

Proximity as a Determinant of Duty: The Nervous Shock Litmus Test

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Ten years ago in the High Court of Australia decision in *Jaensch v Coffey*,¹ Justice Deane interpreted the 'neighbour principle' of Lord Atkin in *Donoghue v Stevenson*² as connoting the concept of 'proximity' as an overriding control on the test of reasonable foresight as the determinant for a duty of care in negligence. Since that time a majority of the High Court has adopted and refined the concept of proximity and applied it in a variety of contexts.³ Proximity has also been utilised as a vehicle to reduce the relevant standard of care,⁴ and to conclude that a duty does not arise where it is not appropriate or feasible to fix the relevant standard.⁵

Recently a majority of the High Court highlighted proximity's role as the unifying theme of the categories of case where the common law of negligence recognises the existence of a duty of care:

Without it, the tort of negligence would be reduced to a miscellany of disparate categories among which reasoning by the legal processes of induction and deduction would rest on questionable foundations since the validity of such reasoning essentially depends upon the assumption of underlying unity or consistency.⁶

Proximity has been described as being 'able to connect up the relationship between the parties with the general social understanding or consciousness of the way in which decisions attributing responsibility have to be made' in a way that reasonable foreseeability alone cannot.⁷

Nevertheless the concept has attracted some harsh criticism.⁸ One commentator considered the sole purpose of proximity as being 'to obscure the fact that decisions in hard cases are based on controversial value judgments by the courts, and to preserve the appearance of value free adjudication by

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¹ (1984) 155 CLR 549.

² [1932] AC 562, 580.

³ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Australian Safeways Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; *Hawkins v Clayton* (1988) 164 CLR 539; *Nagel v Rottneest Island Authority* (1993) 67 ALJR 426; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Bryan v Maloney* (1995) 128 ALR 163.

⁴ *Cook v Cook* (1986) 162 CLR 376.

⁵ *Gala v Preston* (1991) 172 CLR 243.

⁶ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 543.

⁷ P Vines, 'Proximity as Principle or Category: Nervous Shock in Australia and England' (1993) 16 UNSWLJ 458, 479.

⁸ See eg, M McHugh, 'Neighbourhood, Proximity and Reliance' in P D Finn (ed) *Essays on Torts* (1989) 5.

reference to a fundamental pre-existing legal principle',⁹ while another dismissed it as a 'further new-fangled bifurcation [which] would submerge this whole area of law in an ocean of raging chaos.'¹⁰ Justice Brennan in *Gala v Preston*¹¹ summed up his longstanding objection to the concept of proximity as meaning anything more than mere reasonable foreseeability of harm thus:

There are logical and jurisprudential objections to the employment of 'proximity' in an extended sense as a criterion by which to determine whether a duty of care exists in a new category of negligence or to determine whether a relationship is such that, despite reasonable foreseeability, no duty of care has arisen. If the term be used as a description of a relationship out of which a duty of care does arise, it would be a sophism to invoke the term as a criterion to determine whether a duty of care arises. In this case, for example, to say of the relationship between the plaintiff and the first defendant that it was not a proximate relationship and *therefore* no duty of care was owed would be to state as a conclusion what must be demonstrated to justify the premiss [sic] that the relationship was not a proximate one.

On the other hand, if 'proximity' in the extended sense be invoked primarily as a criterion of the existence of a duty of care, it is too amorphous a concept to serve the purpose.¹²

On a more recent occasion, his Honour eloquently described the notion of proximity as a 'juristic black hole into which particular criteria and rules would collapse and from which no illumination of principle would emerge.'¹³

While the majority of the High Court has on several occasions confirmed its commitment to the concept of proximity, it has not had the opportunity to revisit the concept in the context of nervous shock. The extent of liability for nervous shock is a question that has vexed courts since its first recognition a little over one hundred years ago, and is one acutely suited to produce the 'hard case' for which the tort lawyer yearns for a simple answer, or at least a simple mechanism which may yield an answer. Does proximity as a control on an untrammelled test of reasonable foresight provide such a mechanism? The claimed virtues of unification and ability to reflect social consciousness aside, does it provide a cogent, workable and reliable test by which those 'at the coal face' — litigants, their legal advisers and trial judges — can confidently determine whether a particular case of nervous shock falls within or without of those cases which the law recognises as giving rise to liability?

