

The duty of care and the search for certainty: *Sullivan v Moody, Cooper v Hobart*, and problems in the South Pacific.

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In this article, Andrew Barker, from the Faculty of Law at the University of Otago, considers two recent decisions on the duty of care in negligence: Sullivan v Moody, from the High Court of Australia, and Cooper v Hobart, from the Supreme Court of Canada. In these decisions, the two courts have re-evaluated their approach to the duty of care in negligence, and suggested new approaches to this problem in an attempt to remove some of the uncertainty their previous decisions have created. After reviewing these decisions, the author argues that the approach to the duty of care in New Zealand, represented by the decision in South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd, is at least as uncertain as that in Australia and Canada prior to these decisions, and that the appellate courts of New Zealand should also act to remove the uncertainty that their previous decisions have created.

Introduction

Few issues have occupied as much space in the law reports over the last 25 years as the problem of how to recognise a duty of care in negligence where the case involves a fact situation that has not previously been considered by a court. Despite this effort, the courts have achieved little certainty as to the approach to take. This has been particularly apparent in England, Australia and Canada, where practitioners have had to try and make sense of the often conflicting approaches that have been taken by their appellate courts. New Zealand, however, has not been immune from these problems. While our courts have united behind the approach of Richardson J in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* ([1992] 2 NZLR 282 at 305-6 - “*South Pacific*”) - an approach that asks whether recognising a duty of care would be “just and reasonable”, and answers that question by reference to a two stage inquiry into proximity and policy - there remains real uncertainty as to when the approach in *South Pacific* should be used, and when it is used, the exact content of each stage of its inquiry.

Of interest then to those who may have had to grapple with these problems, will be the recent

decisions of the High Court of Australia in *Sullivan v Moody* ((2001) 183 ALR 404), and the Supreme Court of Canada in *Cooper v Hobart* (2001 SCC 79). The decisions represent attempts by those courts to provide clear and definitive statements of their approach to this problem. In this article I review these important decisions. I then reflect on the uncertainties that exist in New Zealand in respect of the approach to the duty of care, and the assistance these decisions might provide in resolving those uncertainties. While I conclude that the particular approaches suggested by the High Court of Australia and the Supreme Court of Canada are only of limited assistance in New Zealand, there remains real uncertainty in our approach to the duty of care which requires clarification from our appellate courts.

Sullivan v Moody

The confusion and uncertainty that has surrounded the approach to the duty of care in Australia is well known. Australia has long struggled with the historical conflict between the development of the duty of care by reference to general principle, and the incremental development of existing categories of liability. Until the mid 1990's, Australia was undoubtedly committed to the first of these approaches. (See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *San Sebastian Pty Ltd v Minister Administering Environmental and Planning Assessment Act 1979* (1986) 162 CLR 340; *Cook v Cook* (1986) 162 CLR 376; *Gala v Preston* (1991) 172 CLR 243; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Bryan v Maloney* (1995) 182 CLR 609). The existence of a duty of care in a novel situation was determined by whether or not there existed between the plaintiff and defendant a sufficient relationship of proximity. On this approach, proximity appeared to have some independent meaning that assisted the inquiry into the duty of care (albeit a meaning not easily articulated). In novel situations, that meaning was best found by looking at its content in analogous situations, and other policy considerations that were relevant to the case at hand (see *Gala v Preston* (1991) 172 CLR 243 at 253, and *Bryan v Maloney* (1995) 182 CLR 609 at 618). However, in more recent times, it has become clear that many on the Court have come to doubt the utility of proximity as a determinate of liability in negligence. (See for example *Hill v van Erp* (1997) 188 CLR 159; *Romeo v Conservation Commission of the northern Territory* (1998) 192 CLR 431; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241). The inability to articulate its meaning, except by reference to analogous situations, suggested to them that the real work was being done not by an exploration of the concept of proximity, but by the incremental development of existing

