; Ernest J. Weinrib, "The Disintegration of Duty" (2006) 31 Advocates' Q. 212 at 245 [Weinrib, "Disintegration of Duty"].

Cooper's duty analysis is conceptually flawed, inasmuch as it conflates what is a fundamentally juridical question with non-juridical "policy" concerns. As such, we will be concerned with the universal requirement which any truly *legal* theory of tort liability absolutely requires as a condition for an award of damages.[13]

II. *JAMES V. BRITISH COLUMBIA*

The plaintiff was employed at a sawmill operated by TimberWest Forest Limited (TimberWest) in Youbou, British Columbia. TimberWest's fibre supply was derived in part through a tree farm licence (TFL) issued by the Minister of Forests (the Minister). When TimberWest closed the mill in 2001, the plaintiff sued the Minister for recovery of pure economic loss (specifically, employment income) allegedly caused by the Minister's negligence. This allegation stemmed from the inadvertent omission of a clause (Clause 7) in the renewed TFL, which would have read:

> The Licensee will not cause its timber processing facility ... to reduce production or to close for a sustained period of time, unless, and to the extent that the Minister, or his designate, exempts the Licensee from the requirement of this paragraph.[14]

Because Clause 7 enabled the Minister to address concerns expressed "by the mill's employees through their bargaining agent ... regarding the impact on the employees of reducing the quantity of timber available to the [mill],"[15] the plaintiff claimed that its purpose was to protect the plaintiff's employment. His submission, neatly summarized by Esson J.A. at the Court of Appeal, was "that the Minister, having required the inclusion of Clause 7 for the benefit of the employees and intending to maintain that clause in force, is liable to the plaintiff for having inadvertently, and thus negligently, allowed the clause to go by the boards."[16]

The statutory scheme at issue, while somewhat complex, is critical to understanding the flaws in this decision. Tree farm licences confer timber harvesting rights akin to *profit-à-prendre* in Crown land,[17] and are granted by the Minister under ss. 27 and 28 of British Columbia's *Forest Act*.[18] As the *FA* then stood, these sections provided in part:

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13 As Lord Macmillan said in *Donoghue (or M'Alister) v. Stevenson*, [1931] UKHL 3, [1932] A.C. 562 at 618 [*Donoghue*]: "[t]he law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage."

14 *James*, *supra* note 11 at para. 4.

15 *Ibid.* at para. 5.

16 *Ibid.* at para. 11.

17 The weight of commentary suggests that a tree farm licence and other interests in timber are also akin to a *profit-à-prendre*. See N.D. Bankes, *Crown Timber Rights in Alberta* (Calgary: Canadian Institute of Resources Law, 1986). See also Russell Brown, "'Takings': Government Liability to Compensate for Forcibly Acquired Property" in Karen Horsman & Gareth Morley, eds., *Government Liability: Law and Practice* (Aurora, Ont.: Canada Law Book, 2007) 4-1 at 4-15. Whether this is actually so has not yet been judicially considered, although in *TFL Forest Ltd. v. British Columbia*, 2002 BCSC 180, 111 A.C.W.S. (3d) 287 at para. 27, Powers J. assumed, but expressly refrained from deciding, that the interest of the plaintiff tree farm licence holder was a *profit-à-prendre*.

18 R.S.B.C. 1979, c. 140 (now R.S.B.C. 1996, c. 157) [*FA*]. All references to provisions of the *Forest Act* refer to the 1979 revision, cited in *James*, *supra* note 11 at paras. 27-28.

27(5) [T]he minister shall evaluate each application, including its potential for

(a) creating or maintaining employment opportunities and other social benefits in the Province;
(b) providing for the management and utilization of Crown timber;
(c) furthering the development objectives of the Crown;
(d) meeting the objectives of the Crown in respect of environmental quality and the management of water, fisheries, wildlife resources; and
(e) contributing to Crown revenues.

28(1) ...

...

(l) [the licence shall require its holder] in accordance with a proposal made in the application for the tree farm licence;
  (i) to undertake or continue the operation, construction or expansion of a timber processing facility, and
  (ii) to undertake specified measures in order to meet the objectives of the Crown in respect of any of the items referred to in section 27(5)(a) to (e).

The overall duties and functions of the Minister were outlined in ss. 3 and 4 of the *Ministry of Forests Act*[19] which provided:

3. The duties, powers and functions of the minister extend to and include all matters relating to forest and range resources in [British Columbia] that are not, by law or by order of the Lieutenant Governor in Council, assigned to another minister, ministry, branch or agency of the government.

4. The purposes and functions of the ministry are, under the direction of the minister, to
(a) encourage maximum productivity of the forest and range resources in [British Columbia];
(b) manage, protect and conserve the forest and range resources of the Crown, having regard to the immediate and long term economic and social benefits they may confer on [British Columbia];
(c) plan the use of the forest and range resources of the Crown, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are coordinated and integrated, in consultation and cooperation with other ministries and agencies of the Crown and with the private sector;
(d) encourage a vigorous, efficient and world competitive timber processing industry in [British Columbia]; and
(e) assert the financial interest of the Crown in its forest and range resources in a systematic and equitable manner.

On behalf of the former employees of the sawmill, the plaintiff applied for certification of his class proceeding in accordance with British Columbia's *Class Proceedings Act*,[20] which

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19 R.S.B.C. 1979, c. 272 (now R.S.B.C. 1996, c. 300) [*MOFA*]. All references to provisions of the *Ministry of Forests Act* refer to the 1979 revision, cited in *James*, *ibid.* at para. 17.

