Memo To: Doble & Doble LLP, Daniel Diamond
File: TEST
Research ID: #40001788ccb63a
Jurisdiction: Ontario, Canada
Date: June 16, 2020
Regarding: Uber Insurance Coverage for Uninsured Driver Partners

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Issue

Does Uber owe a duty of care to its driver partners to insure them for both SABS and liability in the event of a motor vehicle accident in which the driver partner's personal auto insurer takes an off coverage position?

Facts

The Plaintiff was a driver partner driving for Uber in 2015, prior to Uber obtaining fleetwide coverage for its drivers through Intact Insurance. The Plaintiff collided with another vehicle, sustaining injuries. The Plaintiff's own insurer would not cover certain benefits under the SABS, and they would not defend him when he was sued by the passengers in his vehicle at the time of the MVA. They claim that he misrepresented the usage of his vehicle by failing to advise them that he was carrying passengers for compensation, thus falling under commercial coverage.

Conclusion

No cases were identified setting out whether Uber owes a duty of care to its driver partners to insure them for SABS and tort liability in the event there is an accident for which the driver's own insurer assumes an off-liability position.

The Supreme Court set out when a new duty of care may be recognized in *Cooper v. Hobart*. A

duty of care requires a finding of proximity sufficient to create a prima facie duty of care, followed by consideration of whether any factors negative that duty of care. 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. The proximity analysis involved at the first stage of the *Anns* test focuses on the 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. Two questions arise at the first stage:

> 1) Was the harm that occurred the reasonably foreseeable consequence of the defendant's act;
>
> 2) Are there reasons, notwithstanding the proximity between the parties, that tort liability should not be recognized?

Reasonable foreseeability of the harm must be supplemented by proximity. Proximity is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. Sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories may be introduced. But generally, proximity is established by reference to these categories. A relationship 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 is necessary to ground a duty of care. Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved; these are the factors that permit evaluation of the closeness of the relationship between the plaintiff and the defendant and determine whether it is just and fair to impose a duty of care in law. The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. When a case falls within one of the recognized categories or an analogous one and reasonable foreseeability is established, a prima facie duty of care may be posited. Residual policy considerations are considered in the second stage of the *Anns* test. These considerations 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 step generally only arises in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, the court may be satisfied that there

are no overriding policy considerations that would negative the duty of care. Where a duty of care in a novel situation is alleged, it is necessary to consider both steps (*Cooper v. Hobart*).

Whether proximity exists between two parties at large, or whether it inheres only for particular purposes or in relation to particular actions will depend on the nature of the particular relationship at issue. Factors which support recognizing novel proximate relationship do so based upon the circumstances of each particular case. Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so. These corollary rights and obligations create a relationship of proximity. However, any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility - that is, of the purpose for which the representation was made - necessarily falls outside the scope of the proximate relationship, and, therefore, of the defendant's duty of care. By assessing all relevant factors arising from the relationship between the parties, the proximity analysis not only determines the existence of a relationship of proximity, but also delineates the scope of the rights and duties which flow from that relationship. Broadly speaking, reasonable foreseeability concerns the likelihood of injury arising from the defendant's negligence. This inquiry does not require actuarial precision (*Deloitte & Touche v. Livent Inc. (Receiver of)*).

Uber has taken the position that it does in fact maintain insurance coverage providing for up to $5,000,000 for all ride-sharing services in two reported decisions in 2015 (*City of Toronto v. Uber Canada Inc.*,; *City of Toronto v Uber Canada Inc. et al.*). In *City of Toronto v. Uber Canada Inc.*, Uber argued that its insurance policy was unusual, and not a typical "off the shelf" product which could easily be purchased, but rather was specifically designed to address the P2P transportation request market. Uber's Director of Insurance gave evidence that the policy would provide coverage if the P2P driver's own personal policy was exhausted, or if there was no other coverage available for the accident.

