Of Neighbours and Netizens, Or, Duty of Care in the Tech Age: A Comment on *Cooper v. Hobart*

Robert J. Currie †

Introduction

Fast-paced growth in the technology sector has led to regular discussion of whether and to what extent the law is able to "keep up with" technology. In particular, the common law, with its tradition of conservatism and incremental change, is confronted with developments that do not lend themselves readily to the application of precedent and analogy. One need only survey the debate raging in the U.S. regarding the applicability of common-law doctrines of trespass[1] to the Internet to wonder if the law as it currently exists provides the tools needed to deal with tech issues in a manner that is fair, just, and consistent with both larger legal norms and society's technological needs.

Clearly, a larger conversation is taking place regarding the law's ability to regulate and control technological activities, what form that control should take, and even whether it is appropriate at all.[2] The goal of this article is to contribute to the Canadian end of this conversation, albeit in a modest way, by inquiring into the continued viability of negligence law in this setting (i.e., whether the common law of negligence as it currently exists has sufficient capacity to handle "tech torts"). The focal point of this comment will be the recent judgment of the Supreme Court of Canada in *Cooper v. Hobart*,[3] which appears to have made some significant changes to the elements of "duty of care", the foundational negligence concept. The Court framed its decision as refining duty of care analysis in order to properly deal with "novel claims" (i.e., those for which there is not an established or analogous duty of care in the existing case law). Given that the growth of electronic commerce and Internet usage continues to spawn "novel" legal issues, *Cooper* is an appropriate starting point for a discussion of whether the law, as it stands, provides courts with the tools to determine when and where new duties of care should arise.

Duty of Care: *Donoghue* to *Cooper*

The duty of care is the analytical starting point for all negligence claims. In the much-revered[4] case of *Donoghue v. Stevenson*,[5] Lord Atkin laid out the "neighbour principle" that, in effect, created the modern law of negligence:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. 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.[6]

Lord Atkin's famous *dictum*, while revolutionary in scope, actually built on various prototypical forms of the negligence action that had developed. It was already settled law that a duty of care was owed as between doctors and patients, or lawyers and clients, for example.[7] *Donoghue*, however, "established the proposition that the duty of care owed in negligence actions is not confined to a closed list of specific relationships, but is based upon an open-ended and general concept of a relationship of proximity which is capable of extension to new situations".[8] Negligence, then, was universally adaptable, always potentially available — a tort for all seasons.

I do not propose to discuss fully the development of the duty of care within Canadian law, and refer the reader to the leading authorities in that regard.[9] However, a short review of the major touchstones is necessary to provide background for the thoughts that follow. Lord Atkin's "neighbour principle" was developed and expanded by the House of Lords in a series of cases[10] that culminated in the 1978 judgment of Lord Wilberforce in *Anns v. Merton London Borough Council*. In that case, His Lordship set out a two-stage test for determining duty of care:

†Faculty of Law, Dalhousie University, Halifax, Nova Scotia, Canada. I am grateful for the helpful comments of the editors, anonymous peer reviewers, and my colleague, Phillip Saunders. Limitations are, of course, attributable to me.

> 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, if the first question is answered affirmatively, 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. . . .[11]

As Professor Klar has noted, this was a significant development in that the establishment of "a sufficient relationship of proximity or neighbourhood" gave rise to a *presumptive* duty, which could only be rebutted by pressing policy concerns. "[I]n reaffirming that there is a universal formula of duty applicable to all cases of alleged negligence, [*Anns*] divided the elements of duty into two segments: (i) a relationship of proximity or neighbourhood and (ii) policy".[12] However, *Anns* also contained the most explicit recognition to that date that the neighbour principle contains within it limiting factors: that it was not just a mechanism by which the scope of negligence could be expanded, but simultaneously provided the ability for courts to circumscribe it as well. Justice Linden has recently remarked on this aspect:

> Duty is a negative doctrine, a limiting tool, a way of circumscribing the scope of negligence law. It denies, restricts, curtails, confines, controls the spread of negligence law by keeping cases out of the hands of over-sympathetic juries and trial judges. By means of duty, courts may decide, as a question of law, that there is no duty owed by this defendant to this plaintiff for this loss. The determination of no duty, however, addresses a global policy, not an evaluation of specific fact situations . . . [O]ver time the duty issue changed from "identifying where liability *is* imposed to those where it is *not*."[13]

Nonetheless, it became apparent that the "presumptive duty" approach was expansionist in nature. The Supreme Court of Canada adopted *Anns* in its 1983 decision of *Kamloops (City) v. Nielsen*,[14] and proceeded in a series of cases thereafter to expand the reach of negligence law, finding duties of care in "novel" situations where none had existed before.[15] In all of these, the two-step approach to duty of care was utilized, and it seemed relatively clear that if foreseeability could be found in the first step, it created sufficient proximity or neighbourhood for the presumptive duty of care to arise.[16] Foreseeability was, in turn, a modest hurdle, even an "empty vessel",[17] since it was decidedly rare for a plaintiff who had indeed suffered damage to be found to be unforeseeable to the defendant.[18]

