SAN SEBASTIAN REVISITED

MARTIN DAVIES*

1. Introduction

Three years is a long time to wait for the result of an appeal. The decision of the High Court of Australia in *San Sebastian Pty Ltd v. Minister Administering the Environmental Planning and Assessment Act, 1979*[1] has been eagerly awaited, both by the litigants, for whom it brings to a close a saga begun in 1969, and also by the legal community in general, because the case seemed to provide the High Court with an opportunity to review the whole of the law relating to the recovery of economic loss in negligence. Now that the wait is over, the result is, inevitably, somewhat disappointing. Great expectations are seldom realised. Although a rocket was expected, a squib was delivered; however, at least it was not a damp squib. On the one hand the decision of the High Court breaks no new ground, and it makes no binding statements of general principle. On the other hand, the judgments do provide a strong indication of the High Court's current attitude to the recovery of economic loss.

Although the facts of the case are now well-known, they must be repeated briefly here. In 1969, the Sydney City Council adopted a plan for the redevelopment of Woolloomooloo which had been prepared, at the Concil's request, by the State Planning Authority of New South Wales. The plan was exhibited to the public, and the appellant property development companies, led by the eponymous San Sebastian Pty Ltd, purchased land in Woollomooloo, hoping to reap rewards when the redevelopment commenced. The Council abandoned the plan in 1972, and the

* M.A., B.C.L., LL.M. Lecturer in Law, University of Western Australia.

1. (1986), 61 A.L.J.R. 41. Hereafter referred to as *San Sebastian*.

appellant companies sued for the economic losses they had suffered as a result of purchasing property which was now doomed to remain cheap and undesirable. The appellants alleged that the Planning Authority had been negligent in the preparation of the plan, that the council had been negligent in its publication, and also that the Council had owed a duty to warn the appellants of its decision to abandon the plan.

The appellant companies won at first instance and recovered $1.4 million between them. The respondents successfully appealed to the Court of Appeal of New South Wales in 1983.[2] The Court of Appeal decided that the negligent preparation claim was properly subsumed in the negligent misstatement claim, and that the negligent misstatement claim necessarily failed, as the Council had made no positive statements that the plan was at all feasible.

On appeal to the High Court of Australia, the appellants confined their case to the complaint about negligent misstatement, recognising the correctness of the Court of Appeal's view that this claim contained within it a complaint about negligent preparation.[3] By abandoning their claim that the respondents' negligent *acts* had caused them economic loss, the appellants relieved the High Court of the need to review the decision in *Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad"*,[4] thus reducing by half the attraction of the case from the torts lawyer's point of view. The appeal on the remaining points took three years and two months to come to judgment, and it was unsuccessful. Two judgments were given in the High Court of Australia; one jointly by Gibbs, C.J., Mason, Wilson and Dawson, JJ.; and one by Brennan, J.

2. The joint judgment of Gibbs, C.J., Mason, Wilson and Dawson, JJ.

Gibbs, C.J., Mason, Wilson and Dawson, JJ. (hereafter referred to as "the majority") decided the case on essentially the same grounds as the Court of Appeal, namely that no actual statements had been made. On this basis, there could not possibly have been any breach of a duty to take care in making statements, and so

2. [1983] 2 N.S.W.L.R. 268. For a discussion of the decision of the Court of Appeal, see Davies, "Negligently Caused Economic Loss" (1985), 16 U.W.A.L.Rev. 209.
3. *Supra* n. 1 at 44.
4. (1976), 136 C.L.R. 529.

the issue of the existence of such a duty did not fall to be determined. This almost removed the rest of the interest in the case from the torts lawyer's point of view; no determination of the existence of duty of care in the negligent misstatement claim, to complement the dropping of the negligent preparation claim. However, the day was saved to some extent by the fact that the majority did express some views, obiter, concerning the existence of a duty of care in economic loss cases, just as the judges in the Court of Appeal had done. It is these obiter views on duty of care that must serve as the satisfaction of any expectations of a restatement of the law in this area. To some extent, they do serve this purpose, as the majority ranged quite freely over the whole issue of duty of care, commenting on a recent developments in the area.

The most notable of these recent developments in the law relating to duty of care has been Deane, J.'s crusade in the past few years to rehabilitate the concept of proximity as a requirement for the existence of a duty of care in negligence.[5] His views were expressed in a series of cases, and, as the series continued, there were increasing signs that his fellow judges were beginning to agree with him. Deane, J.'s absence from the bench in the *San Sebastian* case might have led one to expect that his line of reasoning about proximity would not be pursued with the usual vigour. In the result, the joint judgment of the majority represents the final confirmation of the ascendancy of the proximity approach. The judgment smacks so strongly of Deane J.'s views on duty of care that one is tempted to wonder whether it might not have been ghost-written by the absent judge.

