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Finding common law duty of care from statutory duties: All within the Anns framework

Gary Chan Kok Yew*

This paper examines the relationship between statutory duties and the common law duty of care in the tort of negligence. There are apparently divergent judicial statements on the general approach towards the duty of care to be owed by persons under a statutory duty. One central question arises: must the plaintiff show that the Parliament intended, through the statute, to confer a private right of action thereby imposing a common law duty of care, or should the courts treat the common law duty as subsisting generally unless it is excluded by the statute? This article argues that the two approaches may be properly accommodated within the two-stage duty of care test in Anns v Merton London Borough Council [1978] AC 728, which has been applied in Canada, New Zealand and Singapore. It further discusses how statutory duties may impact on the specific elements (proximity and policy considerations) within the Anns framework. The analysis will promote greater legal coherence in this complex area of tort law and thereby assist courts to better tailor their decisions in a more consistent and principled manner.

INTRODUCTION

The potential reach of statutory provisions that impose duties is extremely wide, covering a myriad of factual contexts such as employment, public health and safety, finance, and other regulatory contexts. Statutory duties may be imposed on both private entities including natural and artificial persons, employers, and occupiers of premises, as well as public authorities and agencies. These duties carry diverse consequences in the event of a statutory breach, such as personal injury, property damage, and economic loss. The English Court of Appeal in the pre-war case of *Kent v East Suffolk Rivers Catchment Board*[1] remarked that "[t]he case law as to the duties and liabilities of a statutory body to members of the public is in a state of lamentable obscurity and confusion". More than six decades later, Lord Steyn in *Gorringe v Calderdale Metropolitan Council*[2] (*Gorringe*) echoing the same sentiments, stated that the relationship between negligence and statutory duties is "a subject of great complexity and very much an evolving area of the law".[3] It is still a complex and evolving area of law in 2016, not only in England, but also in other parts of the Commonwealth, including Australia, Canada, New Zealand and Singapore.

The common law duty of care, together with standard of care and proof of damage, forms the bedrock of an action in the tort of negligence. With respect to duty of care, the Canadian, New Zealand and Singapore courts apply a legal test resembling in substance Lord Wilberforce's dictum in *Anns v Merton London Borough Council*[4] (the "*Anns* framework"). In Singapore, the legal test enunciated in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[5] (*Spandeck*) comprising the requirement of proximity and policy considerations, is essentially a restatement of the *Anns* framework. The Supreme Court of Canada in *Syl Apps Secure Treatment Centre v BD*[6] (*Syl*

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[1] *Kent v East Suffolk Rivers Catchment Board* [1940] 1 KB 319, 332.

[2] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15.

[3] *Gorringe v Calderdale Metropolitan Council* [2004] 1 WLR 1057; [2004] UKHL 15, [2].

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

[5] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100; [2007] SGCA 37.

[6] *Syl Apps Secure Treatment Centre v BD* [2007] 3 SCR 83; [2007] SCC 38.

Apps) held that one requirement of the common law duty of care is the presence of "sufficient proximity between [the parties] such that it would be fair and just to impose a duty of care".[7] Similarly, in New Zealand, there are two broad fields of inquiry in the duty of care issue: (i) the degree of proximity or relationship between the parties, and (ii) whether there are policy considerations negativing or restricting the duty of care.[8] The Privy Council in *Invercargill City Council v Hamlin*[9] (*Invercargill*) subsequently confirmed this legal test for duty of care. Hence, notwithstanding minor variations which will be discussed below, the courts in Singapore, Canada and New Zealand all employ the *Anns* framework containing the elements of proximity and policy considerations in establishing a duty of care in negligence.

This article is concerned with the relationship between the duties imposed under statute and the establishment of a common law duty of care in the tort of negligence. Two different approaches can be discerned. The first approach is that, in respect of a particular statutory duty, the court must be satisfied that Parliament intended, via the statute, to *create* a private law remedy, thereby imposing a common law duty of care. The alternative approach is that the court should treat the common law duty as already subsisting unless there is evidence that Parliament intended to *exclude* such a private remedy. In *Gorringe*, Lord Steyn preferred the latter approach for duty of care in negligence whilst noting that the former approach applies to the tort of breach of statutory duty.[10] On the other hand, there are Commonwealth cases suggesting that to establish the existence of a common law duty of care, the plaintiff must show that the Parliament intended to confer a private right of action on a class of persons including the plaintiff. This is tantamount to stating that the Parliament must intend to confer a private right of action on a class of persons before a common law duty can be established in favour of that class. If this is the case, there does not appear to be any distinction between the establishment of a duty of care in negligence and right of private action in the tort of breach of statutory duty.

The differing judicial approaches as described above appear to be fundamental. They go to the root of the tort of negligence itself and the appropriate circumstances in which a common law duty of care would arise from a statutory framework. In this regard, there is a need to compare and evaluate the concept of duty of care in negligence set against a statutory duty framework, and also to analyse how the statutory duties impact on the specific elements (in particular proximity and policy considerations) within the duty of care framework. An understanding of the specific elements and circumstances giving rise to a duty of care should assist courts to better tailor their decisions in a consistent and principled manner, as well as provide a general framework for analysing the proper relationship between statutory duties and duty of care in negligence – thereby lending legal coherence to this complex and evolving area of law.

The analysis outlined above would be relevant for assessing the potential legal risks to which statutory bodies are subject under the law of negligence and the possible steps they can take to mitigate these risks.[11] For public authorities, there may be additional special considerations relating to the justiciability of policy decisions, the policy/operational distinction, and the ambit and exercise of statutory discretion,[12] all of which are beyond the scope of this article. The primary focus here is on the fit between the two frameworks: the statutory duty framework, and the *Anns* framework as applied in Canada, New Zealand and Singapore in relation to statutory entities generally. However, the discussion would also be relevant for the other common law jurisdictions (England and Australia) due to their broad similarities in approaching duty of care issues.

[7] *Syl Apps Secure Treatment Centre v BD* [2007] 3 SCR 83; [2007] SCC 38, [34].

[8] *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282.

[9] *Invercargill City Council v Hamlin* [1996] AC 624.

[10] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15, [3].

[11] See Freya Kristjanson and Stephen Moreau, "Regulatory Negligence and Administrative Law" (2012) 25 *Can J Admin L & Prac* 104.

[12] See, eg, *Brown v British Columbia* [1994] 1 SCR 420; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; [1995] UKHL 9.

To set the stage proper for analysing the relationship between statutory duties and common law duty of care, we should begin with the *Anns* framework. This is followed by a description of the apparent divergence between the approach based on parliamentary intention to create a private remedy, and the approach treating the common law duty of care as already subsisting unless excluded by parliamentary intention. Subsequent is an explanation of the different bases for the tort of negligence and breach of statutory duty. The author will then build on this explanation to accommodate the two apparently conflicting approaches within the broad *Anns* framework.

THE ANNS FRAMEWORK AND DUTY OF CARE IN NEGLIGENCE

In *Anns v Merton London Borough Council* (*Anns*), the lessee of a flat sued the Council for failing to carry out inspections of the flat, an omission which led to economic loss to the lessee due to inadequate foundations of the structure. With respect to the issue of whether the Council owed a duty of care to the lessee, Lord Wilberforce outlined the *Anns* framework:

> [I]n order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is *a sufficient relationship of proximity or neighbourhood* such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any *considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise …*[13]

Notwithstanding the words "sufficient relationship of proximity", certain judges[14] have interpreted the *Anns* framework as comprising *foreseeability* at the first stage and policy considerations at the second. Moreover, in the first sentence of the passage quoted above, Lord Wilberforce seemed to suggest that it is not necessary to refer to precedents when determining whether or not a particular situation gives rise to a duty of care. Due to the judicial concern with the near "universal" breadth of Lord Wilberforce's formulation in which a *prima facie* duty of care could arise from the mere presence of foreseeability, the *Anns* framework did not gain traction and was subsequently rejected in England.[15] Instead, the English courts preferred the three-part test (of foreseeability, proximity, and policy considerations – namely, whether the imposition of a duty of care was fair, just, and reasonable) articulated in *Caparo Industries Plc v Dickman*[16] (*Caparo*), a case involving allegations of negligent auditing of company accounts by the auditors. In contrast to the "universal" formula in *Anns*, duty of care in *Caparo* was based on the traditional categories of cases in which negligence liability has been established. Thus, the *Caparo* test envisioned a more cautious and incremental approach to duty of care.[17]

Despite its domestic rejection, the *Anns* framework has found favour further afield amongst the common law jurisdictions in Canada, New Zealand and Singapore.[18] For these jurisdictions, the focus at the first stage of proximity is the closeness of the relationship between the plaintiff and defendant. In Singapore, the *Spandeck* approach to duty of care, substantially similar to the two-stage test of proximity (in lieu of mere foreseeability) and policy considerations in *Anns*, is preceded by a preliminary threshold of factual foreseeability. The Singapore Court of Appeal in *Spandeck* endorsed

[13] *Anns v Merton London Borough Council* [1978] AC 728, 751–752 (emphasis added).

