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"Academic Concerns"—Caring about Conversation in Canadian Common Law

The Supreme Court of Canada, in its 2001 decision in Cooper v Hobart*, refined the test in Canadian common law for establishing a duty of care in the tort of negligence. Although aware of the complexities and ongoing challenges of the "duty of care" concept, the Supreme Court openly labelled these concerns as "academic." This article confirms these concerns as "academic," but insists that this label underlines their centrality not only to an understanding of the tort of negligence but to the nature and form of common law reasoning. By pointing to errors in the Supreme Court of Canada's judgment—errors of using the wrong word, naming the wrong judge, confusing the structure of the duty of care inquiry, and omitting an important precedent case—the authors identify failures in the four principal activities of the common law: placing, naming, identifying, and remembering. They suggest that the image, sounds, and fluctuation of "conversation" capture the method of common law—its linking of past to future through imperfect yet evocative analogical reasoning—and affirm the importance of paying attention to the meaning of words, the names of judges, the structure of questions, and the importance of history.*

La Cour suprême du Canada, dans l'arrêt Cooper c Hobart *prononcé en 2001, a raffiné le critère de la common law canadienne pour établir une obligation de diligence relativement à la responsabilité délictuelle et à la négligence. Quoique bien au fait de la complexité et des contestations relatives au concept de l'obligation de diligence, la Cour suprême a clairement qualifié ces questions de « théoriques ». Cet article confirme que ces questions sont théoriques, mais insiste sur le fait que ce qualificatif souligne qu'il s'agit de questions fondamentales non seulement pour comprendre la faute de négligence, mais également la nature et la forme du raisonnement de la common law. Les auteurs, en soulignant les erreurs dans l'arrêt de la Cour suprême du Canada—mauvaise terminologie, erreurs sur le nom du juge, confusion quant à la structure de l'examen visant à déterminer s'il existe une obligation de diligence et omission d'un précédent important—relèvent des manquements aux quatre activités principales de la common law: situer, nommer, identifier et se souvenir. Ils avancent que l'image, les sons et les fluctuations de la « conversation » reflètent la méthodologie de la common law—le fait qu'elle établit des liens entre le passé et le futur en faisant appel à un raisonnement analogique imparfait, mais évocateur—et affirment l'importance de porter attention à la signification des mots, au nom des juges, à la structure de l'examen et à l'importance de l'histoire.*

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Introduction

In 2001, the Supreme Court of Canada handed down a unanimous decision in the negligence case of *Cooper v Hobart*.[1] Investors who had lost substantial funds due to the misconduct of a mortgage broker brought a claim against a provincial Registrar of Mortgage Brokers. At issue was whether the Registrar was properly understood to owe a duty of care to the plaintiffs or, in other words, whether the Registrar could be held responsible in the tort of negligence for the financial losses suffered by the investors. The Court held that no such duty was owed and thus that there was no possibility of a successful claim for compensation. The decision—and more specifically its articulation of the "rule" for determining duty of care—has been incorporated into Canadian law and language of negligence.

While the story from which the case arose is straightforward, the story in law against which the case was resolved is not. As jurists familiar with the development of the tort of negligence in Anglo-Canadian common law know all too well, the contours of the narrative of pure economic loss caused by negligent words or actions are difficult to trace with confidence

1. 2001 SCC 79, 3 SCR 537 [*Cooper*].

and clarity. Aware of the complexity of establishing a duty of care in a case like *Cooper*, the Supreme Court of Canada openly acknowledged ongoing challenges. And then, as it purported to take on those challenges, the Court stated: "To some extent, these concerns are academic."[2]

This paper suggests that the concerns are indeed "academic."[3] But, rather than justifying their marginalization, that label should bring them to the centre of an important ongoing reflection not only about the particular question of duty of care in the tort of negligence but about the very nature and form of common law reasoning and methodology. We make this argument by reference to the idea of "conversation" both as a description of common law practice and as an ideal which exemplifies its promises and possibilities, and which offers a benchmark or point of reference from which to critique it. By suggesting conversation as an apt metaphor for common law, we explore the responsibilities that come with participation in that conversation. Whether students or teachers, lawyers or judges, contributors to the common law are familiar with its back and forth rhythm. To understand, work with, and critique common law, we must appreciate the interaction of speakers and listeners at the same time that we trace substantive principles and approaches.

Duty of care in negligence is one strand of the dynamic conversation embodied by common law and serves as a fruitful example of its shape and characteristics. In this paper, we argue that the Supreme Court of Canada failed to appreciate the very nature and form of common law in formulating what has become, in the intervening ten years, the so-called "Cooper-Anns"[4] rule.[5] The Court seemed to understand neither

2. *Ibid* at 27.

3. As Peter Birks elegantly stated: "The word 'academic' stands for taking things seriously, getting to the bottom of them and finding out the truth," in "The Academic and the Practitioner" (1998) 18 Legal Studies 397 at 406.

4. *Anns v Merton London Borough Council*, [1978] AC 728 [*Anns*].

5. For references to the Court's restatement of the *Anns* test in *Cooper*, see *Edwards v Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 SCR 562; *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 at para 46-51; *Childs v Desormeaux*, 2006 SCC 18, [2006] 1 SCR 643; *Young v Bella*, 2006 SCC 3, [2006] 1 SCR 108; *Hill v Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41 at 21-25, 31, 43, 136 [*Hill v Hamilton*]; *Syl Apps Secure Treatment Centre v BD,* 2007 SCC 38, [2007] 3 SCR 83 [*Syl Apps*] (*Anns* was "definitively refined" by *Cooper* at 23); *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27; *Holland v Saskatchewan*, 2008 SCC 42 (referring to the *Anns* test as having been "adapted and refined" by *Cooper* at 8); *Design Services Ltd v Canada*, 2008 SCC 22. Provincial courts continue to apply the "*Cooper/Anns* test": see *McMillan v Canada Mortgage and Housing Corporation*, 2008 BCCA 543**;** *Williams v Ontario*, 2009 ONCA 378; *Nette v Stiles*, 2009 ABQB 422; *Piedra v Copper Mesa Mining Corporation*, 2010 ONSC 2421**.** The most recent related cases in the Supreme Court continue to draw on *Cooper* as a guiding reference, even if the terminology of a "*Cooper/Anns* test" seems to have faded: *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5, [2010] 1 SCR 132 [*Fullowka v Pinkerton*], and *Reference re Broome v Prince Edward Island*, 2010 SCC 11, [2010] 1 SCR 360 [*Re Broome*].

how to participate in a complex common law conversation, nor why it was crucial to do so in a responsible way. In labelling "academic" the concerns voiced over shaping the principles of the tort of negligence in Anglo-Canadian common law, the Supreme Court of Canada appeared to disparage the central characteristic of the common law itself: its linking of past to future through imperfect yet evocative analogical reasoning. In other words, the Supreme Court's errors, while seemingly trivial and a part of the messy stuff of normal common law conversation, actually contravene key elements of conversation considered as an "ideal." Why does this matter? Because jurists working within any legal tradition build persuasive arguments when they understand and respect the sources and shape of that tradition. Within common law, that means taking seriously the words used to express ideas, and paying attention to the form through which content is articulated, developed, sustained, and modified.

A note on the methodology of this paper should accompany the mapping out of its substantive claims and directions. Explicitly emphasizing the shape or form of common law against the concrete context of a selected substantive issue (here, the duty of care in the tort of negligence causing pure economic loss) is a project central to a course in "Advanced Common Law Obligations" taken by law students at McGill University.[6] A mandatory component of the curriculum, the course follows on the heels of introductory courses in tort and contract that integrate common and civil law traditions, systems, approaches, and language. Written by a professor of the course together with a doctoral student who acted as assistant for the course over two years, this paper represents a pedagogical conversation made possible by interactions within the classroom and beyond. That level of conversation comes together with two other intersecting conversations: an ongoing conversation among observers, commentators, and academic participants from which we draw our sources, and the conversation of the common law itself—most notably recorded in the written judgments of its principal speakers.

6. On McGill's trans-systemic approach to teaching civil and common law traditions, see: Harry Arthurs, "Madly Off in One Direction: McGill's New Integrated, Polyjural, Transsystemic Law Programme" (2005) 50 McGill LJ 707; Harry W Arthurs, "Law and Learning in an Era of Globalization" (2009) 10 German Law Journal 639; Daniel Jutras, "Two arguments for Cross-Cultural Legal Education" in HD Assman, G Brüggemeir & R Sether, eds, *Unterschiedliche Rechtskulturen—Konvergenz des Reschtesdenkens/Different Legal Cultures—Convergence of Legal Reasoning* (Baden Baden: Nomos Verlag, 2001) 75; Nicholas Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 Journal of Legal Education 29.

While *Cooper* has received attention elsewhere as a substantive reference in the law of negligence,[7] it serves here as a fruitful site for reflection on the methodology of the common law tradition. In Part One, we identify several remarkable errors in the judgment itself: all errors that underline characteristics of common law reasoning and development. We suggest that the errors signal a failure as responsible contributor to, and participant in, common law conversation on the part of the Supreme Court of Canada in *Cooper*. In Part Two, we retrace in broad strokes the contours of the narrative from *Donoghue* to *Cooper* and beyond.[8] In Part Three, we point to the ways in which the image, sounds, and fluctuation of conversation all capture the method of common law in a way that remains beyond the reach of any attempt to map or chart rules and tests, principles and policy. We conclude that "academic" concerns, whether in the classroom or courtroom, case law or commentary, are at the heart of the principles, process, and pedagogy of common law conversation.

I. Cooper v Hobart—*egregious errors and methodological mistakes*

Cooper at first glance appears to be precisely the judgment that the Canadian common law of the tort of negligence had been waiting for: an opportunity for a full and unanimous court to assert and articulate the "test" for establishing a duty of care. The facts themselves were not new or particularly challenging—the court had dealt with a similar factual scenario in *Hercules Managements v Ernst & Young*[9] when deciding if auditors reporting on a company owed investing shareholders a duty of care. In agreeing to hear *Cooper*, the court thus promised to revisit what was perceived to be a problematic area of law and to refine its formulation of the *Anns* test for determining the existence of a duty of care. In its tone and approach, the Supreme Court suggested that its judgment would dispense with the need to revisit the messy history of economic loss in

7. *Cooper* was described as "a landmark decision," which "signals the end of the untrammeled expansion of negligence liability in the Canadian context": Jason W Neyers "Distilling Duty: The Supreme Court of Canada amends *Anns*" (2002) 118 LQR 221; and a "dramatic turning point" that "put an end to the unprecedented expansion of the law": Jason W Neyers & Una Gabie, "Canadian Tort Law since *Cooper v. Hobart*" (2005 & 2006) 13 Torts LJ 1, and 14 Torts LJ 1. For criticism of the reasoning and cogency of *Cooper* see Stephen GA Pitel, "Negligence: Canada remakes the *Anns* test" (2002) 61:2 Cambridge Law Journal 252; Nicholas Rafferty, "The Test for the Imposition of a Duty of Care: Elucidation or Obfuscation by the Supreme Court of Canada" (2002) 18 PN 218. See also Paula Giliker, "Revisiting Pure Economic Loss: Lessons to be Learnt from the Supreme Court of Canada?" (2005) 25:1 Legal Studies 49. For qualified praise of the *Cooper* decision see Bruce Feldthusen, "The *Anns/Cooper* Approach to Duty of Care" (2002) 18 Constitutional Law Review 67 [Feldthusen, "*Anns/Cooper* Approach"]; and Ernest J Weinrib, "The Disintegration of Duty" in M Stuart Madden, ed, *Exploring Tort Law* (New York: Cambridge University Press, 2005).