⁹ J Smillie 'The Foundation of the Duty of Care in Negligence' (1989) 15 *Mon LR* 302, 315.

¹⁰ J Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) 264–5.

¹¹ (1991) 172 CLR 243.

¹² *Id* 261.

¹³ *Bryan v Maloney* (1995) 128 ALR 163, 192.

JAENSCH V COFFEY AND THE 'REDISCOVERY' OF PROXIMITY

In *Jaensch v Coffey*¹⁴ the plaintiff saw her husband in a hospital casualty ward prior to emergency surgery following a motor vehicle collision. Although her husband recovered, the plaintiff suffered an anxiety depressant state which warranted admission to a psychiatric hospital, as well as internal pain and uterine bleeding which eventually led to an hysterectomy.

In the course of his judgment, Deane J noted that the term 'proximity' had been assigned a variety of different meanings in the authorities:

- (1) It had been used to designate no more than a consideration relevant to whether there was a reasonably foreseeable risk or breach of any duty;
- (2) It had been used to refer merely to the circumstance that there is a reasonable foreseeability of injury;
- (3) It had been used in the broader sense of designating a separate and general limitation upon the reasonable foreseeability in the form of a relationship which must exist between the plaintiff and the defendant before a duty arose.¹⁵

Many United States jurisdictions adopt the first meaning,¹⁶ while the chief critic of proximity in the High Court, Brennan J, supports the second approach.¹⁷

In adopting the third formulation, Deane J saw proximity as a broad and flexible touchstone of the classes of case in which the common law will recognise the existence of a relevant duty of care to avoid reasonably foreseeable injury to another. According to Deane J, proximity involves the notion of nearness or closeness and 'embraces' physical, circumstantial and causal proximity. The identity and relative importance of the considerations relevant to an issue of proximity vary in different classes of case, the relevant factors for a particular category being determined by reference to previous authorities and underlying public policy considerations.¹⁸

Proximity therefore removes the 'subterranean' influence of hidden policy considerations that in the past have mutilated the test of reasonable foresight

¹⁴ (1984) 155 CLR 549.

¹⁵ *Id* 583.

¹⁶ Although they differ as to whether it is merely a guideline to foresight (see, for example, *Paugh v Hanks* 451 NE 2d 759 (1983) (Ohio); *Tommy's Elbow Room v Kavorkian* 727 P 2d 1038 (1986) (Alaska); *Johnson v Ruark Obstetrics and Gynecology Assocs* 395 SE 2d 85 (1990) (North Carolina)) or a necessary requirement (see, for example, *Thing v La Chusa* 771 P 2d 814 (1989) (California); *Champion v Gray* 478 So 2d 17 (1985) (Florida); *Gates v Richardson* 719 P 2d 193 (1986) (Wyoming)).

¹⁷ See eg, *Hawkins v Clayton* (1988) 164 CLR 539, 555; *Gala v Preston* (1991) 172 CLR 243, 259

¹⁸ (1984) 155 CLR 549, 584; see also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 498

by providing a forum for the overt consideration of any overriding limitations on that test.¹⁹

PROXIMITY FACTORS

In *Donoghue v Stevenson*²⁰ Lord Atkin, in adopting the notion of proximity embodied in the restriction of the duty of care to one's 'neighbour',²¹ was careful to point out that physical proximity was but one facet of the proximity requirement. Similarly, in his description of 'proximity' Deane J, by the use of the inclusive word 'embraces' did not prescribe physical, circumstantial and causal proximity as the only relevant aspects of the proximity requirement. Indeed in subsequent cases, reliance,²² assumption of responsibility,²³ and, possibly, reasonable expectation,²⁴ have been identified as factors that may be relevant to determining whether a sufficient relationship of proximity exists. It is possible to interpret the factors of reliance, assumption of responsibility and expectation as merely means by which, for example, circumstantial proximity may be established. However, this is not the approach so far adopted by the majority of the High Court, who instead have treated them as independent factors applicable in appropriate circumstances.