categories of liability. For these judges, proximity was simply a way of stating the legal reality that something more than mere foreseeability is needed for a duty of care. However, while these general trends could be seen, the High Court had been far from speaking with one voice. There were still some members who favoured a general principle of liability (for example, Kirby J in *Pyrennes Shire Council v Day* (1998) 192 CLR 330, and *Perre v Apand Pty Ltd* (1999) 198 CLR 180), while others appeared to have rejected the tag of proximity altogether (for example, Hayne J in *Perre v Apand* (1999) 198 CLR 180). One only needs to read the 7 judgments of the court in the recent decision of *Perre v Apand Pty Ltd* ((1999) 164 ALR 606) to realise the extent of that uncertainty, and to sense the embarrassment this has caused to the court.

Against this background, the unanimous decision of the court in *Sullivan v Moody* should be welcomed as an attempt to impose some order on the “doctrinal chaos”. (Whitting, “The three-stage test abandoned in Australia - or not?” (2002) 118 LQR 214 at 214). There were two separate appeals before the court: *Sullivan v Moody*, and *Thompson v Connon*. Both involved similar allegations concerning the negligent investigation of claims of sexual assault. In the *Thompson* case, the plaintiff’s sons were taken for an examination at a sexual assault centre operated out of the local hospital. The doctors who examined the children concluded that they appeared to have been sexually abused. This information was passed on to the Department of Community Welfare (operated by the State of South Australia) who conducted an investigation and also concluded that the boys had probably been sexually abused. The Police then charged the plaintiff with various sexual offences, but subsequently dropped the charges. The plaintiff alleged that as a result of these allegations and charges, he suffered psychiatric harm, and consequential personal and financial loss. The facts of *Sullivan* were essentially the same, except no criminal charges were laid against the plaintiff by the police (although the stress of the investigation did cause his marriage to break up).

The pleadings in the two cases contained virtually identical allegations of negligence. It was alleged that the doctors and social workers owed to a parent suspected of abusing their child a duty to take reasonable care in conducting their examinations and investigations, in forming their conclusions as to abuse, and in communicating them to the Department. The plaintiffs also alleged that the Hospital and the State were vicariously liable for any breach of that duty by the doctors or social workers. In addition, the plaintiffs alleged that the State owed them a separate duty of care in investigating sexual abuse claims which was breached.

The High Court took the opportunity to revisit the problem of how to approach the duty of care in a new fact situation. The most striking part of the decision, given its previous commitment to the principle, is the court's unanimous rejection of proximity as a concept that in any way informs the inquiry into the duty of care (at 414).

Notwithstanding the centrality of that concept, for more than a century, in this area of discourse ... it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established. It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited.

The court went on to illustrate the inutility of the concept by applying it to the present case (at 414):

To ask whether there was a relationship of proximity between the medical practitioners who examined the children, and the fathers who were suspected of abusing the children, might be a convenient short-hand method of formulating the ultimate question in the case, but it provides no assistance in deciding how to answer the question. That is so, whether it is expressed as the ultimate test of the duty of care, or as one in a number of stages in an approach towards a conclusion on that issue.

Having rejected proximity as a useful principle, the court considered the alternative approach of the House of Lords in *Caparo Industries Plc v Dickman* ([1990] 2 AC 605 - *Caparo*), and its 3 stage test of foreseeability, proximity, and whether recognising a duty of care would be fair, just and reasonable. This approach had previously been favoured by Kirby J (see his judgments in *Pyrennes Shire Council v Day* (1998) 192 CLR 330 and *Perre v Apand Pty Ltd* (1999) 198 CLR 180). Again the court had little difficulty in rejecting this approach (at 415):

There is also the danger that ... the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case. The proximity question has already been discussed. The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.