20 R.S.B.C. 1996, c. 50.

required him to demonstrate a cause of action. The Province took the position that the plaintiff's claim was bound to fail because, *inter alia*, neither the *FA* nor the *MOFA* could be read as generating a proximate relationship between the Minister and the plaintiff.[21] Moreover, the Province argued that the plaintiff could not demonstrate reasonable and detrimental reliance on the Minister's undertaking to include Clause 7 in the TFL.[22] At the certification hearing, Wilson J. granted certification, concluding that it was not "plain and obvious that no reasonable cause of action [was] disclosed."[23]

For the Court of Appeal, Esson J.A. affirmed Wilson J.'s decision to certify. More particularly, the Court found that the plaintiff had an arguable case with respect to two of the five categories of pure economic loss identified by Bruce Feldthusen,[24] specifically (1) the independent liability of a statutory public authority, and (2) the negligent performance of a service. In respect of the former category, Esson J.A. made two points. First, the *FA* and the *MOFA* "required" the Minister "to seek to create or maintain employment opportunities and had the power to require the licensee to continue the operation of a timber processing facility."[25] Second, a distinction was to be drawn between refraining from inserting Clause 7 on the basis of conflicting responsibilities and choosing to include Clause 7 but neglecting to see to its insertion.[26] In respect of the latter category (negligent performance of a service), and in response to the Province's objection that the plaintiff could not demonstrate having relied on the Minister's undertaking respecting Clause 7, Esson J.A. said:

> The Crown's submission that the plaintiff cannot succeed without pleading and proving "detrimental reliance" finds support in some cases and some academic writing but, with respect, appears to be based on a misapprehension of the extent of the "new law" propounded in Hedley Byrne & Co. v. Heller & Partners Ltd.... Because that case overruled the longstanding rule that there could be no recovery in tort for pure economic loss, and because it was held that detrimental reliance was an essential element of the cause of action, it seems to have been assumed by some that the requirement of proving detrimental reliance applies to all actions seeking recovery of damages for pure economic loss.
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> That requirement, however, was "old law". It flowed, not from the decision to change the law with respect to claims for pecuniary loss, but from the fact that Hedley Byrne was a claim in misrepresentation. In such an action, it was always incumbent upon the plaintiff to plead and prove reliance upon the false representation....
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> ...

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21 This actual submission does not appear in the case report. It was however, advanced in British Columbia's factum and was extensively addressed by Esson J.A. at paras. 24-35 of *James*, *supra* note 11.

22 *Ibid.* at para. 9.

23 This language is taken from the threshold for certification in the *Class Proceedings Act*, *supra* note 20. Justice Wilson's finding is found in *James*, *supra* note 11 at para. 13.

24 They are: "(1) The Independent Liability of Statutory Public Authorities; (2) Negligent Misrepresentation; (3) Negligent Performance of a Service; (4) Negligent Supply of Shoddy Goods or Structures; (5) Relational Economic Loss" (Bruce Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1991) 17 Can. Bus. L.J. 356 at 357-58 [Feldthusen, "Economic Loss"] [footnotes omitted]).

25 *James*, *supra* note 11 at para. 29.

26 *Ibid.* at para. 33.

> In this case, it would be unrealistic to impose upon the plaintiffs a burden to establish detrimental reliance. That is not their case. However, the facts may demonstrate a different form of reliance. The employees can be said to have relied upon the Minister to exercise reasonable care to retain Clause 7 in the licence unless and until he reached a decision on policy grounds to remove it.[27]

Buttressing his conclusion that the plaintiff need not demonstrate reliance on the Minister's undertaking, Esson J.A. cited the cases brought by "disappointed beneficiaries" who failed to take a benefit due to a solicitor's negligent drafting (or failure to draft) a will.[28]

In our opinion, the Court of Appeal's reasons in *James* contain their own problems but also amplify problems arising from *Cooper*. In turning to those problems, we begin with a brief review of the test articulated in *Cooper* for recognition in negligence law of a duty of care, to which we will then apply our normative critique of the current prevailing methodology for duty determination in Canadian law.

III. DUTY OF CARE

A. *COOPER V. HOBART*

The narrow issue in *Cooper* was whether the British Columbia Registrar of Mortgage Brokers breached a duty owed to investors by failing to suspend the licence of a broker when it was first alleged that he was using their funds for unauthorized purposes. Before concluding that such a duty of care could not arise, however, the Court reconfigured the test governing how a duty of care is to be recognized. Prior to *Cooper*, the duty of care inquiry was based upon Lord Wilberforce's famous two-stage test in *Anns*,[29] combining reasonable foreseeability of "likely" damage[30] (which gives rise to a prima facie duty of care) with the absence of policy considerations "which ought to negative, or to reduce or limit the scope of the duty."[31] Purporting to "highligh[t] and hon[e]"[32] the role of policy concerns and thus to ensure that the *Anns* test is "properly understood," the Court in *Cooper* stipulated that the first stage of the duty of care test requires that the plaintiff demonstrate foreseeability of damage *and* a proximate relationship between the plaintiff and the defendant.[33]

Proximity, in turn, was said to be established by first considering whether the alleged duty falls within an already judicially recognized category through which a duty of care had already been imposed. Failing that, the plaintiff would have to persuade the court to

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27 *Ibid.*, at paras. 44-45, 47.

28 Justice Esson cited "disappointed beneficiary" case (*ibid.* at para. 48). See *Whittingham v. Crease & Co.* (1978), 88 D.L.R. (3d) 353 (B.C.S.C.) [*Whittingham*]; *Ross v. Caunters*, [1979] 3 All E.R. 580 (Ch.) [*Ross*]; *White v. Jones*, [1995] UKHL 5, [1995] 2 A.C. 207 [*White*].

29 *Supra* note 6.

30 Lord Wilberforce referred to this as "proximity" (*ibid.* at 498). This misdescription is discussed in Brown, "Still Crazy," *supra* note 12 at 162-63, n. 16.

