

TWO NOTES ON RECENT DEVELOPMENTS CONCERNING 'PROXIMITY' IN NEGLIGENCE ACTIONS

PROXIMITY AND NEGLIGENT ADVICE — THE SAN SEBASTIAN CASE

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1. Introduction

In November 1986, the High Court handed down its decision in *San Sebastian Pty Ltd v. Minister Administering the Environmental Planning and Assessment Act 1979*.¹ The importance of the decision is that four of the five Justices sitting delivered a joint judgment clarifying the approach to be taken in determining negligence actions for economic loss founded on misstatement. It confirms that the notion of proximity will be used as a determinant of the overall duty of care.

2. A Short Historical Background

The rediscovery of the concept of proximity, is an attempt at a solution to an old problem. It has long been recognized that in certain areas of negligence, the traditional test of reasonable foreseeability in the determination of a duty of care is too wide.² This problem has arisen in 'difficult' areas of negligence such as economic loss,³ negligent misstatement⁴ and the liability of local authorities for non-feasance.⁵ This note will sketch the evolution of proximity as a determinant of a duty of care in negligence actions, focussing on misstatement.

The need for a general limitation on the test of reasonable foreseeability in determining a duty of care in misstatement, was recognized from the time liability for misstatement was first admitted. The House of Lords in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*, suggested that reasonable foreseeability alone may be too wide a test because it was not the words themselves that caused the loss, but the plaintiff's reliance upon them:

Apart altogether from authority, I would think that the law must treat negligent words differently from negligent acts. The most obvious difference between negligent words and negligent acts is this; quite careful people often express definite opinions on social or informal occasions even when they see that others are likely to be influenced by them; and they often do that without taking that care which they would take if asked for their opinion professionally or in a business connection.⁶

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1. (1986) 61 A.L.J.R. 41.

2. *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465;
Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad" (1976) 136 C.L.R. 529.

3. *Caltex ibid.*

4. *Mutual Life and Citizens' Assurance Co. Ltd v. Evatt* (1968) 122 C.L.R. 556;
Shaddock (L) & Associates Pty Ltd v. Parramatta City Council (1981) 150 C.L.R. 225.

5. *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424 analysed in D.G. Gardiner, 'An End to the Short Reign of Anns: The Contracted Liability of Local Authorities in Australia for Defective Structures', (1986) 2 *Q.I.T.L.J.* 1.

6. *Supra* n.2 at 482-3; per Lord Reid.

A second problem was the possibility of numerous plaintiffs if reasonable foreseeability were adopted:

Another obvious difference is that a negligently made article will only cause *one* accident, and so it is not very difficult to find the necessary degree of proximity or neighbourhood between the negligent manufacturer and the person injured. But words can be broadcast with or without the consent or the foresight of the speaker or writer. It would be one thing to say that the speaker owes a duty to a limited class, but it would be going very far to say that he owes a duty to every ultimate "consumer" who acts on those words to his detriment.⁷

These factors resulted in the House of Lords concluding that 'There must be something more than the mere misstatement'.⁸

'Proximity' was mentioned by Lord Reid who recognized that to find the appropriate duty, it was necessary to establish the appropriate proximity or neighbourhood between the parties:

In order that a person may avail himself of relief founded on it (misstatement), he must show that there was a proximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other.⁹

Lord Devlin stated that, '... what Lord Atkin called a general conception of relations giving rise to a duty of care is now often referred to as the principle of proximity.'¹⁰

The narrow test for a duty in providing advice adopted by the House of Lords, was widened by the High Court in *M.L.C. v. Evatt*. The Chief Justice, Justice Barwick suggested that:

Whenever a person gives information or advice to another, whether that information is actively sought or merely accepted by that other upon a serious matter, and particularly a matter of business, and the relationship of the parties arising out of the circumstances is such that on the one hand the speaker realizes or ought to realize that he is being trusted, particularly if he is thought by the other to have or to have particular access to, information or to have a capacity or opportunity to exercise judgment or both as to the matter in hand, to give the best of his information or advice as a basis for action on the part of the other party, and it is reasonable in the circumstances for that other party to seek or accept and in either case to act upon that information and advice, the speaker, choosing to give the information or advice in such circumstances, comes under a duty of care...¹¹

On appeal, the Privy Council placed liability on a narrower basis by confining it to those who carry on a profession, business or occupation involving the possession of skill and competence or who let it be known that they claim to have skill in the matter of advice which they give. In delivering the judgement of the Privy Council, Lord Diplock quoted Lord Reid in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* and said that:

In their Lordships' view, the reference to "such care as the circumstances require", presupposes an ascertainable standard of skill, competence, and diligence with which the adviser is acquainted or has represented that he is. Unless he carries on the business or profession of giving advice of that kind, he cannot be reasonably

7. *Ibid.* at 483.