While physical, circumstantial and causal proximity were not intended to be an exhaustive list of the aspects of proximity that may be taken into account, by identifying physical, circumstantial and causal proximity in *Jaensch v Coffey*, Deane J may be seen as indicating that in the context of nervous shock cases they are among the aspects of proximity that may be relevant when determining whether the relevant relationship of proximity exists.²⁵

Currently in England²⁶ and many United States jurisdictions,²⁷ the relationship between the plaintiff and the person physically threatened or injured by the defendant's conduct is regarded as a limit on the scope of the duty of care.

¹⁹ *Jaensch v Coffey* (1984) 155 CLR 549, 592.

²⁰ [1932] AC 562.

²¹ Tracing the notion to the judgments of Lord Esher MR and A L Smith LJ in *Le Lievre v Gould* [1893] 1 QB 491, 497, 504.

²² See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 461, 498; *San Sebastian Pty Ltd v Minister Administering the Environmental Planning Act 1979* (1986) 162 CLR 340, 355.

²³ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 498.

²⁴ *Hawkins v Clayton* (1988) 164 CLR 539, 596-7 per Gaudron J.

²⁵ In *Jaensch v Coffey* Deane J sought to explain two other controls on liability for nervous shock, that the defendant must foresee psychiatric injury as opposed to physical injury and that the psychiatric injury must not follow death or injury self-inflicted by the victim, in terms of proximity in the sense that, for policy reasons, the relationship will not be adjudged as being so close as to give rise to a duty of care unless they are satisfied: (1984) 155 CLR 549, 604-5.

²⁶ *Alcock v Constable of South Yorkshire Police* [1992] 1 AC 310.

²⁷ See eg, *Thing v La Chusa* 771 P 2d 814 (1989) (California); *Gates v Richardson* 719 P 2d 193 (1986) (Wyoming); *Barnhill v Davis* 300 NW 2d 104 (1981) (Iowa); *Ramirez v Armstrong* 673 P 2d 822 (1983) (New Mexico); *Gain v Carroll Mill Company Inc* 787 P 2d 553 (1990) (Washington).

Justice Deane, however, resisted treating the closeness of that relationship as being relevant to the question of proximity:

While the relationship of the plaintiff with the threatened or injured person (eg that of spouse, parent, relative, rescuer or uninvolved stranger) may well be of critical importance on the question whether risk of mere psychiatric injury was reasonably foreseeable in the particular case, the preferable view would seem to be that a person who has suffered reasonably foreseeable psychiatric injury as the result of contemporaneous observation at the scene of the accident is within the area in which the common law accepts that the requirement of proximity is satisfied . . . regardless of his particular relationship with the injured person.²⁸

This approach is consistent with the notion of proximity as a control on the foreseeability of the defendant. Physical, circumstantial and causal proximity, as well as the concepts of reliance, assumption of responsibility and expectation which are relevant in other contexts, all relate to adjudging the closeness of the relationship between the plaintiff and defendant. The notion of a 'relational proximity' by contrast, relates only to the closeness of the relationship between the plaintiff and the 'victim' — the person physically threatened or injured by the defendant's conduct. Relational proximity therefore involves a different frame of reference from those proximity factors identified by Deane J. If the role of proximity is viewed as an overriding control on an untrammelled test of reasonable foresight, and operates by characterising certain relationships as being 'so' close 'that' a defendant should contemplate the plaintiff as one likely to be injured by his or her act, then those factors taken into account when evaluating whether that relationship is sufficiently close must relate to the plaintiff and the defendant, not one of those parties and a third party.

What then is the meaning of 'physical, circumstantial and causal' proximity, and do they serve as reliable indicia by which to adjudge the closeness of the relationship between the plaintiff and defendant in the nervous shock setting?

(a) Physical Proximity

Physical proximity, according to Deane J in *Jaensch v Coffey*, bears the sense of a closeness in space and time,²⁹ in other words geographical proximity and temporal proximity.