31 *Anns*, *supra* note 6 at 498.

32 *Cooper*, *supra* note 1 at para. 1.

33 This is emphasized in Klar, "Foreseeability," *supra* note 2 at 364:

> Denying that there is a duty at the first stage because there is a lack of proximity recognizes that a coherent legal system, of which tort law is only a part, must create limits to tort law's reach. It refuses to concede to the proposition that there is a presumptive tort law duty merely because of foreseeability.

recognize a novel category of proximity. That latter path entails examination of "factors arising from the *relationship* between the plaintiff and the defendant," including "questions of policy, in the broad sense of that word."[34] Given that there is no "single unifying characteristic" that can address all relevant factors,[35] recognizing a novel category of proximity

> 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.[36]

In view of our concerns about the treatment in *James* of the proximity requirement for imposing a duty of care, it is worth reproducing the bulk of *Cooper*'s direction on this point:

> 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.
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> 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.
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> ...
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> 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.[37]

If the first stage of the test is satisfied and a prima facie duty of care is recognized, the "second stage" entails asking "whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care."[38] Typically, such extrinsic policy concerns are only contemplated if a prima facie duty of care falls within

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34 *Cooper*, *supra* note 1 at para. 30 [emphasis in original].

35 *Ibid.* at para. 35.

36 *Ibid.* at para. 34.

37 *Ibid.* at paras. 43-44, 49. We discuss (beginning at the text associated with *infra* note 84) the significance of the statement "[i]n this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed" (at para. 43).

38 *Ibid.* at para. 30.

a new category of proximity;[39] if an existing category is applicable, a duty of care is presumed, since "residual" policy considerations have presumably already been deliberated.[40]

While arguing that undefined and nebulous notions of "proximity" fail to capture the "normativ[e] significan[ce] about the relationship between the" plaintiff and the defendant,[41] Ernest J. Weinrib has expressed the hope that *Cooper* might ultimately "open a path back to a more coherent approach to the duty issue."[42] His point is that "policy considerations" that are extrinsic to the parties' relationship are now relegated to circumstances where plaintiffs are asserting a novel duty of care not already contemplated in the established categories. While we do not necessarily disagree,[43] as we will show, *James* reveals that until that happy day arrives, the duty inquiry — particularly in respect of actions against the Crown for causing pure economic loss — will pose difficulties for lower courts.

Before proceeding to consider those difficulties, however, we will explicate the juridical yardstick against which *James* will be measured and which, we presume, gives the relationship between the plaintiff and the defendant the "normative significance" to which Weinrib referred. Our objective here is, with reference to tort law's justification for imposing a duty of care, to lay the groundwork necessary to demonstrate that *James* is a misguided judicial product of *Cooper*'s confused and confusing duty analysis.

B. DUTY OF CARE JUSTIFIED

We write from a standpoint of corrective justice.[44] Our preference is not based merely on the privileged place of corrective justice in the positive law of torts in Canada,[45] but on the theoretical ground that corrective justice generates a coherent account of a defendant's liability to a plaintiff by treating each of them as correlatively situated.[46] It does so by insisting upon not only causal connection between the defendant's injustice and the plaintiff's injury (in that the defendant's "gain" must derive from the plaintiff's "loss"),[47] but also normative correspondence in that such correlative gain and loss flow from the

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39 *Ibid.* at para. 31.

40 *Ibid.* at para. 37-39.

41 See Weinrib, "Disintegration of Duty," *supra* note 12.

42 *Ibid.* at 242.

43 One of us has already expressed that hope. See Brown, "Still Crazy," *supra* note 12 at 191. It is worth noting, however, that many "recognized categories" crystallize and perpetuate non-juridical policy rationales for imposing a duty.

44 See Ernest J. Weinrib, "Corrective Justice in a Nutshell" (2002) 52 U.T.L.J. 349; Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995).

45 See e.g. Lewis Klar, *Tort Law*, 3d ed. (Toronto: Thomson Carswell, 2003) at v; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 at paras. 28-31.

46 Weinrib, "Disintegration of Duty," *supra* note 12 at 214-15.

47 See Brown, "Still Crazy," *supra* note 12 at 167 [footnotes omitted], as one of us has noted:

> The notion of liability for breach of duty can be traced to the Aristotelian concept of the plaintiff's "loss" and the defendant's "gain." The plaintiff's loss lies in him or her being materially worse off than before, and also worse off than he or she should be, assuming a normative proscription against injuring others. Conversely, the defendant is seen as having more, to a degree equal to the plaintiff's loss, than he or she ought to have, as a result of having breached the norm against injuring others.

defendant's conduct towards the plaintiff.[48] Our normative framework carries two implications. First, as Weinrib has put it, "the very reason for thinking that the defendant acted wrongfully also [has] to be the reason for thinking that the injury suffered by the plaintiff [is] wrongful."[49] The duty inquiry, then, focuses on the *relationship* between the parties. This relational aspect of negligence liability is worth emphasizing, as it has become obscured by the Supreme Court of Canada's struggles to encapsulate the meaning of "proximity." While "[p]roximity *may* consist of various forms of closeness," the Court identified four forms in *Canadian National Railway v. Norsk Pacific Steamship*.[50] Ultimately in both *Norsk* and *Cooper*, proximity is not described as an essentially relational concept, but as a functional device that describes categories of cases where policy concerns have previously led courts to impose liability.[51] A particularized, category-by-category notion of duty, however, departs from Lord Atkin's emphasis in *Donoghue v. Stevenson* on the necessity for "some *general* conception" of liability, grounded on the "close[ness] and direct[ness]"[52] between the parties. In contrast, a coherent conception of duty (by which we mean a conception that systematically relates each particular duty to every other particular duty)[53] requires that the wrong and the injury integrate into a juridical relationship on the basis of mutual *relation*.