Depending on the context and circumstances of each case, taking contrary positions on the same issues, be they factual or legal, in separate proceedings may constitute an abuse of process (*Glover v. Leakey*).

The Ontario Court of Appeal has held, that even in the context of public representations by a regulator as to its public duties and obligations, although such representations do not establish a relationship of proximity by themselves, they are properly included in the factual matrix to be considered in determining whether the interactions between the defendant and the plaintiff are sufficiently direct and close to warrant a finding of proximity (*Taylor v. Canada (Attorney General)*).

Law

No cases were identified setting out whether Uber owes a duty of care to its driver partners to insure them for SABS and tort liability in the event there is an accident for which the driver's own insurer assumes an off-liability position.

The Supreme Court, in *Cooper v. Hobart*, [2001] 3 SCR 537, 2001 SCC 79 (CanLII), sets out when a duty of care may be recognized. *Cooper* concerned whether the registrar of mortgage brokers is liable in negligence for failing to oversee the conduct of an investment company which it had licensed. Although a quite different factual background, the Supreme Court's decision is helpful nevertheless for its general discussion of when a duty of care will be imposed. No duty of care had previously been recognized in such a context.

The Court held that while the particular extension sought was novel, the general issue of how far the principles of liability for negligence should extent is a familiar one, which had been grappled with previously:

> [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*.

A duty of care requires a finding of proximity sufficient to create a prima facie duty of care, followed by consideration of whether any factors negative that duty of care:

> [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 negativing that duty of care. This Court has repeatedly affirmed that approach as appropriate in the Canadian context.

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. Two questions arise at the first stage. First, was the harm that occurred the reasonably foreseeable consequence of the defendant's act? Second, are there reasons, notwithstanding the proximity between the parties, that tort liability should not be recognized? The proximity analysis involved at the first stage of the *Anns* test focuses on the 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:

> [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.
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> [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.

On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. Two things may be said as to the meaning of 'proximity'. First, proximity is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. Second, sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories may be introduced. But generally,

proximity is established by reference to these categories. Proximity, in conjunction with negligence, has from the outset and throughout its history been used to describe the close and direct relationship that Lord Atkin described as necessary to the grounding of a duty of care. Or, in other words, a relationship 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. Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved; these are the factors that permit evaluation of the closeness of the relationship between the plaintiff and the defendant and determine whether it is just and fair, having regard to the relationship, to impose a duty of care in law:

> [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.
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> [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:
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> 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.]
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> [33] As this Court stated in *Hercules Managements Ltd. v. Ernst & Young, [1997] 2 SCR 165*, 1997 CanLII 345 (SCC), at para. 24, per La Forest J.:
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> 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.]
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> [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.

The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. Proximity is broad concept capable of subsuming different categories of cases involving different factors. Proximity has been recognized in a number of categories, including, most relevantly with respect to the case at hand, economic loss related to a contract's performance such as where the claimant and property owner constitutes a joint venture. When a case falls within one of the recognized categories or an analogous one and reasonable foreseeability is established, a prima facie duty of care may be posited:

> [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 SCR 1021, 1992 CanLII 105 (SCC), [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 D*avis 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) 1988 ABCA 234 (CanLII), 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] SCR 1189*, 1973 CanLII 6 (SCC). 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 SCR 1228*, 1989 CanLII 16 (SCC), *Swinamer v. Nova Scotia (Attorney General), [1994] 1 SCR 445*, 1994 CanLII 122 (SCC), 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 SCR 1210*, 1997 CanLII 307 (SCC). 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.

Residual policy considerations are considered at the second stage of the *Anns* test. These considerations 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 step generally only arises in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, the court may be satisfied that there are no overriding policy considerations that would negative the duty of care. Where a duty of care in a novel situation is alleged, it is necessary to consider both steps:

> [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.
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> [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.