With the release of *Cooper* in 2001, however, this pattern appeared to be brought up short. Cooper was one of a group of investors in British Columbia who alleged financial damage due to a failure on the part of the B.C. Registrar of Mortgage Brokers to properly regulate the brokers under its purview. Cooper applied to have the claim certified as a class action, and the Registrar countered that the claim disclosed no cause of action on the basis that no duty of care was owed. The Registrar was successful before the Supreme Court of Canada, which took the opportunity to "revisit" the *Anns* test.[19]

In revisiting, the Court appears to have fundamentally changed the analytical framework of what it nonetheless continues to call the "*Anns* test." It accomplished this by breaking out the terms "foreseeability" and "proximity" from the first step of the test, asserting (despite over a decade of jurisprudence to the contrary) that each was a discrete element that had to be proven in order to ground the duty of care. Foreseeability remained as straightforward as it had always been; if "a reasonable person would have viewed the harm as foreseeable", then this portion of the test was made out.[20] Proximity, however, was something different; specifically, it became a second sub-step in the first step of the *Anns* test:

> (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.[21]

Proximity is to be determined by reference to the established categories of negligence. If a relationship between plaintiff and defendant has given rise to a duty of care in a previous case, then proximity is settled; if the relationship is analogous to a previously established duty of care, then "a *prima facie* duty of care may be posited".[22] This is not to say, the Court assures us, that novel duties of care cannot be introduced, since ". . . the law of negligence . . . [is] still permit[ed] . . . to evolve to meet the needs of new circumstances".[23] However, the relationship will have to be carefully scrutinized to see whether it justifies a finding of proximity:

> 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. . . .[24]

Since these step-one policy concerns arise from the relationship between the plaintiff and the defendant, step two of the *Anns* test requires consideration of what the Court called "residual policy considerations"[25] outside that relationship. The Court gave as examples the spectre of unlimited liability, the existence of other legal remedies,[26] and in *Cooper* specifically, the need of the Registrar to balance public and private interests with the fact that the Registrar was making quasi-judicial decisions, *inter alia*.[27]

In effect, what the Court did in *Cooper* was insert a new, third step into the two-step *Anns* test, purportedly as more explicit recognition of there being policy considerations inherent in both parts of the test. This was not simply a semantic or academic distinction, however,[28] because it introduced a conservative, incrementalist approach that is likely to facilitate the curtailment of

negligence law (to use Justice Linden's phraseology) rather than its expansion. As Professor Klar comments:

> 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. It asserts right at the start that some types of disputes are not amenable to a tort law resolution … An approach that is more resistant to the recognition of a presumptive duty in the first stage is decidedly more cautious with regard to the extension of negligence law.[29]

Commentators[30] (including this one) are in general agreement that this more cautious approach is indeed what the Court was driving at in *Cooper*, in no small part because it mirrors the retreat from the expansionism of *Anns* by the House of Lords during the 1980s and early 1990s.[31] In contrast to our Supreme Court, the House of Lords explicitly rejected *Anns* on judicial policy grounds, but they did re-implement a more incremental approach by inserting a criterion of "proximity" between the *Anns* stages.[32] While not as explicit as Canadian courts have been about the general policy component that is inherent in the duty exercise,[33] the House of Lords nonetheless sounded the horn for their conservative retreat loudly, as opposed to the subtle, "back-door" approach utilized by the Supreme Court.[34]

In the result, Canada now has a three-step approach to duty of care. In "novel" cases, it will play out as follows:

(1) determine whether harm to the plaintiff would have been a reasonably foreseeable result of the defendant's actions;

(2) scrutinize the relationship between plaintiff and defendant for factors indicating "closeness" and making it "just and fair" to impose a duty of care; and

(3) examine the policy factors external to the relationship to determine whether a *prima facie* duty of care arising from steps (1) and (2) should nonetheless be disallowed.

Moreover, the Court appeared to find in a subsequent case applying *Cooper*[35] that the plaintiff bears the legal burden at all three parts of the test (i.e., he or she must prove foreseeability, proximity and a lack of residual policy factors that would otherwise negative the claim). This is a marked departure from the previous *Anns* structure, where the plaintiff simply bore the burden of proving foreseeability and the substantive policy argument was generally required of the defendant.