[14] See, eg, *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 632 (Lord Oliver); in Australia, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 506–507 (Deane J), overruled without disturbing this point.

[15] See *Murphy v Brentwood District Council* [1991] 1 AC 398.

[16] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[17] *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 618 (Lord Bridge), 628 (Lord Roskill).

[18] On Singapore, see Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd ed, 2011), Chs 3–5.

Deane J's dictum in *Sutherland Shire Council v Heyman*[19] (*Sutherland*) on the importance of finding physical, circumstantial, and causal proximity supported by voluntary assumption of responsibility and reasonable reliance. Post-*Spandeck*, other factors, such as vulnerability of the plaintiff,[20] and the degree of control exercised by the defendant,[21] have been utilised as part of the proximity requirement. It is recognised that the notion of proximity cannot be wholly contained in a definitional straitjacket.[22]

At the second stage of the *Anns* framework, policy considerations, strictly speaking, serve to negate or restrict the prima facie duty which might have been established under the proximity stage. However, policy considerations, consisting of "broad social welfare goals" and the "balancing of competing moral claims",[23] may in particular cases support the existence of a duty of care,[24] or even affirm the absence of a duty at the first stage.[25] Further, as was made clear by the Court of Appeal of Singapore in *Spandeck*, the *Anns* framework is *not* treated as a universal formula for duty of care without recourse to precedents; rather, courts should consciously draw analogies to decided cases at both stages when applying the framework to determine duty of care (an "incremental" approach).[26]

As highlighted above, the duty of care test in *Spandeck* closely resembles the existing New Zealand[27] and Canadian approaches premised on the *Anns* framework of proximity and policy considerations. The Canadian test in *Syl Apps* laid out three enquiries:[28] (1) whether the harm complained of was reasonably foreseeable; (2) whether there was sufficient proximity between the parties such that it would be fair and just to impose a duty of care; and (3) whether there were residual policy reasons for declining to impose a duty arisen under the second stage. In Canada, the requirement of proximity in the second stage involves examining factors such as expectations, representations, reliance, property and other interests.[29] Further, unlike the *Spandeck* test which explicitly demarcated proximity in the first stage from policy considerations in the second, proximity and policy considerations intersect at the second stage of the *Syl Apps* test. Nonetheless, the Singapore courts have recognised that, in particular circumstances, the existence of a contractual matrix between the parties can impinge on both proximity and policy considerations.[30] As we shall see below, the statutory duty framework would also relevant at both stages of the *Anns* framework.

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[19] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 497–498 (cited with approval in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100; [2007] SGCA 37, [78]).

[20] *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761; [2014] SGCA 34, [154].

[21] *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd* [2014] 2 SLR 360; [2014] SGCA 6, [41].

[22] *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284; [2013] SGCA 29, [129] (Sundaresh Menon JA: "These are not meant to be exhaustive factors; nor … is an attempt to *define* legal proximity going to be fruitful. But, these factors enable the court to assess each fact situation within a framework that affords a considerable measure of flexibility" (emphasis in original)).

[23] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100; [2007] SGCA 37, [85].

[24] See, eg, *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1995] 3 SLR(R) 653; [1995] SGCA 79, [75]; *RSP Architects Planners & Engineers (formerly known as Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR(R) 134; [1999] SGCA 30, [41].

[25] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100; [2007] SGCA 37, [114]; *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674; [2008] SGCA 23, [143]–[145] – though there was, strictly speaking, no need for the judges in these cases to refer to policy considerations, as a prima facie duty of care had not been established at the first stage.

[26] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100; [2007] SGCA 37, [73].

[27] *Invercargill City Council v Hamlin* [1996] AC 624; *Body Corporate No 207624 v North Shore City Council* [2013] 2 NZLR 297; [2012] NZSC 83.

[28] *Syl Apps Secure Treatment Centre v BD* [2007] 3 SCR 83; [2007] SCC 38, [34].

[29] *Cooper v Hobart* [2001] 3 SCR 537; [2001] SCC 79.

[30] See, eg, *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100; [2007] SGCA 37, [108], [114]; and *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146; [2011] SGCA 2, [66].

The New Zealand courts adopt a similar approach to duty of care as Singapore, by differentiating the proximity requirement from policy considerations. In *North Shore City Council v Attorney-General*,[31] the New Zealand Supreme Court held that the Building Industry Authority did not owe a duty of care to the Council for the negligent preparation of a report which, the Council alleged, led to the lawsuit by owners of leaky buildings against the Council. This decision was based on the requirement of proximity in which "the defendant may be said to be under an obligation to be mindful of a plaintiff's legitimate interests in conducting his or her affairs",[32] which is akin to the concept of "interpersonal justice".[33] At the second stage of the test, the court must consider the "wider effects of its decision on society and on the law generally", including issues such as the "capacity of each party to insure against the liability, the likely behaviour of other potential defendants in reaction to the decision, and the consistency of imposition of liability with the legal system more generally".[34] There is therefore a conceptual separation within the *Anns* framework, particularly in New Zealand and Singapore, between, on the one hand, the individual rights and obligations encapsulated in the requirement of proximity, and, on the other hand, the macro policy concerns and communitarian interests beyond the litigants' rights and obligations, at the second stage of the enquiry.[35]

In contrast to Singapore, Canada and New Zealand, Australia's judicial approach to duty of care relies on a multitude of factors (such as reasonable foreseeability of loss, indeterminacy of liability, autonomy of the individual, vulnerability to risk and knowledge of risk)[36] rather than a single legal test such as the *Anns* framework. Proximity as a legal requirement is doubted. In *Sullivan v Moody*, the High Court of Australia stated that "[proximity] gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established".[37] Nevertheless, it has been conceded that "the factors which were apt to be included" in "the concept of 'proximity' as a touchstone of the existence of a duty of care … remain relevant".[38] It has been argued that the use of multiple factors in Australia may find resonance with *factual* features relating to the "substantive pathways to harm" between the parties (which is relevant for proximity) as well as *normative* reasoning about rights and obligations (which relate to policy considerations).[39]

From this brief survey, it is clear that there are broad similarities between the judicial approaches to determining the existence of a duty of care in negligence in Australia, Canada, England, New Zealand and Singapore, all of which essentially rely on the elements of foreseeability, proximity and policy considerations (that is, fairness, justice and reasonableness). However, though the elements may be similar, the legal tests employed by the Australian and English courts are different from the *Anns* framework. On the other hand, in Canada, New Zealand and Singapore, the courts follow a staged process of enquiry resembling the *Anns* framework, in which policy considerations may, as a last resort of sorts, negate any duty of care that may previously arise based on proximity. For Canada, the elements of proximity and policy considerations are conflated, whilst the general approach in New Zealand and Singapore is to separate them.

[31] *North Shore City Council v Attorney-General* [2012] 3 NZLR 341; [2012] NZSC 49.

[32] *North Shore City Council v Attorney-General* [2012] 3 NZLR 341; [2012] NZSC 49, [153].

[33] Andrew Robertson, "Policy-based Reasoning in Duty of Care Cases" (2013) 33(1) *LS* 119; Andrew Robertson, "On the Function of the Law of Negligence" (2013) 33(1) *Oxford J Legal Stud* 31.

[34] *North Shore City Council v Attorney-General* [2012] 3 NZLR 341; [2012] NZSC 49, [160].

[35] Andrew Phang, Cheng Lim Saw and Gary Chan, "Of Precedent, Theory and Practice – The Case For A Return to *Anns*" [2006] *Singapore Journal of Legal Studies* 1, 38–40.

[36] See *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36, [133] (McHugh J).

[37] *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59, [48].

[38] *Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479; [2013] NSWCA 317, [24], overruled without disturbing this point. The statement was cited with approval in the overruling decision of *Brookfield Multiplex Ltd v Owners – Strata Plan No 61288* (2014) 254 CLR 185; [2014] HCA 36, [21] (French CJ).

[39] David Tan and Goh Yihan, "The Promise of Universality: The *Spandeck* Formulation Half a Decade On" (2013) 25 *Singapore Academy of Law Journal* 510, [18]; and Christian Witting, "Tort Law, Policy and the High Court of Australia'" (2007) *Melbourne University Law Review* 569, 570, 573.

IS IT ABOUT CREATING, OR EXCLUDING A PRIVATE RIGHT OF ACTION, PRIVATE REMEDY, AND COMMON LAW DUTY?

