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# When Is There A Duty of Care?

***"...for the purposes of the law of negligence,..the duty [is] to take reasonable care when it can be reasonably foreseen that one's "acts or omissions" are likely to injure one's "neighbour"* - Michael Grove *takes look in detail at the state of this area of the law.***

In the first part of this paper the writer discusses the recent decision of the New South Wales Court of Appeal in Lowns & Anor v Woods & Anor (1996) Aust Tort Reports ¶81,376 ("Lowns' case) which attempted to extend the principles (re)formulated by Deane J in Jaensch v Coffey (1984) 155 CLR 549 ("Jaensch's case"). It is the writer's opinion that the decision of the New South Wales Court of Appeal is beset with problems as a precedent and has the potential to create much unnecessary litigation in the future.

In the second part the writer discusses a recent Victorian decision on negligent misstatement.

**Jaensch's Case**

It is necessary to return to principle and revisit Jaensch's case. In that case Mrs Coffey had visited the hospital wherein her husband, who had had a traffic accident, had been admitted. As a result of what she heard and saw, she sustained nervous shock. The trial judge awarded damages to Mrs Coffey. That decision survived the Full Court of the Supreme Court sof South Australia. The appellant appealed to the High Court and argued that "proximity" was a limitation on liability for negligence and that in this case Mrs Coffey was not sufficiently proximate. Mrs Coffey argued that the reasonable foreseeability requirement was the only requirement to be satisfied and had been satisfied, therefore the decisions below should not be disturbed. Which view of the law of negligence was to prevail was the decision for the High Court. In the event the High Court unanimously dismissed the appeal.

It is – it is submitted – fair to say that the decision in Jaensch's case is not satisfactory. Gibbs CJ and Deane J agreed with each other. Brennan J decided the case on a different view of the law. Murphy J did not delve into the issue at all. Dawson J sidestepped the issue but appeared to favour Deane J's approach.

It suffices to say that Deane J's approach would seem to be the accepted law on this issue[1] (more of which later) and for that reason the writer will not explore Brennan J's equally plausible approach to the 'controversy'[2].

Deane J simply iterated the test as expounded by Lord Atkin in M'Alister (or Donoghue)(Pauper) v Stevenson [1932] AC 562 at p.580 that[3]:

"...for the purposes of the law of negligence,..the duty [is] to take reasonable care when it can be reasonably foreseen that one's "acts or omissions" are likely to injure one's "neighbour". A "neighbour" was identified as being...a person who is "so closely and directly affected by my act that I ought reasonably to have [him or her] in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question." (my underlining)

This said Deane J constituted a control on the reasonable foreseeability of injury aspect of the test of negligence. Deane J stated (at p. 583):

"...that the essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonably foreseeable injury to the

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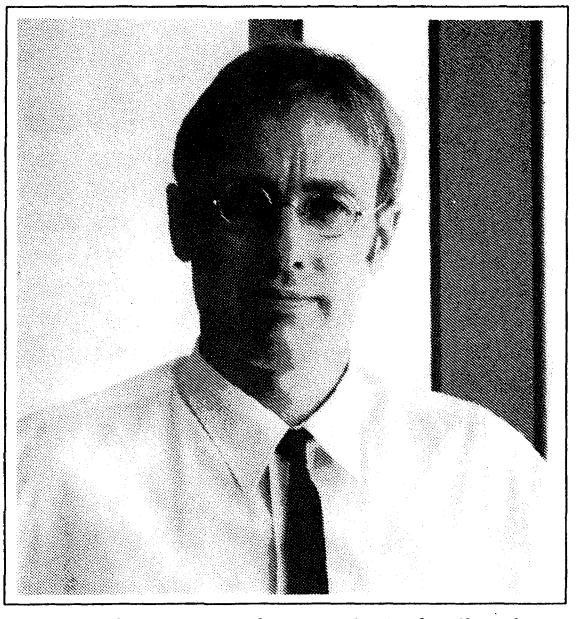

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circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence". (my underlining)

Deane J stated (at p. 584-585) that Lord Atkin's formulation:

"...was left as a broad and flexible touchstone of the circumstances in which the common law would admit the existence of a relevant duty of care to avoid reasonably foreseeable injury to another. It is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act of one person and the resulting injury sustained by the other. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person and property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and causal proximity in the sense of the closeness or directness of the relationship between the particular act or cause of action and the injury sustained...". (my underlining)