The approach that was favoured was the development of categories or classes of liability (or non-liability) in negligence through a consideration of the “different problems that arise in those sorts of cases in determining the existence and nature or scope of a duty of care” (at 415). In order to recognise a category of liability, the court must consider the particular problems liability in that situation would create, and how that problem has been dealt with in other cases. Some of the problems the court has previously recognised as relevant to liability were where the harm is caused by the criminal conduct of a third party, where the defendant is exercising a statutory power or discretion, where there is a concern with the potential for unlimited liability, or where there is a concern to preserve the coherence of other legal principles or a statutory scheme that is in place to regulate that conduct or relationship.

Applying this approach to the cases before them, the High Court thought that there were two main problems that confronted the plaintiffs in these cases: the fact the plaintiff's claims were concerned with what they and other people were told about the suspected child abuse (and so intersected with the law of defamation); and the potential for any duty of care to conflict with the responsibilities the defendants owed under the statutory child protection regimes (a concern with the coherence of the law). In light of these problems, the court held that no duty of care could arise in these cases. In particular, the court appeared to recognise a category of non-liability in negligence where a duty of care would give rise to inconsistent obligations (at 417):

[I]f a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations.

The decision in *Sullivan v Moody* will probably come as no surprise to those who have followed the development of negligence liability in Australia. It is, however, a remarkable decision. For one thing, the final abandonment of proximity completes a dramatic change of position by the court, at least as significant as the rejection by the House of Lords in *Caparo* of its previous approach to the duty of care in *Anns v Merton London Borough Council* ([1978] AC 728 - *Anns*). More remarkable still is the fact that the 5 members of the court

spoke with one voice, even though a number of them had previously expressed opinions contrary to the approach adopted by the court. The need for some certainty and consistency in the approach to the duty of care was clearly the driving force behind the decision. While, as I discuss below, I do not think that their solution to the problem (focusing on the recognition of categories of liability (or non-liability) in negligence) will lead to more certainty in respect of duty questions involving new fact situations, their intention certainly deserves commendation.

Cooper v Hobart

One month later, the Canadian Supreme Court undertook a similar reassessment of its approach to the duty of care in its decision in *Cooper v Hobart* (see also the decision released at the same time *Edwards v Law Society of Upper Canada* 2001 SCC 80). For the last 18 years, the approach of the Canadian courts to the duty of care has been based on the decision of Wilson J in *City of Kamloops v Nielsen* ([1984] 2 SCR 2). In that case, Wilson J adopted the approach of Lord Wilberforce in *Anns*, and suggested a two stage test to establish a duty of care: was there a sufficiently close relationship between the parties such that it was reasonably foreseeable that carelessness on the part of the defendant might cause injury to the plaintiff; and if so, were there any considerations that ought to negative or limit that prima facie duty of care? The Supreme Court had consistently endorsed what is referred to as the “*Anns/Kamloops*” test, but this had not meant that the duty question was free from doubt. For example, there had been uncertainty as to whether it was an approach that applied generally to all negligence claims or was limited to actions against statutory authorities (compare *Just v British Columbia* (1989) 64 DLR (4th) 689 with *Hercules Management Ltd v Ernst & Young* (1997) 146 DLR (4th) 577); whether the first stage of the approach was satisfied by mere foreseeability or required a more complex understanding of proximity (compare *R v Ryan* 1999 Can. Sup. Ct. Lexis 3 with *Martel Building Ltd v Canada* [2000] 2 SCR 860); the role considerations of policy played at each stage of the approach (compare *Hercules Management Ltd v Ernst & Young* (1997) 146 DLR (4th) 577 with the judgment of McLachlin J *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* (1997) 153 DLR (4th) 385); and the relevance of existing categories of claims to the use of the *Anns/Kamloops* approach (compare the decision of Iacobucci J in *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261 at 337 with *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* (1997) 153 DLR (4th) 385).