Second, because negligence law requires the trier of fact to determine whether a legally protected interest has been injured, our reference point of corrective justice also requires that the plaintiff demonstrate a "loss" of a "resource" to the defendant. In cases of physical damage to property or to bodily integrity,[54] this is a straightforward application of the rule in *Donoghue*[55] which Lord Atkin stipulated, extended to "life or property."[56] Such interests are protected because even though the former implicates a property right and the latter a personal right, both are enforceable generally against the world. As such, when a defendant interferes with a plaintiff's resource in his or her property or bodily integrity, the law views the defendant as having interfered with the plaintiff's right in a resource by expropriating it to the defendant's own use and, for that reason, liability is imposed.

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48 *Ibid.* at 168-69. We are also drawing here from Thomas Aquinas' exegesis of Aristotle's *Nicomachean Ethics*, which is accessibly canvassed in James Gordley, "Tort Law in the Aristotelian Tradition" in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 131 at 140.

49 Weinrib, "Disintegration of Duty," *supra* note 12 at 220. See also Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007) [Beever, *Rediscovering*]: "the reasons for holding the wrongdoer liable are the same reasons for finding that liability is owed to the wrong-sufferer" (at 46).

50 [1992] 1 S.C.R. 1021 at 1152 [*Norsk*] [emphasis added].

51 See *ibid.*: "The meaning of 'proximity' is to be found rather in viewing the circumstances in which it has been found to exist and determining whether the case at issue is similar enough to justify a similar finding." We have already (beginning at the text associated with *supra* note 33) noted that *Cooper*'s proximity inquiry entails first examining the alleged duty in light of already-recognized categories.

52 *Supra* note 13 at 580 [emphasis added].

53 Here we are agreeing with Weinrib, "Disintegration of Duty," *supra* note 12 at 213.

54 "The plaintiff's physical integrity ... is a resource that the plaintiff owns ...." (See Brown, "Still Crazy," *supra* note 12 at 169.)

55 *Supra* note 13.

56 *Ibid.* at 599. Lord Macmillan similarly described the protected interest as being in "person and property" (at 614).

Cases such as *James* are trickier, however, because, first of all, the defendant is a statutory public authority. This, as we will discuss below,[57] is said in *Cooper* to require that proximity be grounded in the pertinent statute.[58] Moreover, *James* engages the vexing issue of whether a plaintiff may claim a legally protected interest (that is, a "resource") which is purely economic. How negligence law's protection might rationally be extended to such an interest in a manner that coheres to the rule in *Donoghue* was confronted by the House of Lords in the first case to grant recovery in negligence for pure economic loss — *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[59] There, a protected interest was founded on the defendant's undertaking to employ a special skill for the assistance of another and on the plaintiff's reasonable and detrimental reliance on that undertaking. These elements of liability have been canvassed thoroughly elsewhere[60] and we do not propose to fully reiterate their significance here. In light of *James*, however, it is worth emphasizing the element of *reliance*, which the Supreme Court of Canada specifically cited in *Cooper* as a "factor" denoting the requisite "proximity" between a plaintiff and a defendant.[61]

In brief, the justification for imposing liability for having induced reasonable reliance is that such reliance has caused the plaintiff to alter his or her position. To that extent, he or she has entrusted an aspect of personal autonomy to the defendant by foregoing other more beneficial available options. Reliance is what transforms an unfulfilled undertaking into tortious misfeasance by allowing us to conceptualize it as an interference with the plaintiff's autonomy to choose among all potential courses for action. Because private law recognizes the self-determining agency of persons who "[have] the normative status to assert [their] dignity in relation to others,"[62] autonomy is a legally protected interest and, as such, a "resource." While, therefore, the rule in *Donoghue* addresses physical damage to person or property, the rule in *Hedley Byrne* addresses interference with a person's right in his or her autonomy to choose among different courses of action.

IV. THE PROBLEM

Having set out our juridical framework, we turn to the difficulty with the duty inquiry which is manifest in *James*.[63] It is, given our normative framework, a predictably normative difficulty — specifically, that *Cooper*'s duty formulation fails to offer a coherent account for the imposition (or non-imposition) of a duty of care, because it does not focus the judicial inquiry upon the presence or absence of an injured *right* in the plaintiff. We acknowledge

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57 See the text associated with *infra* note 65.

58 We question (beginning at the text associated with *infra* note 84) whether this fairly reflects the Court's actual intention in *Cooper*.

59 [1963] UKHL 4, [1964] A.C. 465 [*Hedley Byrne*].

60 Stephen R. Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 U.T.L.J. 247; Russell Brown, "Assumption of Responsibility and Loss of Bargain in Tort Law" (2006) 29 Dal. L.J. 345.

61 *Cooper*, *supra* note 1 at para. 34. The relevant passage is reproduced at *supra* note 37.

62 Lorraine E. Weinrib & Ernest J. Weinrib, "Constitutional Values and Private Law in Canada" in Daniel Friedmann & Daphne Barak-Erez, eds., *Human Rights in Private Law* (Oxford: Hart, 2001) 43 at 47.

