NOTES

FORESEEABILITY SINKS AND DUTY OF CARE DRIFTS: THE HIGH COURT VISITS ROTTNEST

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In *Nagle v Rottnest Island Authority*,[1] the High Court found the Rottnest Island Authority liable for injuries suffered by the appellant, Nagle, when he dived from a ledge into the water of a bathing area off Rottnest Island and hit his head on a submerged rock.

In finding for the appellant the High Court disagreed with the decisions of both (i) the trial judge, Nicholson J, who had dismissed the action for want of a causal link between the Authority's alleged negligence and the plaintiff's injuries;[2] and (ii) the Full Court of the WA Supreme Court, before which the plaintiff failed on appeal on the basis that the Authority owed the plaintiff no duty of care.[3]

The case is of general interest because it provides the latest statement by the High Court of the proper approach to questions of foreseeability and duty of care in negligence cases. The decision is also of special interest to statutory and local authorities with responsibility for management and control of coastal (or any other) recreational facilities because of their potential liability for harm suffered by users of those facilities.

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1. (1993) 67 ALJR 426.
2. *Nagle v Rottnest Island Authority* (1989) Aust Torts Rep 69,226.
3. *Nagle v Rottnest Island Authority* (1991) Aust Torts Rep 68,752.

THE FACTS

The Rottnest Island Authority (previously, and at the time of the alleged negligence, the Rottnest Island Board) has management and control of Rottnest Island[4] and of a small, sand-bottomed, U-shaped bathing area on the northern coast of the Island known as "the Basin". The Authority promotes and encourages the use of the Basin as a swimming and recreational area by publicity and directional signs and by the provision and maintenance of public facilities such as change-rooms, toilets and a paved pathway leading from the main settlement to the Basin. The bathing area is surrounded on all sides except the north by a flat rock area known as a wave-platform. At low tide the rock is exposed for approximately 25 centimetres above water. When the plaintiff Nagle dived in, the wave-platform was submerged under about five centimetres of water.

Although he worked on the Island, the plaintiff had never visited or swum at the Basin before the day of the accident in which he was rendered a quadriplegic. The plaintiff's claim alleged that the Authority breached the duty of care owed to him by its failure to provide any, or adequate, warning that the ledge was unsafe for diving.

THE RELEVANCE OF FORESEEABILITY TO NEGLIGENCE

At three stages of the inquiry into an allegation of negligence the concept of reasonable foreseeability has been accepted to be relevant:

- Since *Donoghue v Stevenson*,[5] reasonable foreseeability has been at least the starting-point for discussions of the existence of a duty of care.
- The fundamental test for standard of care is that the defendant is expected to take reasonable precautions to avoid foreseeable harm.[6]
- To determine whether or not a particular loss is "too remote" to be compensated, the courts have (since *The Wagon Mound (No 1)*)[7] resorted to a test based on reasonable foresight of harm.

4. Rottnest Island Authority Act 1987 (WA) s 50 & sch 2 cl 3.
5. [1932] AC 562.
6. *Wyong SC v Shirt* (1980) 146 CLR 40.
7. *Overseas Tankship (UK) Ltd v Morts Dock & Eng Co Ltd* [1961] AC 388.

THE MEANING OF FORESEEABILITY

At first instance the trial judge, Nicholson J, had found that the risk of injury to persons diving from the rock ledge was reasonably foreseeable, even though (as he said) "it may have reasonably been considered foolhardy or unlikely".[8] On the other hand, the Full Court by majority held that the risk of injury to swimmers at the Basin was not reasonably foreseeable: Kennedy J because he excluded from what was reasonably foreseeable conduct that was foolhardy, and Rowland J because the risk of the plaintiff diving as he had done was very small.