Dissatisfaction with the wrinkle in duty of care introduced by *Cooper* has been evident. In an early comment, Professor Klar noted two major problems: first, that the issue of whether a particular relationship fell into or was analogous to a previously recognized category was problematic, since "there are many existing categories which can be so broadly defined that it is difficult to ascertain whether any case falls into them or represents a new category";[36] and second, that the distinction between the kinds of policy concerns to be considered at the second and third steps was not at all clear, and this could only lead to obfuscation and confusion.[37] Justice Linden has very recently surveyed the "avalanche" of motions spawned by *Cooper* and noted that Professor Klar's words were prophetic, in that the introduction of proximity analysis has produced "scores of cases analyzing duty situations, often needlessly, in cases where the duty was long settled and where, therefore, duty should not have been analyzed".[38]

It does seem clear that the effect of *Cooper* has been to restrain the extension of duty of care, as in the Supreme Court of Canada's own decisions using the framework (*Cooper*, *Edwards*[39] and *Odhavji Estate v. Woodhouse*[40]) where the extension of duty of care was primarily[41] denied on proximity grounds. There is consensus, however, that without more clarity being imported into the proximity analysis, this trend is likely to be somewhat muddled in its execution. As Professor Feldthusen comments:

> [C]ritical terms that trigger the *Anns*/*Cooper* analysis such as "new" or "novel" duties of care, existing "categories" of duty, and "analogous" decisions are completely fungible terms. Courts remain relatively free to resort to precedent where they wish, ignore it when they do not, and to distinguish it if necessary.[42]

Negligence = Cyberlaw?

Duty of care is about establishing thresholds for whether relationships are the proper focus of a liability inquiry — in effect, answering the question "who should be able to sue whom?" As has been recognized (perhaps most successfully) by Canadian courts, this is essentially a policy question masquerading as a question of law, and *Cooper* is effective insofar as it reiterates and reinforces this understanding of the question.

It is highly arguable, in my view, that the massive integration of technology into the structure and fabric of Canadian society puts us at a "threshold" where policy is indeed the key question. Technology can produce relationships that are "novel" in the truest sense, in that they are not analogous to any which have come before. To be sure, this is not unique from an historical point of view. The rise of professions such as medicine, law, and engineering produced relationships that in turn gave rise to new duties of care as between professional and client; the industrial revolution changed irrevocably the dynamic between employer and employee, and ultimately produced both common-law and statutory duties of care owed by the former to the latter. To the extent that technology is viewed as a product, there is nothing new about the duty of care owed by manufacturer to consumer. Yet the profound functional integration of technology into our daily lives elevates the products themselves far beyond the snail in the bottle of *Dono-*

ghue. Computers are not merely goods, nor are code-writing or systems design merely services; they are in some sense the creators of new modes of human interaction, new relationships, and the tools by which these relationships function.

The question is whether the new formulation of duty of care will aid the courts in coming to terms with these new kinds of relationships and in determining who should be protected from what kind of harm. The rapid growth and integration of technology and the unpredictability of result seem to demonstrate a continued need for the tort of negligence, for an expansive approach to duty of care, in the same way that the public needed to be protected from early modern civil engineering where advances in the field still did not prevent bridges from falling down. This exact analogy was employed by software specialist John McHugh of the Software Engineering Institute at Carnegie Mellon University during a recent address.[43] He underscored his point with a description of the current state of software evolution that speaks volumes of the void that the law must fill:

> While much of the software that we build is "pretty good," we lack the link between process and product that would permit us to predict accurately the quality of the resulting product. We cannot give prescriptive advice to developers. We cannot provide meaningful warranties. We cannot predict the safety, security or reliability of systems that make extensive and critical use of software.[44]

This is, from a legal standpoint, a startling admission from an expert in the field of software design. What it says to me is that, conceptually, the need for tort law is as great now as at any previous time of technological expansion, where new forces produced new relationships and, inevitably, new kinds of injury. Those injured will need to be compensated; better and safer practices should be encouraged, careless conduct deterred.

It is ironic, then, that at this time when we most need the robustness of *Anns* and its progenitor, *Donoghue*, we are given *Cooper*. Just as the potential for novel claims is arguably at its historical height, the lower courts are instructed to consider the relationships involved more carefully, more conservatively, and ensure that the imposition of a duty of care is justified by reference to two different sorts of policy grounds. Recall that this is a significant break with the previous state of negligence law, where the plaintiff could raise at least a *prima facie* duty by simply making out foreseeability, a modest evidentiary burden. The plaintiff must now, it appears, prove that imposing the duty of care is both justified by the state of the proximity factors and not amenable to being struck on the "residual" policy grounds. If properly applied, *Cooper* must impede the ability of negligence law to embrace new, technology-based relationships.

The counter-argument here might be that this is precisely the way that the common law is supposed to develop — by way of caution, increment, and analogy — and that the expansionist tendencies of the *Anns* test represented an aberration that has now been properly controlled. The speed and complexity with which technological relationships are created and developed, the argument might go, are precisely why the law must proceed with caution. New duties of care unleashed by judges unschooled in the vagaries of technological advance (and hoodwinked by tech-savvy counsel) are as likely to be malevolent genies escaped from bottles uncorked as they are to be salvation for the injured. Far better to proceed cautiously, on the basis of established principles, with careful consideration of the policy implications of every step. Immediate regulatory needs should be filled in by the legislature; the common law must know and keep to its place.