63 We are not purporting here to offer the full critique of *Cooper*, which was levelled in Weinrib, "Disintegration of Duty," *supra* note 12; Brown, "Still Crazy," *supra* note 12; Jason W. Neyers & Una Gabic, "Canadian tort law since *Cooper v. Hobart*: Part I" (2005) 13 Torts L.J. 1 [Neyers & Gabic, "Canadian Tort Law"]. Rather, our critique is limited to the problems that we will argue are amplified in *James*, *supra* note 11.

that, in part, our criticism presupposes that tort law ought to cohere to an overarching principle and, as such, joins an unresolved and probably insoluble debate in modern torts scholarship.[64] What *James* shows, however, is that what we view as a fundamentally normative problem in *Cooper* has manifested itself in pragmatic difficulties. While it is tempting to ascribe them to *Cooper*'s cumbersome duty of care formula, we see the root of the problem not in the formula itself but in its adoption as a substitute for principled and coherent juridical reference points. Ultimately, terms such as "proximity" become meaningless, substituting empty incantations for cogent justifications for outcomes of duty inquiries.[65] As such, the reason *why* the plaintiff is entitled to recover is never actually contemplated under the test, thereby making any imposition of liability arbitrary.

Consider the first category of recoverable pure economic loss that was said to apply here — that of statutory public authority liability — and the Supreme Court of Canada's statement in *Cooper* that proximity "[i]n this case ... must arise from the statute."[66] Assuming "proximity" speaks to the "closeness and directness" which Lord Atkin in *Donoghue* said ought to characterize the relational quality of the plaintiff's harm and the defendant's negligent act or omission, the relevance of a *statute* — at least one that does not expressly address the question of a private law duty of care — is not evident. As Lewis Klar has written (with reference to *Cooper*):

> The real inquiry should have been whether the nature of the relationship that existed between the Registrar and investors, and the interactions that existed between the parties, gave rise to proximity and a private law duty as determined by the application of common law principles. Thus, although the Supreme Court came to the right result in *Cooper* ... it did so for the wrong reasons. It was not that the statute did not impose a private law duty of care on the Registrar; it was that the common law did not.[67]

Further — and here is the intersection we identify of *Cooper*'s normative flaws and its impracticality — different courts parse different statutes in different ways. And so, while acknowledging the diffuse quality of the prescribed interests to be considered in *James*, Esson J.A. nonetheless concluded that the statutory scheme contained in the *FA* and *MOFA* is "radically different" from that in *Cooper* "in ways that ... are favourable to the plaintiff's case."[68] Even allowing for the inherently unpredictable exercise of divining proximity from a statute, however, Esson J.A.'s account of the statutory scheme is far from satisfying. It seemed significant to him that the statutory scheme in *James* (unlike that in *Cooper*) actually enumerated the list of potential stakeholders. Such a scheme could not, he found, "be construed as having limited the duties of the Minister to 'a duty to the public as a whole,'"[69]

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64 The most recent exchange in this debate is found in Arthur Ripstein, "Tort Law in a Liberal State," online: (2007) 1:2 J. Tort L. 3 <http://www.bepress.com/login.e2proxy.library.ualberta.ca/jtl/vol1/iss2/art3>; George P. Fletcher, "Against Reductionism: Some Comments on Ripstein" (Paper presented to the Conference on Tort Law and the Modern State, 16 September 2006) [unpublished].

65 For further discussion on this point, see Russell Brown, "Justifying the Impossibility of Recoverable Relational Economic Loss" (2005) 5 O.U.C.L.J. 155.

66 *Cooper*, *supra* note 1 at para. 43.

67 Lewis Klar, Q.C., "The Tort Liability of the Crown: Back to Canada v. Saskatchewan Wheat Pool" (2007) 32 Advocates' Q. 293 at 296 [Klar, "Tort Liability of the Crown"].

68 *James*, *supra* note 11 at para. 24.

69 *Ibid.* at para. 29.

requiring the Minister to "balanc[e] a range of disparate interests."[70] Rather, it *appears* that Esson J.A. concluded that the scheme gave rise to a duty of care to that full range of identified interests. Thus, in deciding what terms to impose upon a tree farm licence, the Minister was "required to seek to create or maintain employment opportunities."[71] On that basis, Esson J.A. concluded, "[t]he alleged facts demonstrate a high degree of 'closeness of relationship.'"[72]

It is, to say the least, ironic that the disparate quality of the enumerated interests to be considered, contrasted with a more generalized direction to the Registrar of Mortgage Brokers in *Cooper*, was seen by Esson J.A. as potentially grounding a duty of care to the plaintiff. As Jason Neyers and Una Gabie have noted, this seems a thin basis for distinguishing *Cooper*:

> [T]he first distinguishing reason offered by the court — ie, conflicting responsibilities to various members of the public — was the *very reason* why the court in *Cooper* denied the existence of a duty of care.[73]

Moreover, the mere inclusion of a class of persons in a list of enumerated interests in a statute, far from indicating an intention to privilege that class, may implicitly authorize subordination of that interest to other listed concerns. Scrutiny of the relevant provisions in *James* affirms this. Section 3 of the *MOFA*, far from creating a duty to the plaintiff, set out in the most pluralistic (and therefore discretionary) terms imaginable the Minister's overall responsibility of managing "all matters relating to forest and range resources in [British Columbia]." Section 4 specifies that the Minister's "purposes and functions" are to direct the ministry in maximizing productivity, conserving the resource, planning for a range of uses (including harvest, grazing, and outdoor recreation), encouraging efficiency, and protecting the Province's financial interest "in a systematic and equitable manner." Discharge of such a diffuse and unordered set of functions is not, or at least is not obviously, consistent with a duty of care being owed by the Minister to any particular stakeholder in the forest industry. Indeed, the need for a "balance" between precisely those imperatives that s. 4 identifies has become axiomatic in public discourse concerning natural resource allocation: between productivity and conservation, between efficiency and employment, and among different users of the natural environment. The *MOFA*, moreover, does not prescribe a manner in which these requisite balances are to be achieved, entrusting such questions to the Minister's own policy-making discretion.