When addressing the question whether the relationship between the plaintiff and defendant is 'close' it is perhaps natural to at least think in terms of space and time. Indeed, as already noted, physical proximity was expressly identified as relevant by Lord Atkin himself in *Donoghue v Stevenson*,³⁰ and is

²⁸ (1984) 155 CLR 549, 605–6.

²⁹ *Id* 584.

³⁰ [1932] AC 562, 581.

treated as an essential requirement to establishing a duty of care in several United States jurisdictions.³¹

However, without more, determining whether the physical proximity between the defendant's conduct and the plaintiff's injury is sufficiently close is particularly apt to produce arbitrary, value-judgment decisions rather than value-free adjudication based on legal principle. As much was expressly acknowledged by Deane J himself when he declined to explain the denial of duty in the case of psychiatric injury resulting from contact away from the scene of the accident or its aftermath in terms of physical proximity because he perceived the danger of an arbitrary conclusion.³²

The arbitrariness of a test based only on physical proximity may be demonstrated by reference to a series of decisions of the Supreme Court of Hawaii. In the early 1970s Hawaii was among the first of the United States jurisdictions to allow recovery for emotional distress consequent upon damage to one's property (*Rodrigues v State of Hawaii*³³) and as a result of witnessing physical injury to another (*Leong v Takasaki*³⁴). In both cases the test applied to determine the existence of a duty of care was one of reasonable foresight simpliciter.

In the second case, *Leong*, the ten year old plaintiff was crossing the highway with his stepfather's mother when a vehicle driven by the defendant struck and killed the woman instantly. In unanimously upholding the plaintiff's claim for compensation for his psychiatric injuries, the Supreme Court of Hawaii, in a judgment prepared by Richardson CJ, referred to the decision of the California Supreme Court in *Dillon v Legg*,³⁵ which set down three criteria to assist in the determination of claims for emotional distress: the proximity of the plaintiff-witness to the accident; the manner in which he or she witnessed or learned of it; and his or her relationship to the victim. The first two criteria might be regarded as being relevant to the notion of 'physical proximity' while the third involves the notion of 'relational proximity'. In approving the three factors, the Court stressed that they were not to be employed by a trial court to bar recovery but should at most be indicative of the degree of mental stress suffered.³⁶ Upon proof of the necessary damage, therefore, the defendant's liability depended upon whether he or she could reasonably foresee that damage of that kind could arise. Physical proximity was thus no more than one factor relevant to the question whether the defendant should have reasonably foreseen the risk of injury to the plaintiff.

³¹ See eg, *Thing v La Chusa* 771 P 2d 814 (1989) (California); *Gates v Richardson* 719 P 2d 193 (1986) (Wyoming); *Champion v Gray* 478 So 2d 17 (1985) (Florida); *Gain v Carroll Mill Company Inc* 787 P 2d 553 (1990) (Washington). In fact, a number of jurisdictions adhere to a 'zone of danger' approach whereby the plaintiff is denied recovery for distress unless he or she was personally at threat of physical injury, an approach which epitomises a physical proximity requirement: see, for example, *Bovsun v Sanperi* 461 NE 2d 843 (1984) (New York); *Rickey v Chicago Transit Authority* 457 NE 2d 1 (1983) (Illinois).

³² (1984) 155 CLR 549, 606-7.

³³ 472 P 2d 509 (1970).

³⁴ 520 P 2d 758 (1974).

³⁵ 441 P 2d 912 (1968).

³⁶ 520 P 2d 758, 766 (1974).

Only a year later, however, the Supreme Court of Hawaii retreated from this *prima facie* wide test. In *Kelley v Kokua Sales and Supply Ltd*³⁷ a man's daughter and his granddaughters were in a car driving along a highway in Hawaii when it collided with a truck. The daughter and one of the granddaughters were killed and the other granddaughter was seriously injured. At the time the father resided in California. He was telephoned from Honolulu by his other daughter and informed of the accident and the resulting deaths and injury, and as a result of the stress suffered a fatal heart attack.