8. *Donoghue v Stevenson*, [1932] AC 562 at 619 [*Donoghue*].

9. (1997), 146 DLR (4th) 577 at 591 [*Hercules*].

future cases. Instead, from this case on, courts would simply ask: is this relationship similar to that recognized in a past case? If so, the duty of care question is answered, and if not, then the court should move explicitly and openly to an analysis of policy concerns, asking whether policy directs them to establish a duty of care.

But, in re-telling the story that led them to *Cooper*, the Supreme Court committed several remarkable errors: it used the wrong word, it named the wrong judge, it confused the elements of the duty of care inquiry, and it omitted to mention a prior judgment that forms an important precedent in this area of the law. Below we briefly describe these four errors, identifying them in turn as an error of words, an error of naming judges, an error in understanding structural elements, and an error in precedent. We find that the errors signal failures in the four principal activities engaged in doing the common law: placing, naming, identifying, and remembering. Those failures are then explored, leading to our suggestion that they violate the common law's rules of construction and conversation.

1. *Words—placing*

In its reference to *Donoghue*, the Supreme Court in *Cooper* asserts that *Donoghue* revolutionized the common law "by replacing the old categories of tort recovery with a single comprehensive principle—the negligence principle."[10] Lord Atkin's judgment in *Donoghue* is known for articulating the *neighbour* principle in the *tort* of negligence—a tort which already existed—as a particular way of understanding duty of care. Thus, the judgment in *Donoghue v Stevenson* moves negligence from a tort recognized in certain relationships to a tort grounded in the duty of care each one of us owes to our "neighbours." This first error in the Supreme Court judgment is an error of words. Using "negligence" instead of "neighbour" is a failure to situate or place words with care. Particularly when, as in the case of the neighbour principle, those words serve to shape the obligations central to the common law tort of negligence, getting them right is crucial. A failure to do so signals a foundational misunderstanding.

2. *Judges—naming*

Second, the Court in *Cooper* cites Lord Atkin as having declared in *Donoghue* that "the categories of negligence are not closed."[11] Instead, it was Lord Macmillan who stated that "the categories of negligence are never closed." The Supreme Court's mistake in attributing Lord Macmillan's words to Lord Atkin might be seen as paying lip service to

10. *Supra* note 1 at 22.
11. *Ibid* at 31.

Lord Atkin's lofty principle while actually following Lord Macmillan, an approach which has been suggested as characteristic of the development of negligence law in the Supreme Court of Canada.[12] And yet, the Court commits an error of naming. It wrongly puts not only the words but the approach of one judge in the mouth of another. An error in naming fails to attribute a statement to its rightful speaker. It fails to consider the situatedness of the voices of the judges as individual participants in the common law.

3. *Structure—identifying*

Third, the judgment states that the first stage of the test for the duty of care is: "[was] the harm that occurred the reasonably foreseeable consequence of the defendant's act?"[13] But the foreseeability of injury is a question of proximate cause. The question of foreseeability relevant to whether a duty of care is owed is whether *this plaintiff* was foreseeable. As common law courts have considered recovery for injuries not traditionally recognized, the type of damage suffered by the plaintiff has affected the duty of care question, and judges have asked whether the duty of care extends to a plaintiff suffering *this* type of damage. But this does not mean that the duty of care question is a question of foreseeability of damage. The duty of *this* defendant to *this* plaintiff remains the core of the tort of negligence.[14] This is an error in understanding and identifying: a failure of structure and of asking the right question at the right place.

4. *Precedent—remembering*

Fourth, the court sets out the "categories in which proximity has been recognized,"[15] arranged according to different situations in which recovery for pure economic loss has been allowed. From this list—which encompasses liability for negligent misstatement,[16] a duty on public authorities to inspect housing developments with care (*Anns* and *Kamloops*[17]), and cases where the relationship between the claimant and owner of damaged property constitutes a joint venture (*Norsk*[18] and *Bow*

12. "…while paying lip service to Lord Atkin's statement, still dealt with the law in terms of more or less discrete categories of duty situation": David J Ibbetson, *An Historical Introduction to the Law of Obligations* (Oxford: Oxford Univ Press, 1999) at 191.
13. *Supra* note 1 at 30.
14. As Justice Cardozo insists in *Palsgraf v Long Island Railroad Co,* 248 NY 339, 162 NE 99, negligence is a "term of relation" (at 101), and Lord Atkin cites the judgment with approval as he formulates the neighbour principle for negligence.
15. *Supra* note 1 at 36.
16. *Hedley Byrne & Co v Heller & Partners Ltd,* [1964] AC 465 [*Hedley Byrne*].
17. *Kamloops (City) v Nielsen*, [1984] 2 SCR 2 [*Kamloops*].
18. *Canadian National Railway Co v Norsk Pacific Steamship Co*, [1992] 1 SCR 1021 [*Norsk*].

Valley[19])—the court omits a significant unanimous decision of the Supreme Court of Canada on pure economic loss prior to *Cooper: Winnipeg Condominium Corporation No 36 v Bird Construction Co.*[20] In that case, La Forest J wrote for the court in establishing the possibility of recovery for pure economic loss in the situation of dangerously defective premises. One commentator at a loss for understanding this rather bizarre omission could only say: "I suspect it was inadvertent."[21] Whether a mistake, or implicit realignment with the House of Lords in its disregard for *Winnipeg Condo,*[22] the Court makes an error of precedent. It fails to incorporate history, to acknowledge and remember what has come before.

These errors all take place in a part of the Supreme Court judgment labelled "academic." The Court may have meant "academic" in the sense that full discussion of these considerations could be considered peripheral to the task of deciding liability in this case. And the errors we have identified in the court's discussion of these considerations might be deemed superficial, only significant as fodder for ruminations on the quality of Supreme Court of Canada clerks and the treatment of private law issues by the highest appellate court of Canada. Indeed, commentary on the *Cooper* case has tended to mirror the attitude of the court as it skips over this part of the judgment, anxious to reach the court's restatement of the *Anns* test.[23]

However, characterizing this part of the discussion as irrelevant or unworthy of attention misses the point of *Cooper* and other cases on pure economic loss. Judgment is never a theoretical exercise in that it has real consequences for the parties involved,[24] and, indeed, we have no particular objection to the court's conclusion as to liability in this instance. But the errors in the judgment—and the labelling of a central preoccupation in tort law as "academic"—are striking. The fact that these errors appear within the context of a judgment that is so significant in the substantive evolution of economic loss, and that is presented as a paradigmatic judgment and an

19. *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210 [*Bow Valley*].

20. [1995] 1 SCR 85 [*Winnipeg Condo*].

21. Feldthusen, "*Anns/Cooper* Approach", *supra* note 7 at 71.

22. *D & F Estates v Church Commissioners*, [1989] 1 AC 177 [*D&F Estates*]; *Murphy v Brentwood District Council*, [1991] 1 AC 398 [*Murphy v Brentwood*].

23. Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed (ON: Lexis Nexis Canada, 2006). The text goes straight to *Cooper's* restatement of the *Anns* test in paragraphs 30, 31, and 34. See also Pitel, *supra* note 7.

24. Judicial interpretation "takes place on a field of pain and death": Robert Cover, "Violence and the Word" in Martha Minow, Michael Ryan, & Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1993) at 203.

essential part of the common law story in Canada about the duty of care in negligence, demands that they be taken seriously.

We argue that the errors in *Cooper* are symptoms or reflections of methodological failures to appreciate the architecture of common law conversation, and the responsibility of those who participate and move the conversation along. They are failures to care about the language of the common law, about who the judge is, about how common law arguments are structured, and about the past. In other words, they are failures in placing, naming, identifying, and remembering. What appear at first to be mere, albeit messy, mistakes, actually serve to highlight the importance of classification, naming, elements, and history in the normative structure of the common law. The metaphor of conversation—with its particular characteristics and constraints—illustrates that structure.

II. *Telling and retelling the story of* Donoghue v Stevenson

Situating the Supreme Court of Canada's judgment in *Cooper* requires an understanding of the context upon which the case draws and within which it is located. In particular, appreciating the errors identified above calls out for a substantive reminder of the legacy of *Donoghue v Stevenson.* While the common law story of the modern tort of negligence usually begins in 1932 with *Donoghue*, the House of Lords judgment is more than a starting point. Instead, as sketched in Part II of this paper, it is the touchstone for telling and retelling the negligence narrative in the hands of all judges and courts asked to determine the existence of a duty of care.

In tracing the reception and ever-developing meaning of *Donoghue v Stevenson,* teachers, writers, judges, and students alike must pass through certain cases—*Dorset Yacht*,[25] *Hedley Byrne, Anns,* among others—and grapple with a cluster of key words and concepts including neighbour, proximity, categories, and pure economic loss. These are the weights or anchors of the negligence story, what Cass Sunstein has called "fixed point[s]."[26] While never actually fixed in substance, they act as reference points for the law that precedes and follows, and demand to be reread and reconsidered. Here, then, we refresh the reader's memory of the *Donoghue* narrative and provide a sketch of the story line upon which *Cooper* now sits as a point. We do so through four sections which recall the themes raised by the errors noted in Part I: Words, Judges, Structure, and Precedent. That is, this Part serves to illustrate the substance of the area of law to which *Cooper* contributes and, at the same time, to show

25. *Home Office v Dorset Yacht Co,* [1970] AC 1004 [*Dorset Yacht*].
26. Cass R Sunstein, "On Analogical Reasoning" (1993) 106 Harvard Law Review 741 at 771.

the ways in which that substance rests on four central and characteristic elements—placing, naming, identifying, and remembering—of common law methodology and development.

In "Words" we examine how the neighbour principle came to be articulated as a defining feature of the tort of negligence. In "Judges" we trace the development of proximity as the key to determining duty of care, and the ways in which that notion has taken on different meanings depending on the speaker and context. In "Structure" we examine case law in the Supreme Court of Canada that, as a result of finding proximity inadequate to the task of circumscribing responsibility in situations of pure economic loss, increasingly appealed to policy for guidance. In "Precedent" we examine how *Cooper* appears to transform the duty question in negligence—"who is my neighbour?"—from one of proximity to one of policy. By telling the substantive story through a framework composed of these four structural pillars, we not only underscore their importance, but also prepare the reader for Part III's discussion of responsible "conversation" among participants in common law.