Where the Minister opts to exercise his or her discretion to devote a tract of forest lands to productive harvest by issuing timber harvesting rights, ss. 27 and 28 of the *FA* envision an additional layer of Ministerial discretion, requiring him or her to evaluate each application for a tree farm licence with reference to five factors: (1) creation or maintenance of employment opportunities; (2) management and utililization of Crown timber; (3) the Crown's development objectives; (4) the Crown's environmental quality and resource management objectives; and (5) Crown revenues.[74] As was the case with s. 4 of the *MOFA*,

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70 *Ibid.*
71 *Ibid.*
72 *Ibid.* at para. 38.
73 Neyers & Gabie, "Canadian Tort Law," *supra* note 63 at 9 [emphasis in original].
74 *FA*, *supra* note 18, s. 27.

no prioritization is assigned to this array of imperatives. "Maintaining employment opportunities"[75] is only part of *one* of *five* factors, from which the only reasonable conclusion is that none are meant to be determinative.

Given, then, the range of factors to be considered by the Minister (first of all, in deciding under the *MOFA* whether to dedicate forest resources for harvest, and then in setting under the *FA* the terms of a tree farm licence), it is difficult to see how a duty of care could be grounded upon the statutory scheme in *James*. Because the scheme requires the Minister to turn his or her mind to factors which are often, even stereotypically, at odds (such as employment and environmental considerations), it expressly contemplates that the Minister must make choices between and among stakeholders. The scheme thus inherently contemplates both winners and losers, and that on occasion the losers will be employees where the Minister determines that other listed imperatives in s. 4 of the *MOFA* must receive priority in order to ensure that the Minister's overarching duty to the public in s. 27(5) of the *FA* is satisfied. Indeed, for the Minister to be able to respond to the social, economic, and political imperatives that are expressly contemplated in the *MOFA*, it would only make sense for legislators to confer upon the Minister the discretion to subordinate employment to other concerns. As such, it seems incongruous to hold the Minister liable in negligence for damage which he or she acting in good faith could have, with impunity, inflicted intentionally.[76]

The unavoidable conclusion is that the Court of Appeal missed the point in *Cooper*. It was not the absence of specifically denoted duties to investors, but rather the conflicting responsibilities to various members of the public, whether contemplated in the statutory scheme or not, that was the basis for not recognizing a duty of care in *Cooper*. Such confusion, however, speaks perhaps not so much to the Court's grasp of *Cooper* but rather to the *Cooper* test itself. In particular, it seems to stem from *Cooper*'s requirement that courts discern the abstract notion of "proximity" *not* with reference to a juridical notion of relation, but through a process as ill-defined and riddled with subjectivity as divining legislative intent where legislators appear not to have ever actually turned their minds to questions of civil liability.

It is also tempting to criticize *James* for treating *Cooper* not as the source of the duty test but merely as furnishing a statutory scheme for comparative purposes with the scheme in *James*. This is also, however, an inevitable by-product of *Cooper*. On one hand, we are told that whether a duty of care is owed by a public authority is to be discerned by sole reference to the statutory scheme, or, more precisely, we are told that "proximity" between a plaintiff and a statutory public authority is to be found in the statute. On the other hand, *Cooper* does not set out a specific procedure by which the statute is to be evaluated for the presence or absence of proximity. *James*, then, is the child of the Court's failed attempt in *Cooper* to substantively reconcile "proximity" as a duty determinant with a form of liability that is to be statutorily implied. As such, it represents the failure of "policy considerations" as a proxy for a principled, juridical inquiry into the existence of a duty of care.

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[75] *Ibid.*, s. 27(5)(a).

[76] The problem of recognizing liability for negligent injury to economic interests while intentional injury remains non-actionable is canvassed in John Murphy, ed., *Street on Torts*, 12th ed. (New York: Oxford University Press, 2007) at 324-26.

Perhaps anticipating that his distinction between the statutory schemes in *Cooper* and *James* was dubious (or that the statutory scheme in *James* was inadequate to ground a duty of care), Esson J.A. buttressed his conclusion by looking beyond the traditional scope of statutory public authority liability. The Minister's duty, he held, could also be recognized as an instance of the category of pure economic loss caused by "negligent performance of a service."[77] While this taps into past academic arguments which have been advanced for a broader basis for Crown liability,[78] the currently prevailing view is expressed by Feldthusen, who has written:

> [T]here is *no private party analogy which may be drawn to the unique public power* to convey certain discretionary benefits, such as the power to enforce by-laws, or to inspect homes or roadways. It is allegations of negligence in the failure to exercise or exercise with due care these unique public powers which are difficult and controversial.[79]

It seems, at the very least, reasonable to say that the obligations of statutory actors cannot be analogized with those of private actors, because statutorily created duties are not "services" provided to private parties *qua* private parties.[80] Rather, statutory provisions are grounded by the legislature's obligation to act in accordance with a generalized public interest which may (or may not) benefit certain citizens *qua* citizens. *James* is not an exception to that general rule, but is in fact the clearest imaginable instantiation of it, because the Minister was responsible for balancing a multitude of potentially countervailing and mutually hostile interests. This is hardly the stuff of professional services.

The general inapplicability of this category of pure economic loss notwithstanding, it must have been a tempting refuge for the plaintiff, given the strength of the Province's submission that the plaintiff could not demonstrate having reasonably relied on the inclusion of Clause 7 in the TFL. Recall our earlier point that a duty of care to refrain from causing pure economic loss requires not only the defendant's undertaking to employ a special skill for the assistance of another, but also the plaintiff's reasonable and detrimental reliance on that undertaking. As such, even if we take the Minister's statement to the plaintiff's bargaining agent as an "undertaking" to include Clause 7 in the TFL, the fact remains that the plaintiff did not rely, or at least *reasonably* rely, on that undertaking. The evidence did not, for example, disclose foregone employment opportunities or any other autonomous choice to be made with which the Minister's undertaking interfered. Moreover, *even if* the Clause had been inserted, the continuing terms of the TFL remained subject to the Minister's ongoing discretion, whose exercise would be guided by the broad purposes addressed in the *MOFA*, and not by exclusive reference to the provision relating to employment in the *FA*.