To sum up, the first question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care. The second is whether it is a situation in which the new duty of care should be recognized. Mere foreseeability is not enough to establish a prima facie duty of care, proximity of relationship must also be shown. A plaintiff must point to factors arising from the circumstances of the relationship that impose a duty:

> [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.
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> [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.

The *Anns/Cooper* test was recently endorsed again by the Supreme Court in *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017] 2 SCR 855, 2017 SCC 63 (CanLII):

> [16] Traditionally, the test from *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.), governed the duty analysis in decisions of this Court addressing claims for pure economic loss (*Hercules*; B*ow Valley Husky (Bermuda) Ltd. v.*

> *Saint John Shipbuilding Ltd.*, 1997 CanLII 307 (SCC), [1997] 3 S.C.R. 1210; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, 1992 CanLII 105 (SCC), [1992] 1 S.C.R. 1021). Significantly, however, the Anns test for establishing tort liability in Canada has since been refined. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, this Court provided greater certainty to the law of tort by clarifying the factors which may be considered at each stage of the *Anns* test. While the resulting *Anns/Cooper* framework has yet to be applied by this Court in a case of auditor's negligence, we adopt this statement of La Forest J. for the Court in *Hercules*: ". . . to create a 'pocket' of negligent misrepresentation cases . . . in which the existence of a duty of care is determined differently from other negligence cases would, in my view, be incorrect" (para. 21).

Although the case in *Deloitte* dealt with negligent misrepresentation by an auditor in preparing a statutory audit, its statements and application of the *Anns/Cooper* test are generally applicable. Further, the Court also considered how the test ought to be applied in cases of negligent misrepresentation.

As noted, under the *Anns* proximity test, the term is used, in part, as a shorthand description of those categories of relationships in which proximity has already been found to exist. If a relationship falls within a previously established category, or is analogous to one, then the requisite close and direct relationship is shown. So long, then, as a risk of reasonably foreseeable injury can also be shown, or had already been shown through an analogous precedent, the first stage of the *Anns/Cooper* framework is complete and a duty of care may be identified. In such cases the second stage of the *Anns/Cooper* framework will seldom be engaged because residual policy considerations will have already been taken into account when the proximate relationship was first identified. Whether proximity exists between two parties at large, or whether it inheres only for particular purposes or in relation to particular actions will depend on the nature of the particular relationship at issue. Factors which support recognizing novel proximate relationship do so based upon the circumstances of each particular case:

> [25] Assessing proximity in the prima facie duty of care analysis entails asking whether the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law"

(*Cooper*, at paras. 32 and 34).

[26] Under the *Anns* test, proximity did not, "in and of itself, provide a principled basis on which to make a legal determination" (*Hercules*, at para. 23). Rather, proximity was a "label" which expressed nothing more than a "result, judgment or conclusion" (ibid.), where mere reasonable foreseeability of injury could be shown. While, under the *Anns/Cooper* framework, the proximity analysis has become more analytically robust, this descriptive component remains. By this, we mean that the term "proximity" is still used, in part, as a shorthand description of those categories of relationships in which proximity has already been found to exist (*Cooper*, at para. 23). If a relationship falls within a previously established category, or is analogous to one, then the requisite close and direct relationship is shown. So long, then, as a risk of reasonably foreseeable injury can also be shown — or has already been shown through an analogous precedent — the first stage of the *Anns/Cooper* framework is complete and a duty of care may be identified (ibid., at para. 36). In such circumstances, the second stage of the *Anns/Cooper* framework will seldom be engaged because any residual policy considerations will have already been taken into account when the proximate relationship was first identified (ibid., at para. 39; *Edwards*, at para. 10).