Decided solely on a test of reasonable foresight the father's estate appeared entitled to recover. There ought to have been no problem satisfying proof of the requisite damage, since the plaintiff had been so shocked that he had died, and it was reasonably foreseeable that the parent of a person involved in a car accident would be informed of the death and suffer some kind of shock as a result. Nevertheless, a majority of the Court in a judgment written by Kobayashi J (who had been one of the judges who had concurred in the judgment of Richardson CJ in *Leong*) held that:

[The judgment in *Leong*] could very well be construed to mean that the appellees owe a duty of care from the negligent infliction of serious mental distress upon a person located in any part of the world.³⁸

After pointing out that in the factual context of both *Rodrigues* and *Leong* the conclusion that the defendant's liability was limited only by a need for the plaintiff to prove serious mental distress was justifiable, the majority were of the view that such an approach did not 'realistically and reasonably limit' liability in the case before them. The majority continued:

Without a reasonable and proper limitation of the scope of the duty of care owed by appellees, appellees would be confronted with an unmanageable, unbearable and totally unpredictable liability . . . [W]e hold that the appellees could not reasonably foresee the consequences to Mr Kelley. Clearly, Mr Kelley's location from the scene of the accident was too remote.

We hold that the duty of care enunciated in *Rodrigues* and *Leong*, applies to plaintiffs meeting the standards stated in said cases, and who are located within a reasonable distance from the scene of the accident.³⁹

Thus, concerned by the spectre of the defendant being confronted with an 'unmanageable, unbearable and totally unpredictable liability' the Court sought to introduce a requirement that the plaintiff be 'located within a reasonable distance from the scene of the accident.' In other words physical proximity at least in the sense of geographical proximity was elevated from the status of merely a factor to be taken into account alongside other relevant factors in an assessment of reasonable foresight, to that of a necessary precondition for reasonable foresight. Contrary to the express caveat sounded in *Leong*, physical proximity had been converted into a criterion that could be employed by a trial court to bar recovery.

Not surprisingly, the case featured a strongly worded dissent by Richardson

³⁷ 532 P 2d 673 (1975).

³⁸ *Id* 676.

³⁹ *Ibid*.

CJ, the author of the judgments in both *Rodrigues* and *Leong*. His Honour declared:

The line that my colleagues choose to draw in the case at bar arbitrarily forecloses plaintiff's claim for negligent infliction of mental stress . . . I would not, as my colleagues advocate, restrict the holdings of *Rodrigues* and *Leong* to the facts of each respective case, that is, to the contemporaneous experience of the alleged tortious event.

Confining liability to a specific sphere of contemporaneity, as proposed, is all too inflexible. In effect the majority reinstates a scheme of arbitrary distinctions as to where liability ends that we expressly rejected in *Rodrigues*. The artificiality of the majority's position is too readily apparent.⁴⁰

It was not long before Chief Justice Richardson's reservations about the artificiality of the majority approach were realised. In *Campbell v Animal Quarantine Station*⁴¹ the plaintiff family's boxer dog, which had been placed in quarantine when the family moved to Hawaii, died of heat prostration after being left in a hot van. The plaintiffs heard news of the dog's death by telephone from a doctor at a pet hospital. None of the plaintiffs saw the dog die nor did any see the deceased body of the dog. Nevertheless, the Supreme Court of Hawaii held that the plaintiffs were entitled to recover. The five member court, which included Richardson CJ and two judges who were in the majority in *Kelley*,⁴² unanimously applied *Rodrigues* and *Leong* and distinguished *Kelley*:

In *Kelley* we were concerned with formulating a reasonable and proper limitation of the scope of the duty of care because of the potential for unmanageable and unpredictable liability. We therefore imposed a geographical limitation restricting recovery to those located within a reasonable distance from the scene of the tortious event. Our holding in that case was based upon policy considerations. *Kelley's* geographical consideration is not present within the facts of this case since plaintiffs and their dog were located within Honolulu.⁴³

Instead, the Court found that the facts of the case were similar to those in *Rodrigues*, a case where the plaintiffs witnessed the consequences but not the accident and were located no further from the scene of the accident.