The High Court agreed with Nicholson J's formulation of the test for what is reasonably foreseeable. As was stated by Mason J (as he then was) in *Wyong Shire Council v Shirt*:

> 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 far-fetched or fanciful.[9]

On this basis the High Court found that the majority of the Full Court had applied the wrong test of foreseeability for, as Mason J stated in *Wyong Shire Council v Shirt*, though the risk must be a "real risk" to be foreseeable, it "does not follow that a risk which is unlikely is not foreseeable".[10]

FORESEEABILITY AS AN ELEMENT IN DUTY OF CARE

In the realm of physical injury caused by the direct impact of a positive act, foreseeability of harm to a person in the class of the plaintiff has, generally, remained the sole determinant of a duty of care, as it was in *Chapman v Hearse*.[11] However, where the injury complained of falls within a less developed or emerging area of the law — such as liability for nervous shock or pure economic loss — foreseeability alone has, since Deane J's landmark judgment in *Jaensch v Coffey*,[12] come to be seen as inadequate as a test for the duty of care because of the potential for liability "in an indeterminate amount for an indeterminate time to an indeterminate class."[13]

8. Supra n 2, 69,238.
9. Supra n 6, 47.
10. Ibid.
11. (1961) 106 CLR 112.
12. (1984) 155 CLR 549.
13. *Ultramares Corp v Touch, Niven & Co* (1931) 225 NY 170, 174 NE 441.

In a well-known dictum in *Jaensch v Coffey*, Deane J set out the beginnings of a test of duty of care employing "proximity" as an additional requirement or what he called an "over-riding limitation upon reasonable foreseeabiltity".[14] At first it might have seemed that the duty of care inquiry had evolved into two stages: first, reasonable foreseeability and, second, proximity. However, increasingly, the inquiry into duty of care has focused on proximity alone, with reasonable foreseeability relevant only as a factor in the proximity inquiry. Where foreseeability is the decisive factor (as in cases of physical injury caused by a positive act) it is because foreseeability is sufficient to establish proximity. Thus, in *Gala v Preston*, a 4-1 majority of the High Court stated:

> The requirement of proximity constitutes the general determinant of the categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid a reasonably foreseeable and real risk of injury.[15]

This is also the approach which the majority of the High Court thought proper in *Nagle*. In the majority judgment of Mason CJ, Deane, Dawson and Gaudron JJ, their Honours stated:

> [I]t is beyond question that the Board brought itself into a relationship of proximity with those visitors who lawfully visited the Island and resorted to the Basin for the purpose of swimming.... In reaching this conclusion, we have not mentioned foreseeability otherwise than by reference to the standard or scope of the duty of care. That is because this is a case in which it is possible to ascertain the existence of a generalised duty of care ... without looking to foreseeability.[16]

The rise of proximity as the determinant of a duty of care can be seen as the correlative of the erosion of the concept of foreseeability which, since the expansive interpretation given to it in *The Wagon Mound (No 2)*,[17] has proved inadequate for the three tasks of discrimination assigned to it (ie, standard of care, duty and remoteness). A concept of foreseeability which includes everything which is not "far-fetched and fanciful"[18] is so broad that its utility even as an indicator of proximity is doubtful. The problem which remains, of course, is to determine when the requisite relationship of proximity will be present.

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14. Supra n 12, 579.
15. (1990) 172 CLR 243, 253.
16. Supra n 1, 429.
17. *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617.
18. Supra n 6.

PROXIMITY, RELIANCE AND DUTY OF CARE

Criticism that the proximity concept is without "ascertainable meaning"[19] was met by Deane J in *Sutherland Shire Council v Heyman*[20] where he attempted to explain the concept in these terms:

> The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) 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 and employee or of a professional man (sic) and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained.[21]

His Honour went on to refer expressly to two situations where the necessary relationship might be found. The first arose where there was "an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another"; the second arose where there was "reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance".[22]

In *Nagle*, it was the presence of precisely these two factors which apparently persuaded Nicholson J and the majority of the High Court that a relationship of proximity existed between the appellant and the Board. Nicholson J based his finding of proximity on "an assumption of responsibility by the Board in relation to persons attending the Basin".[23] The majority of the High Court, on the other hand, apparently employing both reliance and assumption of responsibility, held that the Board brought itself into a relationship of proximity with those visitors who lawfully visited the Island and resorted to the Basin as a venue for the purpose of swimming on the basis that (i) "the Board was the occupier of the reserve and ... under a statutory duty to manage and control it for the benefit of the public" and (ii) "the Board promoted the Basin as a venue for swimming and encouraged the public to