[27] This Court has on occasion defined previously established categories of proximity in broad terms. In *Hill*, for example, the Court listed "[t]he duty of care of the motorist to other users of the highway; the duty of care of the doctor to his patient; the duty of care of the solicitor to her client" (para. 25). Proximate relationships will not always, however, be identified so generally. In particular, whether proximity exists between two parties at large, or whether it inheres only for particular purposes or in relation to particular actions, will depend upon the nature of the particular relationship at issue (ibid., at para. 27; *Haig*, at p. 479). Indeed, and as we explain below, factors which support recognizing "novel" proximate relationships do so based upon the characteristics of the parties' relationship and the circumstances of each particular case (*Cooper*, at paras. 34-35).

[28] It follows that, where a party seeks to base a finding of proximity upon a

> previously established or analogous category, a court should be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized. And, by corollary, courts should avoid identifying established categories in an overly broad manner because, again, residual policy considerations are not considered where proximity is found on the basis of an established category (*Cooper*, at para. 39). Analytically, this makes sense. For a court to have previously recognized a proximate relationship, second-stage residual policy considerations must already have been taken into account. When, therefore, a court relies on an established category of proximity, it follows "that there are no overriding policy considerations that would [negate] the duty of care" (ibid.). A consequence of this approach, however, is that a finding of proximity based upon a previously established or analogous category must be grounded not merely upon the identity of the parties, but upon examination of the particular relationship at issue in each case. Otherwise, courts risk recognizing prima facie duties of care without any examination of pertinent second-stage residual policy considerations.

Although discussing cases of pure economic loss arising from negligent misrepresentation the majority's discussion of the proximity analysis in respect of negligent misrepresentation is helpful. Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so. These corollary rights and obligations create a relationship of proximity. However, any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility - that is, of the purpose for which the representation was made - necessarily falls outside the scope of the proximate relationship, and, therefore, of the defendant's duty of care. By assessing all relevant factors arising from the relationship between the parties, the proximity analysis not only determines the existence of a relationship of proximity, but also delineates the scope of the rights and duties which flow from that relationship:

> [30] In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are determinative in the proximity analysis:

the defendant's undertaking and the plaintiff's reliance. Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so (W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913), 23 Yale L.J. 16, at pp. 49-50). These corollary rights and obligations create a relationship of proximity (Haig, at p. 477; *Caparo Industries plc. v. Dickman*, [1990] 1 All E.R. 568 (H.L.), at pp. 637-38; *Glanzer v. Shepard,* 135 N.E. 275 (N.Y. 1922) at pp. 275-76; *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at pp. 445-46; E. J. Weinrib, "The Disintegration of Duty" (2006), 31 Adv. Q. 212, at p. 230).

[31] Rights, like duties, are, however, not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility — that is, of the purpose for which the representation was made or the service was undertaken — necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care (Weinrib; A. Beever, Rediscovering the Law of Negligence (2007), at pp. 293-94). This principle, also referred to as the "end and aim" rule, properly limits liability on the basis that the defendant cannot be liable for a risk of injury against which he did not undertake to protect (*Glanzer*, at pp. 275 and 277; *Ultramares*, at pp. 445-46; Haig, at p. 482). By assessing all relevant factors arising from the relationship between the parties, the proximity analysis not only determines the existence of a relationship of proximity, but also delineates the scope of the rights and duties which flow from that relationship. In short, it furnishes not only a "principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not" (*Fullowka*, at para. 70), but also a principled delineation of the scope of such duty, based upon the purpose for which the defendant undertakes responsibility. As we will explain, these principled limits are essential to determining the type of injury that was a reasonably foreseeable consequence of the defendant's negligence.