Moreover, *Cooper* itself may provide part of the answer, in that it instructs the lower courts that cases which fall into existing categories of negligence, or are analogous thereto, do not require proximity analysis, but at most need only be evaluated on the basis of the residual policy considerations. Personal injury is still personal injury; pure economic loss arising from negligent misrepresentation does not become something different because the representation was made by way of e-mail instead of orally.

I admit some sympathy for this argument, but in my view, the matter is made more complex both by the structure of *Cooper* and the subject matter under discussion here. First, it is not at all clear that the courts will recognize "existing categories" when they see them, and a great deal depends on how broadly or narrowly the facts are construed and presented during the course of the case and the reasons deciding it. Professor Klar argues convincingly that, while *Cooper* and *Edwards* themselves were used as the platform for introducing proximity analysis on "novel" issues, both could just as easily have been presented as being in line with existing duties of care.[45] The post-*Cooper* case law to date demonstrates that the lower courts are "confused about this", and often fail to see established category or analogy where it exists, compounding this with proximity analysis even in cases where they recognize the duty of care.[46] While it is early days yet, developments thus far are not encouraging.

The other response is that, while it may reek of 21st-century conceit to suggest that the common law is simply not up to the task of dealing with new technology, there is some indication that simply proceeding by way of categorization and analogy will not be sufficient. As noted earlier, the American courts have been struggling with the tenuousness of analogizing the activity of web spiders to classical notions of trespass;[47] courts the world over have wrestled with determining when the appearance of writings or remarks on the Internet constitutes "publication" for the purposes of defamation claims.[48] Can viruses and worms really constitute a "nuisance" in the manner of seeping industrial waste? As Professor O'Rourke has observed, "the newness

of the medium causes courts to search for analogies to guide decision making. However, the application of real-world analogies to the particular characteristics of virtual space may lead to unintended consequences".[49]

The difficulty is not only how to compare computer-based relationships with traditional physical-space relationships, for the purpose of analogizing under *Cooper*, but the inertia created by the proximity step. The potential negligence liability of Internet Service Providers (ISPs) provides a good example. There simply is no precedent that enables us to effectively analogize what an ISP does and many of the relationships within which it operates.[50] As a result, different policy factors will need to be considered; for example, as some commentators have suggested, "[t]he ISP makes a very attractive defendant because it is more readily identifiable in the realm of cyberspace where user anonymity is often the norm, because of the jurisdictional problems that arise from the global nature of the Internet, and because the ISP may have deep pockets".[51] Whether or not these are indeed appropriate policy factors for consideration, they indicate that the kind of policy debate that must be had is substantially at the macro level, and should fall under the "residual" policy considerations in the second part of the test. The problem with *Cooper* is that it potentially prevents courts from ever reaching this stage. If analogy is not to be had, a judge may not find sufficient identifiable "closeness" in the relationship to ground proximity. The "residual" policy considerations that would better inform the issue are left unearthed.

More generally, there is a potentially large variety of "relationships" to try to fit within the contours of the existing duty-of-care structure. As Professor Owens recently noted in these pages,[52] the list of potential defendants in a case involving worms or viruses could include anti-virus software manufacturers, proprietors of infected electronic commerce Web sites, security consultants and auditors, application service providers, and ISPs, *inter alia*.[53] There is usually no physical closeness, often no geographical neighbourhood, and even the functional proximity will be questionable in some cases. The legal regime for dealing with "novel" claims is going to get a workout in the coming years and decades, but it may not be up to the task.

Case Studies

The question that the foregoing suggests, then, is simply this: can the *Cooper* duty-of-care test, designed to proceed cautiously from known categories of neighbours, also figure out whether it is "fair and just" to impose a duty of care as between netizens? The answer is necessarily speculative, but it may be useful to pose a couple of fact scenarios and estimate how they would fare under a *Cooper* analysis.

On Friday, February 6, 2004, RealNetworks announced that it had discovered flaws in different versions of its popular media player, RealPlayer, which could allow attackers to create corrupt music or video files that, when played, would allow the attacker to take control of the victim's personal computer.[54] RealNetworks quickly released a patch to fix the problem, which one report noted could "affect a large portion of the 350 million unique registered users of" RealPlayer.[55] Suppose that an attacker created a corrupt mp3 (digital music file), which he or she released by way of a file-sharing service like Kazaa, and that the victims included both registered and un-registered users of RealPlayer, as well as a corporation whose employee downloaded and played the corrupt file.