1. *Words: who is my neighbour?*

As noted above, the first error committed by the Supreme Court of Canada in *Cooper* occurs as it rightly nods to the 1932 House of Lords judgment in *Donoghue*, the case inevitably cited as the beginning of the story of the modern tort of negligence. According to the Supreme Court, *Donoghue* "replac[ed] the old categories of tort recovery with a single comprehensive principle—the negligence principle." But the various torts have not been eliminated and replaced by the tort of negligence, even if it is true that this particular tort has expanded dramatically in significance and scope post-*Donoghue*. Rather, the "neighbour principle" purported to replace the categories of relationship inscribed with the duty to take reasonable care. Before 1932, there existed no strongly articulated and generalized concept or principle for the tort of negligence.[27] Instead, a list of relationships based largely on particular vocations and situations required that appropriate care be taken so as not to inflict harm of one sort or another. If a plaintiff claimed damages to compensate for some harm he had suffered, he had to show that the relationship between the alleged wrongdoer and the victim fell into one of these existing categories.

27. For a more in-depth and nuanced discussion of pre-*Donoghue* negligence law, see further Michael Lobban, "Common Law Reasoning and the Foundations of Modern Private Law" (2007) 32 Austl J Leg Phil 39; Ibbetson, *supra* note 12 at 169-201.

Donoghue moved negligence beyond specifically recognized categories of relationship, most strikingly in the form of Lord Atkin's general duty of care owed to one's neighbour:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. 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.[28]

The narrow holding of *Donoghue*—that a manufacturer owes a duty of care to the ultimate consumer in the case of goods not susceptible to intermediate inspection—did not depend on the neighbour principle. Indeed, Lord MacMillan finds the same duty through incremental category-based reasoning, based on a combination of detailed analysis of past decisions and an explicit responsiveness to changing circumstances:

> The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.[29]

Subsequent decisions of the House of Lords reflected the significance of the neighbour principle, even as they grappled with the tension and challenges it produces. For example, in *Hedley Byrne,* Lord Devlin acknowledges the impact of Lord Atkin's judgment,[30] while at the same time adopting Lord MacMillan's more categorical approach:

> Now, it is not, in my opinion, a sensible application of what Lord Atkin was saying for a Judge to be invited on the facts of any particular case to say whether or not there was "proximity" between the plaintiff and the defendant. That would be a misuse of a general conception and it is not the way in which English law develops. What Lord Atkin did

28. *Donoghue*, *supra* note 8 at 580-581, per Lord Atkin.
29. *Ibid* at 619, per Lord MacMillan.
30. "I approach the consideration of the first and fundamental question in the way in which Lord Atkin approached the same sort of question—that is, in essence the same sort, though in particular very different—in *Donoghue v Stevenson.* If counsel for the respondent's proposition is the result of the authorities, then, as Lord Atkin said [1932] AC 562 at 582: 'I should consider the result a grave defect in the law and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House,'" *Hedley Byrne*, *supra* note 16 at 602.

> was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognised the existence of such a duty in the category of articles that were dangerous in themselves.[31]

We find Lord Devlin working hard to reconcile principle and categories by characterizing *Donoghue* as an extension of already present categories, or "the widening of an old category or as the creation of a new and similar one,"[32] and Lord Atkin's neighbour principle as "a general conception [which] can be used to produce other categories in the same way."[33] Indeed, each Law Lord in *Hedley Byrne* specifically refutes the plaintiff's argument that *Donoghue* already provides an answer to the question of potential liability for negligent misstatements resulting in pure economic loss, but at the same time turns to *Donoghue* for support in opening up precisely that possibility.

The centrality of, combined with resistance to, Lord Atkin's neighbour principle characterizes not only *Hedley Byrne* but *Dorset Yacht,* the remaining case in the "trilogy" of leading negligence law cases. There, Viscount Dilhorne carefully circumscribes the judicial function:

> We are being asked to create in reliance on Lord Atkin's words an entirely new and novel duty and one which does not arise out of any novel situation. I, of course, recognize that the common law develops by the application of well established principles to new circumstances, but I cannot accept that the application of Lord Atkin's words…suffices to impose a new duty on the Home Office and on others in charge of persons in lawful custody of the kind suggested…we are not concerned with what the law should be but with what it is. The absence of authority shows that no such duty now exists. If there should be one, that is, in my view, a matter for the legislature and not for the courts.[34]

Lord Morris, in the same case, calls the Home Office's liability "glaringly obvious,"[35] saying it would be "contrary to the fitness of things"[36] were there to be no duty, and Lord Reid elevates Lord Atkin's words into a "statement of principle" which "ought to apply unless there is some justification or valid explanation for its exclusion."[37] Lord Diplock, careful to distinguish

31. *Ibid* at 524.
32. *Ibid* at 525.
33. *Ibid*.
34. *Dorset Yacht*, *supra* note 25 at 1045.
35. *Ibid* at 1034.
36. *Ibid* at 1039.
37. *Ibid* at 1027.

Dorset Yacht from *Donoghue*, takes a more cautious approach to what the neighbour principle might mean:

> Used as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care this aphorism marks a milestone in the modern development of the law of negligence. But misused as a universal it is manifestly false.[38]

Early on in the *Donoghue* negligence narrative, then, it became obvious that the neighbour principle, although perceived as central, would be subject to constant interpretation as to its scope and significance. While it transformed the structure and scope of the duty of care question in the tort of negligence, Lord Atkin's principle continues to provoke discussion and disagreement. *Cooper* became part of that legacy as the Supreme Court of Canada was asked to determine the existence of a duty of care for the purposes of establishing liability for negligent acts or words. In refusing to find a duty of care, the Court contributes to the ever-developing answer to the question "who is my neighbour?"

2. *Judges: proximity as principle*

The concept of relationship—whether grounded in a general principle or in recognized categories—as a way to establish the duty to take care owed by one person to another, demands some analysis of closeness or "proximity." Although earlier case law had foreshadowed this idea of a relationship, set within a more general discourse of responsibility to those whom our actions might affect,[39] Lord Atkin's judgment in *Donoghue* explicitly turned to "proximity" to explain what constitutes "closely and directly" in his neighbour principle:

> 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.[40]

Lord Atkin leaves the question of proximity open, rather than pointing to specific categories of relationship previously recognized in negligence law as illustrations of the closeness requisite to establishing a duty of care.

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38. *Ibid* at 1060.

39. Lord Atkin and Lord Macmillan both drew on Brett MR in *Heaven v Pender* (11 QB 503) as well as Cardozo J in *Macpherson v Buick Motor Company* (1916), 217 NY 382, 111 NE 1050. See also Percy H Winfield, *The Province of the Law of Tort: Tagore Law Lectures delivered in 1930* (Cambridge: Cambridge University Press, 1931).

40. *Donoghue*, *supra* note 8 at 581.

Wrongly attributed by the Supreme Court of Canada to Lord Atkin, the focus on categories of negligence and on their flexibility characterizes the judgment of Lord MacMillan. Both judgments, separately and in their co-existence, underscore the key element of proximity in the tort of negligence. The intertwining of these two voices in their analysis of the proximity between manufacturer and consumer lays the foundation for the continued multiplicity of approaches, sometimes complementary and sometimes conflicting, to "proximity" as the touchstone for determining the existence of a duty of care in the tort of negligence.

Indeed, in order to understand the importance and elusiveness of "proximity," whether as notion or principle or test, it is necessary to pay close attention to how it is engaged in the hands of particular judges. As the contours of duty of care were refined, most noticeably in the context of pure economic loss, concern over the inadequacy of "reasonable foreseeability" as a way to limit recovery[41] prompted heightened investment in the project of giving substantive meaning to "proximity." Thus, for Lord Devlin in *Hedley Byrne*, requisite proximity in negligence is established and a duty of care owed to the recipient of information disclosed by someone with special knowledge and the expectation of reliance on the information. And for Lord Diplock in *Dorset Yacht*, proximity is satisfied in a careful analogy-based analysis of the relationship between the negligent guards and the owner of the boat damaged by the delinquent boys who take advantage of that negligence in order to escape from their island.

In the 1978 formulation of what became the *Anns* test, Lord Wilberforce attempted to combine *Donoghue, Hedley Byrne*, and *Dorset Yacht* together into a coherent approach grounded in proximity and refined by policy considerations. The first stage of the *Anns* test asked

> "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."[42]

The second stage, arising after a *prima facie* duty of care has been established, asked whether there exist "any policy considerations which would mitigate against such a duty of care."[43]

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41. "Economic interests in a competitive market economy are inherently vulnerable to foreseeable injury": Stephen Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 UTLJ 247 at 264.
42. *Anns*, *supra* note 4 at 751-752.
43. *Ibid* at 752.

The *Anns* test marked a broad and generous approach to proximity for the purposes of establishing, at least initially, a duty to take reasonable care. It also signalled the beginning of a new explicitness surrounding the inclusion of policy analysis in determining liability for negligence. Although subsequently rejected by the House of Lords,[44] it was enthusiastically adopted by the Supreme Court of Canada and relabelled the *Anns/Kamloops* test.[45] In subsequent Canadian case law, "proximity" was put under increasing pressure to circumscribe responsibility as courts grappled with relational economic loss, dangerous products or buildings, liability of public authorities, and the consequences of careless words. As insisted upon by Desmond Manderson, proximity "captures a distinct, crucial, though imprecise element of the constitution of responsibility."[46] But Supreme Court of Canada judges have shied away from the challenge, implied in Manderson's assertion, of finding a way to give significance to "proximity" as a principle.

Thus, for example, in the 1992 judgment in *Norsk,* the two principal opinions display, on the one hand, a highly skeptical approach to proximity and, on the other, an over-generalized approach to the notion. Justice McLachlin observes that "the concept of proximity may be seen as an umbrella, covering a number of disparate circumstances in which the relationship between the parties is so close that it is just and reasonable to permit recovery in tort."[47] Her understanding and application of *Anns/Kamloops* appears to track Lord MacMillan's starting point of flexible categories.[48] Justice La Forest asserts in his judgment in *Norsk* that proximity is "a result, rather than a principle."[49] In doing so, he redirects the analysis away from a concentrated focus on the closeness of the

44. In *D&F Estates* and *Murphy v Brentwood.*

45. In *Kamloops*, Wilson J suggested the following slightly modified version of the *Anns* test, asking "(1) is there a sufficiently close relationship between the parties…so that, in the reasonable contemplation of [one person], carelessness on its part might cause damage to [the other] person? If so, (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?" at 10-11.

46. Desmond Manderson, *Proximity, Levinas, and the Soul of Law* (Quebec: McGill-Queen's University Press, 2006) at 144.

47. *Norsk*, *supra* note 18 at 1152.