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77 *James*, *supra* note 11 at para. 39.

78 J.A. Smillie has argued that statutory authorities should owe the same private law duties as all persons, and that their statutory duties should only be a defence that the legislature intended to remove a person's private law right. See J.A. Smillie, "Liability of Public Authorities for Negligence" (1985) 23 U.W.O. L. Rev. 213 at 224-25.

79 Feldthusen, "Economic Loss," *supra* note 24 at 358 [emphasis added, footnotes omitted].

80 This point is amplified by the qualifier of "*business or professional* service" employed by Bruce Feldthusen in *Economic Negligence: The Recovery of Pure Economic Loss*, 4th ed. (Scarborough: Carswell, 2000) at 119 [emphasis added].

Recall, furthermore, our conceptualization of the normative and practical problem with duty in cases of statutory public authority liability as the substitution of statute-parsing for correlational right and duties. The same difficulty arises with the duty inquiry in cases of negligent performance of a service. Because, under *Cooper*, "proximity" in novel cases is informed with reference to fuzzy "policy considerations" and *not* by a juridical structure through which the defendant's negligent act correlates to the plaintiff's injured right, liability in Canadian tort law for the negligent performance of a service does not require a defendant's undertaking to correlate to any reliance on the plaintiff's part.[81] The paradigm of this truncated method of duty determination — the wills cases,[82] where the beneficiary of a negligently-prepared will does not have to show actual reliance upon the negligent solicitor — was specifically cited by Esson J.A.

Again, this approach is generally objectionable because it fails to consider the reason *why*, given the degree of relation between the parties, liability extends to an inducement, by way of one party's assumption of responsibility to refrain from risky conduct, or another party's reliance on the reasonableness of those actions. An undertaking cannot be considered separately from reliance, because it is from such reliance that the undertaking acquires its legal significance. Reliance — or, more accurately, detrimental reliance — is necessary, because it expresses the quality of the plaintiff's loss and ties it to the defendant's wrongful inducement. Or, as Winkler J. (as he then was) stated in *Carom v. Bre-X Minerals Ltd.*,[83] liability in *James* cannot be rationally imposed from the sole fact of the Minister's undertaking because, "the representation must have caused the recipient to act in a certain manner."[84] Linkage between that undertaking and the decision taken by the plaintiff in confidence in the undertaking, then, must be established because otherwise the plaintiff cannot demonstrate an injury that corresponds to the undertaking. In other words, we are conceiving the wrong *not* as the Minister's failure to insert Clause 7 in the TFL, but in causing the plaintiff to alter his or her position in a manner that caused detriment.

It bears observing that, even allowing for the current policy-driven duty inquiry in Canadian tort law, Esson J.A.'s resort to the wills cases is unpersuasive. In those cases, the beneficiary's right to recover has been rationalized by unusual circumstances. The testator,

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81 *Ibid.*: "the duty of care appears to be based on the defendant's undertaking or voluntary assumption of responsibility."

82 *Whittingham*, *supra* note 28; *Ross*, *supra* note 28; *White*, *supra* note 28. See *James*, *supra* note 11 at para. 48. Peter Benson has encapsulated the typical situation:

> A testator, wishing to leave a gift to a third party, employs a solicitor to prepare and execute a will to give effect to his or her testamentary intentions. The intended beneficiary, we assume, is not a party to the contract between the testator and solicitor, knows nothing of the testator's intentions, and has no other dealings with the solicitor. Due to the solicitor's failure to exercise reasonable care, the will is not properly done or not done at all and, upon the testator's death, probate of the invalid will is refused. As a result, the third party is not entitled to the intended benefit. Instead the benefit is distributed to others under intestacy provisions or a prior will, depending upon the particular facts of the case. The simple question is whether the third party should have standing to bring an action against the solicitor for the lost benefit.

(Peter Benson, "Should *White v. Jones* Represent Canadian Law: A Return to First Principles" in Jason W. Neyers, Erika Chamberlain & Stephen G.A. Pitel, eds., *Emerging Issues in Tort Law* (Oxford: Hart, 2007) 141 at 141 [Benson, "First Principles"]).

83 (1999), 44 O.R. (3d) 173 (Sup. Ct. J.).

84 *Ibid.* at para. 264.

who is the only party that could select the solicitor, suffers no detriment for having relied. Moreover, the testator's contractual rights against the solicitor would only be enforced at the estate administrator's discretion. The intended beneficiary, conversely, has been injured but the only basis for a claim is the will itself which, but for its invalidity, would have conferred upon him or her a mere, ambulatory *spes successionis*.[85]

While it is true that, like a beneficiary to a will, the plaintiff in *James* was not party to the TFL, this similarity does not make *James* analogous to the wills cases. First, the TFL's principal purpose was to regulate the harvesting of trees, which only incidentally benefited those who would be employed as a result of its issuance. A will, however, is procured principally to benefit third parties. Second, inasmuch as the rationale for granting beneficiaries a right of action is grounded upon the testator's death, the wills cases are distinguishable because in *James* the Minister continued to owe contractual duties to TimberWest. Indeed, while neither party to the contract between the testator and the solicitor can assert rights (or perform) after the testator has died,[86] no disability prevented either TimberWest or the Minister from asserting rights and performing obligations under the TFL. Third, disappointed beneficiaries were excused from proving reliance not because the solicitor was providing a "service," but because of the unique relationship between the plaintiffs' loss and the defendant's negligence. No such relationship arose in *James*.