In *Cooper v Hobart*, the Supreme Court made an attempt to reduce this uncertainty by stating a general approach to the duty of care. Eron was a mortgage broker, registered under the Mortgage Broker's Act 1996 of British Columbia. Its business was to pool funds from a number of investors to allow a single loan to be made to a borrower, usually a developer of commercial property. The plaintiff alleged that in August 1996, the Registrar of Mortgage Brokers was made aware of potentially serious violations of the Mortgage Broker's Act by Eron. However, it was not until October 1997 that the Registrar suspended Eron's licence and froze its assets. Not long after that, Eron went out of business. It soon became clear that there was likely to be a substantial shortfall between the funds outstanding on loans made by Eron, and the amounts that would be recovered from the security for those loans, a shortfall estimated at \$182 million.

The plaintiff was an investor in Eron, and brought proceedings alleging that the Registrar should have acted sooner in suspending Eron's licence and freezing its assets, or that he should at least have warned investors of its concerns about Eron. The plaintiff claimed that if the Registrar had acted sooner, her losses would have been avoided or substantially diminished. The proceedings before the court involved an application by the plaintiff to have the proceedings certified as a class action on behalf of all investors in Eron. Under the relevant legislation, one of the requirements the court had to be satisfied of was that the pleadings disclosed a cause of action. By the time the case reached the Supreme Court, that question had become whether the Registrar owed a duty of care in negligence to members of the investing public in overseeing its investment activities.

The Supreme Court took the opportunity to "revisit" their approach to the duty of care, and in particular their approach to the duty of care in the novel situation. The problem, as the court saw it, was how to describe those factors additional to mere foreseeability that limit recognition of a duty of care. The court recognised that since the decision in *Anns*, and the acceptance by the Supreme Court of its 2 stage test, there had been uncertainty concerning the content of the first stage of that test (whether it meant mere foreseeability or foreseeability plus proximity), and the relationship proximity had with the policy considerations that arise at stage two of the test (does proximity simply duplicate considerations that arise at stage two). The court took the opportunity to reaffirm its commitment to the *Anns* two stage analysis, and to outline the inquiries involved at each stage of that approach (at para 30):

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 recognised 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 broadest sense of the 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 remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

The court went on to discuss in some detail the content of each stage of this test. At the first stage, the question was what is meant by proximity, and in respect of this, the court made two general points. The first was that proximity is used to characterise the type of relationship between the parties in which a duty of care may arise. It refers to the closeness and directness of the relationship between the plaintiff and defendant. The second was how to determine whether a relationship was sufficiently proximate. In most situations, this will not present a difficulty, as the alleged duty of care will be within an existing category, or analogous to an existing category. The court offered some examples of such categories: physical injury; negligent misstatement; misfeasance in public office; a duty to warn of a danger once recognised; building negligence; and some types of relational economic loss. However, where a novel claim is involved, the Court accepted that it is pointless searching for one single unifying characteristic of proximity. Questions such as the expectations of the parties, representations that were made, reliance issues, and the nature of the property and other interests involved, are all factors that will allow the court to evaluate the closeness and directness of the relationship between the plaintiff and defendant and determine whether it is just and fair to impose a duty of care. Other than that, it appears that the Court favoured the incremental development of existing categories.

At the second stage of the *Anns* test, the Court will consider policy considerations that are external to the parties, and in particular the effect the duty of care would have on other legal obligations, the legal system and society more generally. However, consideration of this step will not usually arise where the case is within an already existing category of liability. Where it does arise, a number of considerations may be relevant; does the law already provide a remedy, would recognition of a duty of care create the possibility of indeterminate liability,

and are there other reasons of broad policy that tend to negative a duty of care? Of importance to the case before the court, it is at this stage that the court would consider the policy/operational distinction in respect of the liability of a public authority.