48. *Ibid* at 1149.

49. *Ibid* at 1114.

wrongdoer and victim, and, with the assistance of Bruce Feldthusen,[50] toward an analysis of context and kind of loss.

When "duty of care" is at issue and acts as the principal hurdle to liability and compensation, it would seem that the closeness between defendant and plaintiff would be central to the analysis. And yet, the way to assess that closeness, for the purposes of ascribing potential tort liability in negligence, continues to perplex courts and distinguish individual judges. Lord Diplock warns us in *Dorset Yacht* that Lord Reid's emphasis on foreseeability will stretch proximity too far to do any real work; Lord Wilberforce acknowledges in *Anns* that a corrective in the form of policy considerations must go hand-in-hand with proximity; Justice La Forest discards proximity in favour of categories each with its own set of contextual considerations; Justice McLachlin holds onto proximity in theory, but describes it "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."[51]

In every case, as pointed out by Geoffrey Samuels,[52] the stories and images and concrete facts describing the encounter between tortfeasor and victim shape the analysis of whether a duty of care does or should exist. The ominous opening of the "floodgates" of compensation for pure economic loss (after *Hedley Byrne*), the terror of "dangerous" products (starting with Mrs. Donoghue's snail), the indignance over shoddy foundations (*Anns* and *Kamloops*) all play a role in understanding the full panoply of cases that intertwine to produce a composite and always-shifting picture of "proximity." But that picture only comes into focus through attention to the plurality of voices that co-exist, complement each other, and sometimes conflict. Keeping track of those voices, and the approaches to proximity and duty of care that they reflect, is crucial to an understanding of how and why the Supreme Court of Canada produced a unanimous judgment in *Cooper*. That is, even as the distinctiveness of particular judges fades in the context of a unitary judgment, significantly different strands of the story require appropriate labelling and appreciation.

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50. La Forest J adopted Bruce Feldthusen's analysis of five categories of economic loss cases in "Economic Loss in the Supreme Court of Canada" (1990–1991) Can Bus LJ 356 at 357-358; see *Norsk*, *supra* note 18 at 299-300 and *Winnipeg Condo*, *supra* note 20 at 199. Feldthusen observes that in practice Canadian courts have taken the incremental approach of the English courts, generally finding liability only in the familiar pockets, while avoiding "the proximity road to nowhere so long taken by the Australian High Court": Bruce Feldthusen, "The *Anns/Cooper* Approach to Duty of Care for Pure Economic Loss: The Emperor has no Clothes" (2003) 18 Construction Law Reports (3d ed) 67.

51. *Norsk*, *supra* note 18 at 1151; cited in *Hercules*, *supra* note 9 at 23.

52. Geoffrey Samuels, *Epistemology and Method in Law* (Aldershot, UK: Ashgate, 2003).

3. *Structure: categorization plus policy*

Awareness of, and frustration with, the potentially circular nature of any inquiry into proximity has provoked the Supreme Court of Canada into increasing reliance on what Lord Wilberforce had named "policy" implications of finding a duty of care. Justice La Forest, writing for the court in *Winnipeg Condo*, accepted what he understood to be an explicit invitation contained in the *Anns/Kamloops* test to engage in a discussion of policy considerations such as the necessity of providing "incentives for plaintiffs to mitigate potential losses."[53] Even as he moved beyond proximity to "policy" in *Winnipeg Condo*, Justice La Forest maintained focus on the nature of the obligation at stake. In the same vein as Justice Laskin in a dissenting judgment decades before in *Rivtow Marine*[54] (referred to with approval by Lord Wilberforce in *Anns*), he highlighted the risk of danger and personal injury presented by defective premises. Defining that risk as core to the tort of negligence, the Supreme Court of Canada in *Winnipeg Condo* explicitly added dangerous premises to the list of categories in which recovery for negligently caused pure economic loss will be allowed.

Carl Stychin writes that Justice La Forest's judgment "provides a model of judicial reasoning, effortlessly combining issues of judicial principle and public policy."[55] Cass Sunstein might see in that combination a striving for what he refers to as the necessary "reflective equilibrium"[56] between principle and policy considerations. Indeed, the combination of honest recourse to policy, lucid explanation, and attention to the functional context of decisions has been celebrated as characteristic of Supreme Court of Canada jurisprudence, most notably during the era of the "Dickson Court,"[57] but also as compared more recently to its English counterpart.[58]

The attempt to give meaning to the slippery and multi-faceted notion of "policy," as applied in a spectrum of contexts, may indeed be helpful or even crucial. And yet, the risk—as illustrated in *Cooper* itself—is that policy might overwhelm any substantive assessment of the relationship at stake and of the potential obligation to take reasonable care vis-à-vis potential victims in the plaintiff's shoes. The Court in *Cooper*, unanimous

53. *Winnipeg Condo*, *supra* note 20 at 37.
54. *Rivtow Marine Ltd v Washington Iron Works*, [1974] SCR 1189.
55. Carl F Stychin, "Dangerous Liaisons: New Developments in the Law of Defective Premises" (1996) Legal Studies 387 at 416.
56. Sunstein, *supra* note 26 at 786.
57. See John PS McLaren, "The Dickson Approach to Liability in Tort" in Deloyed J Guth, ed, *Brian Dickson at The Supreme Court of Canada 1973–1990* (Winnipeg: Canadian Legal History Project, 1998) at 282.
58. See Giliker, *supra* note 7.

as in *Winnipeg Condo*, assumes from the outset that the duty of care inquiry involves balancing multiple policy interests.[59] It locates the significance of *Anns* in "its recognition that policy considerations play an important role in determining proximity in new situations."[60] Yet the Court complains that *Anns:*

> left doubt on the precise content of the first and second branches of the new formulation of the negligence principle. Was the first branch concerned with foreseeability only or foreseeability and proximity? If the latter, was there duplication between policy considerations relevant to proximity at the first stage and the second stage of the test?[61]

Since the first branch of the *Anns* test refers explicitly to "a sufficient relationship of proximity," the Court's claim to confusion is itself confusing. Certainly *Anns* established the role of policy considerations in determining *a duty of care* in new situations, but limited policy to the second stage, reserving the first stage for an inquiry into proximity. Having installed policy in both stages of the *Anns* test, the *Cooper* court reassures us that there is no duplication because "different types of policy considerations are involved at the two stages."[62]

Stage one policy considerations, according to *Cooper*, arise from the relationship between the two parties,[63] and are "diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic."[64]

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59. The judgment cites H Street's *The Law of Torts*, which characterizes the inquiry of reasonable foreseeability as a smokescreen for "the true judicial process," which was adjudicating matters of policy. "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" at 29. "[I]t cannot be too strongly stressed that the use of [the] test of foreseeability in order to determine whether there is a duty-relationship between the parties conceals the true judicial process—that test is in fact a conclusion embracing within it, and yet concealing the identity of, the several considerations of policy, and the balancing of interests which have led the court to decide that a duty is owed"; Street, *The Law of Torts*, 7th ed (London: Butterworths, 1983) at 108, cited in *Cooper* at 25.

60. *Cooper*, *supra* note 1 at 25.

61. *Ibid* at 26.

62. *Ibid* at 28.

63. "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": *ibid* at 30.

64. *Ibid* at 35.

> 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.[65]

Here then, the court lists terms—expectations, representations, reliance, interests—as almost interchangeable post-facto justifications to be invoked instrumentally for whichever conclusion the court reaches. The concepts of "just and fair" replace the relational inquiry into duty of care that a term like proximity provides, and the distinctiveness of judicial reasoning is subordinated to a consideration of policy.

For the Court, there seems to be no necessary structure to the questions to be asked as part of a duty of care inquiry.[66] It appears to ignore, or fail to understand, the difference between, on the one hand, finding a *prima facie* duty of care exists but is negated by policy, and, on the other, finding that a duty of care does not arise at all.[67] And it appears to cast aside the distinctive location of the onus of proof involved in each stage.[68] The Court is right to notice that there is overlap between the different questions to be asked and that the type of injury or loss is relevant to certain aspects of the inquiry. The consequence, however, need not be the one amorphous question articulated by the *Cooper* court: "The underlying question is whether a duty of care should be imposed, taking into account all relevant factors disclosed by the circumstances."[69]

As suggested by Stephen A Smith, Supreme Court of Canada jurisprudence from *Norsk* to *Cooper* appears increasingly to adopt what Stephen Waddams names a "bundle-of-factors" model of legal reasoning that addresses liability "on the basis of an ever-changing list of 'cumulatively and concurrently' relevant factors, such as insurance,

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65. *Ibid* at 34.

66. "Provided the proper balancing of the factors relevant to a duty of care are considered, it may not matter, so far as a particular case is concerned, at which 'stage' it occurs. The underlying question is whether a duty of care should be imposed, taking into account all relevant factors disclosed by the circumstances": *ibid* at 27.

67. "So long as the court is applying any notion of a *prima facie* duty, it *does* matter whether policy factors relating to proximity or residual policy considerations are applied at the first stage or the second. For example, while, having imposed a duty of care at stage one, the Court might ultimately absolve a defendant of liability at stage two, the fact remains that a duty of care has been recognized": Russell Brown, "Still Crazy after all these Years: *Anns*, *Cooper v Hobart* and Pure Economic Loss" (2003) 36 University of British Columbia Law Review 159 at 183.

68. The claimant bears the burden of proof with respect to the first two stages, but having discharged that burden, the defendant then carries the burden of persuading the court that there are countervailing policy arguments, see *Hill v Hamilton*, *supra* note 5.

69. *Cooper*, *supra* note 1 at 27.

deterrence, loss spreading and indeterminate liability."[70] Having stripped proximity of substantive meaning, the Supreme Court dispatches the duty of care question through a process of analogy to categories defined by the nature and context of the loss. Thus, categories of pure economic loss provide the organizing framework for all negligence actions resulting in this kind of damage.[71] An organizing structure, characterized by the attempt to map out different kinds of situations in which liability for negligently created pure economic loss might be appropriate, is understandable and even desirable. But, the jump from categorization directly to an all-encompassing appeal to policy appears to give up on a principled attempt to focus on duty of care as central to the tort of negligence.

Perhaps the Supreme Court of Canada's willingness to make "policy" ubiquitous and expansive explains its somewhat sloppy attention to the distinctive issues at stake in any analysis of liability in negligence. As noted above in Part I, the Court mistakenly casts the duty question as one of foreseeability of the type of damage suffered, thus merging proximate cause and duty of care into one inquiry. This could have been done explicitly, with explanation as to how the concern over duty often arises in contexts where the kind of loss is problematic, and with an acceptance that the overarching task for the court is always one of circumscribing the tortfeasor's scope of liability. Instead, the Court indicates limited self-awareness as to how it mixes together foreseeability of the kind of damage with proximity of the plaintiff. The call to policy seems to do away with the need either to grasp, or to work with, a structured, principled analysis.