The Court's unwillingness to apply '*Kelley's* geographical consideration' to a situation where none of the plaintiffs saw the dog die nor saw the deceased body of the dog, and were merely located in the same city, gives rise to a curious comparison. While in *Kelley* a man suffering such distress at news of the death of his daughter and granddaughter and injury to another granddaughter that he suffered a heart attack and died did not give rise to liability, recovery was allowed in *Campbell* for the distress and sense of loss, not even substantiated by medical evidence, felt by a family on hearing news of the death of their pet. The assertion therefore that *Kelley* had set a 'reasonable and

⁴⁰ Id 678.

⁴¹ 632 P 2d 1066, (1981).

⁴² Namely Ogata and Menor JJ.

⁴³ 632 P 2d 1066, 1069 (1981).

proper limitation' of the scope of the duty of care because of the potential for unmanageable and unpredictable liability might be thought open to doubt.

Kelley was again side-stepped in the recent case of *Masaki v General Motors Corporation*.⁴⁴ In that case a 20 year old mechanic broke his neck when the van he was working under lurched backwards. The mechanic's parents sued for emotional distress and succeeded notwithstanding the fact that at the time they were not present at the scene but rather were merely residents on the same island and witnessed the consequences in the form of subsequently seeing their son in hospital.

The Court, again in a unanimous decision, was of the view that *Rodrigues* and *Campbell* held that it was not necessary that the plaintiff actually witness the event in order to recover. In declining to follow *Kelley* the Court stated:

We find the facts of this case analogous to those in *Campbell* and *Rodrigues*. While Frank and Sumiye Masaki were not present at the scene of their son's accident, they resided on the same island and witnessed the consequences of the accident. Upon learning of Steven's injuries, the Masakis went immediately to the hospital and were told that their son would never walk. We conclude that it was reasonably foreseeable for Appellants to have anticipated the Masakis' emotional distress. The fact that the Masakis did not witness the accident is not a bar to recovery, but rather is a factor in determining the degree of mental stress suffered.⁴⁵

The issue left unresolved by the Court applying the decisions in *Rodrigues* and *Campbell* in preference to that in *Kelley* lies at the very heart of the physical proximity question: precisely *when* is it appropriate to call into play '*Kelley's* geographical consideration'. Of the cases allowing recovery, in *Campbell* the plaintiffs were situated in the same city, while in *Rodrigues* and *Masaki* the plaintiffs were located on the same island as the defendant. By contrast, in *Kelley* the plaintiff was situated in California while the defendant's conduct took place in Hawaii and recovery was denied. What then constitutes the yardstick for whether or not the plaintiff and defendant are geographically proximate?

The basis of the distinction could not have rested on the simple question whether the plaintiff and the defendant were located within the one state, for it is conceivable for the parties to be in adjacent states and yet be closer to each other than if they were at opposite ends of the one state. More likely the distinction was based on the distance between the plaintiff and defendant: the 3500 km that separated the parties in *Kelley* being considered too far apart to impose a duty while the 500 km that could encompass the distances in *Rodrigues*, *Campbell*, and *Masaki* were not too distant. That conclusion may be a natural one in light of Hawaii's physical isolation and it may suit Hawaii's purposes to treat a plaintiff located on or about the islands as being sufficiently proximate whilst regarding a plaintiff located on the mainland

⁴⁴ 780 P 2d 566 (1989).

⁴⁵ *Id* 576.

as being too remote. Difficulties arise, however, when the question is removed from the Hawaiian setting and cast in more general terms.

In as much as distance, like time, is a continuum, it might be asserted that 500 km is close while 3500 km is far. Besides begging the question of exactly where between 500 km and 3500 km close becomes far, there is the additional problem that distance is, in many ways, relative. On the facts of one case 500 km may be considered close while on the facts of another it may be considered far. Also, if distance is considered in terms of, for example, the time it would take the plaintiff to travel the distance to be with the victim, again no simple answer is forthcoming. With modern transport it is possible to conceive of a situation where a plaintiff on being advised of an accident could travel 3500 km faster than it takes for a plaintiff in an isolated location to travel even 50 km.