Applying their analysis to the case before them, the court first asked whether the case came within any existing category of claim. In their view, it did not. The question then was whether the court should recognise a duty of care in this novel situation. Assuming that the investors would be able to establish that it was reasonably foreseeable that negligence in failing to suspend Eron or to issue a warning could result in loss, the question was whether there was a sufficient relationship of proximity. That relationship could only be found in the governing statute, and on reviewing that statute, the court thought it clear that any duty owed by the Registrar was to the public as a whole rather than to individual investors. It was a duty to ensure the efficient operation of the marketplace through the balancing of a myriad of competing interests. Indeed, recognising a duty to an individual investor was likely to conflict with the duty the Registrar owed to the public. Accordingly there was no relationship of proximity between the investors and the Registrar such as would give rise to a duty of care. While not necessary to resolve the case, the court also noted that policy reasons at the second stage of the test would have negated the recognition of a duty of care. The power exercised by the Registrar involved the determination of questions of policy, a quasi-judicial exercise of power, and discretionary decisions in an area of public policy. The decision was accordingly made within the limit of the powers conferred on the Registrar by the legislation. There was also the spectre of unlimited liability, and the adverse impact on the taxpayer if required to assume the risk in such circumstances.

As with the decision in *Sullivan v Moody*, *Cooper v Hobart* is an attempt by the Supreme Court of Canada to remove some of the uncertainty in the approach to the duty of care that their previous decisions had created. On its face, their approach seems to be radically different to that of the High Court of Australia. It suggests a general approach that can be applied to novel claims, a methodology the High Court of Australia was at pains to reject. In its application, however, it seems that the approach in *Cooper v Hobart* will be an incremental approach in all but name (See Neyers, "Distilling duty: the Supreme Court of Canada amends *Anns*", (2002) *LQR* 118 at 221). The content of the proximity and policy inquiries will in most cases be determined by the category of claim within which the case falls. Where a novel case arises outside an existing category, it seems that the court will ultimately rely on the

incremental development of existing categories.

Implications for New Zealand

The temptation in New Zealand, with the constant repetition by our courts of the approach of Richardson J in *South Pacific*, has been to think that we are largely immune from the problems that have confronted other commonwealth courts in this area (see for example the comments of Cooke P in *Brown v Heathcote County Council* [1986] 1 NZLR 76 at 79). If this is the belief, then it is a myth I think it important to dispel. In my view, the approach to the duty of care in New Zealand, represented by the decision in *South Pacific*, is every bit as uncertain as that in Australia and Canada prior to the decisions in *Sullivan v Moody* and *Cooper v Hobart*. We are in just as much need of a clear and definitive statement by our appellate courts of the approach to take to the duty of care in order to resolve the uncertainties previous decisions have created. In the rest of this article, I shall explore the nature of the uncertainties that surround the approach in *South Pacific*, and in particular, the problems of when we should use it, and the content of each stage of its inquiry.

The use of the South Pacific approach

South Pacific is usually described as an approach to the duty of care in the “novel” situation (see *South Pacific* at 305 per Richardson J). The problem is that we have never really had any guidance from our courts as to what is a novel situation. The impression gained from reading decisions of the Court of Appeal through the 1990’s is that the novel situation is simply a case that involves facts that have not previously been considered (see *South Pacific* at 316 per Hardie Boys J; *Connell v Odlum* [1993] 2 NZLR 257 at 265 per Thomas J). Accordingly, the question of whether you should use the approach in *South Pacific* simply turns on whether there is binding authority on facts similar to those at issue in the case before you.

Recently, however, our Court of Appeal has on a number of occasions approached the question of the duty of care in a new fact situation, not by reference to previous binding authority, but by asking whether the case falls within an existing “category” of claims in negligence. The clearest examples of this are in respect of claims for negligent misstatement (for example *R M Turton & Co Ltd (in liq) v Kerlake and Partners* [2000] 3 NZLR 406), and mental injury to secondary victims (*van Soest v Residual Health Management Unit* [2000] 1

NZLR 179). On this approach, whether a situation is novel (ie, a situation in which you will use *South Pacific*) is determined by whether the new fact situation falls within an existing category of liability in negligence. It is only if the new fact situation is outside an existing category of liability that you use the approach in *South Pacific*.