4. *Precedent:* Donoghue *after* Cooper

To appreciate the implications of *Cooper* and the turn from principle to policy, the obvious place to look is Supreme Court of Canada jurisprudence following the 2001 judgment. Indeed, the Court has referred to the *Anns* test—"definitively refined" in *Cooper*—as "the analytic divining rod used by this Court for determining whether a duty of care exists."[72] Despite the direction offered by this "divining rod," decisions subsequent to *Cooper* have been obliged to linger at length over the judgment and refine

70. Stephen Smith, "A Map of the Common Law?" (2004) 40 Canadian Business Law Journal 364 at 268, citing Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge: Cambridge University Press, 2003).

71. Bruce Feldthusen's authoritative analysis of pure economic loss was cited by La Forest J in *Norsk* and then *Winnipeg Condo*. In *Winnipeg* at 199, then two years later in *Bow Valley* the court adopted La Forest J's conclusions to govern relational loss. Feldthusen in turn describes La Forest's "prophetic dissenting judgment" in *Norsk* as a "breakthrough," in "Pure Economic Loss and Statutory Public Authority Liability after *Cooper v Hobart*" (March 2005) online: <http://ssrn.com/abstract=702081> or <doi:10.2139/ssrn.702081>.

72. *Syl Apps*, *supra* note 5 at 23.

or reformulate the two-part test.[73] In 2007 the Court stated that policy considerations at both stages of the test were fairly interchangeable, stressing the need for an overall grasp of "all relevant concerns."[74] In a decision later that same year, after discussing "the possibility of some blending of policy considerations"[75] between the two stages, the Court echoed the House of Lords[76] by proposing a three-stage test divided into, first, reasonable foreseeability, second, proximity "such that it would be fair and just to impose a duty," and, third, "residual" policy concerns.[77] At the same time, then, that the Court has maintained the definitive nature of the *Cooper* formulation, that claim to the test's authoritative status has been continually subject to structural refining and overhauling.[78]

Looking beyond *Cooper* to later cases is not the only way to assess its place in the story of the duty of care in the tort of negligence. We can also look backwards, through the lens provided by *Cooper*, to observe its impact on our understanding of preceding case law stretching all the way back to *Donoghue*. Indeed, *Cooper* appears to have changed the teaching and learning of tort liability for negligently caused pure economic loss. After *Cooper,* the question of negligence—who is my neighbour—has become less a question of proximity than of policy.[79] In their textbook, *Canadian Tort Law*, Linden and Feldthusen cite *Cooper* when remarking

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73. See further Neyers & Gabie, *supra* note 7. See in particular *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263 at paras 45-52 per Justice Iacobucci; and *Childs v Desormeaux,* 2006 SCC 18, [2006] SCJ No 18, where Chief Justice McLachlin further recast the *Anns* test by viewing reasonable foreseeability as one element of proximity: "(1) Is there a sufficiently close relationship between the parties or proximity to justify imposition of a duty and, if so, (2) Are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise" at para 11.

74. "In practice, there may be overlap between stage one and stage two considerations. We should not forget that stage one and stage two of the *Anns* test are merely a means to facilitate considering what is at stake. The important thing is that in deciding whether a duty of care lies, all relevant concerns should be considered": *Hill v Hamilton*, *supra* note 5 at 31, citing *Cooper* at 37.

75. *Syl Apps*, *supra* note 5 at 33.

76. *Caparo Industries Plc v Dickman*, [1990] 2 AC 605 recognized the new three-fold test of foresight, proximity, and whether liability would be fair, just, and reasonable.

77. "Accordingly, in order to establish…a duty of care, (1) the harm complained of must have been reasonably foreseeable, (2) there must have been sufficient proximity between [the parties] such that it would be fair and just to impose a duty of care, and (3) there must be no residual policy reasons for declining to impose such a duty": *Syl Apps*, *supra* note 5 at 33.

78. In the most recent negligence decisions, albeit not in the context of pure economic loss (*Fullowka v Pinkerton's*, re a claim made by miners again negligent managers; and *Reference re Broome*, re a claim made by survivors of child abuse in a foster home), the Supreme Court continues to engage in the necessary finessing of the *Cooper* "policy" considerations relevant at different stages of determining duty of care. In both cases, the statutory context serves as the primary basis for determining the proximity between tortfeasor and victim.

79. In 2007 the court cited *Cooper*: "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" at 29, cited in *Syl Apps*, *supra* note 5 at 31.

that "more recently the duty issue has been recognized as largely a matter of policy."[80] Their chapter on "duty of care" opens with explicit policy language: "The duty concept is a control device that enables courts to check the propensity of juries to award damages in situations where matters of legal policy would dictate otherwise."[81] *Canadian Tort Law* is in turn cited in almost all decisions applying *Cooper*.[82]

Starting from *Cooper* and looking backwards holds the potential for transforming history and what we take to be fixed points along its timeline. The reluctance to open up the possibility of recovery for relational economic loss (*Norsk, Bow Valley*), the justification for imposing liability for the cost of repairing dangerously defective premises (*Winnipeg Condo*), the limited possibilities of holding public authorities responsible for the consequences of their lack of care (*Dorset Yacht, Anns, Kamloops*), the parameters drawn around the responsibility to convey information with appropriate attention (*Hedley Byrne, Haig v Bamford*,[83] *Henderson*[84]), and even the significance of establishing a line of responsibility from manufacturer to ultimate consumer (*Donoghue*), are all subject to rewriting. All are remodelled as precedent; all take on a different meaning. All also become instances of categories into which new cases may fall and, at the same time, potential sources for understanding policy as re-centred by *Cooper*. That is, in 2006, the Supreme Court of Canada underscored the importance of categories of duty of care situations, by suggesting that this requirement "simply captures the basic notion of precedent."[85] According to *Canadian Tort Law*, this seems to mean that if a case falls into one of the established categories in negligence law, then the *Anns-Cooper* two-step

80. Linden & Feldthusen, *supra* note 23 at 285.
81. *Ibid* at 265.
82. For a recent example see *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at 5 [*Mustapha*].
83. *Haig v Bamford et al,* [1977] 1 SCR 466.
84. *Henderson v Merrett Syndicates*, [1995] 2 AC 145.
85. "The Court in *Cooper* introduced the idea that as the case law develops, categories of relationships giving rise to a duty of care may be recognized, making it unnecessary to go through the *Anns* analysis. The reference to categories simply captures the basic notion of precedent: where a case is like another case where a duty has been recognized, one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise. On the other hand, if a case does not clearly fall within a relationship previously recognized as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established": *Childs* at para 15. See also *Eliopoulos et al v Ontario (Minister of Health and Long-Term Care)*, [2006] OJ No 4400 (Ont CA) at 12.

analysis becomes unnecessary.[86] In a later case, the Supreme Court in turn cites the textbook.[87]

Casting as a threshold question the analogy of the present case to past cases, to be answered independently of the two-stage duty of care inquiry, begs the question of how close two cases have to be, and why. Without relational analysis, there is no basis for deciding which policy concerns are relevant, and no guidance for where to look to articulate the contours of the duty of care and the limits of potential liability. Gone is careful attention to the wording of past judgments as they grappled with the closeness of wrongdoer and plaintiff, and to the factors that explain the existence or absence of a duty to take requisite care. Scholarly writing relevant to *Cooper* argues for the need to separate the relational element of the duty of care from policy inquiries.[88] For Desmond Manderson, "proximity involves a one-to-one relationship where policy imports a one-to-many relationship"[89]; for Ernest Weinrib, the Court's acceptance that duty is a matter of "policy" has "led to a distaste for the abstract practical reasoning that undergirds a general conception of duty."[90] Such scholars argue that a duty of care inquiry must include occasion for properly normative and relational reasoning, and that once proximity is represented as policy, the core element of the duty of care has been ignored.[91]

Rather than participating in a substantive assessment of the *Cooper* court's explicit turn to both category and policy, we conclude our brief sketch of the duty of care narrative in Anglo-Canadian negligence law with a comment on the back-and-forth nature of situating any given case in that narrative. That is, as we have indicated above, *Cooper* can be studied by moving forward or by casting back. *Donoghue* itself begs

86. Linden & Feldthusen, *supra* note 24 at 293 and 302.

87. "As stated by AM Linden and B Feldthusen, categories of relationships that have been recognized and relationships analogous to such pre-established categories need not be tested by the *Anns* formula": *Cooper*, *supra* note 1 at 35-36; *Mustapha*, *supra* note 82 at para 5.

88. One exception is Giliker who, in noting the convergence of English and Canadian law, writes: "relevant factors may be termed 'policy or proximity,' but the adoption of a different filing system does not alter the content of those files," *supra* note 7 at 60.

89. Manderson, *supra* note 46 at 105. "The concept of policy considerations limits responsibility by reference to *we,* the sociopathic grammar. It imports the social outcome of legal judgments as a relevant constraining factor… [But] proximity and policy…are concerned with quite distinct relationships. Proximity orients responsibility by reference to *you;* policy by reference to *us,* in terms of society's interests as a whole" at 104-105.

90. Weinrib, "The Disintegration of Duty", *supra* note 7 at 145.

91. As Allan Beever writes of the UK context: "The presence of policy arguments in legal analysis is symptomatic of the failure of our general accounts of the law. The frequent appeal to policy is symptomatic of a system in crisis. The law of negligence is a system in crisis": "Policy in Private Law: An Admission of Failure" (2006) 25:2 The Queensland Law Journal 287 and *Rediscovering the Law of Negligence* (London: Hart Publishing, 2007).

for an analysis of category and policy justifications, if observed through the *Cooper* lens. Indeed, the need to follow the *Anns* structure, already discarded by the House of Lords, comes starkly into question. The Court in *Cooper* grasps the need to follow past case law and claims to have "repeatedly expressed"[92] the view that policy belongs at both stages of the *Anns* inquiry. And yet, previous jurisprudence had not explicitly inserted policy considerations into stage one of the *Anns* inquiry and had instead affirmed that policy considerations arise on the second stage to trump a *prima facie* duty of care.[93]

History is thus subject to constant revisiting and questioning in the common law; the "holding" of a case is never quite fixed in time. Against this context we can better appreciate the error identified in Part I as one of precedent or of remembering. When the Supreme Court forgets its own history, and, in particular, *Winnipeg Condominium*, one of its own principal unanimous cases relevant to the development of the duty of care for pure economic loss, then it forces others to rewrite the lines that tie past to present to future. It forgets to build on what has come before and instead replaces or rewrites, leaving us to speculate as to how well it understands where it has been and where it is going.