The various other negligence issues, such as standard of care, causation, and remoteness, aside, even the duty-of-care issue begins to read like a first-year Torts exam. Who are the defendants, and who owes whom a duty of care under *Cooper*? The obvious beginning point is the attacker. While commentators generally agree that in principle such an individual, if he or she could be found, would be liable,[56] this would seem to come fairly close to being a "novel claim" in Canadian negligence law. He or she clearly comes within the first step, since harm was eminently foreseeable and, in fact, intended.[57] Moving to proximity, care against potential harm from malicious code is not (to my knowledge) a recognized duty of care in Canada. Analogy is difficult; one thinks of a defendant negligently creating a power surge that could cause property damage to persons on the same power grid. However, the latter example derives its duty of care from geographical, or at least physical, proximity, not to mention the fact of the potential for *physical* harm (i.e., property damage). The RealPlayer attacker, by contrast, has set in motion a force that may cause pure economic loss to a large group of people who have nothing more in common than RealPlayer on their hard drive and an Internet connection. It is not a recognized category of pure economic loss. Precedent and analogy fail us.

Thus, the analysis must move to those factors that might make it "fair and just" to impose a duty of care. *Cooper* provides examples — expectations, representations, reliance, the property or other interests involved, the "closeness" of the relationship — but aside from the exceedingly general "other interests", these are not overly helpful. The aspect of the Internet that makes it such an incredible tool — its ability to electronically link millions of people — is what may defy any notion of "closeness" as the term is to be understood under *Cooper*. It is difficult to conceive of the attacker, who simply releases malevolent code out into the electronic stream to be picked up by the unaware, as being "proximate" to any of the hypothetical victims. In this case, we never move to the larger, societal or "residual" policy implications of the decision.

The flip side of the equation is that despite the *Cooper* criteria, it is not difficult to arrive at the opinion

that it would be "fair and just" to allow a cause of action as between the victims and the attacker. To do this, however, we must examine the Internet as the *sui generis* thing that it is. The fairness and justice of imposing the duty of care here derives from the very nature of the relationship and the setting within which it occurs, and not from analogy to categories of negligence that have gone before. The attacker, as an Internet user, is not only neglecting a duty to other netizens but knows that the file is virtually certain to cause injury of some kind[58] to a wide variety of people. The nature of the Internet allows him or her to reach many more victims than would be physically possible. The far-flung intimacy of Internet users, despite lacking any hallmarks of traditional "proximity", nonetheless makes it just and fair to impose the duty of care.

Cooper does not necessarily foreclose this kind of inquiry, but the fit is an uncomfortable one.[59] The former *Anns* framework would arguably have produced a different result; once the victim made out that the harm was foreseeable, the onus would have been on the defendant to present policy factors that justified *not* imposing a duty of care in this situation. The policy debate would have to have been held in its entirety at the second stage, where both relationship-based and societal policy factors could be balanced against one another to tailor the result to the tech setting. Procedurally, unlike *Cooper*, the defendant would not have the advantage of being entitled to two efforts at refuting the novel duty of care (with the burden of proof on the plaintiff). Substantively, the Court would have more flexibility in terms of taking a truly holistic view of the relationship in question, rather than being hamstrung by adherence to the new proximity analysis.

What about RealNetworks, which created the faulty software and made it easy to download and install, leaving the victims open to the bad code? This part of the analysis fares better under *Cooper*, mostly because it has a products liability angle. RealNetworks obviously owes a duty of care to registered users of its product, because negligent construction of the product could foreseeably cause harm to the ultimate consumer, and because products liability is an established category of negligence. Both the unregistered users and the corporation are arguably foreseeable users or third parties. The law regarding pure economic loss will apply to include or exclude certain claims; any policy debate will be had at the residual policy step where it properly belongs in any event.

Let us take a different scenario. Suppose an unidentified party hacks into the network of a large law firm and uses it as a conduit to hack into the systems of the firm's clients with which the firm's network is integrated.[60] Suppose as well that one of these clients is the Regional Health Authority and that the hacker gains access to the computer system of a major hospital, where his or her negligent hacking not only destroys digitized records but knocks out the primary power system. Backup power covers off most vital machinery, but several patients are injured when some systems fail because of the blackout.

The hacker being unidentified (and likely judgment-proof), both the hospital and the individual victims look to the law firm for recovery. It is certainly foreseeable that negligent protection of a network could lead to harm to those parties, such as the hospital, who were electronically connected to it. Again, one struggles for a precise analogy to existing caselaw, but if one takes a broad approach, then property damage by way of computer negligence will likely turn up on the proximity radar. The patients present a thornier problem. Foreseeability is not an issue, but there does not seem to be a previously established category from which to draw. Is "negligence indirectly causing physical injury" enough in this setting? The closest analogy might be where the power company itself negligently allowed the third party to cause the blackout. The difference for proximity, however, is that the link between the firm's network and that of the hospital is only incidental to their commercial relationship. The link does not truly come within the scope of the firm's provision of "services" to the hospital, which might otherwise be sufficient to ground the third-party claim of the patients. The relationship between the patients and the firm is therefore that much less proximate.