V. CONCLUSION

A confused and confusing statement from the British Columbia Court of Appeal in *James* is unfortunate, yet possibly inescapable. While *Cooper* may, as Weinrib has suggested, bring us closer than did *Anns* to a juridical understanding of tort law's protective force, it still leaves room for idiosyncratic notions of "justice" that still lead courts to impose a duty of care on subjective and diverse policy bases. That said, the Court of Appeal's resort in *James* to non-statutory bases for finding a duty of care also points to an interesting ambiguity in *Cooper*. Whereas it has become commonly assumed that the Supreme Court of Canada in *Cooper* intended to require that plaintiffs demonstrate proximity to statutory authorities *in all instances* by exclusive reference to the relevant statutory scheme,[87] the language of *Cooper* does not clearly preclude a finding of proximity based on the *relationship* between the parties in *other* cases.[88] All we are told is that proximity "*in this case*"[89] must arise from the statute. While we have already argued that statutory scrutiny is neither a legitimate nor helpful method for discerning proximity,[90] our point here is that McLachlin C.J.C. did not clearly exclude in *Cooper* the possibility of *other* bases for proximity in cases of statutory

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85 This suggests that distributive arguments favouring recovery in the wills cases are functionally as well as normatively misguided. Allan Beever has observed

> as a matter of distributive justice, at least as far as we know, the benefit to the claimants seems undeserved. This is most often so with inheritance. Usually, inheritance is a windfall to the inheritor that depends on the wealth and preference of the testator, not on the desert of the beneficiary.

(Beever, *Rediscovering*, *supra* note 49 at 265).

86 On this point, see Benson, "First Principles," *supra* note 82.

87 Linden & Feldthusen, *Canadian Tort Law*, *supra* note 3 at 297.

88 We are grateful to Karen Horsman for this insight.

89 *Cooper*, *supra* note 1 at para. 43 [emphasis added].

90 See also, on this point, Klar, "Tort Liability of the Crown," *supra* note 67.

public authority liability. In other words, we do not know whether the statutory scheme in *Cooper* was considered to be the only basis "in [that] case" simply because of the lack of relational nexus between the investors and the Registrar.[91]

Hovering over this process, particularly in a case which, like the wills cases, was brought by a third party beneficiary to a contract, is a more general and intriguing phenomenon, which is a perceptible gradual retreat from contractual privity[92] as a basis for precluding the application of tort remedies. Since *Hedley Byrne*, the question of privity's impact on tort law has been the substantial, lumbering, and rarely discussed "elephant in the room."[93] The dearth of debate can perhaps be explained by one side's concern that it might lead to further retrenchment in tort liability (by returning to the orthodoxy that the *contract* to which the manufacturer subscribed should, in the absence of injury to person or property, delimit its obligations). Conversely, it may stem from the opposing side's concern that the floodgates will burst.

Both of these observations — the potential extra-statutory basis for grounding proximity in public authority liability cases, and the chipping away at the doctrine of privity — go to the significance of reliance. If, first of all, it remains open to courts to ground proximity in a relationship between the plaintiff and a public authority, liability cannot arise from the sole fact of a public authority's undertaking, but in that undertaking causing the plaintiff to act in a certain way. After all, absent a correlative undertaking that induces reliance, nothing in the public authority's conduct can be shown to have contributed to the plaintiff's loss. As to concerns for privity, the plaintiff in *James*, like the beneficiary in the wills cases, is a third-party beneficiary to a contract and thus has no right against the contractual promisor. While we therefore claim for our juridical conception of tort liability for pure economic loss the advantage of furnishing a justification in certain circumstances for such liability, in view of

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[91] *Cooper*, *supra* note 1 at para. 43. That the statute is not the sole determinant of proximity is also suggested by Abella J. in *Syl Apps*, *supra* note 8 at para. 27 [emphasis added], where she described a relationship as occurring "in the *context* of a statutory scheme." The point being that the statute does not reveal proximity, but rather sets the stage in which relationships — which can then be assessed for proximity — occur. Also worthy of note is the emphasis recently placed on the *relational* quality of proximity by McLachlin C.J.C. for the majority in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, 285 D.L.R. (4th) 620 at para. 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." The most recent reference to proximity in a Crown liability context at the Supreme Court of Canada (*Holland*, *supra* note 4), however, saw McLachlin C.J.C. hypothesizing for the Court that "the legislative and regulatory matrix established proximity between [the plaintiffs] and the government" (at para. 10). We are indebted to Lewis Klar for discussion of this issue.

[92] But see Jason W. Neyers, "Explaining the Principled Exception to Privity of Contract" McGill L.J. [forthcoming], which argues that the so-called "exceptions" to the privity rule are not so much exceptions as the application of other accepted legal principles to the factual situations typified by the decisions.

[93] Notable Canadian exceptions being Benson, "First Principles," *supra* note 82 at 187; Bruce Feldthusen, "Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.: Who Needs Contract Anymore?" (1995) 25 Can. Bus. L.J. 143; Robert Flannigan, "Privity — The End of an Era (Error)" (1987) 103 Law Q. Rev. 564; Michael Trebilcock, "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada" (2007) 57 U.T.L.J. 269. The Supreme Court of Canada has recently evinced sympathy for Feldthusen's views on this point in *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] S.C.J. No. 22 (QL) at paras. 54-56.

the Supreme Court of Canada's tepid support for the doctrine of privity,[94] it is worth emphasizing in conclusion that a juridical conception of rights is not tort-centric. Rather, it requires mutual coherence among all branches of law that govern the relations between private persons.

[94] Compare *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 at 438-39 (upholding the doctrine of privity) with *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 at para. 32 ("creating a new exception to the doctrine of privity").