Deane J then says that (at p. 585) the approach to the requirement of proximity is not:

"...a question of fact to be resolved merely by reference to the particular relationship between a plaintiff and defendant in the circumstances of a particular case. The requirement of a "relationship of proximity" is a touchstone and a control of the *categories* of case in which the common law will admit the existence of a duty of care and, given the general circumstances of a case in a new developing area of the law of negligence, the question whether the relationship between plaintiff and defendant with reference to the allegedly negligent act possessed the requisite degree of proximity is a question of law to be resolved by the processes of legal reasoning by induction and deduction". (my underlining)

He went on to say that (at p.586):

"This generalized formulation of the ingredients of a cause of action in negligence is obviously a superficial one and fails to take into account serious difficulties and uncertainties such as those that are liable to arise in the case of a mere omission...".

Later Deane J in Sutherland Shire Council v Heyman & Anor (1985) 157 CLR 424 at p.501("Heyman's case") stated that:

"There is much to be said for the view that Lord Atkin's inclusion of "omissions" in his formulation of the requirement of proximity...was intended to be read as referring not to mere failure to act...but to an omission in the course of positive conduct...which results in the overall course of conduct being the cause of injury or damage".

In the event Deane J rejected that view in Heyman's case, but in Heyman's case he stated (at p. 501-502):

"That does not mean that the distinction between mere omission and positive act can be ignored in identifying the considerations by reference to which the existence of a relationship of proximity must be determined in a particular category of case. To the contrary, the distinction between a failure to act and positive action remains a fundamental one. The common law imposes no prima facie general duty to rescue, safeguard or warn another from or of reasonably foreseeable loss or injury or to take reasonable care to ensure that another does not sustain such loss or injury...That being so, reasonable foreseeability of a likelihood that such loss or injury will be sustained in the absence of any positive action to avoid it does not of itself suffice to establish such proximity of relationship as will give rise to a prima facie duty on one party to take reasonable care to avoidance of a reasonably foreseeable but independently created risk of injury to the other. The categories of case in which such proximity of relationship will be found to exist are properly to be seen as special or "exceptional"...Apart from those cases where the circumstances disclose an assumption of a particular obligation to take such action or of a particular relationship in which such an obligation is implicit [I submit an anterior relationship], they are largely confined to cases involving reliance by one party upon care being taken by the other in the discharge or performance of statutory powers, duties or functions arising from or involved in the holding of an office or the possession or occupation of property" (my underlining)

Deane J in Jaensch's case (at p. 599 quoted, with apparent approval, Lord Wilberforce in McLoughlin v O'Brien [1983] 1 AC 410 at p.420 when his Lordship said:

"...that foreseeability must be accompanied and limited by the law's judgement as to persons who ought according to its standards of value and justice, to have been in contemplation" (my underlining)

In Jaensch's case Deane J said (at p 599-600):

"...there may arise the rare "landmark" case in which a court, usually a final appellate court, concludes that the circumstances are such as to entitle and oblige it to reassess the content of some rule or set of rules in the context of current social conditions, standards and demands and to deny or reverse the direction of the development of the law" (my underlining)

In Jaensch's case Deane J decided that the requirement of proximity should not be jettisoned in the area of nervous shock (at p. 603).

Finally Deane J says (at p. 607):

"It has been said in many cases that the general underlying notion of liability in negligence is "a general public sentiment of moral wrongdoing for which the offender must pay...". (my underling)

**Gala's case**

This 'authority' has come under scrutiny in the High Court. The majority[4] judgement in Gala & Ors v Preston (1991) 172 CLR 243 (at pp. 253-254) ("Gala's case") noted that Cook v Cook (1986) 162 CLR 340 is authority for the proposition:

"...that special and exceptional circumstances...may transform the relationship between a driver and a particular passenger into a special or different class or category of relationship. It follows that the onus of establishing the existence of facts giving rise to

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[such] a relationship...under which it would be unreasonable to fix a duty of care...lies on the party who asserts it".

Brennan J was of the view (at p.260) that 'proxmity' can comprehend other elements than those expounded by Deane J including:

"...the effect of a statute giving a particular character to a relationship...[and]..."policy considerations".

Brennan J was still clearly of the view that the imposition of a duty of care should proceed incrementally.