If there is no analogy, then closeness must be sought through the proximity analysis for this novel case. Once again, there is little in the way of expectations, representations, reliance, or property interests upon which to base a finding of "closeness." The fact of actual physical injury must surely be taken into account, but one could expect a heated argument from the firm that it would hardly be "fair and just" that by simply running its own computer network (which virtually every company does) it should be opened up to claims from any third party who might be affected, somehow, somewhere.[61] Must every computer network operator have a duty to take care with regard to anyone who may be affected by its negligence? Surely not, but on what principled basis can we impose limitations? Those we are used to, such as geography, do not really apply any more. *Cooper* does not help in this task. The debate that must be had is in the realm of the larger, extraneous or "residual" policy concerns of the second step, but the proximity analysis keeps us from ever getting there.

One can easily imagine twists and turns on these or other scenarios. What if the law firm's negligence allows a virus to emanate from its network that shuts down and damages half of Lower Manhattan? My point here, however, is not to speculate on the "what-ifs" of tech torts, but to demonstrate that the Supreme Court's approach in *Cooper* may ultimately tie the hands of the courts. An approach based on the language and conceptual frameworks of days past has the strong potential to pro-

duce undue rigidity when assessing truly novel claims or those with novel aspects. This is not to say that open-minded judges cannot make the leaps required, but the structure of the *Cooper* test actually holds them back in their ability to do so. This does more than accomplish the somewhat laudable goal of restraining the careless extension of duty of care — it prevents the adaptation of the common law of negligence to new subject matter, which defeats the most profound strength of the common law.

Conclusion

In 1893, Lord Esher wrote of duty of care, "a person is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."[62] Over a century later, we have arrived at a time when all the world is, potentially, your neighbour. This idea was at the heart of *Donoghue*, and was a startling one for its time. Today, society takes this for granted, but the law has yet to catch up.

It may be that, in promoting the extension of negligence law into the tech sector, I am attempting to fit square pegs into round holes. Legislation, in tandem with jurisdictional and technical co-operation among like-minded states, may ultimately be the best vehicle through which to proceed. Yet I am reluctant to concede the inability of the common law to continue its mostly proud tradition of compensating the injured, providing education and deterrence, and even simply moving money around the economy in a principled way. There is no doubt that some of the issues to be considered are manifestly different than those that have gone before. The beauty of *Donoghue*, however, was that the "neighbour principle" was amenable to being extended on a principled basis, anywhere, at any time.

It is certainly important that the rigour that currently exists in negligence law be reinforced, so that the expansion of negligence law to embrace technologically based relationships does not bring us to that "day when liability will be determined routinely on a case by case basis, 'under all the circumstances' basis, with decision makers (often juries) guided only by the broadest of general principles."[63] However, if *Anns* was too liberating a structure for duty of care, I have argued here that *Cooper* represents too great a retreat. It may prevent negligence from blossoming into an effective adjunct to both legislative and self-regulation. It may be, as the old song goes, that duty of care has left us — just when we needed it most.

Notes:

[1] See, by way of sample only: Maureen A. O'Rourke, "Property Rights and Competition on the Internet: In Search of an Appropriate Analogy" (2001) 16 Berkeley Tech. L.J. 561; Niva Elkin-Koren, "Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing" (2001) 26 Dayton L. Rev. 179; and Laura Quilter, "Regulating Conduct on the Internet: The Continuing Expansion of Cyberspace Trespass to Chattels" (2002) 17 Berkeley Tech. L.J. 421.

[2] See, for example, Michael Lee *et al.*, "Comment: Electronic Commerce, Hackers and the Search for Legitimacy: A Regulatory Proposal" (1999) 14 Berkeley Tech. L.J. 839, wherein the authors suggest the decriminalization of non-malicious hacking, towards the twin goals of "promot[ing] self-regulation through market forces" and "facilitate[ing] democratization of [Internet] architectural developments" (at 882–886).

[3] (2001), 206 D.L.R. (4th) 193 (S.C.C.) [*Cooper*]. The Court released a companion judgment with *Cooper*, *Edwards v. Law Society of Upper Canada* (2001), 206 D.L.R. (4th) 211 (S.C.C.) [*Edwards*], which dealt with the same issue. However, *Cooper* contains the more complete version of the Court's new duty-of-care test, and will be emphasized here.

[4] See, for example, the various articles on the case in (1983) 17 U.B.C.L. Rev., particularly A.M. Linden, "The Good Neighbour on Trial: A Fountain of Sparkling Wisdom," at 67 of the same volume.

[5] [1932] A.C. 562 (H.L.) [*Donoghue*].