Deane, J.'s position with respect to the requirement of proximity has been that the concept is not synonymous with reasonable foreseeability of injury to the plaintiff, as had previously been thought, but rather operates as a further, limiting requirement in all cases, over and above reasonable foreseeability. The majority in *San Sebastian* unequivocally adopted this position:

> "The relationship of proximity is an integral constituent of the duty of care concept. We refer to that relationship in its broader sense, namely, as embracing a general limitation upon the test

5. See *Jaensch v Coffey* (1984), 155 C.L.R 549, 579-585; *Hackshaw v. Shaw* (1984), 155 C.L.R. 614, 654; *Stevens v. Brodribb Sawmilling Pty Ltd* (1986), 63 A.L.R. 513, 537-8; *Sutherland Shire Council v Heyman* (1985), 59 A.L.J.R. 564, 594-5.

of reasonable foreseeability, this being the sense in which it has been discussed and applied in recent judgments in this Court."[6]

The stress on proximity as an overarching requirement unifying the tort of negligence will render obsolete previous approaches that relied heavily on characterisation of the nature of the loss suffered and the nature of its cause. For example, in the Court of Appeal in *San Sebastian*, Glass, J.A.'s analysis of duty of care was expressed in terms of "...three mutually exclusive areas...",[7] namely, physical damage, whether caused by act or statement, economic loss caused by negligent misstatement, and economic loss caused by negligent act. According to this analysis, different tests for duty of care were applied in each category: *Donoghue v. Stevenson*[8] in the first, *Hedley Byrne v. Heller*[9] and *Shaddock v. Parramatta City Council*[10] in the second, and *Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad"*[11] in the third. Such an approach was particularly attractive to practitioners, as it held out the promise of at least some degree of certainty of prediction; one had merely to identify the category into which one's case fell, and one could be reasonably sure of the law that applied. However, Deane, J.'s holistic approach to duty of care denies the existence of such sub-categories. There are not three independent sub-categories of negligence, but rather one single category. In all cases of negligence, whatever the type of loss, and whatever the nature of the loss-causing activity, duty of care is established in the following way. Firstly, it must be determined whether loss or injury to the plaintiff was reasonably foreseeable as not unlikely to occur if the defendant failed to take reasonable care.[12] Secondly, if the test of reasonable foreseeability of loss is satisfied, it must be determined whether there existed a sufficient relationship of proximity between plaintiff and defendant to give rise to a duty of care.

Of course, this does not mean that the old law based on clear

6 *Supra* n. 1 at 45.

7. [1983] 2 N S.W.L.R 268, 300. See Davies, *supra* n. 2, at pp. 217-8.

8 [1932] A.C 562.

9 [1964] A.C 465.

10. (1981), 150 C L.R. 225.

11. (1976), 136 C.L.R 529.

12. *Donoghue v Stevenson*, [1932] A.C. 562; *Chapman v Hearse*, [1962] A.L.R. 379, *Caterson v Commissioner for Railways (N S W)* (1973), 128 C.L.R. 99.

distinctions between types of cases has become irrelevant. It is clear that different degrees of proximity of relationship are required to give rise to a duty in different categories of case.[13] Different characteristics of the relationship between plaintiff and defendant will be relevant in different kinds of cases, but this relationship always must be expressed in terms of proximity. Thus, the joint judgment of the majority stated that, in cases of economic loss caused by negligent misstatement, "...the element of reliance plays a prominent part in the ascertainment of a relationship of proximity between the plaintiff and the defendant." On the other hand, in cases of economic loss caused directly by the negligent acts of the defendant, "...the element of reliance may not be present...", in which case there is an "...additional difficulty..." in ascertaining whether there is a sufficient relationship of proximity to give rise to a duty of care.[14]

Difficulties such as this have led to strong criticisms by English courts of the use of proximity as part of the test for duty of care, particularly in relation to economic loss cases.[15] It has been said that the concept is so vague and elastic that it is meaningless; to require "proximity" in each case gives no indication of *how much* proximity is required. Although there is some force in such an argument, it overlooks the extent to which all of the concepts used in the law of torts are flexible and indeterminate. The requirement of "reasonable foreseeability" is every bit as meaningless as that of "proximity" until later cases have fleshed out its meaning with determinations of what constitutes *reasonable* foreseeability. As predicted by Stephen, J., in *Caltex*,[16] and echoed by Deane, J., in *Sutherland Shire Council v. Heyman*,[17] the future of the newly-revived concept of proximity will be the familiar, gradual process of refinement of definition in later cases, which is the very way in which the common law operates.[18]

13. *Sutherland Shire Council v. Heyman* (1985), 59 A.L.J.R. 564, 594-5.
14. All quotations from (1986), 61 A.L.J.R. 41, 45.
15. See, for example, *The Aliakmon*, [1985] 1 Q.B. 350, 395 (C.A.), per Robert Goff L.J., *The Mineral Transporter*, [1986] A.C. 1, 23-24, per Lord Fraser of Tullybelton.
16. (1976), 136 C.L.R. 529, 575.
17. (1985), 59 A.L.J.R. 564, 595.
18. For a theoretical examination of this process, see M. Davies, "Reading Cases", forthcoming in the *Modern Law Review*.