Assessing reasonable foreseeability entails asking whether an injury to the plaintiff was a

reasonably foreseeable consequence of the defendant's negligence. Broadly speaking, reasonable foreseeability concerns the likelihood of injury arising from the defendant's negligence. The inquiry does not require actuarial precision:

> [32] Assessing reasonable foreseeability in the prima facie duty of care analysis entails asking whether an injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence (*Cooper*, at para. 30).
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> [33] Broadly speaking, reasonable foreseeability concerns the likelihood of injury arising from the defendant's negligence (*Donoghue*, at p. 580). This inquiry is not amenable to, and does not require, actuarial precision. The jurisprudence gives content, however, to the foreseeability inquiry, providing courts with guidance. In the abstract, a defendant's negligent misrepresentation or performance of a service could potentially give rise to innumerable injuries tangentially cascading from the originally contemplated service. This was so in *Hercules*, where the Court recognized that an auditor's statement could be relied upon by a potentially limitless number of individuals (e.g., shareholders or takeover bidders), for a potentially limitless array of purposes (e.g., investments or takeover bids), any of which could result in various foreseeable injuries.

Although not dealing with the duty of care, but rather a request for a sealing order, *City of Toronto v. Uber Canada Inc.*, 2015 ONSC 1617 (CanLII) is informative as to the positions Uber took with respect to insurance in 2015.

In particular, in responding to the City of Toronto's allegation that Uber did not provide adequate insurance coverage to protect drivers and passengers who use uber services, Uber stated that it did in fact maintain insurance coverage providing for up to $5,000,000 for all ride-sharing services:

> [2] The City alleges that Uber is required and has failed to obtain a taxi cab brokerage licence and a limousine service company licence, and that various services offered by Uber to the residents of Toronto allegedly breach the provisions of the Code as the those services involve drivers using personal vehicles to provide taxi/limousine services within Toronto.

> [3] Uber takes the responding position that as a technology company, the provisions of the Code do not apply to those services offered by Uber, and even if those services are found to be subject to the City's licensing requirements, Uber asserts that such licensing requirements infringe upon, inter alia, its right to freedom of expression under section 2(b) of the Charter of Rights and Freedoms.
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> [4] In support of its application, the City alleges that Uber does not have adequate insurance coverage that would protect drivers and passengers who use Uber services – namely the requesting and accepting of requests for transportation services. In response to that specific allegation, Uber states that it does in fact maintain insurance coverage providing for $5,000,000.00 for all ride-sharing services requested through its Uber phone application (the "App"). It is Uber's position that this insurance policy is "integral to its ability to make a full answer to the City's allegations".

The City questioned whether individuals using the service would be adequately insured. In response, Uber took the position that its insurance policy was unusual, and not a typical "off the shelf" product which could easily be purchased, but rather was specifically designed to address the P2P transportation request market:

> [11] As stated above, the issue of whether insurance coverage secures P2P ride-sharing services requested through the Uber App is raised in the City's application. Indeed, the City questions whether individuals (drivers or passengers) who are using P2P ride-sharing services through the Uber App would be adequately insured.
>
> [12] As stated above, Uber has served and filed a copy of the insurance policy for the limited purposes of this motion. Uber has provided sworn evidence detailing both (what Uber claims to be) the extensive history of negotiations leading up to the securing of the policy, and the reasons why the contents of the policy are commercially sensitive and valuable. I note that the City chose not to cross-examine upon any of the affidavits tendered by Uber on this motion, taking the position that such evidence, on its own, does not meet the requisite test for a sealing

order (to be described in greater detail below).

> [13] Uber claims that the insurance policy is unusual, in that it is not a typical "off the shelf" product which can be easily purchased, and that the policy is a new insurance product, the development of which resulted from the "investment of considerable time and expense". I pause to note that there was no evidence filed on behalf of Uber's insurer on this motion, confirming the emergence of this "new market", the lack of current insurance products able to provide the necessary coverage, or the extensive negotiations leading to this "new product".
>
> [14] In any event, Uber states that the insurance policy was specifically designed to address the new, emerging P2P transportation request market. Uber states that it entered into extensive negotiations with its insurer over a period of 7 months to create entirely new, special terms which would affect the provision of insurance coverage. There is little doubt that the insurer's policy does indeed confer value upon Uber's business. Uber goes further by claiming that armed with the insurance policy, it now enjoys a significant competitive advantage over companies that may offer products similar to the Uber App, but do not presently have any such insurance coverage.