Insofar as statutory duties are concerned, under the *Anns* framework, the court enquires at the first stage whether the statutory body or entity owes a duty of care based on proximity, and at the second stage, whether the duty, if established, should be negated or limited due to policy considerations. To what extent should one gather from the relevant statutory scheme whether a common law duty of care in negligence should be established? One general approach is that discussed in *Gorringe*.[40] In that case, the plaintiff alleged that the highway authority caused the accident that led to her personal injury by failing to give her proper warning of dangers on the road surface. Lord Steyn referred to the distinction between negligence and breach of statutory duty as follows:

> [I]n a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute an *intention* can be gathered to create a private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute *excludes a private law remedy*? An assimilation of the two enquiries will sometimes produce wrong results.[41]

Lord Steyn's proposition in *Gorringe* based on the exclusion of a private remedy has been cited by several English courts.[42] Lord Hoffmann in *Gorringe* described the issue in similar terms: "the question is not whether [the common law duty] is created by the statute but whether the terms of the statute … are sufficient to *exclude* it".[43]

There does not appear to be any material difference between Lord Steyn's and Lord Hoffmann's judicial formulations. The context of the pronouncements essentially concerned whether a common law duty of care should arise given a statutory background. Damage is the gist of the action in negligence. Common law duty of care encompasses a duty to take reasonable care not to cause damage or injury of a certain type to a particular class of persons that includes the plaintiff.[44] Thus, the concept of a private remedy for the plaintiff is inextricably linked with the duty of care issue. If a common law duty exists, assuming the proof of breach of duty and damage, the plaintiff would be entitled to a private remedy for the defendant's statutory breach. Conversely, if the private remedy for the statutory breach were to be excluded by the statute, a common law duty would not arise.

In line with Lord Steyn and Lord Hoffmann's approaches in *Gorringe*, Gummow and Hayne JJ in the Australian decision of *Graham Barclay Oysters Pty Ltd v Ryan*[45] (*Graham Barclay*) affirmed that:

> [T]he discernment of an affirmative legislative intent that a common law duty exists, is not, and has never been, a necessary pre-condition to the recognition of such a duty. This may be contrasted with the action for breach of statutory duty, the doctrinal basis of which is identified as legislative intention.[46]

In essence, statutory intention is not the primary source of a common law duty of care in the tort of negligence, unlike for the tort of breach of statutory duty. In *Sutherland*, Mason J stated, in a similar vein, that:

> [T]he proposition that a public authority is not liable at the suit of an individual for damages for breach of statutory duty unless the statute on its true construction manifests an intention to confer a civil cause of action has no application to the liability of an authority for breach of a common law duty of care.[47]

On the other hand, there are judicial statements that suggest a different approach to describing this complex relationship between statutory duties and the common law duty of care. It is recognised, as in

[40] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15, [3].

[41] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15, [3] (emphasis added).

[42] *Connor v Surrey County Council* [2011] 1 QB 429, [98]; *X v Hounslow LBC* [2009] EWCA Civ 1242, [40]; *Rice v Secretary of State for Trade and Industry* [2007] PIQR P23, [37] (May LJ).

[43] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15, [38] (emphasis added).

[44] MA Jones, "Negligence" in *Clerk & Lindsell on Torts* (Sweet & Maxwell, 21st ed, 2014), [8.05].

[45] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54.

[46] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54, [148].

[47] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 459.

the Supreme Court of Canada decision of *Cooper v Hobart*,[48] (*Cooper*) that depending on the facts of a particular case, the statute[49] might be "the only source of … duties, private or public".[50] Hence, whether a common law duty of care will arise would depend solely on whether it can be directly derived from the statutory source.

Further, the Court of Appeal of Singapore in the decision of *Tan Juay Pah v Kimly Construction Pte Ltd*[51] (*Tan Juay Pah*) referred to a guideline for ascertaining the common law duty of care in negligence as follows:

> [T]he party seeking to establish that a private right of action exists for a breach of statutory duty must show that Parliament, in imposing the statutory duty in question to protect the members of a class, intended those members to have such a right of action. Here, it must also be borne in mind that such right is not immediately established just because a statute is intended to protect a particular class of persons. Ordinarily, something more is required to demonstrate a statutory intention to confer a private right of action. In matters where the statute's objective is to protect the public in general, exceptionally clear language will be required before an intention to confer a private remedy for a breach of statutory duty can be established.[52]

That case was squarely concerned with the question of whether a common law duty of care ought to be owed by an authorised examiner of cranes, who was operating under the *Workplace Safety and Health Act*[53] and *Regulations*,[54] to contractors of a construction project. There was no action based on the tort of breach of statutory duty, only the negligence claim. The above guideline enunciated by the Court, in requiring that Parliament must have intended to confer the plaintiff with a right of civil action for the establishment of a common law duty, appears, on the face of it, inconsistent with the general approach towards statutory duties and duty of care taken in *Gorringe*, *Graham Barclay*, and *Sutherland*. Moreover, the threshold for showing the existence of a parliamentary intention to confer a private right of action appears to be high, requiring "exceptionally clear language" where the statutory purpose is to protect the public in general. In this connection, the Court of Appeal in *Tan Juay Pah* added in the same judgment that "a concurrent common law duty of care may be found alongside a statutory duty imposed by subsidiary legislation provided there are *clear indications* that the primary legislation contemplates the creation of such a common law duty".[55]

The above position in *Tan Juay Pah* seems to find support in Lord Scott's remark in *Gorringe* that he does not accept "that a common law duty of care can grow parasitically out of a statutory duty not intended to be owed to individuals".[56] His Lordship also stated that:

> [I]f a statutory duty does not give rise to a *private right to sue for breach*, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there. If the policy of the statute is not consistent with the creation of a statutory liability to pay compensation for damage caused by a breach of the statutory duty, the same policy would, in my opinion, exclude the use of the statutory duty in order to create a common law duty of care …[57]

The upshot of Lord Scott's remark is that where the statutory provision in question does not confer a private right of action on an individual plaintiff, the statutory body or entity would not owe a common law duty to the plaintiff, a stance consistent with the guideline expressed in *Tan Juay Pah*.

[48] *Cooper v Hobart* [2001] 3 SCR 537; [2001] SCC 79.

[49] In the case of *Cooper v Hobart* [2001] 3 SCR 537; [2001] SCC 79, the *Mortgage Brokers Act*, RSBC 1996, c 313.

[50] *Cooper v Hobart* [2001] 3 SCR 537; [2001] SCC 79, [43].

[51] *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549; [2012] SGCA 17.

[52] *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549; [2012] SGCA 17, [54] (VK Rajah JA for the Court).

[53] *Workplace Safety and Health Act* (Singapore, cap 354A, 2009 rev ed).

[54] *Workplace Safety and Health (General Provisions) Regulations* (Singapore, cap 354A, Rg 1, 2007 rev ed).

[55] *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549; [2012] SGCA 17, [54] (emphasis added).

[56] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15, [71].

[57] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15, [71] (emphasis added).

As we have seen in *Gorringe*, there is no consensus amongst Lord Steyn, Lord Hoffmann and Lord Scott on the proper approach towards the common law duty of care against the backdrop of a particular statutory regime. Similarly, the High Court of Australia in *Crimmins v Stevedoring Industry Finance Committee*[58] appeared to be divided as to whether the common law duty, or the statutory regime, should be in the foreground. Gaudron J, for instance, adopted the view that the statutory body operates within the common law and that common law applies unless excluded by the statute.[59] Gummow and Kirby JJ, on the other hand, took the statute rather than the common law as the starting point of analysis.[60]

The *Gorringe* approach as expressed by Lord Steyn and Lord Hoffmann is relatively more amenable to the establishment of a common law duty of care, since it presupposes the existence of a common law duty unless the duty has been excluded by statutory intention. That is, the approach prioritises the general position of the common law over of the legislative view, though this is subject to clear statutory intention to the contrary. One clear example of such statutory intention would be the presence of a statutory immunity provision excluding negligence liability of the defendant in question.

Where proof of parliamentary intention to confer a right of private action on the plaintiff is required for a common law duty of care, as stated in *Tan Juay Pah*, it is relatively more difficult to establish a common law duty of care from statutory duties. Here, in contrast to the approach of Lord Steyn and Lord Hoffmann in *Gorringe*, the legislative position is prioritised even in the development of the common law tort of negligence where statutory duties are involved. In fact, it was stated in the case that where the statutory purpose is to protect the public in general, exceptionally clear language will be required. The plaintiff's burden to establish a common law duty appears especially onerous in cases where, as stated in *Tan Juay Pah*, the statutory duty is imposed by subsidiary legislation rather than the parent statute, or where the statute provides for the protection of the public in general as opposed to an identifiable class of persons.

Further, the default position in the tort of breach of statutory duty is that, in the event that the statute provides for criminal sanctions for the breach, *or* is silent about remedies, provided there is no limited class of persons sought to be protected by the statute, Parliament would *not* have intended to confer a private right of action.[61] It is a fairly common phenomenon for statutes to either impose criminal penalties or remain silent on remedies for statutory breaches. Hence, if the test for common law duty of care in negligence is to be equivalent to or closely aligned with that for the tort of breach of statutory duty, a common law duty would be unlikely to arise in cases of a statutory duty.