I have argued previously that how you define a novel claim, and when you use the approach in *South Pacific*, does matter. (See Barker, “Divining an approach to the duty of care; the New Zealand Court of Appeal and claims for negligent misstatement” (2001) 10 *OLR* 91; and Barker, “Lights in the fog; secondary victims and the recovery for mental injury in New Zealand” (2002) 10 *TLJ* 1.) For example, it seems clear to me that the result in *Price Waterhouse v Kwan* ([2000] 3 NZLR 39) would have been different if it had been treated as within the category of claims for negligent misstatement. I can only repeat what I said earlier; if the Court of Appeal intends to develop a more limited definition of the novel situation, defined by reference to what is or is not within an existing category of liability, then it should tell us. The court would then be moving in a direction similar to that of the Supreme Court of Canada and the High Court of Australia. But before the court moves down that path, I want to mount a qualified defence of its apparently former approach (it is subject to the comments I make below about the meaning of each stage of that approach), and highlight why I believe an approach based on developing the categories of negligence is unlikely to in any way advance the cause of certainty in this area.

In terms of promoting greater certainty in the tort of negligence, the main attraction of an approach to the duty of care that relies on the identification of various categories of liability is that you do not need to use your general approach to the duty of care (ie *South Pacific*) in every case that involves a new fact situation. The majority of cases involving new fact situations will be resolved (and the results for practitioners easily predicted) because they will be a clear example of an existing category of claim, and as such will be determined by an application of the criteria for recovery within that category. It is only in the rare, truly novel case, that the court will need to resort to its general approach.

In theory, this approach sounds like a real advance. In practice, I doubt that it will in any way reduce the scope of argument over the duty of care in cases involving new fact situations. Once you accept that the categories can be expanded, or that new categories can be created (and everyone seems to accept that the categories of negligence are not closed) it is unrealistic

to think that you can avoid the need to individually consider cases that do not involve similar facts to a case previously considered. A defendant is unlikely to accept that a case involving a new fact situation clearly falls within an existing category of liability, and that the new facts satisfy the criteria for liability in that category. Rather, the defendant is likely to argue that the new facts take it outside that category, and that the category should not be extended to cover the claim. Contrawise, a plaintiff is unlikely to accept that a case involving new facts falls within an existing category, and that its claim must fail because it does not satisfy the criteria for recovery within that category. Rather, it will argue that the category should be extended to cover their situation, or even that a new category be recognised.

The point is that reliance on a category based approach to liability in negligence will not remove any arguments over the duty of care in cases involving new fact situations. The only situation where there will not be an argument over the duty of care is where the facts involved are similar to a case previously decided. In this situation, “categories” of liability in negligence add nothing to the simple application of the principle of stare decisis. Subject to my comments below about the content of such an approach, in my view it is misleading and inherently unfair to resolve the duty of care in a new fact situation by anything other than an application of the court’s general approach to the duty of care in a novel situation. It is misleading because it assumes that cases involving new facts can be easily allocated to an existing category of claim, which is just not true. It is unfair because it “suffers from a temporal defect - that rights should be determined by the accident of birth” (*Ward v McMaster* [1988] IR 337 at 347).

The content of the South Pacific approach

While I have above indicated my support for the way in which our Court of Appeal has traditionally used the *South Pacific* test, I think it is more difficult to support the content of that approach as it has been developed by the Court of Appeal. Under the *South Pacific* test, it is important to understand that the *only* thing that determines whether a duty of care will be recognised is whether or not the court believes such a duty would be “just and reasonable”. Proximity and policy have no independent meaning that advances that inquiry. All they signify is that the judge is satisfied that the relationship between the parties is sufficiently close such that it is just and reasonable that a duty of care is owed (proximity), and that policy reasons are such that it is just and reasonable to recognise a duty of care (policy). They are

fields of inquiry, under which relevant considerations are collected, rather than tests for the duty of care.