Uber's Director of Insurance gave evidence that the policy would provide coverage if the P2P driver's own personal policy was exhausted, or if there was no other coverage available for the accident:

> [17] According to the evidence of Henry Fuldner ("Fuldner", Uber's Director of Insurance), the insurance policy has to date been kept strictly confidential since development, and is only shared on a "tightly restricted, need-to-know basis". To Fuldner's knowledge, the insurance policy has only been reviewed or provided to Uber's legal counsel, insurance broker and its third party claims administrator) who have all promised to safeguard the confidentiality of its terms.
>
> [18] There is no evidence from Fuldner that Uber's insurer has promised to safeguard the confidentiality of the insurance policy. As stated above, there is no evidence at all from Uber's insurer on this motion.

> [19] For its part, while the City chose not to cross-examine Black or Fuldner upon their respective affidavits, in opposing its motion it sought to introduce and rely upon acts and statements made to the public by Uber about the insurance policy, and additional insurance coverage which Uber has obtained in other jurisdictions.
>
> [20] While refusing to disclose the insurance policy to the public for the reasons set out above, in his affidavit Fuldner described the policy as including coverage liability for third parties for bodily injury and property damage that occurs "while a P2P driver is on route to pick up a passenger who has requested a ride using the Uber App and while transporting such a passenger to his/her destination".
>
> [21] Fuldner also stated that the insurance policy provides coverage if either the P2P driver's own personal automobile policy has been exhausted, or there is no other coverage available for the accident. As such, the City contends that Fuldner's "general summary" of the salient terms of the insurance policy are inconsistent with Uber's request for a sealing order.

Uber took a similar position in *City of Toronto v Uber Canada Inc. et al.*, 2015 ONSC 3572 (CanLII), in the face of an application by the City of Toronto to declare it a taxicab brokerage when describing its 'self-regulation' regime, whereby it alleged it maintained an insurance policy of $5,000,000 for passengers while on an Uber-arranged trip:

> [44] Uber has developed its own self-regulation regime that deliberately emulates but does not copy the safety regulations of the City. Among other features of Uber's "self-regulation" model are:
>
> a. Drivers are subjected to license and criminal background checks with their licenses and photos retained on file[2];
>
> b. Drivers may be reviewed by riders and, following a complaints process, may have their access to the Driver App suspended or cancelled;
>
> c. Vehicles are subject to annual inspection requirements and there are age and

vehicle condition requirements;

d. Snow tires are required between December and March each year;

e. Uber keeps a record of each trip taken including time and date, starting point, end point, distance and route travelled, fare charged and the name of both passenger and driver; and

f. Uber maintains an insurance policy of $5,000,000 for passengers while on an Uber-arranged trip.

In *Glover v. Leakey*, 2016 BCSC 1624 (CanLII) the Court held that, depending on the context and circumstances of each case, taking contrary positions on the same issues, be they factual or legal, in separate proceedings may constitute an abuse of process:

Legal Framework

[53] The court has inherent power to prevent its procedure from being used in a manner that brings the administration of justice into disrepute: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37. The doctrine of abuse of process is a broad and flexible mechanism; its purpose is to enable the court to prevent misuse of its own process: F*irst Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5 at para. 22.

[54] In *Jensen v. Ross*, 2014 BCCA 173, Mr. Justice Goepel referred to the following passage from *Babavic v. Babowech* (1993), 42 A.C.W.S. (3d) 447 (S.C.):

[17] ... The principle of abuse of process is somewhat amorphous. The discretion afforded courts to dismiss actions on the ground of abuse of process extends to any circumstance in which the court process is used for an improper purpose. …

[18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or

serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression. ...

[55] Canadian courts have invoked the doctrine of abuse of process in circumstances where, while issue estoppel may not be made out, permitting the litigation to proceed would violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City)* at para. 37.