In any event, in both *Kelley* and *Campbell* the plaintiffs witnessed neither the defendants' conduct nor its consequences. The medium of conveying the news was the same, namely by telephone, a medium in relation to which distance is entirely irrelevant. Whether a message travels by telephone 50 km, 500 km or 3500 km the message remains the same. As much was recently recognised by Kirby P of the New South Wales Court of Appeal when he rejected a submission that a plaintiff who was not present at the accident or its aftermath and was informed by telephone or later oral message should not recover. After opining that such a rule was in part the product of 19th century notions of psychology and psychiatry, his Honour held:

The suggested rule is also hopelessly out of contact with the modern world of telecommunications. If any judge has doubts about this, he or she should wander around the city streets and see the large number of persons linked by mobile telephones to the world about them. Inevitably such telephones may bring, on occasion, shocking news, as immediate to the senses of the recipient as actual sight and sound of catastrophe would be. This is the reality of the world in which the law of nervous shock must now operate.⁴⁶

There is a risk, therefore, that if proximity is determined in terms of physical proximity alone the resolution of the question is likely to be based more on a value judgment of the circumstances of the particular case rather than a reasoned conclusion based on legal principle. In other words, a court is likely to merely declare the distance 'close' or 'not close' on the facts without reference to any general formula that determines for all cases what is 'close' or 'not close' precisely because, distance being relative, it is not possible to devise such a general formula.

⁴⁶ *Coates v Government Insurance Office of New South Wales* (unreported, New South Wales Court of Appeal, 15 February 1995).

(b) Circumstantial Proximity

Justice Deane in *Jaensch v Coffey* gave as examples of 'circumstantial proximity' the 'overriding relationship of employer and employee or of a professional man and his client.'⁴⁷ While *Jaensch v Coffey* did not itself involve such a relationship, the earlier High Court decision in *Mount Isa Mines Ltd v Pusey*⁴⁸ may serve as an illustration. In that case a plaintiff who went to the aid of a co-worker horribly burnt in an industrial accident suffered psychiatric injury. In the course of arguing that the case did not stand as authority for reasonable foresight as the sole determinant of duty, Deane J explained:

The decision in the case must, however, be understood in the context of the relationship of employer and employee and of the specific issues which had been raised by the notice of appeal: in that context, the case was seen by all members of the Court as turning on the limited issue whether it had been reasonably foreseeable that there was a risk of injury by mere nervous shock to an employee in the position of the plaintiff. While the case may, upon proper analysis, lend support for a general proposition that an employer is liable for damages in respect of nervous shock sustained by an employee at his place of employment in circumstances where the employer has failed to take reasonable steps to avoid a reasonably foreseeable risk of injury in that form, [*Mount Isa Mines Ltd v Pusey* is not authority for any such unqualified proposition in a case where the proximity involved in the relationship of employer and employee is not to be found.⁴⁹

Circumstantial proximity in the form of the relationship between a professional man and his client as a basis for a duty of care may be demonstrated by reference to *X and Y (by her tutor X) v Pal*.⁵⁰ A doctor's negligent failure to diagnose a woman's syphilis resulted in the birth of a deformed child. While the New South Wales Court of Appeal devoted most of its attention to upholding the claim of the child,⁵¹ it was also prepared to assume that a duty of care was owed by the doctor to not cause his patient psychiatric injury as a consequence of her child's deformities.⁵²

Circumstantial proximity might therefore be considered in terms of a pre-existing relationship between the plaintiff and defendant within which relationship the acts of the defendant involve the foreseeable risk of harm to the defendant. In as much as that concept enables argument by analogy from previously recognised relationships in a way not always possible in cases where physical proximity is relevant, it might be regarded as less likely than

⁴⁷ (1984) 155 CLR 549, 584; see also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 498

⁴⁸ (1970) 125 CLR 383.

⁴⁹ (1984) 155 CLR 549, 597. The recent cases *Gillespie v The Commonwealth* (1991) 104 ACTR 1 and *Miller v Royal Derwent Hospital Board of Management* [1992] Aust Tort Reports 61,483 are further examples of a duty to avoid nervous shock arising in an employer-employee context, although in both cases it was held that the respective duties had not been breached.