However, while it has always been clear that proximity and policy simply describe two fields of inquiry, it has never been clear exactly what considerations arise under each of these headings. Thomas J in *Connell v Odlum* ([1993] 2 NZLR 257) suggested an approach similar to that in *Cooper v Hobart*, where proximity refers to the relationship between the parties, and policy to matters external to that relationship (see also the judgment of Hammond J in *Wilson & Horton Ltd v AG* [1997] 2 NZLR 513 at 520). However, while this is undoubtedly the best way to understand these two inquiries,¹ it is clear that this is not an understanding that has been consistently followed by the courts in New Zealand. We often see considerations that are relevant to the nature of the relationship between the parties arise as a policy consideration, and considerations relevant to policy arising at the proximity stage of the inquiry. For example, the broad contractual circumstances between the parties within which it is alleged the duty of care arises have usually been considered as a matter of policy, even though it is difficult to think of any consideration that is more relevant to the question of whether the nature of the parties' relationship is such that it is just and reasonable to recognise a duty of care. By contrast, considerations of general reliance have usually been considered as relevant to proximity, even though this concept reflects society's expectations of the nature of the relationship, and as such seems relevant to an inquiry into policy.

Some might respond that it does not really matter when these factors are considered, as long as they are considered (for example, *South Pacific*, at 306 per Richardson J). I disagree. It is clear that a finding of proximity creates a prima facie duty of care, and that the burden effectively passes to the defendant to present compelling policy reasons against the recognition of a duty. Accordingly, where in the inquiry a factor is considered does matter. A good illustration of this can be found by comparing the recent decisions in *Price Waterhouse v Kwan* ([2000] 3 NZLR 39) and *R M Turton & Co Ltd (in liq) v Kerlake and Partners* ([2000] 3 NZLR 406). In *Price Waterhouse v Kwan*, the court found a sufficient relationship of proximity between the client of a law firm and the auditor of the law firm's nominee company. It then considered the effect of the plaintiff's contractual rights against its solicitor as a matter of policy. The solicitor was, of course, insolvent. The court concluded as follows (at 44): "To hold that a party who enjoys sufficient proximity with A to raise a prima facie duty of care in tort should be confined to a contractual remedy against B, when the

efficacy of the remedy is dubious, hardly seems like a good policy reason for denying the existence of a duty of care in A". By contrast, in *Turton v Kerlake*, the contractual relations between the parties were considered as the defining characteristic of the relationship between the parties. On that approach, the fact that the party against whom the plaintiff had a contractual claim was insolvent was not relevant.

So in my view, there is a real uncertainty in New Zealand as to the precise criteria that arise in considering the inquiries into proximity and policy. It is an uncertainty that must be addressed because where you consider a particular factor can make a real difference to the result. However, while I have noted the problem, I am not sure it is one that requires a radical response from our Court of Appeal. The general structure of the type of considerations that should arise at each stage of the inquiry has already been suggested; proximity looks to factors relevant to the relationship between the parties, policy to factors external to that relationship. The decisions in *Cooper v Hobart* and *Sullivan v Moody* emphasise the guidance that can be found by consideration of analogous cases.

Conclusion

Cooper v Hobart and *Sullivan v Moody* are seminal decisions on the duty of care. They illustrate the need for superior courts to act to remove uncertainty in important areas of the common law, and offer detailed consideration of the problem of determining the duty of care in the novel situation. In this article I have endeavoured to argue that the law in New Zealand is also in need of clarification, although this should not necessarily involve the wholesale adoption of a category based approach to liability in negligence.

¹ Since the completion of this article, the Court of Appeal has released its decision in *Wellington District Law Society v Price Waterhouse* (2002) 7 NZBLC 103,678. The decision makes some comments on the question of proximity that suggest that it is not limited to a consideration of the closeness of the relationship between the parties, but includes issues such as the scope of the duty of care. These comments have the potential to be misunderstood, and some clarification is necessary. What I think Gault P means is that it is never enough to look simply at the nature of the relationship between the parties in the abstract. Rather you should look at the relationship between the parties in the context of what the defendant actually did, and the injury the plaintiff suffered. Understood in this way, the comments of Gault P in *Wellington District Law Society v Price Waterhouse* are unremarkable.