8. *Ibid.*

9. *Ibid.* at 485.

10. *Ibid.* at 524.

11. *Supra* n.4 at 572-3.

expected to know whether any and if so, what degree of skill, competence or diligence is called for.¹²

In *Shaddock v. Parramatta City Council*, the High Court adopted the test for duty in *M.L.C. v. Evatt*. Mason J. said:

I consider that this court should now adopt Barwick C.J.'s statement of the conditions which give rise to a duty of care in the provision of advice or information.¹³

In *Sutherland Shire Council v. Heyman*, Gibbs C.J. suggested that 'foreseeability does not of itself automatically lead to a duty of care'.¹⁴ The Chief Justice adopted the House of Lords approach in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd* where it was suggested by Lord Keith of Kinkel that

The true question in each case is whether the particular defendant owed to the particular plaintiff, a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case.¹⁵

Gibbs C.J. observed that, 'It is necessary for the Court to examine closely all the circumstances that throw light on the nature of the relationship between the parties',¹⁶ and proposed that 'If the relationship of proximity is found to exist, it will be necessary to proceed to the second stage of the inquiry',¹⁷ the reasonable foreseeability test.

It was left to Deane J. to define clearly what the newly rediscovered proximity entailed:

It involves the notion of nearness or closeness and embraces physical proximity (in the sense of time and space) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer-employee or of a professional man and his client, and what may be referred to as causal proximity, in the sense of closeness or directness of the causal relationship between the particular act or course of conduct and the loss or injury sustained.¹⁸

Deane J accepted that reasonable foreseeability of loss or injury to another in the more settled areas of the law of negligence involving physical injury or damage caused by the direct impact of a positive act, is commonly an indication that the requirement of proximity has been satisfied. He would apply proximity to those negligence situations where reasonable foreseeability is not sufficient to determine a duty:

It will ultimately be seen that the question in the present case [in his opinion, one of economic loss], is whether the relationship between the Council and the respondents, possessed the requisite degree of proximity to give rise to a duty of care.¹⁹

The need for some limitation upon the general test of reasonable foreseeability was illustrated by Mason J. in *Wyong Shire Council v. Shirt* where he suggested that in isolation, the test of reasonable foreseeability is too wide and would cover risks which are unlikely:

12. [1971] A.C. 793 at 806-7.

13. *Supra* n.4 at 251.

14. *Supra* n.5 at 441.

15. [1985] A.C. 210 at 240.

16. *Supra* n.5 at 441.

17. *Ibid.*

18. *Supra* n.5 at 497-8.

19. *Ibid.* at 502.

A risk of injury which is quite unlikely to occur . . . may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is farfetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not so foreseeable.²⁰

The subsequent case of *Cook v. Cook* confirmed that the High Court has now adopted the limiting test of proximity:

For our part, we accept that a relevant duty of care will arise under the common law of negligence only in a case where the requirement of a relationship of proximity between the plaintiff and defendant is satisfied.²¹

The majority of the Court in *Cook's* case suggested that the aim of the law of negligence is to identify the *categories* rather than the single instances of cases in which a duty of care will arise. The Court suggested that the general objective standard for measuring reasonable foreseeability is not always adequate because ' . . . the relation may vary with duty . . . it is not the same in every case'.²²

In emphasizing 'proximity' as a factor in measuring the appropriate standard, the Court said that every negligence case gives rise to its own set of detailed facts and that ' . . . it is the more detailed definition of that objective standard which will depend upon the relevant relationship of proximity'.²³

In *Australian Safeway Stores Pty Ltd v. Zaluzna*,²⁴ the High Court were faced with a case of occupier's liability. There had been much concern as to the approach to be taken in defining the duty of care in such cases. The question remained whether the Court should examine the class of entrant and apply the appropriate duty tariff under the old rules accordingly, or whether the Court should use the general principles of negligence. Justices Mason, Wilson, Deane and Dawson held that:

All that is necessary is to determine whether, in all the relevant circumstances, including the fact of the defendant's occupation of the premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence. A prerequisite of such a duty is that there be the necessary degree of proximity of relationship, the touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or the class of persons of which the visitor is a member.²⁵

The notion of proximity has established itself firmly as an antecedent factor in the determination of a duty of care in negligence actions involving economic loss,²⁶ nervous shock,²⁷ occupiers' liability²⁸ and now, in respect of the standard of care in general negligence actions.²⁹

20. (1980-81) 146 C.L.R. 40 at 47.