III. *Responsible participation: the rules of conversation*

In Part I, we identified four errors committed by the Supreme Court of Canada in *Cooper*: errors in the placement of words, the naming of judges, the identification of structure, and the remembering of precedent. In Part II, we retold the story of duty of care in the tort of negligence with *Cooper* as a point on a timeline stretching back to *Donoghue* and forward to the present. In selecting and emphasizing certain aspects of that story, we attempted to fill out the four themes of words, judges, structure, and precedent, and the corresponding four characteristic features of common law methodology and development: placing, naming, identifying, and remembering. In the third and final part of this paper, we reflect on responsible participation in the common law. We argue that the importance of words, names, structure, and history of the common law can be best understood by reference to an idea of "conversation." Engaging in conversation may indeed be "academic," as the Supreme Court of Canada

92. *Cooper*, *supra* note 1 at 28.

93. The SCC's approach in cases preceding *Cooper* meant that *prima facie* duties of care were recognized in circumstances where they may not have been under *Cooper's* reformulation of *Anns:* see for instance *Norsk*, *supra* note 18 per Stevenson J; *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299, per La Forest J and *Hercules*, *supra* note 9. This point is also made by Russell Brown, *supra* note 67 at 183, note 103.

suggests, but it is also crucial to responsible participation as advocates, judges, and readers of the common law. That is, instead of worrying about and characterizing as "beside the point" the admittedly slippery discussion of duty of care, we can acknowledge and nourish its "academic" nature as central to common law methodology itself.

Viewing the common law as a conversation gives us a metaphor with which to explore and define its unique characteristics, constraints, and contours. The constantly shifting, and yet undeniably shaping, nature of the common law can be captured by many possible images and metaphors. From a chain novel to a family recipe recopied and modified through generations, from an unfinished symphony to a pointillist painting, from an everlasting gobstopper to blues improvisation, concrete pictures can both inspire and ground our understanding of common law method and form.[94] Here, we offer conversation as a particularly helpful and significant structure that provides a way both to take part in, and maintain a critical perspective on, common law development. We then underscore, in turn, the "rules" of conversation that mean that words, names, structure, and history all matter in the creation and maintenance of the conversation itself.

A conversation is commonly defined as an exchange of words between or among speakers, which takes place on the basis of a common language and shared understanding or commitment. But the meaning of the Latin root of "conversation" went beyond the purely verbal, invoking dealings with others and one's manner of conducting oneself in the world: *conversationem* (nom *conversatio*) meant the "act of living with," from the verb *conversari* which meant "to live with or keep company with."[95] A conversation, then, was a social relationship before it was a verbal interaction. The relational dimension of this original wider sense of conversation grounds its potential as an activity grounded in social interaction, ethical behaviour, and responsibility to others.

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94. These are all suggestions made by second year law students in Advanced Common Law Obligations at McGill University in response to the challenge of finding metaphors for, or images of, common law drawn from music, art, literature, or cuisine. The idea of a line of precedent as a "chain novel" is explored in Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) 228-238.

95. L. *conversationem* (nom. *conversatio*) "act of living with," prp. of *conversari* "to live with, keep company with," lit. "turn about with," from L. *com-* intens. prefix + *vertare,* freq. of *vertere*. The Latin-based word moved from designating social intercourse in general to a more specific verbal sense. The Greek-based synonym "dialogue" (from O.Fr. *dialoge,* from L. *dialogus,* from Gk. *dialogos,* related to *dialogesthai* "converse," from *dia-* "across" + *legein* "speak") arose a different way, its sense being broadened from a *literary work* consisting of a conversation between two or more people (c 1225) to a conversation itself (c 1401).

Linguistic philosopher HP Grice viewed conversation as a "cooperative effort," governed by what he called the "cooperative principle":

> Our talk exchanges do not normally consist of a succession of disconnected remarks, and would not be rational if they did. They are characteristically, to some degree at least, cooperative efforts; and each participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a mutually accepted direction…. We might then formulate a rough general principle which participants will be expected (ceteris paribus) to observe, namely: Make your conversational contribution such as is required, at the stage by which it occurs, by the accepted purpose of direction of the talk exchange in which you are engaged. One might label this the cooperative principle.[96]

We can perceive that Grice's cooperative principle is both descriptive—a kind of precondition for actually having a conversation—as well as prescriptive—a normative ideal by which participants in that conversation are encouraged to moderate and shape their utterances.

The metaphor of conversation has been used before to describe certain features of law and legal reasoning.[97] But law is a particular kind of conversation, given that it is a product of institutional power and

96. HP Grice, "Logic and Conversation" in Peter Cole & Jerry L Morgan, eds, *Syntax and Semantics*, vol 3 (New York: Academic Press, 1975) 41 at 45. Grice analyzed this cooperation as involving four maxims: quantity, where speakers give enough and not too much information; quality, by which speakers are genuine and sincere, speaking truth or facts; relation, by which utterances are relevant to the context of the speech; and manner, by which speakers try to present meaning clearly and concisely, avoiding ambiguity.

97. Joseph W Singer referred to "legal reasoning" as a "conversation" when defending critical legal studies against the charge of indeterminacy: "Legal reasoning is not an accurate representation of an innate antecedently existing decision procedure of rational consensus that unites all persons involved in legal discourse. Traditional legal theorists assume that if legal reasoning is neither accurate representation nor an intersubjective decision procedure, then we are left intolerably free to say anything…. This fear is not surprising. Conversations are often free-wheeling. They can take unexpected and dangerous turns." Joseph W Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale LJ 1 at 51. For an understanding of law and legal writing as conversation, see Teresa G Phelps, "The New Legal Rhetoric" (1986) 40 Sw LJ 1089, 1102; for rights as conversation, see Elizabeth M Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" (1986) 61 NYU Law Review 589 at 622. Many scholars point out that a good metaphor opens up multiple possibilities of re-understanding, while a bad metaphor confines discourse within its own limited terms. See Douglas Berggren, "The Use and Abuse of Metaphor I" (1962) Rev Metaphysics 237 at 244-245. Justice Benjamin Cardozo was sensitive to the use of metaphors in legal reasoning, warning that they had "to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it": *Berkey v Third Ave Ry Co* (1926), 155 NE 58 at 61; see also Lord Mansfield's observation that "nothing in law is so apt to mislead than a metaphor," cited in Thomas Ross, "Metaphor and Paradox" (1989) 23 Ga L Rev 1053 at 1053, see also 1055-1056.

authority.[98] In Austinian terms, the speech act of a judge is performative, instantiating the force of law it claims to be drawing upon.[99] While its written form allows it to span centuries and continents, engaging past and present voices in a back and forth dialogue, the common law is dominated by the motif of the speaking person and the singular judicial voice.[100] Indeed, appellate judgments are often written as if read aloud in a courtroom, in the presence of adversaries and interested parties.[101] Unique among the world's major legal traditions, the common law practice of rendering multiple judgments in appellate decisions means each decision must be grasped as an exchange among distinct voices. The common law is multivocal and dialogic even in its most authoritative form.

Adopting the "aural"[102] metaphor of a conversation, with its emphasis on the speaking voice, allows us to sidestep visual formats for understanding the common law. Attempts to render the common law in terms of a map of legal principles "thought to have no uniquely correct verbal form"[103] are products of a sometimes overpowering or hegemonic appeal to visualisation. In contrast, as Karl Llewellyn wrote, the principles of the common law cannot be disembodied from those responsible for articulating them and then later referring to, and necessarily modifying, them:

> The phrasing of the court, the points that it picks out for stress, the patience and impatience displayed in dealing with cases cited and with contentions of counsel, the interest or lack of interest shown (on the level of evidence-interpretation) in what the parties seem really to have had in mind, the bluntness or the delicacy of the legal tools with which the court has reasoned—these lay the foundation for a prediction as to how the court in a later case will respond.[104]

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98. Charles Fried reminds us that "the judicial opinion is unique in the world of political discourses: it is an *authoritative* explanation": Charles Fried, "Scholars and Judges: Reason and Power" (2000) 23:3 Harvard JL and PP 807 at 828. Some other generic features of judgments are discussed in Robert A Ferguson, "The Judicial Opinion as Literary Genre" (1990) 2 Yale J L & Hum 201; and John Leubsdorf, "The Structure of Judicial Opinions" (2001) 86 Minn LR 447.

99. John L Austin, *How to Do Things with Words* (Oxford: Oxford Uni Press, 1975).

100. Mikhail M Bakhtin commented that "the enormous significance of the motif of the speaking person is obvious in the realm of ethical and legal thought and discourse": *The Dialogic Imagination: Four Essays by M.M. Bakhtin*, ed by Michael Holquist, translated by Caryl Emerson & Michael Holquist (Austin: Uni of Texas Press, 2004 [1981]) at 249.

101. Lord Goff, in "The Future of the Common Law" (1997) 46 International and Comparative Law Quarterly 745, remarks on the common law's "essentially oral procedure" at 759.

102. Bernard J Hibbits, "Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse" (1994**)** 16 Cardozo Law Review 241.

103. AWB Simpson, *An Invitation to Law* (Oxford: Basil Blackwell, 1988) at 7.

104. Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana Publications, 1951) at 67-68.

In allowing us to talk about speakers, voices, listeners, and dialogue, the idea of conversation helps to contextualize the partial nature of any particular moment in the common law, to see how each speaker is responding to someone else, and that their words are always liable to adaptation and re-use. Conversation demands respect for other participants in it; there are limits and constraints on how one voice is able to dominate and even bring an end, temporarily, to the conversation on a particular topic. Understanding judges as conversants highlights their obligation to attend to what has come before, to position themselves within a continuing tradition, and to remain open to what may lie ahead.

1. *Why words matter: meaning and metaphor in conversation*

Words shape and redirect conversation.[105] As participants in a conversation, we rely on words and their significance in whatever language or languages we happen to be speaking. We select our words with some comprehension of what they mean to us and what they will convey to others. Words are the stuff of conversation, its basic elements or building blocks. In legal judgments, a word can be the crucial nexus in relations of meaning stretching back into the past and forward into the future. In the context of the common law, and in particular that of the private law of obligations, words define ways of talking about the limits of our responsibility to others, and sometimes fall short of expressing what it is we really want to say.[106]

For example, judgments about "proximity" in negligence law can use words such as "reliance," "expectation," and "vulnerability," developed in the context of contract and fiduciary duty.[107] Each use of a word by common law judges and commentators illuminates and is illuminated by every other instance of its use. As demonstrated by Mikhail Bakhtin, influential theorist of conversation, meaning does not rely on a pre-existing set of differences between words, but on an ongoing diachronic production

105. "Legal language does not determine the outcome to legal disputes. Rather, it 'steers the mind through the task at hand,' directing practitioners and thinkers in an ordered way towards various factors and particular ways of presenting their arguments. The common law is, in short, a discourse and not a machine…": Manderson, *supra* note 46 at 142.

106. "[T]he imperfection of a symbol is not a shortcoming but the other side of the work of abstraction it performs": Hans George Gadamer, *Truth and Method* (London: Continuum, 2006 [1979]) at 346-347.