[6] *Ibid.* at 580.

[7] See generally Winfield, "The History of Negligence in Torts" (1926) 42 L.Q. Rev. 184, for a historical overview.

[8] Lewis Klar, *Tort Law*, 2nd ed. (Toronto: Carswell, 1996) at 134.

[9] See, in particular, L. Klar, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) c. 5; Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham, Ont.: Butterworths, 2001) c. 9; Smith, "The Mystery of Duty," in Klar, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1977) at 1. For some recent theoretical (albeit American) scholarship on the subject, see Daniel More, "The Boundaries of Negligence", Vol. 4, *Theoretical Inquiries in Law (Online Edition)*: No. 1, Article 6 (2003), available online (to subscribers) at: http://www.bepress.com/til/default/vol4/iss1/art6.

[10] Most notably *Home Office v. Dorset Yacht*, [1970] A.C. 1004 (H.L.).

[11] [1978] A.C. 728 (H.L.) at 751-52.

[12] L. Klar, "Foreseeability, Proximity and Policy" (2002) 25 Adv. Q. 360 at 362.

[13] A.M. Linden, "Doubts About Duty", an address given to the Continuing Legal Education Conference, Vancouver, British Columbia, April 23, 2004 (unpublished; copy on file with the author), citations omitted.

[14] [1984] 2 S.C.R. 2 [*Kamloops*].

[15] E.g., *Kamloops*, *ibid.*; *C.N.R. v. Norsk*, [1992] 1 S.C.R. 1021; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *London Drugs v. Keuhne & Nagel*, [1992] 3 S.C.R. 299; *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85; *Crocker v. Sundance*, [1988] 1 S.C.R. 1186; *Stewart* v. Pettie, [1995] 1 S.C.R. 131; *Ryan v. Victoria (City)* (1999), 168 D.L.R. (4th) 513 (S.C.C.).

[16] In some cases, it was difficult even to tell whether the Court was actually engaging in the "policy" discussion required by the *Anns* test or just running with foreseeability; see *Crocker v. Sundance*, *ibid.*

[17] For an argument on this point, see L. Klar, "Judicial Activism in Private Law" (2001) 80 Can. Bar Rev. 215 at 221ff.

[18] Though it was not unheard of; see, for example, *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228.

[19] *Cooper*, *supra* note 3 at para. 1.

[20] *Ibid.* at para. 22.

[21] *Ibid.* at para. 30.

[22] *Ibid.* at para. 36.

[23] *Ibid.* at para. 31.

[24] *Ibid.* at para. 34.

[25] *Ibid.* at para. 37.

[26] *Ibid.*

[27] Though the decision was actually rendered on the basis of there being no proximity, the Court did briefly consider the "second step" considerations.

[28] Despite efforts by McLachlin C.J. and Major J., who co-wrote the decision, to portray it as such; see *Cooper* at para. 27.

[29] *Supra* note 12 at 364.

[30] See Klar, *Tort Law*, 3rd ed., *supra* note 9 at 163–169, and "Foreseeability, Proximity and Policy", *supra* note 12; Linden, *supra* note 13; B. Feldthusen, "The *Anns/Cooper* Approach to Duty of Care for Pure Economic Loss: The Emperor Has No Clothes" (2003), 18 C.L.R. (3d) 67 [Feldthusen]; S. Pitel, "Comment: *Cooper v. Hobart*: A Reformulated *Anns* Test for Canada" [2002] Tort L. Rev. 10, and "Case Comment: *Cooper v. Hobart*: Canada Remakes the *Anns* Test" (2002) 61 Camb. L.J. 252.

[31] For summaries, see A.M. Linden & L. Klar, *Canadian Tort Law: Cases, Notes & Materials*, 11th ed. (Toronto: Butterworths, 1999) at 282, notes 6 and 8; Klar, *Tort Law*, 3rd ed., *supra* note 9 at 167–169. See generally *Peabody Donation Funds Govs. v. Sir Lindsay Parkinson & Co.*, [1985] A.C. 210 (H.L.); *Yuen Kun-yeu v. A.G. Hong Kong*, [1988] 1 A.C. 175 (P.C.) [which the Supreme Court of Canada cited, tellingly, in *Cooper* at para. 29]; *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (H.L.); *Murphy v. Brentwood District Council*, [1990] 2 All E.R. 908 (H.L.).

[32] See Howarth, "Negligence After *Murphy*: Time to Re-Think" (1991) 50 C.L.J. 58.

[33] For early recognition of this, see *Nova Mink v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241 (N.S.S.C.) per Vincent MacDonald J., cited in *Cooper* at para. 25.