21. (1986) 61 A.L.J.R. 25 at 27. (The case is discussed in the second comment below).

22. *Ibid.*

23. *Ibid.*

24. (1987) 61 A.L.J.R. 180.

25. *Ibid.* at 183.

26. *Sutherland Shire Council v. Heyman supra* n.5.

27. *Jaensch v. Coffey* (1984) 155 C.L.R. 549; analysed by D. Gardiner in '*Jaensch v. Coffey* (Foresight, Proximity and Policy in The Duty of Care for Nervous Shock)', (1985) 1 *Q.I.T.L.J.* 69.

28. *Australian Safeway Stores Pty Ltd v. Zaluzna supra* n.24.

29. *Cook v. Cook supra* n.21.

3. San Sebastian

Since *San Sebastian*,³⁰ proximity, as was anticipated, is now to be used in determining liability for negligent misstatement.

The Facts

In 1968, the N.S.W. State Planning Authority prepared plans for the redevelopment of an area of Sydney. The Council of Sydney adopted the plans and made them public, with a view to encouraging developers to participate in the proposed redevelopment by buying and developing property. The proposals were expressed to be 'capable of implementation' and stated that a 'workforce of 35,000 is envisaged' when the area is fully redeveloped.

The proposals contained a section relating to the maximum floor space ratios for the redevelopment. The problem was that if approval were given to redevelop at the maximum floor space ratios, and if full redevelopment occurred, a workforce in excess of 70,000 would be needed. It was alleged that the transport system to be provided for the area was capable of handling only 35,000 persons.

The appellant development companies sued for damages for economic loss when the proposals for redevelopment were abandoned by the Council in 1972, after the developers had invested in the land. The alleged negligence on the part of the defendants involved: (a) The preparation and publication of the plan as feasible for redevelopment; (b) Failing to warn that the plan was to be abandoned.

At first instance, Ash J. found that the defendants had been negligent in the preparation of the proposals and awarded \$1.4 million in damages. He found that reasonable care in the preparation of the proposals required the defendants to undertake a detailed analysis of the transport system, which they had failed to do.³¹

On appeal, Hutley, Glass and Mahoney JJ.A., followed the decision in *Caltex Oil (Australia) Ltd v. The Dredge 'Willemstad'*³² and held that no duty was owed to the plaintiffs in the preparation of the proposals because at that stage, the defendants had no knowledge of the plaintiffs as ascertained individuals.³³

On appeal to the High Court, it was conceded that success on the second ground of negligence was dependent on the success of the first ground — the alleged misrepresentation that the plan was feasible of implementation.

Gibbs C.J., Mason, Wilson and Dawson JJ., in a joint judgment, held that the plaintiffs had not established this because:

... the documents contain no statement, express or implied, in terms of the representations which are pleaded. The absence of any assurance or representation of this kind is significant. It detracts from the appellants' suggestion that the Study documents amounted to an invitation to developers to rely on the contents as a solid and unalterable basis for action by way of acquiring and developing properties in accordance with its proposals . . . it will not readily be inferred that a plan intended to serve as a guide to future development contains an assurance that it will be continuously and inflexibly applied in the future³⁴

They concluded:

The general nature of these documents and the appellants' failure to establish that they contained any representation or assurance about either the ultimate level of development, beyond the estimate of a workforce of 35,000, or the continuing

30. *Supra* n.1.

31. (1983) 48 L.G.R.A. 126.

32. *Supra* n.2.

33. [1983] 2 N.S.W.L.R. 268.

34. *Supra* n.1 at 47.

application by the Council of the maximum floor ratios, . . . is fatal to these appeals.³⁵

The appeal failed because the appellants could not establish that any misrepresentation had been made.

In determining whether the respondents owed a duty of care, the Justices who joined in the joint judgment were at pains to point out that:

. . . as liability for negligent misstatement is but an instance of liability for negligent acts and omissions generally, so the treatment of the duty of care in the context of misstatements is but an instance of the application of the principles governing the duty of care generally.³⁶

They held that 'The relationship of proximity is an integral constituent of the duty of care concept'.³⁷ Because *reliance* on the statement plays an important role in misstatement, the Court stated that:

When the economic loss results from negligent misstatement, the element of *reliance* plays a prominent role in the ascertainment of a relationship of proximity between the plaintiff and the defendant and therefore in the ascertainment of a duty of care.³⁸

'Proximity' is now to be used as the general limitation upon the test of reasonable foreseeability, and applied in cases where economic loss is claimed as a result of a misstatement.