Dawson J was of the view (at p.277) that:

"...proximity embraces considerations unrelated to closeness or nearness...[5]

"...I think it may be going too far to say, as Deane J. does in *Stevens v Brodribb Sawmilling Co. Pty. Ltd.*, that "the notion of proximity can be discerned as a unifying theme explaining why a duty to take reaonable care to avoid a reasonably foreseeable risk of injury has been recognized as arising in particular categories of case"...On the other hand, it would also be going to far to say that the notion of proximity is entirely without content and that no principle emerge from the process of extrapolation from decided cases...".

Dawson J goes on to state that the denial of a duty of care in that case was a matter of policy.

**Van Erp's case**

In Hill (trading as RF Hill & Associates) v Van Erp[6] ("Van Erp's case") the High Court dealt with the situation of a negligent solicitor and the alleged duty of care owed by her to an intended beneficiary of a will prepared by the solicitor.

Dawson J stated (at p.496):

"In *Jaensch v Coffey* Deane J suggested that the concept "involves the notion of nearness and closeness", but the features of a relationship which give rise to a duty of care do not always answer the description of nearness or closeness. Likewise, some relationships which would...be thought proximate do not constitute relationships of proximity [Dawson J cites Gala's case]. That is because, as Deane J recognized in *Jaensch v Coffey*, the identification of proximity in developing areas...is not divorced from the considerations of public policy which underlie and enlighten the concept of proximity, and if nearness or closeness are neither sufficient nor necessary to establish a relationship of proximity in all cases, then it cannot be said that any unifying common element has emerged which can adequately be described as proximity"[7].

Dawson said further (at p.497):

"...I retain the view...that the requirement of proximity is at least a useful means of expressing the proposition that in the law of negligence reasonable forseeablity of harm may not be enough to establish a duty of care...Proximity in that sense expresses the result of a process of reasoning rather than the process itself...But to hope that proximity can describe a common element underlying all those categories of case in which a duty of care is recognized is to expect more of the term than it can provide".

Dawson J was then of the view that the respective approaches of Deane J and Brennan J did not disclose the same level of protraction as the 'debate' on the 'controversy' would have it. Dawson J was importantly of the view that "...policy considerstions will set the outer limits of the tort"[8].

Toohey J generally agreed with Dawson J and noted that (at p.504):

"...proximity [does not] of itself identifies with any precision a common element underlying all those cases in which liability in negligence has been held to exist".

Toohey J appears to favour an incremental approach.

McHugh J (in dissent) said (at p. 515):

"...the present case has reinforced my scepticism as to whether the concept of proximity gives any real guidance...".

Gummow J was of the view that "...proximity is of limited use in the determination of individual disputes"[9].

**Precedent**

Such is the authority that came to be applied in Lowns' case (albeit that Van Erp's case was not then decided). One may summarise that authority as follows:

1. A general test for negligence has been stated.
2. A methodology in determining a duty of care were enunciated.
3. That test requires, *inter a.* foreseeability of injury and proxir between the parties before a duty of c is established. Proximity (albeit bein process of reasoning and wider tl mere nearness or closeness) acts a restraint on foreseeability of injury. T approach may have changed in the li of Van Erp's case[10].
4. There is a need to establish categor or classes before determining whethe particular situation fits within tl category or class.
5. There is authority in 'rescue' cas that no duty of care exists.
6. 'Omission' cases require cauti before accepting that there exists a du of care.

**Lowns' case**

Three judges made up the Court Appeal in Lowns' case. The decisi was decided by majority in favour of tl Respondent.

The facts simply put were these. young boy has a seizure in his sixth flo flat whilst his mother was out. Upon h return she sent another son to get a ambulance and a daughter to get a doct (who was 300 metres away). Tl daughter told the doctor that her broth was having a fit and that they could n bring him down. The doctor replied th they should get an ambulance and sai that he would not come. It was foun that had the doctor come and given th standard treatment at that stage instea of some twenty minutes later, that th young boy, Patrick, would not hav suffered quadriplegia.

The trial judge found negligence an awarded damages.

The stakes were huge. On one side severely impaired young lad presumabl without proper means to care for him On the other, a large liability for a docto in circumstances where previously n duty of care had been found to exist.

Kirby P and Cole JA constituted th majority.