DISTINGUISHING THE TORT OF NEGLIGENCE FROM THE TORT OF BREACH OF STATUTORY DUTY

Given the possible ramifications of the different approaches towards statutory duties and the common law duty of care, a cogent explanation and clarification of the appropriate approach is called for. As we have seen above, underlying the differences between the judicial approaches based on the creation and the exclusion of a private remedy and common law duty of care, is the conceptual distinction between the tort of negligence set against a statutory framework, and the tort of breach of statutory duty.[62]

First and foremost, there does not exist a common law tort of "careless performance of a statutory duty". Instead, in the common law world, there are two separate torts: negligence and breach of statutory duty. Further, there is no necessary connection between the presence and scope of statutory duties and a duty of care in negligence. Though a statutory duty per se does not necessarily arise from

[58] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; [1999] HCA 59; see also Martin Davies, "Common Law Liability of Statutory Authorities: *Crimmins v. Stevedoring Industry Finance Committee*" (2000) 8 *TLJ* 133.

[59] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR1; [1999] HCA 59, [26].

[60] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR1; [1999] HCA 59, [159] (Gummow J), [203] (Kirby J).

[61] *Atkinson v Newcastle Waterworks Company* (1877) 2 Ex D 441; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; [1995] UKHL 9.

[62] See *London Passenger Transport Board v Upson* [1949] AC 155, 168.

and is not equivalent to a common law duty of care, statutory duties may "form the backdrop to and inform the existence (or lack thereof) of a common law duty of care".[63] The proper approach is therefore to assess the actual relationship between the parties and use "the statutory framework as, at most, the context or explanation for these interactions".[64]

The differences in the judicial approaches, it is argued, may be rationalised based on the nature and purposes of the two different and separate torts. The common law duty of care in negligence is part of the general law, and is prima facie separate and independent from statute, in contrast to the tort of breach of statutory duty, which is necessarily tied to statute.[65] Moreover, the essence of the common law duty in negligence is based on reasonable care, which is conceptually distinct from that in breach of statutory duty.

Whether a statutory duty would give rise to a claim in the tort of breach of statutory duty depends, as a starting point, on whether Parliament intended to confer a private right of civil action flowing from the alleged breach of statute.[66] It is clear that a provision that expressly stipulates an action based on "breach of statutory duty" and/or a civil remedy in the event of a breach, confers such a private right of action. On other occasions, the statute may specify the pre-conditions before a private right of action will arise. The position is less clear where the statutory provision is silent on the civil consequences of a breach. As a general principle, a private right of action will arise if "the statutory duty was imposed for the protection of a limited class of the public and … Parliament intended to confer on members of that class a private right of action for breach of the duty".[67] For example, a statutory duty that is stipulated for the benefit of a specific class of persons[68] in the absence of criminal sanctions, judicial review, and other alternative remedies is more likely to confer a private right of civil action. The courts are also more likely to allow a tortious action in breach of statutory duty simpliciter in cases involving employer responsibility for workers' physical safety.[69] On the other hand, statutory provisions that confer the benefit on the general public,[70] stipulate for criminal sanctions and alternative statutory remedies in event of a breach,[71] or permit the statutory authority wide discretion in carrying out a public duty such as the promotion of social welfare, generally are not likely to give rise to a private right of action.[72] That being said, the availability of judicial review should not be treated as conceptually equivalent to common law remedies in negligence or even breach of statutory duty; the former remedy is forward-looking in getting the official to fulfill a duty, whilst the latter remedy looks to the past for compensation.[73] The presence of alternative statutory remedies is not conclusive against a common law duty of care.

In contrast, for a common law duty of care in negligence to be established, it is argued that there is, strictly speaking, no need for the courts to ascertain if Parliament had, by enacting the statutory provisions, intended to confer a private right of action. For the tort of negligence, what the plaintiff is strictly required to show is that the elements in the *Anns* framework are satisfied in order to establish

[63] *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146; [2011] SGCA 2, [22].

[64] Lewis Klar, "*Syl Apps Secure Treatment Centre v B.D.*: Looking for Proximity within Statutory Provisions" (2007) 86 Canadian Bar Review 337, 340.

[65] One caveat is that the common law duty, though it may arise independently of statute, is ultimately subject to contrary statutory intention. This will be discussed in detail later in this article.

[66] *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146; [2011] SGCA 2, [24].

[67] *Loh Luan Choo Betsy v Foo Wah Jek* [2005] 1 SLR 64; [2004] SGHC 230, [25] (citing *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; [1995] UKHL 9, 731).

[68] *Loh Luan Choo Betsy v Foo Wah Jek* [2005] 1 SLR 64; [2004] SGHC 230, [25].

[69] *Xu Ren Li v Nakano Singapore (Pte) Ltd* [2012] 1 SLR 729; [2011] SGHC 197; *Groves v Lord Wimborne* [1898] 2 QB 402.

[70] *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832, 840 (Bankes LJ).

[71] *MCST Plan No. 586 v Menezes Ignatius Augustine* [1992] 1 SLR(R) 201.

[72] *O'Rourke v Camden London Borough Council* [1998] AC 188.

[73] Mark Aronson, "Government Liability in Negligence" (2008) 32 *MULR* 44, 66.

a common law duty of care. The *Anns* framework is sufficiently broad to cater to a variety of fact situations, including in the event of a statutory breach.

There are, admittedly, judicial statements suggesting that the non-availability of a claim for breach of statutory duty would necessarily lead to a corresponding failure in the negligence claim. However, those statements can be explained when read in the context of the entire judgment. For instance, Lord Hoffmann in *Gorringe*, commenting on the case of *O'Rourke v Camden London Borough Council*,[74] stated that, in the absence of a right to sue for breach of statutory duty, it would be absurd to hold that the council was under a common law duty of care to provide accommodation for homeless persons.[75] His Lordship explained that *Gorringe* was not concerned with cases where public authorities have "actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care"[76] – that is, the statute is the only source of common law duty of care. This statement suggests that such acts, relationships or undertakings, where present in a particular case, should be independently assessed for the purpose of ascertaining the existence of a duty of care in negligence. Hence, the absence of a right to sue in the tort of breach of statutory duty does not necessarily mean that there is no common law duty of care in negligence.

On the distinction between the tort of negligence and breach of statutory duty simpliciter, it should be recognised that the duty of care in negligence is part of the common law and prima facie separate and independent from statute. The duty of care in the tort of negligence has developed apace since the time of *Donoghue v Stevenson*[77] (*Donoghue*) by judges in areas outside the purview of statutes. In extending the "neighbour principle" in *Donoghue* to, for example, cases of economic loss for negligent misstatement in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[78] and psychiatric harm in *McLoughlin v O'Brian*,[79] the common law developments have taken place *alongside*, rather than emanating from, statutory developments. This general approach to the common law duty of care in negligence should apply even in a case where a statutory duty is imposed on the defendant. The two-stage test of proximity and policy considerations in *Anns* that has built upon the "neighbour principle" should be the guiding approach for duty of care in negligence regardless of the existence of a statutory backdrop. That said, however, the *Anns* framework cannot, and should not, disregard the statutory backdrop. In line with the secondary rules of a proper and functioning legal system, it is clear that statutes possess the potential power to override common law principles if Parliament so intends; where statutory and common law rules do conflict, the statute will prevail. This is particularly pertinent when we consider the specific elements within the *Anns* framework below.

The prima facie independence of a common law duty of care from statute is aptly illustrated in the case of *Bux v Slough Metals Ltd*.[80] In that case, the plaintiff employee was not entitled to claim for breach of statutory duty simpliciter since the regulations[81] only required that employees be provided with suitable goggles, and the employers had complied with the regulations. However, the employee successfully claimed in negligence against the employer for failing to instruct the employee to *wear* the goggles.[82] Stephenson LJ described the relationship between the common law duty of care and the statutory duty as follows:

> There is, in my judgment, no presumption that a statutory obligation abrogates or supersedes the employer's common law duty or that it defines or measures his common law duty either by clarifying it

[74] *O'Rourke v Camden London Borough Council* [1998] AC 188.

[75] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15, [25]; see also *Stovin v Wise* [1996] AC 923, 952–953 (Lord Hoffmann).

[76] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15, [38].

[77] *Donoghue v Stevenson* [1932] AC 562.

[78] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

[79] *McLoughlin v O'Brian* [1983] 1 AC 410.

[80] *Bux v Slough Metals Ltd* [1973] 1 WLR 1358.

[81] *Non-ferrous Metals (Melting and Founding) Regulations 1962*, reg 13(1)(c).

[82] See *Franklin v Gramophone Co Ltd* [1948] 1 KB 542; compare *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743.