Conspicuous by a consistent rejection of proximity has been Brennan J's approach to negligence cases. For example, considering economic loss, Brennan J. stated that after ascertaining that there *has* been economic loss,

. . . the next question is whether there is some causal relationship between the preparation and publication of the study documents (on the one hand) and the loss suffered on the other.³⁹

Whereas the majority then employed the proximity test, Brennan J. rejected it. He reiterated in rejecting both the *Anns* approach and the proximity approach, that:

. . . legal rules are required to determine whether a duty of care exists in a particular case. By a legal rule I mean a rule that prescribes an issue of fact on which a legal consequence depends. It is necessary to appreciate that neither approach expresses a legal rule; each approach postulates a framework within which the courts can develop legal rules which limit the occasions when the law would otherwise impose a duty of care.⁴⁰

Brennan J. pointed to the variable components of proximity — physical, causal and circumstantial, and said ' . . . the variable content proposed for the notion denies its applicability as a particular proposition of law'.⁴¹ Admitting that reasonable foreseeability has a variable element, he said that 'Such a rule nevertheless requires determination of an issue of fact but proximity is not a community standard by reference to which issues of fact can be determined'.⁴²

He suggested that:

If proximity was misunderstood as being a *particular* proposition of law, expressing

35. *Ibid.* at 48.

36. *Ibid.* at 45.

37. *Ibid.*

38. *Ibid.*

39. *Ibid.* at 50.

40. *Ibid.*

41. *Ibid.* at 51.

42. *Ibid.*

a touchstone for resolving a particular case, the judge would be required to define its legal content according to some notion of whether it was appropriate to impose a duty of care in that case. A rule without specific content confers a discretion. The discretion might be described as a judicial discretion and the discretion might be reviewed on appeal . . . Damages in tort are not granted or refused in the exercise of a judicial discretion.⁴³

Brennan J. would determine every action according to legal rules developed in relation to a particular set of facts. Hence his reluctance to abandon the older legal rules relating to the liability of occupiers.⁴⁴ In *San Sebastian*, he used the test of reasonable foreseeability as a legal test but said that he would find the appropriate limitations in particular propositions of law which are applicable to differing classes of cases.⁴⁵

With respect, it is submitted that proximity will continue to play an important role in negligence cases because of its advantages. The advantages of proximity spring from its unification of the several qualifications to reasonable foreseeability. Whereas the easily satisfied test of reasonable foreseeability may simply be too wide a test for some categories of modern negligence actions, proximity allows explanation in common form of the limitations upon such test. 'Proximity' is a mechanism or device and the greatest attraction of the test of proximity as a device is its fluidity, and, therefore, ability to be applied as a unifying mechanism for separate legal rules in all negligence actions.

By way of illustration, if a court were to follow Brennan J's approach, each new negligence action would be decided by applying a legal rule to the facts of that category of case and determining the outcome. In the more complex actions such as pure economic loss, a set of legal rules would need to be developed and consolidated. It is submitted that to follow such reasoning would lead to a situation as existed in occupier's liability before *Australian Safeway Stores Pty Ltd v. Zaluzna*⁴⁶ — a fragmented series of particular rules with the inability to proceed from some general aspect to the particular.

However, because proximity is a 'unifying mechanism', not itself amounting to a strict legal rule, a court may resort to the *mechanism* in difficult and new areas of negligence. The existence of proximity as a mechanism for limiting duty categories allows a Court to test and explain the bounds of negligence without becoming trapped in a maze of individualised legal rules. Individual rules will still be necessary for particular categories of case — the process of identification of proximity has been an original reflection of the High Court's inductive reasoning. In each concrete case, it remains to apply deductive reasoning from the general concept of proximity to the particular case or category of case. That is what is recognised in the second part of proximity, the evaluation of the legal consequences of the degree of proximity found in a particular case or category of case. This author respectfully agrees with Deane J. when he stated:

Nor do I think that either the validity or utility of common law concepts is properly to be measured by reference to whether they can be accommodated in the straight jacket of some formalized criterion of liability. To the contrary, it has been the flexibility of fundamental concepts which has enabled the common law to reflect the influence of contemporary demands of society.⁴⁷

43. *Ibid.*

44. *Australian Safeway Stores Pty Ltd v. Zaluzna supra* n.24.

45. *Supra* n.1 at 51.

46. *Supra* n.24.

47. *Sutherland Shire Council v. Heyman supra* n.5 at 497.