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19. Goff LJ in *Leigh & Sillivan Ltd v Aliakmons Shipping Co Ltd* [1985] 2 WLR 289, 327. See also *San Sebastian v The Minister Administering Environmental Planning & Assessment Act* (1986) 162 CLR 340, Brennan J, 367.
20. (1985) 157 CLR 424.
21. Id, 497.
22. Id, 498.
23. Supra n 2, 69,245.

use it..."[24]

The importance of those two factors, namely assumption of responsibility by the defendants and reliance by the plaintiff, in determining the existence of a duty of care has become apparent in a number of cases. Their significance was demonstrated first in the context of negligent misstatements.[25] In *Sutherland Shire Council v Heyman*, Mason and Deane JJ noted the significance of reliance in establishing the necessary relationship between the parties where the duty alleged is one of positive action.[26] Again, in *Hawkins v Clayton*, where the alleged negligence was a failure to act, Mason CJ, Wilson and Deane JJ regarded assumption of responsibility by the respondents and reliance by the appellant as the determinants of a relationship of sufficient proximity.[27]

In fact it has been suggested that *all* liability in negligence could be based on the concept of reasonable reliance.[28] Using this approach a duty of care would exist in circumstances where the plaintiff relied on the defendant to take care and the defendant ought to have been aware of that reliance.

In *Nagle*, the High Court by-passed the opportunity to define more clearly and predictably the relationship between proximity and the factors of reliance and the assumption of responsibility. This is unfortunate because the apparent demise of foreseeability in the context of duty of care has given urgency to the need for further guidance as to how the notion of proximity is to be used to define those relationships which do give rise to a duty of care. The concepts of assumption of responsibility, reasonable reliance and reasonable expectation appear to provide the tools with which content can be given to proximity. They provide a means of analysing the relevant relationship and maintaining flexibility by including elements of community standards.[29] It may be, for instance, that reliance could prove an appropriate test for proximity even in areas like nervous shock, where it has not yet been utilised.

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24. Supra n 1, 429.
25. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Mutual Life & Citizens Assurance Co Ltd v Evatt* (1970) 122 CLR 628.
26. Supra n 20, Mason J, 641; Deane J, 503.
27. (1988) 164 CLR 539, Mason CJ & Wilson J, 545; Deane J, 578. Gaudron J considered the related concept of a "reasonable expectation" by the appellant to be more useful where the alleged breach of duty was an omission to act.
28. *Sutherland SC v Heyman* supra n 20, Mason J, 461; B J Reiter "Contracts, Torts, Relations & Reliance" in B J Reiter & J Swan (eds) *Studies in Contract Law* (Toronto: Butterworths, 1980) 235, 242.
29. *San Sebastian v The Minister* supra n 19, 368.

PROXIMITY IN CASES OF NON-FEASANCE

As we have said, the majority of the High Court in *Nagle* based its finding of a duty of care solely on a consideration of the proximity of the relationship between the Board and the appellant. The existence of a relationship of proximity between the Board and visitors who came to the Basin to swim was regarded as "beyond question".[30] The apparent ease with which the majority reached this conclusion is surprising, since the negligence alleged in this case involved a non-feasance, namely a failure to warn the plaintiff of the risks of diving from the wave-platform.