> or by cutting it down – or indeed by extending it. It is not necessarily exhaustive of that duty or co-extensive with it … The statutory obligation may exceed the duty at common law or it may fall short of it or it may equal it.[83]

As has been highlighted above, the Supreme Court of Canada in *Cooper* held that the relevant statute may be the only source of duties.[84] Whilst this may be true in a given case, this does not preclude the possibility of proximity arising outside the scope of statutory duty imposed. This possibility became a reality in another decision of the Supreme Court of Canada, *Fullowka v Pinkerton's of Canada*[85] (*Fullowka*), a decade later. In *Fullowka*, explosives had been set up in a mine by certain miners on strike, resulting in the deaths of miners who were in the mine. The Supreme Court held that the territorial Government owed a duty of care to the deceased miners for failing to prevent the latters' deaths by the acts of third parties (the miners on strike who had set up the explosives) – though the claim was eventually dismissed on other grounds. The establishment of a common law duty of care was due to the presence of a *specific relationship* between the parties set against a statutory framework. The *Mining Safety Act*[86] placed the responsibility on mine owners, management and workers to observe safety regulations. The role of the mining inspectors belonging to the Government was essentially to ensure that the mine owners, managers and workers discharged their obligation to comply with the statute, and to order the immediate cessation of work in a mine that the inspectors considered unsafe. A prima facie duty arose based essentially on the determinate class of persons affected, the direct and personal interactions between the Government and the deceased miners, the presence of specific risks to the deceased miners, and the Government's knowledge of the risks. In tandem with *Fullowka*, the Court of Appeal for Ontario in *Taylor v Canada (Attorney General)*[87] stated that statute is not normally the source of private law duties, and where the statutory scheme itself does not foreclose the existence of a duty of care, the court can and should examine the interactions between the statutory body and the plaintiff.[88]

This is consistent with one of the central themes of this paper, that is, that the *Anns* framework is indispensable for determining the common law duty of care in cases involving statutory duties. In other words, it is not the statute as such, but the judicial declarations applying the *Anns* framework, which ultimately *create* or establish the common law duty of care. In this regard, the comments of Lewis Klar are instructive:

> It might very well be, for example, that the statute's provisions themselves, without more, place the parties in a relationship which *the common law of negligence* recognises as a proximate relationship. This *does not mean* that the statute creates the private law duty. It means only that the statute creates a relationship which the common law recognizes as a duty of care relationship ...[89]

The common law duty in negligence is based on reasonable care, unlike breach of statutory duty where the standard imposed on the statutory body or entity ultimately depends on the statutory language as interpreted by the courts. The standard for breach of statutory duty may be strict, that is, a breach arises without any need to show an absence of reasonable care. Singapore and New Zealand courts, following the English common law, allow for a separate tort of breach of statutory duty, whilst

[83] *Bux v Slough Metals Ltd* [1973] 1 WLR 1358, 1369.

[84] *Cooper v Hobart* [2001] 3 SCR 537; [2001] SCC 79, [43].

[85] *Fullowka v Pinkerton's of Canada* [2010] 1 SCR 132; [2010] SCC 5.

[86] *Mining Safety Act*, RSNWT 1988, c M-13.

[87] *Taylor v Canada (Attorney General)* [2012] ONCA 479.

[88] Taylor v Canada (Attorney General) [2012] ONCA 479, [78]–[79]. See also *Heaslip Estate v Mansfield Ski Club Inc.* [2009] 310 DLR (4th) 506 (Ontario Court of Appeal), [19]–[20] (Sharpe JA – specific and direct interactions between the plaintiffs and the government agency responsible for providing air ambulance services which failed to give priority to the plaintiffs' son's medical needs over those of a less severely injured person).

[89] Lewis Klar, "The Tort Liability of Public Authorities: The Canadian Experience" in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 265.

Canada has abolished the tort.[90] This demonstrates, albeit indirectly, that the tort of breach of statutory duty is ultimately a category of judge-made common law principles which may be declared or removed by the courts. In lieu of the tort of breach of statutory duty, Canada adopts the approach of treating a statutory breach as constituting *evidence* of negligence[91] – which is distinct from the position in the United States that a statutory breach *is* negligence per se.[92]

For countries such as New Zealand and Singapore which have retained the tort of breach of statutory duty, the difference in standards for breach is another good reason for not treating the statutory duty on par with a common law duty of care. Such a distinction in standards was explicitly noted in *Leighton Contractors Pty Limited v Fox*.[93] In that case, the principal contractor was held not to owe a duty of care to the independent contractor (who was injured in the course of work on the site) to ensure that the latter had undergone occupational and health induction training pursuant to the *Occupational Health and Safety Regulation 2001* (NSW),[94] made under the *Occupational Health and Safety Act 2000* (NSW).[95] The High Court of Australia stated its reasoning as follows:

> While it is true that obligations under statutory or other enactments have relevance to determining the existence and scope of a duty, it is necessary to exercise caution in translating the obligations imposed on employers, principal contractors and others under the OHS Act and the Regulation into a duty of care at common law. This is because, as Gummow J explained in *Roads and Traffic Authority (NSW) v Dederer* [(2007) 234 CLR 330; [2007] HCA 42, 345 [43]], "whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden".[96]

Hence, the tort of negligence is distinctive by virtue of this standard of reasonable care, which is not shared by breach of statutory duty (or any other tort). The standard expected under a statutory duty varies, depending ultimately on the statutory language and judicial interpretation. Where the statutory duty imposed is based on strict liability, determining common law duty to take *reasonable care* based solely on the approach for tort of breach of statutory duty simpliciter (that is, whether Parliament intended to confer a private right of action) would be incongruous. Put in another way, the imposition of a common law duty to take reasonable care would not sit well with parliamentary intention to allow a private action for a statutory breach based on strict liability.

CREATION AND EXCLUSION OF PRIVATE LAW REMEDY, PRIVATE ACTION, AND COMMON LAW DUTY: ALL WITHIN THE ANNS FRAMEWORK

We compared above the different approaches to the relationship between statutory duties and duty of care in negligence: namely, the approach taking the common law duty as subsisting unless the statute *excludes a private law remedy* (*exclusion*), versus the approach of enquiring whether the statute creates a private law remedy, thereby imposing a common law duty of care (*creation*). If we were to analyse duty of care based on the *Anns* framework, there is, on closer analysis, no inconsistency between the two approaches. Both approaches can be meaningfully accommodated within the *Anns* framework. What we have is a compromise between the prioritisation of the statutory and the common law positions.

How does the statutory framework fit within the *Anns* framework? Under the first limb of *Anns* comprising the requirement of proximity, the statutory framework should be analysed to examine

[90] For a critique of the Canadian abolishment of breach of statutory duty, see Neil Foster, "The Merits of the Civil Action for Breach of Statutory Duty" (2011) 33 *Syd L Rev* 67.

[91] *R v Saskatchewan Wheat Pool* (1983) 143 DLR (3d) 9.

[92] ER Thayer, "Public Wrong and Private Action" (1914) 27 *Harv LR* 317.

[93] *Leighton Contractors Pty Limited v Fox* (2009) 240 CLR 1; [2009] HCA 35. Although this is an Australian case, it illustrates the point clearly.

[94] The *Occupational Health and Safety Regulation 2001* (NSW) was repealed by *Work Health and Safety Act 2011* (NSW), s 276C.

[95] The *Occupational Health and Safety Act 2000* (NSW) was repealed by *Work Health and Safety Act 2011* (NSW), s 276C.

[96] *Leighton Contractors Pty Limited v Fox* (2009) 240 CLR 1; [2009] HCA 35, [49].

whether there is a sufficiently proximate relationship between the parties with reference to the statutory intention expressed in the relevant statutory provisions and extrinsic materials. If the only source of proximity happens to be the statutory provision, then the parliamentary intention would be the controlling factor for the purpose of ascertaining a common law duty of care. In such an instance, it is open to the courts to consider whether Parliament had intended to confer a private right of action and remedy on the plaintiff in question such that a proximate relationship is established between the parties. Once this requirement is satisfied, there would be a prima facie duty of care under the first limb of the *Anns* framework created alongside the statutory duty. Alternatively, the statutory provision may not be the controlling factor at the first stage. If so, the court has to enquire if factors outside the statutory framework may be relevant for establishing the prima facie duty of care.

On the assumption that a prima facie duty of care exists under the first limb, the enquiry under the second limb of *Anns* is whether policy considerations would negate the duty. In this regard, the statutory scheme and parliamentary intention would be examined to ascertain whether there are material policy considerations that would have the effect of *excluding* the duty arising under the first limb. The exclusion of the duty would be consistent with the approach of Lords Steyn and Hoffmann in *Gorringe* of treating a common law duty as subsisting unless it is excluded by the statute. This is also in line with the judgement in *Tan Juay Pah* that if the alleged common law duty of care is found to be inconsistent with the statutory scheme in question, the effect of the statutory scheme would be to limit or negate the duty of care.