Cole JA gave the most expansive majority judgement. It is necessary to g through his judgement. He notes tha Patrick was not a patient of the doctor, D Lowns ("Lowns") and that Lowns dic not know of Patrick. He found tha Lowns did not know where Patrick was

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(although Cole JA assumes that it was not far as his sister came on foot. How the doctor is to have assumed such knowledge is not explained or explored in the judgement), and knew only that he was having a 'fit'. Lowns did not know that Patrick lived on the sixth floor or that there was some difficulty in the ambulance officers getting Patrick to ground level. In addition Cole JA notes that the doctor gave evidence that if the conversation with the sister had occurred (which he had denied) then he would have gone to Patrick as "...he could well foresee damage...". Indeed in the cross examination extracted in Cole JA's judgement that is the thrust of the questions put i.e. foreseeability of injury.

Cole JA then accepts (at p. 63,175) that generally the common law does not impose a duty to rescue and in the case of a doctor no duty is imposed unless there is a professional relationship (this basic law is accepted by all the judges in the Court of Appeal).

Cole JA then says (at p. 63,175):

"However, a question arises regarding whether the implicit request...made by Joanna...gives rise to such a relationship of proximity as to give rise to a duty of care...". (my underlining)

His Honour cites paragraph 27(2)(c) of the Medical Practitioners Act 1938 (NSW) which states that it is professional misconduct for a medical practitioner to:

"...refuse or fail...to attend, within a reasonable time after being requested to do so, upon a person...in any case where he has reasonable cause to believe that such person is in need of urgent attention...".

This reference is made without reference to anything and stands seemingly *in vacuo* to the rest of his judgement.

It should be noted that Kirby P was more expansive in relation to the 'duty' contained in the Medical Practitioners Act 1938 (NSW) than Cole JA. It was surely necessary for Cole JA to link that Act in his reasoning process to establish proximity.

Cole JA stated (at p. 63,176) that Lowns was in proximity to Patrick for quite bald reasons being:

1. Lowns accepted foreseeability of injury.
2. There was "obvious physical proximity", for Joanna, the sister, came on foot.
3. There was circumstantial proximity as Lowns was a medical practitioner to whom a direct request [it was earlier "implicit"] for assistance had been made where there was no impediment in acting out that request and in circumstances where that Lowns knew that serious harm could occur if he did not attend.
4. There was causal proximity as proper treatment would have brought an end to the fit before the onset of quadriplegia.

As to Cole JA's first point (supra) that could not have been remotely determinative of the issue. It is true that as Deane J said in Jaensch's case (at p. 579-580)[11]:

"The fact that an act of one person can be reasonably foreseen as "likely to injure" another is an indication, and, as will be seen, sometimes an adequate indication, that the requirement of "proximity" is satisfied. At the same time, the overall proximity of the relationship between the person or property of the plaintiff and that of the defendant or between the allegedly negligent act and its effect may be relevant to the question whether injury to the plaintiff was reasonably foreseeable".

But Deane J appears to confine those situations to the obvious ones e.g. direct physical damage[12].

One must keep in mind that there was (until this case was decided) a well established principle in rescue cases and omission cases which required a cautious approach before determining whether or not a duty of care existed. This, it is submitted, is a 'landmark' case and as such the 'warnings' sounded by Deane J in Jaensch's case should have been adhered to i.e. this is an omission case[13] requiring resolution "...by the process of legal reasoning by induction and deduction"[14] and that "...any reassessment of the content of the relevant rules should be approached with due regard to existing authority and established principle"[15]. In addition it was a rescue case requiring a cautious approach before accepting that a new category or class of case was to be created[16].

In the writer's view the use of such a factor by Cole JA does not follow those prescriptions, it is submitted, is required and merely, in an almost offhand manner, presumed that foreseeability of injury is determinative of the issue of proximity without establishing the reasons why such reasoning should exist beyond the 'obvious' cases. The concepts are different and distinct.

The writer doubts there is physical proximity in the way Cole JA presumes. It is well to remember that Lord Atkins "neighbour" is one who is so closely and directly affected. Even if there was physical proximity, is this sufficient to override previous authority in such a terse manner? Surely it required deeper analysis given Deane J's warnings.

In relation to circumstantial proximity the writer makes the same comments made as to Cole JA's first point. There

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was a long established line of authority that a person owes no duty to help a stranger except in certain defined situations. Deane J in Jaensch's case uses the phrase[17], in relation to circumstantial proximity, "overriding relationship". It is submitted that the test is not one of a relationship created by a single circumstance but circumstances creating a relationship. The mere fact that a request is made by a stranger does not, in the writer's opinion, on the current state of the law (as it then was!), create at that stage such an overriding relationship.