107. See the language of "reasonable expectation" and "reasonable reliance" in *Hercules* and *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574. The notions of reliance and vulnerability in analyses of fiduciary duty could also have dominated negligence law if circumstances had facilitated a more sustained development of *Hedley Byrne*—see for example Lord Goff in *White v Jones*, [1995] 2 AC 207, who expanded the *Hedley Byrne* principle to include a duty of care owed by a solicitor to a beneficiary of a negligently prepared will.

of differences through use. Thus dialogue is inherent to the sense-making capacity of language:

> The word in living conversation is directly oriented towards a future answering-word: it provokes an answer, anticipates it and structures itself in the answer's direction. Forming itself in an atmosphere of the already spoken, the word is at the same time determined by that which has not yet been said but which is needed and in fact anticipated by the answering word. Such is the situation in any living dialogue.[108]

Taken out of the context of the common law conversation of which it forms a part, the *Cooper* court's characterization of Lord Atkin's principle as the "negligence" principle rather than the "neighbour" principle may not seem like a significant or noteworthy mistake. A small slip in language does not, and should not, single-handedly determine the outcome of any particular dispute. To dismiss this error as meaningless or irrelevant, however, misses a crucial dimension of the inventive and interpretative activity of judging. It misses the resonance of the "neighbour" word and concept and principle. It avoids the legacy of the neighbour principle, its echo through the case law that added layer upon layer to the meaning of the judgment in which it was formulated. And it tries to dull the sharp impact of the neighbour principle, to flatten the contours of judgments that have wrestled with its promise and perils.

The sound of a conversation in which the word "neighbour" gets repeated over and over—by different speakers with widely differing attitudes and interpretations—doesn't lead inexorably to that word's definition. But, if we want to participate in the quest for the meaning of words like "neighbour" or "proximity" or "policy," then we pay attention to how they are used by different participants in different contexts.[109] Their "meaning" may exist primarily in the spaces between their mention. But that doesn't mean that we can afford to be sloppy about words that don't seem fixed. Instead, it invites us to consider how each and every use of them will affect their meaning. For common law participants, as for speakers in a conversation, words are all there is to work with, so we have to get them right—especially when they shape a central idea like that of the neighbour principle in negligence.

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108. Bakhtin, *supra* note 100 at 280; see also Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1968) ss 66-71.

109. Like any legal tradition, the common law "does not exist apart and in abstraction from those who consider themselves participants in it and the words that they use": Rod Macdonald & Jason MacLean, "No Toilets in Park" (2005) 50 McGill LJ 721 at 730.

2. *Why names matter: participants in the conversation*

As pointed out by Hans Gadamer, "The first condition of the art of conversation is ensuring that the other person is with us."[110] That is, there may be words (the "what" of conversation) but there must also be people (the "who") speaking with, and listening to, each other. Two characteristics of common law judging reflect the significance in conversation of engaging the listener. First, common law judges are not one-time story-tellers with no future speaking engagement in sight. Rather, they talk with each other and listen as they speak. Any student of common law appreciates that judges cannot simply create or innovate out of thin air; perhaps most romantically put by Benjamin Cardozo, the judge is not a "knight errant."[111] The common law judge must draw on what has already been said and must speak with a sense of responsibility and in a way meant to persuade those who will speak in the future.

Second, judgments are always signed and attributed to the judges who construct them. Most evident in multi-judgment decisions where each judgment carries the name of its author—such that the case moves forward with a necessarily plural meaning—this is a crucial characteristic of the development of common law.[112] The distinctive voices of individual judges are part of the sound and significance of the conversation surrounding any given issue and its ongoing analysis. Responsibility for what is said rests with the creator of the specific judgment. Thus, when the words of one judge are attributed to another, the conversation breaks down. The listener has stopped paying attention not only to what has been said, but by whom.

Studying the common law involves tracking the voices of individual judges through different cases, and noting how they revisit and refine their own past judgments. Studying the duty of care in the tort of negligence, in particular, might include imagined conversations between Lord Atkin and Lord Wilberforce, or between Lord MacMillan and Lord Diplock, or between Justice McLachlin and Justice La Forest. It might require heightened attention to the role in dynamic conversation of the dissenting judge, whether Lord Buckmaster in *Donoghue*, Justice Laskin in *Rivtow Marine*, or Justice La Forest in *Norsk*.[113] And it might benefit from analysis of the transatlantic "conversation" between the Supreme Court of Canada

110. Gadamer, *supra* note 106 at 360.

111. Benjamin Cardozo, "The Judge as a Legislator" in *The Nature of the Judicial Process* (New Haven: Yale Univ Press, 1921) 98 at 141.

112. Lord Goff, *supra* note 101.

113. Claire L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?" (2000) 38 Osgoode Hall LJ 495. See Lord Goff, *supra* note 101 at 755-756 (commenting on the centrality of dissent in the common law as opposed to the civil law).

and the House of Lords in post-*Anns* jurisprudence as an engagement between different positions on judicial responsibility for policy.

It is in this context that we might express concern over the Supreme Court of Canada's confusion between Lord Atkin and Lord MacMillan. This is a mistake that seems to express disregard for the matching of individual participant to specific idea. And, if the importance of taking responsibility for one's own words disappears from the very construction of common law, then we risk losing the constraints that ensure its shape and solidity. That is, through reference to other fellow speakers in the conversation, common law judges operate within a framework meant to underscore responsibility—responsibility to the past, and responsibility for the future. In *Cooper*, the seven judges who sign on to the judgment must all accept responsibility for the error in naming their predecessors and situating their contributions.

Judges are the primary participants in the common law conversation, but they are not the only voices. While the traditional sources of the common law are past cases, academic commentators play a significant role in judicial decision-making and thinking about a particular case, as evidenced in Bruce Feldthusen's analysis of pure economic loss being adopted by the Supreme Court of Canada and providing the organizing framework for all negligence actions in that field.[114] There is always potential for the dynamics of the conversation to disrupt the hierarchy of judicial authority, as an academic commentary or a clerk's ingenuity finds its way into the common law. As writers, teachers, students, and practitioners, we each have a responsibility to develop the common law in an appropriate methodological way. All of us are participants, which means that none of us are the primary or definitive storytellers or authorities, but have to continue talking with each other and listening carefully as we speak.

3. *Why structure/space matters: fixed points in the conversation*

The description of any conversation goes beyond reference to its words and its speakers. To capture the essence of an ongoing conversation, we pay attention to "how" it proceeds, develops, plays itself out. There are rules and structures: questions—unless rhetorical—demand response; exclamations provide emphasis; new directions are marked out in specific ways; certain tools exist for bringing the conversation to an end, at least temporarily. One speaker's contribution to the conversation becomes a

114. See note 71.

starting point for elaboration or modification or variation provided by the next speaker in time: "[s]uch is the situation in any living dialogue."[115]

As participants in common law, we know that we learn more by looking at how a judgment is structured and developed than by noting who won the case. Just as is required in following a conversation, we delve into the complexity of the common law not by looking for the final answer but by paying attention to the ways in which the questions are asked and the responses are shaped. In this sense, a judge is required to answer the issue at hand and the determination for the particular parties in the case will thus be fixed. But that answer also becomes a contribution to the ongoing conversation, a point subject to dislocation. By necessity, then, there exists no settled way to transcribe or represent or determine for all time what the answer is.

It is in this context that responsibility in articulating the question becomes significant and, for these reasons, that the Supreme Court in *Cooper* commits an error when it frames the issue of duty of care as one of foreseeability of damage. The question asked should provide direction and structure for the potentially complex discussion that follows. The wrong question means that participants in the conversation lose track of what they have agreed to talk about. Thus, when the Court suggests that the first stage of the test for duty of care in negligence is whether the harm that occurs is the foreseeable consequence of the wrongdoer's behaviour, then the conversation shifts course. No longer do its participants focus on the relationship between wrongdoer and victim, and it becomes difficult to understand how the answer to a proximate cause inquiry provides direction to the submerged question of duty of care.

Misstating the precise question need not derail the conversation. Its participants can modify the words the next time around, and dissection of the conversation might reveal the error to be a mere instance of misspeaking rather than misunderstanding. But the *Cooper* court not only gets the question wrong, but—as illustrated by its approach to answering it—also gets wrong the very structure of the conversation and the common law it symbolizes. In unison it purports to repair all past complexity and to avoid any future confusion over the duty of care inquiry. It is rare for a judgment to hold itself out as a "fixed point,"[116] as a definitive guide and standard for future courts. The *Cooper* court does just that.

115. Bakhtin, *supra* note 100 at 280.
116. Sunstein, *supra* note 26 at 771.

Sure enough, the decision is now a touchstone for Canadian courts deciding duty of care.[117] Its reformulation of the *Anns* test is referred to as a new rule: the "*Cooper/Anns* test,"[118] suggesting that the decision renders unnecessary any renewed inquiry into *Anns* itself and its admittedly messy legacy. The *Cooper/Anns* test is unabashedly offered as a way to make the judicial function easier, to leave to "academic" circles any ongoing discussion of proximity and relationship in the tort of negligence, and to restrict analysis to recognition of fixed categories and explication of relevant policy considerations. And yet, the fact that *Cooper* announces itself as a voice that erases part of the past conversation doesn't mean that it succeeds in doing so. The appeal to policy doesn't mean that past struggles to delineate the scope of responsibility in the tort of negligence lose their resonance, nor that future struggles disappear.[119]

Chief Justice McLachlin, writing extra-curially, has suggested that the Supreme Court of Canada's post-*Anns* cases on tort recovery for pure economic loss reflected "a see-saw competition"[120] between two approaches she labels universal and formalist. McLachlin describes her judgment in *Norsk* as "a case-by-case enunciation of how the universal principle applies"[121] and her later "flexible categories" notion as a way to reconcile any conflict between universalism and formalism.[122] The combination of category and policy offered by *Cooper* is presented as a way to stop the "see-saw," a way to hold the process of inquiry in perpetual equilibrium, a way to simplify reasoning and decision-making. And yet, the notion of categories does not do away with principled analysis; as Stephen Perry explains, "categories of cases are, after all, defined by principles stated at one or another level of generality."[123] And choosing a category for any given case requires normative judgment and, as Desmond

117. *Cooper* has been referred to in every Supreme Court case dealing with duty of care since 2001: see cases cited at *supra* note 5. Provincial Courts of Appeal also continue to negotiate the *Cooper* restatement of *Anns:* for recent examples, see *Jones v Donaghey*, 2010 BCSC 1498 at paras 32-39; *Williams v Ontario*, 2009 ONCA 378 at paras 12-36.

118. See for instance *Eliopoulos*, *supra* note 85 at 9; *Donaldson v John Doe et al*, 2007 BCSC 557 at 48; and Michael Bodner, "Odhavji Decision: Old Ghosts and New Confusion in Canadian Courts" (2004-5) 42 Atla L Review 1061 at 1082.