A point of clarification is, however, appropriate here. As the reader would recall, the Court of Appeal of Singapore in *Tan Juay Pah* had stated that, in establishing a common law duty of care, the court has to find parliamentary intention to confer a private right of action on an individual or class of persons, as opposed to the general public. This legal requirement can be explained on the particular facts of that case. There was no other evidence in that case, apart from the statutory framework of the *Workplace Safety and Health Act* and *Regulations*, which would go towards fulfilling the requirement of proximity. As such, the statutory duty appeared to be the only possible source from which a common law duty of care may be derived.[97] Therefore, on the facts of that case, the existence of a common law duty of care would be crucially dependent on parliamentary intention to confer a private right of action. Further, other statements in the same judgement demonstrate that the Court of Appeal was acutely aware that as a matter of legal principle, parliamentary intention to confer a private right of action was not the be-all and end-all of a common law duty:

> [W]e emphasise that the underlying statutory scheme and the parliamentary intention behind the enactment of that scheme are not controlling factors in determining whether an alleged common law duty of care exists concurrently with a statutory duty, but rather go towards *negating* the alleged common law duty of care …[98]

Thus, the statutory regime does *not necessarily* determine the duty of care issue in all cases but is merely one, albeit significant, factor to be taken into account. In summary, there is no inconsistency between the judicial statements premised on the creation or the exclusion of a common law duty or private law remedy or action. This "dual" approach towards statutory duties and duty of care in negligence can be accommodated within the *Anns* framework. This is, in the author's view, aptly summed up by May LJ's statements in *Sandhar v Department of Transport, Environment & the Regions*[99] (*Sandhar*):

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[97] Ultimately, however, the Court of Appeal found that Parliament did not intend for the *Workplace Safety and Health Act* (Singapore, cap 354A, 2009 rev ed) and *Workplace Safety and Health (General Provisions) Regulations* (Singapore, cap 354A, Rg 1, 2007 rev ed) to protect the contractors and sub-contractors from economic losses arising from the alleged negligence of the authorised examiner of the cranes. Hence, there was no common law duty.

[98] *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549; [2012] SGCA 17, [54].

[99] *Sandhar v Department of Transport, Environment and the Regions* [2005] 1 WLR 1632.

> [U]nless a statute on its proper construction provides a private law right of action or conversely unless the statute excludes it, the existence of a common law duty of care depends on unvarnished common law principles.[100]

At a more concrete level, the statutory framework interacts with the specific elements of duty of care in the *Anns* framework in order to determine if a common law duty of care may be established, an enquiry to which we shall now focus our attention.

Statutory framework and proximity

The presence and content of statutory duties impact on the requirement of proximity under the first limb of the *Anns* framework. Proximity, as mentioned, is essentially about the closeness of the relationship between the parties. The judicial interpretation of the purpose underlying the statutory scheme is therefore crucial to discerning the intended scope of the statutory duty insofar as it impacts on the closeness of the relationship between the parties. Did Parliament, for example, intend the statute to give rise to a common law duty,[101] in particular by reference to a class of persons who are permitted to recover for breach of the statute,[102] and the type of damages[103] recoverable by such class of persons? Did the statute give control or supervision to the person acting under the statutory duty over the victim? Given the statutory scheme, can it be said that there was voluntary assumption of responsibility by the person on whom the statutory duty was imposed, or reliance by the victim?

Though the first limb of *Anns* is focused on proximity, due to the presence of the statutory framework and the need for discerning statutory purpose, the question of whether a statutory body should owe a private law duty alongside the statutory framework is also a policy issue within the province of the legislature.[104] In this regard, legislative purpose or policy and proximity inevitably interact at the first stage of the *Anns* framework. However, at this first stage, the focus is on how the statutory purpose or policy affects the *interpersonal relationships* between the statutory body and the potential plaintiff to be protected under the statute[105] (or "interpersonal justice"), and less on broad social welfare goals and the weighing of competing moral claims, which are the focus of the second stage of the *Anns* framework.

Courts, in examining the purpose of a statute and the identifiable class of persons intended to be protected by the statute, have ruled that auditors preparing audited accounts under the legislation on companies only owe a duty to the company which engaged their services, and not to individual investors in the audited company.[106] In similar vein, it has been held that Commissioners of Deposit-taking companies and the Registrar of Mortgage Brokers do not owe common law duties to individual depositors[107] and individual investors[108] respectively. Contractors and sub-contractors have been held responsible for workplace safety under the workplace safety legislation[109] due to their operational *control* of the workplaces.[110] Conversely, building authorities, to the extent that they do not exercise any control over the daily operations of city councils under the relevant statute,[111] are less

[100] *Sandhar v Department of Transport, Environment & the Regions* [2005] 1 WLR 1632, [37] (Thomas and Brooke LJJ agreeing).

[101] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15.

[102] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[103] *Resource Piling Pte Ltd v Geospecs Pte Ltd* [2014] 1 SLR 485.

[104] *Taylor v Canada (Attorney General)* [2012] ONCA 479.

[105] *Taylor v Canada (Attorney General)* [2012] ONCA 479, [76].

[106] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[107] *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175.

[108] *Cooper v Hobart* [2001] 3 SCR 537; [2001] SCC 79.

[109] *Workplace Safety and Health Act* (Singapore, cap 354A, 2009 rev ed).

[110] *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd* [2014] 2 SLR 360; [2014] SGCA 6, [41].

[111] *Workplace Safety and Health Act* (Singapore, cap 354A, 2009 rev ed).

likely to owe a corresponding common law duty to the council in question.[112] Further, one must not disregard the historical background to the statutory scheme which may impact on the intended scope of a common law duty. In *Gorringe*, the statute in question was dependent on common law development; at the same time, it served as a source of common law duty.[113] The erstwhile common law duty on the inhabitants to keep the highway in repair had been transferred to the highway authority via the enactment of the *Highways Act 1980*, (UK),[114] and that interpretation of the limited statutory duty led the court to hold that there was no duty of care owed by the highway authority to the injured victim to erect warning signs on the road. Whilst it is accepted that the statutory scheme may in certain cases such as *X (Minors) v Bedfordshire County Council*[115] run contrary to the imposition of a common law duty of care, there is no reason why statutes themselves cannot present opportunities for further common law development.[116] Indeed, the metaphor of "oil and water" to describe the separate streams of statute and common law is becoming increasingly obsolete. The work of the legislature and the courts is not necessarily separate and independent but may exhibit evidence of symbiosis in certain cases.[117]

In addition, the proximity requirement may, on other occasions, be satisfied by evidence outside the statutory framework, as illustrated in the Singaporean case of *Animal Concerns Research & Education Society v Tan Boon Kwee*[118] (*Animal Concerns*). *Here*, the duties of the defendant (the site supervisor) fell outside the ambit of s 10 of the *Building Control Act*.[119] In any event, the Court of Appeal noted that the statutory provision did not "obviously create" a private cause of action, and the statutory breach would only attract purely criminal sanctions under the statute. The Court proceeded to observe that:

> [G]iven the rather general terms in which s 10 of the Act is phrased, it is unlikely that the Legislature had intended, when enacting s 10, to preclude common law civil remedies against negligent site supervisors or clerks of works.[120]

There are two important points to note here. First, a common law duty of care was established despite the fact that the parliament did *not* intend to *confer* a private right of action to the victim who suffered economic loss pursuant to s 10 of the statute. However, the absence of statutory intention to confer a private right of action was immaterial, as the court had found proximity both in the specific communications between the parties and in the industry practices relating to the functions of the clerk of works. Second, as the statute clearly did not *exclude* a cause of action in negligence, it permitted a common law duty of care to be established based on those specific communications between the parties. This is consistent with the dual approach discussed above. A voluntary assumption of responsibility arose *outside* of the statutory framework from the defendant's specific conduct in procuring the contractor to appoint him as clerk of works and in holding himself out as possessing the qualifications and skills to discharge the role.[121]

In fact, the general principle is that if the defendant carries out an act that he is obliged to carry out under a statute, the defendant is *not* regarded as voluntarily assuming responsibility for that act.

[112] *North Shore City Council v The Attorney-General* [2012] 3 NZLR 341; [2012] NZSC 49.

[113] A Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 *LQR* 232, 233.

[114] *Highways Act 1980*, (UK) c 66, s 41(1).

[115] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; [1995] UKHL 9.

[116] J Beatson, "Has the Common Law a Future" (1997) 56(2) *Camb LJ* 291, 309–310.

[117] See generally, Pam Stewart and Anita Stuhmcke, "The Rise of the Common Law in Statutory Interpretation of Tort Law Reform Legislation: Oil and Water or a Milky Pond?" (2013) 21 *TLJ* 126.

[118] *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146; [2011] SGCA 2.

[119] *Building Control Act* (Singapore, cap 29, 1999 rev ed).

[120] *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146; [2011] SGCA 2, [81].

[121] *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146; [2011] SGCA 2, [63].