In relation to Cole JA's fourth point (supra) the writer has some difficulty understanding Cole JA's judgement. It is necessary, it is submitted, to maintain the distinction between causation and proximity. It is the writer's view that even Deane J in Jaensch's case may have blurred that distinction[18]. What Deane J appears to be driving at is that the act (note Deane J does not use an omission as an example) must have some bearing on the injury i.e. the act is responsible for the ensuing injury. In Lowns' case nothing Lowns did caused the ensuing injury i.e. to say it is not akin to creating a dangerous situation and letting it lie. In this case the dangerous situation already existed. It is necessary to repeat Deane J's warnings[19] and this needed to be addressed by Cole JA.

Kirby P generally supported Cole JA. He rightly noted that (at p. 63,155):

"Different considerations arise in respect of negligent omission or failure to act than in the case of positive and careless action".

But again Kirby P states those problems fall away as Lowns admitted that he would have been obliged to respond (what type of obligation is mooted here is not developed). Kirby P cites the Medical Practitioners Act 1938 (NSW) and states that the relevant subsection:

"...reflects the expectations which were accepted as appropriate and proper amongst medical practitioners in responding to a call to the aid of "a person...in need of urgent attention".

This might well be a basis to extend negligence in these types of cases to reflect:

"..the general underlying notion of liability..."[20]

But it is not stated to be so. Again, a bold statement without the necessary elucidation.

Kirby P then baldly and bluntly agrees with Cole JA's conclusion.

If one is to accept the reasoning of Dawson J in Van Erp's case that proximity may include more than mere closeness or nearness then the Court of Appeal was required to consider the question of whether policy considerations would firstly override previous authority and secondly whether a duty of care should have been imposed in this new 'category' of case.

Mahoney JA gives a strong dissent. He notes (at p. 63,167) that the law is:

"...not concerned with obligation in morals or charity, with professional obligations, or with statutory obligations".

Mahoney JA notes (the writer submits somewhat confusedly) that the obligation sought to be imposed in this case was not an obligation in negligence. He states (at p. 63,167) that:

"The issue here is not whether the doctor owed a duty of care to go to the child. If he did [owe a duty of care], his failure to do so, whether deliberate or negligent, was a breach of his legal duty. His default, if there was one, was not based on the tort of negligence, it was based on a tort or duty of a different kind".

He states (at p. 63,168) that the law of negligence does not determine:

"...whether there is a duty as such upon a person having goods or skill to provide the benefit of them to another. It does not determine whether, because the person is...a doctor, he has such an obligation".

He favours a legislative solution (at p. 63,169).

Again, on His Honour's own admission, it is not a full analysis.

Mention should be made to the comment made in Gibbs CJ's judgement in Jaensch's case (at p. 553) that:

"The duty is owed not to the world, but to one's neighbour".

He makes the point (at p. 555) that:

"The law must continue to proceed...step by cautious step".

**Criticism**

The writer's criticisms of Lowns' case are not of the result but the legal reasoning which should have been more exacting to reach the conclusion it did and in effect overrule a century of clear authority. Certainly the majority in the Court of Appeal stated the general test of negligence correctly i.e. the need for foreseeability of injury and proximity. But it is the writer's opinion that the majority did not pay sufficient regard to existing authority, failed to expose their reasoning which might have enabled the expansion of a category or class in the general action of negligence which the authority of Deane J in Jaensch's and Heyman's case requires and did not heed the need for caution in 'omission' and 'rescue' cases. Put simply their methodology was wrong. It is to be noted that in the sphere of nervous shock the process has been more gradual. One method this new duty may have been developed is by using 'reliance' principle used in negligent misstatement and possibly the 'assumption of risk' principle coupled with a more exacting analysis of how legislation and public policy matters may combine to create such a duty[21].

The thrust of the Deane J's analyses is that the role of the courts is to establish "categories" of liability. That requires a judgement to be expressed in detailed analysis not on an *ad hoc* basis suited to the facts of the case. The judgement in Lowns' case reflects such an *ad hoc* judgement.

To iterate, the Court, in the writer's opinion, was required to develop a principle for this category of case and attempt to ensure that the law was settled and not open to challenge. The writer is of the view that this has not occurred.