That there is a distinction between misfeasance and non-feasance in the determination of a duty of care was made plain by Deane J himself in *Sutherland Shire Council v Heyman.* He said:

> 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 secure avoidance of a reasonably foreseeable but independently created risk of injury to the other. The categories of cases in which such proximity of relationship will be found to exist are properly to be seen as special or "exceptional".[31]

In the same case, Mason J stated that a statutory authority will not generally have a common law duty to exercise a power, but he identified a number of situations which will attract a positive duty to exercise a power. These include situations in which an authority has created the danger, situations in which the authority is the occupier of premises or has the ownership or control of a structure or public place, and situations in which the authority has placed itself "in such a position that others rely on it to take care for their safety".[32]

In *Nagle*, the High Court did not refer to the distinction between misfeasance and non-feasance in discussing duty of care. It is now necessary to ask whether the distinction remains significant.

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30. Supra n 1, 429.
31. Supra n 20, 502. See also *Jaensch v Coffey* supra n 12, 578; *Hargrave v Goldman* (1963) 110 CLR 40.
32. *Sutherland SC v Heyman* supra n 20, 461.

THE NEXUS BETWEEN DUTY OF CARE AND BREACH OF DUTY

In *Hawkins v Clayton*, Deane J drew attention to the nexus between duty of care and the extent of the duty when he said that, "the content of the duty of care in a particular case is governed by the relationship of proximity from which it springs".[33]

Arguably this means that, if the basis of a duty of care is proximity, which in turn is based upon reasonable reliance (or reasonable expectation) by the plaintiff, or an assumption of responsibility by the defendant, then the extent of the duty should be determined by the same criteria. In other words, the duty should extend only to those risks which are within the scope of the plaintiff's reasonable reliance or the defendant's assumption of responsibility.

If this is correct, then in *Nagle* the extent of the duty should have been determined by the same criterion which established the duty of care (whether reasonable reliance or assumption of responsibility). However, the majority of the High Court apparently overlooked this point and used the formula properly applicable to a duty of care only in cases where the negligence complained of consisted of physical harm caused by a positive act of the defendant. In these cases the proximity of the relationship is determined by foreseeability and the extent of the duty is determined by asking whether the risk was foreseeable.[34]

A closer analysis by the majority in *Nagle* of the basis of the relationship of proximity may have led to a different result. If, for instance, the extent of the duty reached only as far as risks within the range of the plaintiff's reasonable reliance, then the Court's task was surely to identify the risks with respect to which the plaintiff could reasonably rely on the defendant. The question would then have been, not whether it was reasonably foreseeable that a person might dive into the water without ascertaining whether it was safe to do so, but rather whether it was reasonable for the general public to rely upon the Board to give warnings of the dangers of diving into a rocky bay.

THE DISSENTING JUDGMENT

In his dissent, Brennan J preferred to adopt the approach of the High Court in *Schiller v Mulgrave Shire Council*,[35] basing the duty of care owed

33. Supra n 27, 579.
34. Supra n 6, Mason J, 47.
35. (1972) 129 CLR 116.

by the Board on their management and control of the reserve rather than the occupation of the reserve. He cited with approval comments in *Aiken v Kingsborough Corporation*[36] where Dixon J had identified the factors which give rise to such a duty of care:

> They are in charge of the structure provided for the use of people who must, in using it, rely upon its freedom from dangers which the exercise of ordinary care on their own part would not void.

The basis of the duty identified by Brennan J appears to be the general reliance on the Board's management and control of the reserve. Brennan J used the extent of this reliance to determine the measure of the duty and concluded that it did not extend to a duty to warn the public of dangers that are apparent or of dangers which could be avoided by the exercise of ordinary care.

In *Nagle*, Brennan J continued to take the view he has expressed elsewhere that it is necessary to define particular principles applicable to different classes of negligence cases.[37] In doing so he focused more closely on the source of the duty than the majority and eschewed the search for one all-embracing principle by which to determine questions of duty.

CONCLUSION

Nagle's case raises many of the most difficult issues currently facing the law in the area of negligence — the role of foreseeability, the meaning of the proximity requirement, the extent of the duty to take affirmative action, and the duty of statutory authorities. However it is probably most noteworthy for its silences. The High Court has not taken the opportunity to clarify a number of issues which currently perplex those who confront them.

36. (1939) 62 CLR 179, 205.
37. *San Sebastian v The Minister* supra n 19, 368.