Assumption of responsibility must be "conscious and volitional",[122] "considered" or "deliberate",[123] and as such runs contrary to the notion of a responsibility imposed by statute. That said, the absence of a voluntary assumption of responsibility does not, however, prevent the defendant from owing a duty of care in negligence on other bases. First, the defendant could, in principle, undertake a responsibility over and beyond that statutorily imposed upon him. Second, the common law duty of care may be based on evidence of voluntary assumption of responsibility independent of the statutory regime (such as voluntary assumption of responsibility through specific communications and interactions between the parties). Apart from *Animal Concerns*, *R v Imperial Tobacco Canada*[124] (*Imperial Tobacco*) is another case in point. There the Canadian Government made negligent misrepresentations concerning the health benefits of low-tar cigarettes and was negligent in the design of certain low-tar tobacco strains. Under s 4(1) of the *Department of Health Act*,[125] the Minister of Health was under a duty in respect of the "promotion and preservation of the health of the people of Canada".[126] It was held that a duty of care could arise from the specific interactions between the government and the plaintiff so long as they did not conflict with the statute. For the negligent misrepresentation claim, there was proximity between Canada and tobacco companies based on the fact that Canada was adviser to the finite number of manufacturers and companies. For the claim in negligent design, there were specific commercial relations between Canada and the tobacco companies and consumers in respect of the design of tobacco strains.

When voluntary assumption of responsibility and reliance arise in the context of specific relationships between the parties, such assumption of responsibility is typically based on the defendant's implied promise or voluntary choice, coupled with the plaintiff's knowledge of the promise or choice made by the defendant. In *Spandeck*, the twin criteria of voluntary assumption of responsibility and reliance (as two sides of the same coin)[127] were particularly useful under the first limb of proximity, in negligence claims for economic loss. This composite model of voluntary assumption of responsibility and reliance invariably focuses on specific reliance rather than general reliance.

General reliance refers to the dependence or expectation by a member of the public or a large section of the community that a particular statutory duty imposed on a statutory authority will be performed, such as the control of air traffic, safety inspection of aircraft, and fire-fighting.[128] In cases involving statutory authorities under a duty to act, the concept of general reliance is arguably more relevant.[129] Nevertheless, the concept of general reliance has not acquired a firm footing in the common law jurisdictions. In *Sandhar*, the Court held that there was no general assumption of responsibility by the Department of Transport, Environment & the Regions to all road users to ensure that all or any trunk roads would be salted in freezing conditions. The concept of assumption of responsibility is tied to a "particular relationship with an individual or individuals".[130] Hence, a general expectation cannot alone support an assumption of responsibility. There was no general reliance by motorists on the highway authority to have salted a potentially icy road, even if they had

[122] *Smith v Eric S Bush* [1990] 1 AC 831, 870C (Lord Jauncey); *Chu Said Thong v Vision Law LLC* [2014] SGHC 160, [166] (Vinodh Coomaraswamy J).

[123] *Commissioners of Customs and Excise v Barclays Bank plc* [2006] 3 WLR 1; [2006] UKHL 28, [73] (Lord Walker).

[124] *R v Imperial Tobacco Canada* [2011] 3 SCR 45; [2011] SCC 42.

[125] *Department of Health Act*, SC 1996, c 8.

[126] *R v Imperial Tobacco Canada* [2011] 3 SCR 45; [2011] SCC 42, [50].

[127] However, there were exceptions to this composite picture, for example, *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223, 268–269, where Lord Denning MR ruled that there was no necessity to show voluntary assumption of responsibility before a duty of care will arise where there is evidence of the defendant's constructive knowledge of the plaintiff's reliance on his statement.

[128] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 464 (Mason J), overruled without disturbing this point.

[129] Bruce Feldthusen, "Simplifying Canadian Negligence Actions against Public Authorities – or Maybe Not" (2012) 20 *Tort L Rev* 176, 184.

[130] *Sandhar v Department of Transport, Environment and the Regions* [2005] 1 WLR 1632, [43].

known that the highway authority salted roads in icy conditions.[131] This proposition applies even to representations made to the public by a public authority.[132]

In the Australian decision of *Pyrenees Shire Council v Day*,[133] the notion of general reliance based on community expectations was regarded as a fiction.[134] RA Buckley has, however, argued that "[t]he concept of general reliance involves an overt appeal to experience and to intuitive notions of responsibility. Whatever the difficulties associated with it, it is therefore more in accordance with the nature of law of tort than a search for an unexpressed legislative intention."[135] General reliance on the performance of statutory duties has been applied, albeit in limited circumstances, in England,[136] Canada[137] and New Zealand.[138] It has also been applied by certain judges in Australia in determining duty of care, in conjunction with other factors as the vulnerability of the individual plaintiff,[139] and the knowledge of the statutory authority that the plaintiff will suffer harm.[140]

In Canada, the concept of general reliance, which was employed in the Supreme Court case of *Laurentide Motels Ltd v Beauport (City)* to find that a duty of care was owed by firefighters, was based on:

> [T]he expectations created in taxpayers who have assumed the cost of acquiring a firefighting service, and who accordingly have every reason to think they will be able to rely on that service to fight fires on their properties. If such taxpayers do not expect all fires to be prevented, they can at least expect to rely on the municipality to fight fires as effectively as possible …[141]

In New Zealand, the main applications of the principle of general reliance have been in relation to real property matters. In *Marlborough District Council v Altimarloch Joint Venture Limited*,[142] a common law duty of care was imposed on a local authority in respect of the issuance of a land information memorandum pursuant to a statute.[143] Prior to the purchase, the purchaser sought and obtained from the defendant council the memorandum containing inaccurate information, which reinforced a prior misrepresentation. The relevant statute provided for the right of a person to apply to a territorial authority (such as the defendant) for a memorandum in relation to land matters and contained the provision that, "in the absence of proof to the contrary, a land information memorandum shall be sufficient evidence of the correctness … of any information included in it".[144] The Supreme Court of New Zealand took the view that the statutory provision encouraged *general reliance* on the accuracy of information contained in it. We see a similar recourse to general reliance or expectation in *Invercargill*, where the Privy Council held that persons responsible for the construction of buildings or supervision of same owed a duty of care to building owners.[145] It specifically cited the New Zealand case of *Hope v Manukau City Council*:

[131] *Sandhar v Department of Transport, Environment and the Regions* [2005] 1 WLR 1632, [44].

[132] *Taylor v Canada (Attorney General)* [2012] ONCA 479.

[133] *Pyrenees Shire Council v Day* (1998) 192 CLR 330; [1998] HCA 3.

[134] See *Pyrenees Shire Council v Day* (1998) 192 CLR 330; [1998] HCA 3, [19] (Brennan CJ).

[135] RA Buckley, "Negligence in the Public Sphere: is Clarity Possible?" (2000) 51 *Northern Ireland Legal Quarterly* 25, 34.

[136] *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] UKHL 15, [43] (Lord Hoffmann); *Stovin v Wise* [1996] AC 923, 954 (Lord Hoffmann).

[137] *Laurentide Motels Ltd v Beauport (City)* [1989] 1 SCR 705.

[138] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] 2 NZLR 726; [2012] NZSC 11.

[139] *Pyrenees Shire Council v Day* (1998) 192 CLR 330; [1998] HCA 3, 361 (Toohey J), 370–371 (McHugh J).

[140] *Pyrenees Shire Council v Day* (1998) 192 CLR 330; [1998] HCA 3, 371 (McHugh J).

[141] *Laurentide Motels Ltd v Beauport (City)* [1989] 1 SCR 705, 770.

[142] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11; [2012] NZSC 11.

[143] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11; [2012] NZSC 11, [87].

[144] *Local Government Official Information and Meetings Act 1987* (NZ), s 44A(5).

[145] *Invercargill City Council v Hamlin* [1996] AC 624, 639.

> I would be prepared to draw the inference as a matter of common sense that the *average prudent purchaser of a new residential flat expects that the By-laws and regulations will have been complied with* ... In our Cities there would be few citizens who would be unaware of the necessity for buildings to comply with the By-laws and health regulations and unaware of the control which City Councils exercise over building works.[146]

Statutory framework and policy considerations

Policy considerations under the second limb of the *Anns* framework may limit or negate a duty of care that has been established under the first limb. The overarching consideration is that the common law duty of care to be imposed must not be inconsistent with the intention of Parliament.[147] With specific reference to the statutory framework, the Court of Appeal of Singapore in *Tan Juay Pah* stated that "the imposition of the alleged common law duty of care *should not be inconsistent with the statutory scheme concerned and the statutory duties owed under that scheme*".[148] Apart from respect for the rule that statutes prevail over common law principles in the event of a conflict, it may be argued that the underlying rationale of the insistence on consistency between a common law duty of care and the statutory scheme concerned is to "preserve the coherence" of both legal principles and statutory schemes that govern particular conduct or relationships between the parties.[149]

There are at least four ways in which policy considerations can negate or limit a prima facie duty with specific reference to cases involving statutory schemes.[150] First, a common law duty of care is unlikely to arise where the statutory framework potentially sets up a conflict between the alleged common law duty owed to the claimant and those owed to a different party or parties under the statute.[151] In the Canadian case of *Syl Apps*, the negligence claim against a treatment centre and a social worker by the parents of a child removed from the home and placed in the centre was dismissed due to potentially conflicting duties towards parents and child. The treatment centre was under a statutory duty pursuant to the *Child and Family Services Act*[152] to protect the best interests of the child, and this would conflict with the common law duty (if it were imposed) alleged in favour of the parents. Similar reasoning was applied in *B v Attorney General of New Zealand*[153] for the decision that the Director General of Social Welfare did not owe a common law duty to the parents in respect of claims by both parents and children that the defendant was negligent in carrying out its statutory duty of investigating complaints of sexual abuse by child victims. In addition to conflicts between a potential common law duty of care owed to litigants and statutory duties owed to other individual parties, it has also been stated in *Imperial Tobacco* that the common law duty cannot conflict with the statutory duty owed by the public authority to the public.[154]

The second way in which policy considerations can negate or limit a duty of care refers to a situation where the imposition of a duty of care may "undermine the effectiveness of the duties imposed by the statute",[155] or "distort the performance of the functions of the statutory body".[156]

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[146] *Hope v Manukau City Council* (Unreported, Supreme Court of New Zealand, Chilwell J, 2 August 1976) 31 (emphasis added).