Why is this important? The writer submits it is so because as the judgement lacks full analysis, the state of the law has become vague. How as lawyers are lawyers to advise medical professionals or indeed the lay public? As the law stands a lawyer could not confidently advise that the law is settled. The judgement is open to challenge for the very reason that reasoning process is not laid bare. The Court of Appeal was deciding a category of case from that time hence. It behoved them to be full in their analysis. Then lawyers can advise

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their clients accordingly and the medical profession and the lay public would know where they stand.

As an aside one may make the comment that some of the references to authority in Lowns' case do not establish the principles stated.

One question of interest is whether such an extension may ground a new 'category' of case in the Northern Territory. Section 38 of the Medical Act (NT) merely states that a person may complain about a medical practitioner on the ground that the medical practitioner is guilty of unprofessional conduct (not defined). By virtue of section 21 of the Nursing Act (NT) a nurse's registration or enrolment may be cancelled or suspended if found to be guilty of unprofessional conduct (again not defined). In addition section 155 of the Criminal Code (NT) states that:

"Any person who, being able to provide rescue, resuscitation, medical treatment first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so is guilty of a crime...".

Will these provisions be sufficient to ground a new duty of care? The professions and the public deserve a full answer.

Persons are more than willing in most cases to help. The question is when are they civilly liable if they do not. Since the Northern Territory legislature has enacted the provision as it has in the Criminal Code (NT), is it therefore not possible for legislatures to introduce the morality which Mahoney JA was unwilling to do by judicial fiat for obvious reasons?

This decision should be compared with the seeming reluctance of the courts to intervene in cases of pure economic loss. Cases of pure economic loss and negligent misstatement almost appear to be in a category of their own[22].

**Caveat Emptor**

A decision of the Court of Appeal in Victoria in Bentley v Wright & Ors[23] (Bentley's case) has again reiterated the old law of *caveat emptor* - 'let the buyer beware' and illustrates this seeming reluctance. In that case the purchaser had bought an ostrich. They alleged that they should have been told more than they were of the egg-laying history of the bird. The ostrich turned out to be infertile.

The Court of Appeal noted that a person may be negligent (and liable at least to pay damages) for a pure omission to provide information if there has been[24]:

1. "...a voluntary assumption of responsibility..."[25] (or the person is possessed of special knowledge or means of knowledge and undertakes to impart information to another[26]) and "...reliance on that assumption"[27] (or undertaking). In order to show "...a voluntary assumption of responsibility ...", it is necessary to show the special nature of the circumstances and the special relationship between the parties. This may[28] be shown if a person has put him or herself "...in a position where his function and purpose is to facilitate another's exercise or enjoyment of his rights...if he knows or ought to know that that other is not possessed of information which he possesses and which, if not disclosed, may result in foreseeable economic loss to that other because that other's exercise or enjoyment of rights is likely to be impaired"[29].

In Bentley's case there was no evidence to show that the sellers had set themselves up as an "information centre"[30] and in addition, the seller was not the only one who had the information. Furthermore there was no function attributable to the seller to justify the imposition of a duty to disclose, nor was there any evidence of a special relationship between the two parties.

The Court of Appeal then noted that generally speaking and in the absence of a special relationship, a person does not owe "...a legal duty to rescue another from physical harm or financial ruin"[31]. This principle has the same effect in respect of obligations to speak.

2. Actual reliance on another "...to disclose all relevant information in circumstances where the other party ought to know of such reliance, whether or not that other party assumed a responsibility to impart all relevant information"[32].

In Bentley's case there was no evidence to support that conclusion i.e. "...ithere is no reason why the appellant should have known that the respondents relied on her to tell them when the hen last laid"[33].

The Court of Appeal then noted that it is necessary to show that the reliance was reasonable. This raises questions of whether the person Should use his or her own judgement and whether the person should have sought independent advice amongst other questions. Importantly the Court of Appeal stated that "[i]n business transactions conducted at arm's length it may sometimes be difficult for an advisee to prove that he was entitled to act on a statement without taking any independent advice or to prove that the adviser knew, actually or inferentially, that he would act without taking such advice"[34].

Finally the Court of Appeal noted that it is necessary to then ask whether it is just and reasonable in all the circumstances of the case to impose a duty of care in such cases.

Interestingly the Court of Appeal did not directly rely on the direction of negligence law expounded in Jaensch v Coffey (1984) 155 CLR 549 ("Jaensch's case") i.e. that the law of negligence is to be determined by reference to a 'universal' principle namely proximity. They referred instead to cases that have been decided, in the main, before Jaensch's case was handed down. It would seem that negligent words (or negligent omission) and pure economic loss cases still provide some difficulties for the courts.