[56] In *First Majestic*, Mr. Justice Tysoe considered whether the concept of abuse of process could extend to inconsistent factual positions rather than just an inconsistent election of rights. Tysoe J.A. concluded that the plaintiffs had not made inconsistent allegations in a previous action as the defendants argued. His reasons make reference to a number of cases supporting the proposition that inconsistent positions in prior proceedings can constitute an abuse of process. *Mystar Holdings Ltd. v. 247037 Alberta Ltd.,* 2009 ABQB 480 was cited with approval.

[57] In *Mystar*, the applicants argued that the respondent had made an inconsistent claim and that their action should be dismissed as abuse of process. The relevant Alberta rule is nearly identical to the B.C. rule:

129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that ... (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly.

[58] The alleged inconsistent claim in *Mystar* was that in a previous action against a different defendant, the respondent claimed they lost half interest in a particular property. Then in a later action the respondent claimed to have lost 100% interest in the same property. While considering the applicable principles, Mr. Justice Brooker held at para. 49:

In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims.

[Emphasis in original.]

[59] In the result, Brooker J. found that it was not plain and obvious that the action in that case was an abuse of process as he "[did] not read the current Amended Statement of Claim as asserting that [the respondent] never lost a 50% interest in the property" (at para. 71). The case is instructive as it recognizes that advancing irreconcilable positions in various actions is impermissible. This is adopted in *First Majestic*.

[60] The decision of *Pepper's Produce Ltd. v. Medallion Realty Ltd.,* 2012 BCCA 247 is also informative. In that case the appellant, Pepper's Produce entered into a contract to buy a business that failed to complete. Two parties filed a small claims action against Pepper's Produce. The president of Pepper's Produce deposed that these individuals were not parties to a contract and they had never met. Pepper later brought its own action, stemming from the same transaction after the small claims action was dismissed and sought to add the individuals that they had denied knowing as parties to the new action.

[61] Madam Justice Levine upheld the decision of the chambers judge refusing to add those defendants. She held, in part relying on First Majestic:

[28] … These positions are diametrically inconsistent within the same action, and the claims against Gao and Tan are diametrically inconsistent with the appellant's response to the Small Claims action. These proceedings cannot, as a matter of protecting the integrity of the court's process, stand together.

[62] Whether taking contrary positions on the same issues in separate proceedings, i.e. inconsistent pleadings, constitutes an abuse of process depends on the context and circumstances of each case: *Mystar* at para. 53; *Stewart v. Clark,* 2013 BCCA 359 at para. 51.

[63] In *Halagan v. Reifel,* 1997 CarswellBC 4040, Madam Justice Satanove considered an application to amend pleadings. She refused to do so and dismissed the application because the proposed amendments were inconsistent. She found they

constituted approbation and reprobation. At para. 8 she stated:

> … [N]either pleadings nor any other of the court processes are a game to be played according to what appears to be a strategic advantage of the time. The court expects a party to take a position which is consistent with its evidence and to maintain that position in its dealings with the court. In other words, saying something to one judge and saying the opposite to another will not be countenanced.

Taylor v. Canada (Attorney General), 2012 ONCA 479 (CanLII) was a class action against the government of Canada alleging that Health Canada was negligent in the exercise of its regulatory responsibilities in misrepresenting the safety of certain temporomandibular joint implants. Although a different context, one of the Court's holdings remains relevant.

In particular, the Court held that in the case of public representations by a regulator as to its public duties and obligations, although such representations do not establish a relationship of proximity, they are properly included in the factual matrix to be considered in determining whether the interactions between a regulator and a plaintiff are sufficiently direct and close to warrant a finding of proximity:

> [96] Although public representations by a regulator as to its public duties and obligations do not establish a relationship of proximity between the regulator and an individual plaintiff, they are properly included in the factual matrix to be considered in determining whether the interactions between a regulator and a plaintiff are sufficiently direct and close to warrant a finding of proximity. [page188]

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