[34] One is struck not so much by the fact that the Court changed the law, but that it did so while blithely purporting to be changing nothing, or at most providing "clarity" where it is alleged to have been lacking (see, e.g., *Cooper* at para. 29). This has not been unusual as of late, however; for another example of *sotto voce* law reform in the guise of clarity and restatement, see *R. v. Handy*, [2002] 2 S.C.R. 908. For relevant commentary, see R. Haigh, "A *Kindler*, Gentler Supreme Court? The Case of *Burns* and the Need For A Principled Approach to Overruling" (2001) 14 S.C.L.R. (2d) 139.

[35] *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 52 [*Odhavji Estate*].

[36] *Supra* note 12 at 370.

[37] *Ibid.* at 371–375.

[38] *Supra* note 13.

[39] *Supra* note 3.

[40] *Supra* note 35.

[41] In *Odhavji Estate*, the action was permitted to proceed against the Police Chief of Boothby, but struck as against the Province of Ontario and the Metropolitan Toronto Police Services Board. The case is more remarkable for its revival of the tort of misfeasance in public office.

[42] B. Feldthusen, *supra* note 30 at 74.

[43] John McHugh, "Computer Security and Security Research: Impossible or Just Plain Difficult?", an address given to the Privacy and Security Laboratory (PSL) Workshop Strategic Thinking Session, held at Dalhousie University, Halifax, Nova Scotia, March 5, 2004 (unpublished; copy on file with author).

[44] *Ibid.*

[45] *Supra* note 12 at 371.

[46] *Supra* note 13.

[47] *Supra* note 1.

[48] See, for example, *Weiss v. Sawyer*, [2002] O.J. No. 3570 (Ont. C.A.); *Dow Jones & Company Inc. v. Gutnick* [2002] H.C.A. 56 (Aust. H.C.) available online at: http://www.austlii.edu.au/au/cases/cth/HCA/2002/56.html. The Ontario Court of Appeal recently made the following finding:

> Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.

(*Barrick Gold Corp. v. Lopehandia*, [2004] O.J. No. 2329 (QL) at para. 35, citing in support (at para. 33) Lyrissa Barnett Lidsky, "Silencing John Doe: Defamation and Discourse in Cyberspace" (2000) 49 Duke L.J. 855 at pp. 862–865).

[49] O'Rourke, *supra* note 1 at 629.

[50] Note the Federal Court of Appeal's treatment of whether an ISP was a mode of communication, and the significance of operating a cache, under copyright law, in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2002] 4 F.C. 3; Appeal to S.C.C. heard and reserved, December 3, 2003 ([2002] S.C.C.A. No. 289).

[51] A. Bernstein & R. Ramchandani, "Don't Shoot the Messenger! A Discussion of ISP Liability" (2002) 1 C.J.L.T. 77 at 77.

[52] R.C. Owens, "Turning Worms: Some Thoughts on Liabilities for Spreading Computer Infections" (2004) 3 C.J.L.T. 33.

[53] *Ibid.* at 36.

[54] R. Lemos, "RealPlayer flaws open PCs up to hijackers," CNET News.com (6 February 2004) online: CNET News.com http://news.com.com/RealPlayer+flaws+open+PCs+up+to+hijackers/2100-7349_3-5154193.html.

[55] *Ibid.*

[56] E.g. Owens, *supra* note 52.

[57] I am intentionally avoiding intentional tort (particularly trespass) analysis, which raises its own issues for this kind of claim, not least the element of "directness;" see generally Klar, *Tort Law*, 3rd ed., *supra* note 9 at 26–29.

[58] Which would, of course, have to be proven by the plaintiff as a separate element, and would depend on how the loss of control of the computer manifested itself.

[59] Note again the Court's closing words in its new proximity analysis. After reviewing the "categories in which proximity has been recognized," the following statement occurs: "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" (*Cooper*, *supra* note 3 at para. 36).

[60] This is a gloss on a scenario suggested by Lee *et al.*, *supra* note 2, which those authors in turn draw (at fn. 55) from D.L. Gripman, "The Doors are Locked but the Thieves and Vandals are Still Getting In: A Proposal in Tort to Alleviate Corporate America's Cyber-Crime Problem" (1997) 16 J. Marshall J. Computer & Info. L. 167.

[61] This kind of claim is conceivably resolvable by resort to the element of "remoteness". However, the Canadian law on remoteness is in an unsatisfactory state and is ultimately too fact-specific a tool to deal with the major policy issues to which tech torts give rise. Moreover, it prevents the procedural advantages which stem from the "front-end" analysis of duty of care (i.e., the ability to have a claim struck prior to trial), since remoteness is only evaluated after findings of duty, breach of standard and causation.

[62] *LeLievre v. Gould*, [1893] 1 Q.B. 491 at 497.

[63] J. Henderson, "Expanding the Negligence Concept: Retreat from the Rule of Law" (1976) 51 Ind. L.J. 467, as quoted in Linden & Klar, *Canadian Tort Law*, 11th ed., *supra* note 31 at 21.