It would have been preferable for the Court of Appeal to continue the direction provided by Jaensch's case, and in particular Deane J's views, in providing a 'universal' test for negligence, whatever its manifestation. The same comments can de directed to a recent High Court decision in Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)[35].

[1] See Cook v Cook (1986) 162 CLR 376,

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# Conferences

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381 but see Hill (trading as RF Hill & Associates) v Van Erp (1997) 71 ALJR 487 where some forceful comments are made as to the notion of proximity as an underlying notion for the imposition of a duty of care.

[2] See Dawson J in Jaensch's case at p. 611-612.

[3] At p. 579.

[4] Mason CJ, Deane, Gaudron & McHugh JJ.

[5] At p. 277.

[6] (1997) 71 ALJR 487.

[7] At p. 496.

[8] Dawson J lists them as the need to avoid indeterminate liability, the need to avoid placing of impediments in the way of ordinary commercial activity and to avoid making negligence an all embracing remedy.

[9] At p. 531.

[10] In Esanda Finance Corporations Ltd v Peat Marwick Hungerfords (Reg) (1997) 71 ALJR 448, Brennan CJ, Dawson J, Toohey & Gaudron JJ (and to a lesser extent McHugh J and Gummow J) accepted proximity as a necessary ingredient in negligent misstatement cases.

[11] At p. 579-580.

[12] At p. 581-582. Again in Hawkins v Clayton & Ors (1988) 164 CLR 539 Deane J said at p. 576 that:

"In more settled areas of the law of negligence including direct physical injury or damage caused by negligent act, the reasonable foreseeability of such injury or damage is, of itself, commonly an adequate indication that the relationship between the parties possesses the requisite element of proximity".

He then noted in that case that in cases of pure economic loss, the notion of reliance or dependance is required to be present before proximity can be established.

[13] At p. 586.

[14] At p. 585.

[15] At p. 600.

[16] See Heyman's case at p 501-502.

[1]. At p. 584.

[18] At p. 584-585.

[19] At p. 586.

[20] Per Deane J in Jaensch's case at p. 607.

[21] Those cases which involve the duty of care owed by solicitors to intended beneficiaries may also provide a jurisprudential basis although in the writer's view those cases press heavily on the boundaries of imposition of a duty of care. See K Tapsell, *The Negligence Juggernaut and Unjust Enrichment* (1997) 16 Australian Bar Review 79, W Davis, *Proximity - To be Privatised or Retrenched?* (1997) 35 Law Society Journal 57 and M Gronow, *Liability of Professional Advisers for Economic Loss* (1997) 71 Law Institute Journal 38.

[22] The High Court in Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg) (1997) 71 ALJR 448 did not cite Jaensch v Coffey.

[23] Unreported, Court of Appeal (Victoria) 19/12/96 per Tadgell, Charles & Callaway JJ. Tadgell JA delivering the major judgement, the others, in essence, concurring.

[24] But see Dawson J in Hill (trading as RF Hill & Associates) v Van Erp (1997) 71 ALJR 487 wherein he noted Deane J in Hawkins v Clayton (1988) 164 CLR 539 @ 576 to the effect that reliance and assumption of responsibility are not necessarily elements to establish a duty of care in a particular case in negligent misstatement.

[25] Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd & Ors [1990] 1 QB 665 @ 794 quoted in Bentley's case by Tadgell JA.

[26] See Shaddock & Associates Pty Ltd v Parramatta City Council [No 1] (1980) 150 CLR 225 cited in Bentley's case by Tadgell JA.

[27] Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd & Ors [1990] 1 QB 665 @ 794 quoted in Bentley's case by Tadgell JA.

[28] This issue is not conclusively determined by the Court of Appeal.

[29].See Professor PD Finn "*Good Faith and Nondisclosure*" in *Essays in Tort* (1989), Butterworths.

[30] A phrase used in Bentley's case by Tadgell JA.

[31] Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd & Ors [1990] 1 QB 665 @ 794 quoted in Bentley's case by Tadgell JA.

[32]. See Hawkins v Clayton (1988) 164 CLR 539 per Gaudron J @ 493 quoted in Bentley's case by Tadgell JA.

[33] Bentley's case per Tadgell JA.

[34] Bentley's case per Tadgell JA.

[35] (1997) 71 ALJR 448.