[147] *Rowley v Secretary of State for Work and Pensions* [2007] 1 WLR 2861, [61] (Dyson LJ).

[148] *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549; [2012] SGCA 17, [53]. See also *Harris v Evans* [1998] 1 WLR 1285, 1297, applying *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; [1995] UKHL 9; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 650.

[149] *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59, [50].

[150] There are, of course, other policy considerations relating to the opening of floodgates and indeterminacy of liability.

[151] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373; [2005] UKHL 23; *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, [231] (Gummow and Kirby JJ).

[152] *Child and Family Services Act*, RSO 1990, c C-11.

[153] *B v Attorney General of New Zealand* [2004] 3 NZLR 45.

[154] *R v Imperial Tobacco Canada* [2011] 3 SCR 45; [2011] SCC 42, [44].

[155] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54, [78].

[156] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; [1999] HCA 59, [216].

The third limiting policy category covers cases where there are viable alternative remedies under the statute.[157] Further, where the commencement and conduct of adversarial legal processes pursuant to a statute or regulations are involved, the court would be hesitant to impose a common law duty.[158]

Fourthly, Parliament may express its intention by clear language to immunise a statutory body from liability under a statute. Where a statute expressly immunises the statutory body from liability save in specified circumstances such as the absence of good faith,[159] imposing a common law duty would clearly be inconsistent with the statute. The Supreme Court of New Zealand in *McNamara v Auckland City Council*[160] held that the absence of "good faith" cannot be equated with "want of diligence" (or negligence); otherwise, the immunity provision would be rendered devoid of "any real meaning".[161] Another example is found in *Edwards v Law Society of Upper Canada*,[162] where the *Law Society Act*[163] immunised the officials of the Law Society in respect of their exercise in good faith of the duties and powers under the statute. Section 9 of the Act[164] further stipulates for statutory immunity of the Law Society and pre-empts compensation in situations falling *outside* the scope of lawyers' professional indemnity insurance[165] and the lawyers' fund for client compensation.[166] However, where the statutory body has acted with gross and serious carelessness, the good faith clause would not operate to immunise the defendant.[167]

It is not the case, however, that policy considerations will always negate the common law duty of care. The statutory purpose may be consistent with, promote, or complement the alleged common law duty. In *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd*,[168] the Singapore Court of Appeal held that the main purpose of the workplace safety legislation in that case was to strengthen the responsibilities of contractors and sub-contractors at the construction site, which purpose, "complement[s] the very aims of the common law tort of negligence".[169] In Canada, the new tort of negligent investigation in *Hill v Hamilton-Wentworth Regional Police Services Board*[170] was based on the close and direct relationship between the police officer and the particular suspect, taking into account the suspect's liberty and reputation. In addition to the absence of alternative remedies

[157] *Clunis v Camden and Islington Health Authority* [1998] QB 978.

[158] *Jain v Trent Strategic Health Authority* [2009] 1 AC 853; *Elguzouli-Daf v Commissioner of Police for the Metropolis* [1995] QB 335; *Business Computers International Ltd v Registrar of Companies* [1988] Ch 229.

[159] *South East Enterprises (Singapore) Pte Ltd v Hean Nerng Holdings Pte Ltd* [2012] SGHC 119, [51]; *McNamara v Auckland City Council* [2012] 3 NZLR 701; [2012] NZSC 34; *Edwards v Law Society of Upper Canada* [2001] 3 SCR 562; [2001] SCC 80.

[160] *McNamara v Auckland City Council* [2012] 3 NZLR 701; [2012] NZSC 34.

[161] *McNamara v Auckland City Council* [2012] 3 NZLR 701; [2012] NZSC 34, [160]. Section 50(3) of the 1991 Building Act obliged territorial authorities (such as the Council) to accept such certificates as establishing compliance and the territorial authorities are protected from civil liability if they acted in "good faith" in reliance on such certificates.

[162] *Edwards v Law Society of Upper Canada* [2001] 3 SCR 562; [2001] SCC 80.

[163] *Law Society Act*, RSO 1990, c L-8.

[164] *Law Society Act*, RSO 1990, c L-8, s 9 reads: "No action or other proceedings for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation, a by-law or a rule of practice and procedure, or for any neglect or default in the performance or exercise in good faith of any such duty or power."

[165] *Law Society Act*, RSO 1990, c L-8, s 61.

[166] *Law Society Act*, RSO 1990, c L-8, s 51.

[167] *Finney v Barreau du Quebec* [2004] 2 SCR 17; [2004] SCC 31.

[168] *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd* [2014] 2 SLR 360; [2014] SGCA 6. See also *Attorney-General v Prince* [1998] 1 NZLR 262, 284 (the tortious duty does not conflict with any other duty by the department and its officers but "enhances" it).

[169] *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd* [2014] 2 SLR 360; [2014] SGCA 6, [41].

[170] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129; [2007] SCC 41.

available to the plaintiff, the Supreme Court of Canada in that case emphasised that imposing a common law duty would be consistent with the values of "liberty and fair process"[171] under the *Canadian Charter of Rights and Freedoms*.[172]

CONCLUSION

Given their diverse origins, the relationship between statutory duties and the common law duty of care is not expected to be, and is certainly not, straightforward. There is no necessary connection between statutory duties and the existence of a common law duty of care in negligence. The presence of a statutory duty does not mean that a corresponding common law duty will be created. Conversely, a wider common law duty may, on occasions, be created notwithstanding the absence of a statutory duty based on a particular factual matrix.

Nonetheless, statutory duties provide the context and background in which a common law duty may arise. Yet, the common law duty of care in negligence must be ultimately premised on fulfilling the elements in the *Anns* framework. Unlike the tort of breach of statutory duty, the duty of care in negligence is principally based on a judge-made principle and not necessarily premised on a statutory duty. Further, the standard expected of the defendant in the tort of negligence is that he or she takes reasonable care, unlike the variable standard for the tort of breach of statutory duty.

The apparently divergent judicial approaches towards statutory duties as to whether the statute must create a common law duty, or whether a common law duty subsists unless it is excluded by the statute, can be meaningfully accommodated within the *Anns* framework as applied in Canada, New Zealand, and Singapore. Under the first limb of the *Anns* framework, the statutory duty with the attendant parliamentary intention may be an important legal source to determine if there is sufficient proximity between the parties (such as by delineating the intended scope of duty, the protected class of persons and interests, and ascertaining whether voluntary assumption of responsibility and reliance exist). If sufficient proximity exists, this will lead to the *creation* of a prima facie duty of care at the first stage. It should also be noted that evidence outside the statutory framework may also give rise to a common law duty of care based on other proximity factors (such as voluntary assumption of responsibility, reliance, and control). Under the second limb of the *Anns* framework, the statute may reinforce the prima facie duty of care; alternatively, the statute may have the effect of overriding the duty if it is interpreted as *excluding* a private right of action or remedy or a common law duty of care. This takes place when the imposition of the alleged common law duty would be regarded as inconsistent with the duties under the statutory scheme due to, amongst others, conflicting statutory duties owed to other parties, alternative statutory remedies, and explicit statutory immunities.

[171] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129; [2007] SCC 41, [38].

[172] *Canada Act 1982* (UK) c 11, sch B pt I ("*Canadian Charter of Rights and Freedoms*"). See also *Couch v Attorney-General* [2008] 3 NZLR 725; [2008] NZSC 45, [58] (Elias J – that in respect of the Probation Service which was obliged to undertake a statutory duty, a duty of care in negligence would "march hand in hand" with its statutory responsibilities); *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282, 298 (Cooke P – that statutory regulation "may encourage the court to hold that certain interests warrant protection").