As noted above, the comments of the majority, although obiter, provide a strong indication of the way in which the High Court will approach the question of duty of care in future cases of economic loss, whether it be caused by negligent misstatements or by negligent acts. The majority had little to say about the latter type of case, negligent acts causing economic loss, because of the decision by the appellants to concentrate on negligent misstatement before the High Court. However, the majority did take the opportunity to score a few points in the continuing battle with the House of Lords about who knows best in cases of economic loss caused by negligent acts. The House of Lords has recently given up the attempt to find a workable test for the existence of a duty of care in such cases, both as itself,[19] and in its guise as the Privy Council.[20] The Lords preferred to adopt the simple, defeatist solution of a blanket denial of liability, and, in doing so, cast aspersions on the High Court of Australia's attempts to find a sound basis for liability.[21] It seems somewhat churlish to criticise others for attempting a task which one finds too hard oneself, and the majority in *San Sebastian* observed acidly that, despite the English criticisms of *Caltex*, "...the critics have themselves been unable to offer a solution to the problem."[22]

There is a little more in the judgment of the majority by way of obiter dicta concerning negligent misstatements causing economic loss, and this was to be expected given the way in which the case was argued before the High Court. The majority reiterated the view that reliance is of central importance to the presence of the requisite degree of proximity between plaintiff and defendant,

> "...particularly so when the defendant directs his statement to a class of persons with the intention of inducing members of the class to act or refrain from acting in reliance on the statement, in circumstances where he should realize that they may thereby suffer economic loss if the statement is not true."[23]

Further, in response to an argument advanced by the appellants, the majority distinguished between cases where the defendant makes

19. *Leigh & Sillivan Ltd. v Aliakman Shipping Co Ltd (The Aliakman*, [1986] 2 W.L.R. 902. (H.L.)

20. *Candlewood Navigation Ltd v Mitsui O S K Lines Ltd (The Minera Transporter)*, [1986] A.C. 1 (P C.)

21. *Ibid.*, at 24.

22. *Supra* n. 1, at 45.

23. *Ibid.*

a statement *intending* to cause the plaintiff or a class of persons to act in a particular manner, and cases where the defendant makes a statement intending to *induce* the plaintiff or a class of persons to act in *reliance* on it. In the former case, the majority seemed to be of the view that no duty is owed, whereas in the latter case a duty is owed only if the plaintiff's reliance on the defendant's statement is reasonable in the circumstances. This distinction is somewhat difficult to grasp, and the judgment does little to expand upon it, but the essence of the difference seems to lie in the defendant's knowledge of the likelihood of the plaintiff's reliance. For example, if I publish a manifesto in the newspaper, I intend that the audience should act as I exhort them to. However, it seems undesirable that I should be held liable for any losses they suffer if they decide to do as I urge. On the other hand, if I make a statement concerning the creditworthiness of a company, knowing that the person who requested the information intends to rely upon it, I not only intend him or her to act upon it, I intend to induce him or her to rely upon it, and in these circumstances it is desirable that I should bear the consequences if my advice causes loss.

Although reliance is highly likely where there has been a request for information or advice, it will clearly not be confined to such cases. Correspondingly, the joint judgment of the majority made it clear that liability is not confined to those cases where the defendant's statement was made in response to a request. Although the majority recognised that cases where the defendant volunteers information negligently will be rare, they stated that there is "...no convincing reason ..." for confining liability to cases of request. If the other circumstances of the case are such that the defendant, in volunteering the information, knows that the recipient is likely to rely on it, and intends to induce him or her to do so, a duty will be owed.[24] This confirms an opinion expressed by Hunt, J., in the Supreme Court of New South Wales in *Compafina Bank v. A.N.Z. Banking Group*,[25] although no reference was made to that case.

With respect to the negligent misstatement claim, the majority also considered an argument advanced by the appellant companies that the respondent Council owed them a duty because of its special

24. *Ibid.*, at 46.