119. Cass Sunstein argues that analogical reasoning facilitates practical outcomes without the need for the judges to agree on a comprehensive theory that accounts for that outcome. "Within the legal culture, analogical reasoning imposes a certain discipline, and a widespread moral or political consensus is therefore unnecessary": Sunstein, *supra* note 26 at 770.

120. Beverley McLachlin, "Evolution of the Law of Private Obligation: The Influence of Justice La Forest" in R Johnson et al, eds, *Gerald V La Forest at the Supreme Court of Canada, 1985–1997* (Winnipeg: Canadian Legal History Project, Faculty of Law, University of Manitoba, 2000) at 38.

121. *Ibid* at 39.

122. *Ibid* at 42.

123. Perry, *supra* note 42 at 252.

Manderson underlines, is the precise choice with which reference to the past does not assist.[124] The process of characterizing facts and articulating relevant considerations[125]—or, in *Cooper* terms, of selecting categories and inserting policy—continues to shape and depend upon ongoing conversation.[126] Not even the *Cooper* court, despite assertion to the contrary, can circumvent that process.

4. *Why history matters: from past to future through conversation*

The fourth and final error in *Cooper* is one of memory. Participants in a meaningful conversation situate themselves each time they make a contribution. They refer to what has come before; they indicate that they have been listening to their counterparts or that they are conscious of what they have already said. Speakers are not necessarily bound to consistency, but they are generally expected to indicate awareness of where the conversation has come from and where their contributions fit. In common law too, participation in the form of judgment requires repeated accounting for where it comes from and where it belongs. When the *Cooper* court excludes one of its own unanimous judgments of the past, it overlooks its institutional identity and its responsibility for paying attention to the development of the conversation to which it contributes.

As students of the common law, we understand and analyze cases by looking at what they build on and predicting their later impact. At times, as Karl Llewellyn graphically suggested, a common law judge offers a judgment that, like a "knife," "cuts the past away."[127] The importance of precedent in common law methodology does not mean that change—whether incremental or abrupt—is not possible. But it does mean that the past cannot be ignored. The voices of past participants do not disappear even if they lack the power to somehow freeze the conversation. Even more obviously, acknowledging one's own contributions as a speaker in the past is crucial to persuading others of a change in direction or of modified interpretation. In particular, confronting past contributions, when one is no

124. "A judge trying to decide whether the current dispute fits within established categories must always confront the fact that they have a *choice*: we must still decide if this case is 'the same as' or 'different from' the past, and—obvious or difficult—this is one choice that the past cannot ever help us with," in Desmond Manderson, "Two Turns of the Screw: The Hart-Fuller Debate" in Peter Cane, ed, *The Hart-Fuller Debate: 50 Years On* (Oxford: Hart Publishing, 2009) 197 at 208.

125. Geoffrey Samuels describes the process of drawing an analogy between two facts as "a matter of image (non-symbolic knowledge) rather than proposition": Samuels, *supra* note 52 at 176.

126. Cardozo described judging as the selection and presentation of facts, and the framing of issues, "so as to produce a cumulative and mass effect" which reinforces the "rightness" or "justice" of the decision, in *Selected Writings of Benjamin Cardozo*, Margaret E Hall, ed, (Albany: M Bender, 1980) at 352.

127. Llewellyn, *supra* note 104 at 68.

longer confident as to their correctness, is crucial to inspiring trust among fellow speakers.

The judgment in *Cooper* begins by revisiting the history and development of recovery for negligently caused pure economic loss from *Donoghue* on. In the course of sketching that history, and the ongoing quest to clarify the test for establishing a duty of care, the Court omits *Winnipeg Condominium* and its own strong approval of recovery in that case's situation of dangerously defective premises. In a judgment based on negligence law's principled preoccupation with, and responsiveness to, personal injury, a unanimous Supreme Court of Canada had moved situations of dangerous buildings into a recognized category of recovery for pure economic loss. By *Cooper*, perhaps the Supreme Court of Canada would have offered a different answer to the issue of duty of care in *Winnipeg Condo*, but by simply ignoring its own past, the Court fails to paint the full picture of where it comes from as it offers a new way to determine duty of care. It fails to take full responsibility as a reliable and persuasive speaker in the conversation.

The substantive impact or significance of this incomplete fitting together of past jurisprudence with the policy-heavy *Cooper* test is difficult to assess. But the answer to why the omission of a particular reference matters doesn't lie in substantive analysis of the judgment. Instead, the error matters because, as a participant in the development of the common law, the Supreme Court should be counted on to know at least its own history. The very notion of precedent demands that we continually acknowledge and work over the "knotty problem of the past…[build] knots upon knots, imperfections upon imperfections."[128] As evocatively stated by Justice Benjamin Cardozo, the common law judge "must be a historian and prophet all in one."[129] As historian, the judge in common law mode looks backwards, retracing the story and highlighting those parts of history to be brought to bear on the current decision. As prophet, the judge constantly looks to the future, aware of the impossibility of fixing the way in which the judgment at hand will be understood, interpreted, and applied.[130] When the judge—as a participant in the conversation of

128. "Precedent remembers and continues to worry over that knotty problem of the past. It builds knots upon knots, imperfections upon imperfections. Certainly the High Court, faced with such interruptions in its supposedly seamless thread of rules, will always attempt to gather up the loose ends and retie the thread over and over again. That is how our institutions work. But the knots thus formed conserve the memory of that disruption and authorize the possibility of new ones to further unsettle a purely internal and conceptual system of order": Manderson, *supra* note 46 at 198.

129. Benjamin Cardozo, "The Game of Law and its Prizes" in *Law and Literature and Other Essays* (New York: Harcourt, Brace and Company, 1931) at 166.

130. Llewellyn, *supra* note 104.

common law—appears to get history wrong, then the direction set for the future might not be right either.

The *Cooper* court's approach to the future, echoing that to the past, signifies a particularly problematic disregard for the conventions of conversation. The judgment in *Cooper* purports to tie up all the loose ends. It attempts to articulate, with a definitive tone, a test that will need no further revisiting or revision. But this derails the ongoing conversation and fails to sustain the very shape of the common law. The complex, necessarily dense back-and-forth embedded in past jurisprudence and analysis of the tort of negligence is dismissed as "academic": unnecessarily difficult to understand and engage in, and perhaps even pointless. In contrast, the Court promises that post-*Cooper* negligence law will be straightforward, transparent, and pared down. The promise may feel attractive, perhaps particularly for students of common law conversation who find it difficult and exhausting to look backward in order to move forward, but it is a necessarily empty promise.[131] No common law court truly ends the conversation; no judgment unilaterally replaces ongoing discussion with the final word.

Conclusion: academic concerns

Academic analysis of law in general, and of a Supreme Court judgment in particular, can take many forms. Varieties of social critique assess context and consequences; a historical focus situates sources of law and elaborates on their setting in time and space; the literary elegance of a judgment might be the subject of attention; alternatively, the discussion might consist of a dissection of substantive consistency with related sources. In this essay, the Supreme Court of Canada's decision in *Cooper* has inspired a methodological commentary in the form of reflections on conversation as a metaphor for common law. Through the errors it includes and its attempt to distance "academic" discussion from its central task, the *Cooper* judgment provides a rich backdrop for identifying and appreciating principal features of common law methodology and the conversation to which participants commit.

The rules of conversation that we have highlighted in this paper are prescriptive: use words carefully, get names right, pay attention to structure, remember what has already been said. These are guiding norms

131. In his critique of this kind of approach, Cass Sunstein contrasts the hubris of Ronald Dworkin's ideal judge Hercules, who seeks a principle and an interpretation of that principle which will be right for now and forever, with the humility of a real (and model) judge, Justice Harlan, who assiduously works and reworks the threads of the past. Sunstein, *supra* note 26 at 783-787.

in the common law tradition.[132] They describe the language and methods of common law reasoning, and provide the signposts for understanding and developing the law. A speaker in a meaningful conversation chooses words carefully, identifies other speakers, respects procedural parameters, and listens carefully to what has been said. So too do participants—whether judges or advocates, teachers or students—in the common law. Sometimes the weight of following the rules of common law conversation feels oppressive,[133] but this is the only way to grasp the contours of the common law, to engage in a multi-dimensional mapping of its movement, to appreciate its normative dimensions. Participants, including judges, stay on-track by keeping sight of these signposts. When mistakes are made—with respect to words, names, structure, or memory—the conversation falters and the speakers lose their way.

This paper is "academic"—perhaps in the very way the Court meant the term. It does not aim to clarify the test for establishing duty of care in the tort of negligence, although it does suggest that the combination of category and policy may not provide the certainty the Court intends. It does not comment on the rightness or wrongness of the conclusion regarding recovery for pure economic loss in *Cooper*, nor does it trace the precise ways in which *Cooper* has been incorporated and modified in the years since it was decided. Instead, it underlines the need to pay attention to the back-and-forth, ups and downs, this way and that way, that characterize the case law that precedes *Cooper*. It provokes the reader to revisit the importance of principle and precedent as organizing structures in the common law generally and in the tort of negligence more specifically.[134] It suggests that mistakes about and disdain for the past, render necessarily suspect the significance for the future of any common law judgment.

The Supreme Court, like any speaker in common law, is invited to participate in a multi-faceted conversation. But enjoyment of the conversation itself—in all its "academic" glory—is the prerequisite to full

132. For a discussion of the common law traditions and the features of its methodology, in comparative perspective, see H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 2d ed, (Oxford: Oxford University Press, 2004) 222-270.

133. Cardozo describes common law judging in the following way: "[I]t is the masters, and no others, who feel sure enough of themselves to omit the intermediate steps and stages, and leap to the conclusion. Most of us are so uncertain of our strength, so beset with doubts and difficulties, that we feel oppressed with the need of justifying every holding by analogies and precedents and an exposure of the reasons": Benjamin Cardozo, "Law and Literature" (1939) 52:3 Harvard Law Review 471 at 478. While he himself might qualify as a "master," he captures the general responsibility of the common law judge.

134. In the distinction he provocatively and confidently draws between activist and dynamic law-making, Lord Devlin insists that creativity is not an element of responsible common law judging: Lord Devlin, "Judges and Lawmakers" (1976) 30 Modern Law Review 1.

and meaningful participation. That enjoyment comes through welcoming, and engaging in, the "academic" enterprise of paying attention to the meaning of words, the names of judges, the structure of questions, and the importance of the past. In this sense, the common law is a scholarly enterprise, and the discussion dismissed in *Cooper* as "academic" is central to its functioning, development, and health. Common law participants, including courts and judges, are by definition caught in a constant process of reading, learning, reflecting, testing, and shifting direction. Nothing that is said or done in the common law is lost and nothing is final; everything is part of an ongoing conversation that both precedes and outlives what we have to say. "Academic" concerns, then, are the very core of common law. Rejoicing in, rather than marginalizing, the "academic," fosters and sustains common law conversation and all of the contributions that make it meaningful.