25. (1984) Aust. Torts Reports 80-546.

position as local authority, which argument was presented in terms of "pecuniary interest". It had been suggested previously that where the defendant has a pecuniary interest in the transaction about which information or advice is sought, he or she owes a duty of care to the plaintiff.[26] The appellants argued that the Council's interest in the planned developments was sufficient in itself to give rise to a duty of care. The majority rejected this notion:

> "In Australia the general interest which a local authority has in promoting or encouraging the development of its area would not ordinarily be classified as a 'pecuniary interest'. We do not consider that a general interest of this kind is enough to support the existence of a duty of care on the part of an authority in relation to statements made in development plans so as to make the authority liable for negligent misstatement..."[27]

Thus, the decision of the majority at least tells us that the relationship between a local authority and the inhabitants of its area of responsibility is *not* sufficiently proximate in itself to give rise to a duty to take care in making statements. Further, it tells us that a duty would have been owed (and thus that there would be sufficient proximity between appellant and respondent) if "...the Authority and the Council made the representation with the intention of *inducing* members of the class of developers to act in *reliance* on the representation."[28]

Unfortunately, in the judgment in question, that is the end of the line as far as information about the requirements for duty of care is concerned. The majority decided that, on the facts, the Authority and the Council had made no firm representations at all, and in particular, no representations about the feasibility of the proposals in the plan. It is clear from the parts of the development plan quoted in the judgment that it was expressed throughout to be a kind of glorified discussion document, capable of modification or revocation, and that it did not override the Council's normal discretion to depart from any of the proposals therein. In these circumstances, anybody relying on the contents of the published

26. E.g. *Presser v Caldwell Estates Pty Ltd*, [1971] 2 N.S.W.L.R. 471, 493 (per Mason J.A.)
27. *Supra* n. 1 at 46.
28. *Ibid.* (Emphasis added).

plan did so at their own risk, and had no cause for complaint if they suffered loss by so relying.

3. The judgment of Brennan, J.

It is almost always the fate of lone voices to be left crying in the wilderness. Unlike those of the majority, Brennan, J.'s observations about duty of care in negligent misstatement cases form part of the ratio of his decision, but it is a fairly sure bet that it will be the obiter comments of his fellows which will be taken up in later cases. It is not merely because Brennan, J.'s is one voice against four that one can predict a fairly short "life" for his judgment. He now stands alone on the current High Court,[29] as a voice against the use of proximity as a test for the existence of a duty of care in negligence. Slowly but surely through the negligence cases of recent years in the High Court, Brennan, J.'s fellow judges have defected from the camp of orthodoxy or the fence-sitting of no comment, to a position of support for Deane, J.'s re-reading of duty of care. Now all but Brennan J. are arrayed beside Deane, J.'s new orthodoxy.

Three or four years ago it was Deane, J., who filled the role of Don Quixote, tilting at the windmills of *Donoghue v. Stevenson*[30] and *Anns v. Mertor, L.B.C.*[31] Now that role is reserved for Brennan, J., who sounded somewhat forlorn in *San Sebastian* when he said,

> "I beg leave to doubt whether proximity, if it is understood as having a wider connotation than reasonable foreseeability of loss, will prove to be a unifying rationale of particular limiting propositions of law."[32]

Brennan, J., stuck to his guns right through to the end, undertaking an analysis of duty that was, until recently, perfectly orthodox, by inquiring about particular aspects of the relationship between plaintiff and defendant, rather than seeking a general relationship of proximity between them. However, it is not only in this that Brennan, J., stood alone in *San Sebastian*. He also disagreed

29. At time of writing, the High Court judges were Gibbs, C.J , Mason, Wilson, Brennan, Deane and Dawson, JJ. It remains to be seen whether the appointment of Toohey and Gaudron, JJ., will give Brennan, J., any support on this issue.

30. *Supra* n. 8.

31. [1978] A.C. 728.

32. *Supra* n 1, at 51

with his fellows about the necessity for a request for information or advice before there can be an imposition of duty,

> "To impose a legal duty of care on the unsolicited and voluntary giving of any information and advice on serious or business matters would chill communications which are a valuable source of wisdom and experience for a person contemplating a course of conduct."[33]

Further, he took the opposite approach to the facts from that of the majority. Whereas the majority said that, as there were no representations of feasibility, there was no need to consider duty, Brennan, J., said that there was no duty to take care in publishing the plan, as it contained no representations of feasibility.[34]

4. Conclusion

In the final analysis, the decision of the High Court in this long-awaited appeal is like a film of a striptease show. It leaves little to the imagination, but nevertheless, it is not quite the real thing. We now know what last year's High Court would be likely to say about duty of care, if pressed to a decision. Of course, the new appointments to the Bench may alter the balance on the question of the use of proximity as a test for duty. Unless *San Sebastian* becomes, like *Hedley Byrne v. Heller* itself, a long-lived and influential set of obiter dicta, we must resign ourselves to another long wait for guidance. Perhaps we should console ourselves with the thought that, in the long run, it matters little whether or not the duty question is phrased in terms of proximity, as the nature of the inquiry itself will always be much the same.

33. *Ibid.*, at 52.
34. *Ibid.*, at 53.