⁵⁰ (1991) 23 NSWLR 26.

⁵¹ Holding that a relationship of proximity can exist with a class of persons which includes members who are not yet born or who are identified by some future characteristic or capacity, as in *Hawkins v Clayton* (1988) 164 CLR 539, 577-8.

⁵² (1991) 23 NSWLR 26, 59.

physical proximity to produce an arbitrary or value judgment decision in a 'hard case.'

(c) Causal Proximity

In *Jaensch v Coffey* Deane J did not offer a detailed explanation of the aspect of proximity that he termed 'causal proximity'. In his judgment, he referred only to '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'⁵³ and, later, 'logical or causal proximity between the act of carelessness and the resulting injury.'⁵⁴ In *Sutherland Shire Council v Heyman* his Honour described the aspect of proximity as 'what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connexion or relationship between the particular act or course of conduct and the loss or injuries sustained.'⁵⁵

Notwithstanding the lack of a detailed definition, Deane J in obiter in *Jaensch v Coffey* offered causal proximity as an alternative to physical proximity as the reason why a duty of care should not arise in the case of a person suffering psychiatric injury from subsequent contact with the victim away from the scene of the accident and its aftermath, such as the nursing or care of a close relative following an accident. In such a case, his Honour said, there would be an absence of causal proximity because the psychiatric injury would result from contact with more remote consequences, such as the subsequent effect of the accident upon an injured person rather than from the impact of matters which themselves formed part of the accident and its aftermath, such as the actual occurrence of death or injury in the course of it. In relation to which of the two explanations was to be preferred, his Honour stated that:

The choice between one or other or a combination of these two distinct rationales may obviously be of importance in the more precise identification of any essential criteria of the existence of the requisite duty relationship. On balance, I have come to the conclusion that [that] which justifies the line of demarcation by reference to considerations of causal proximity, is to be preferred as being the less arbitrary and the better attuned both to legal principle and considerations of public policy. 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': see, eg, *Donoghue v Stevenson*, *Dorset Yacht Co Case*, *The Dredge 'Willemstad' Case*. A requirement based upon logical or causal proximity between the act of carelessness and the resulting injury is plainly better adapted to reflect notions of fairness and common sense in the context of the need to balance competing and legitimate social interests and claims than is a requirement based merely upon mechanical considerations of geographical or temporal proximity.⁵⁶

Thus it seems that while his Honour regarded the evaluation of physical

⁵³ (1984) 155 CLR 549, 584-5.

⁵⁴ Id 607.

⁵⁵ (1985) 157 CLR 424, 497-8.

⁵⁶ (1984) 155 CLR 549, 607.

proximity as 'arbitrary' and 'mechanical', determining whether there is causal proximity involves an appraisal of fairness, commonsense and the balancing of competing social interests. No guideline or mechanism was provided, however, for the way in which this appraisal is to be performed. It is likely that the plaintiff and the defendant in a case will have diametrically opposed views on what should be considered 'fair'. Moreover, by what standard is one social interest to be judged more worthy than the other?

It would appear that causal or logical proximity will be satisfied where act A leads to consequence B, but will not be satisfied where act A leads to consequence B which in turn leads to consequence C. Thus where the defendant's act (the accident or its immediate aftermath) leads to the consequence of psychiatric injury from the impact of perceiving that act there will be causal proximity, whereas there will be no causal proximity where the defendant's act (the accident or its aftermath) leads to one consequence, the effect on the victim (such as death or permanent disability), which in turn leads to the consequence of psychiatric injury suffered by the plaintiff as a result of the impact of that effect.

It might be queried whether causal proximity is any less susceptible to arbitrary, value judgment based decisions than physical proximity. For example, where consequence C is the necessary corollary of consequence B it might be deemed artificial to regard consequence C as being proximate to only consequence B and not also act A. Moreover, Justice Deane's formula itself might be seen as standing on an arbitrary base: for the purposes of causal proximity a distinction is drawn between 'the impact of matters which themselves formed part of the accident and its aftermath' and 'more remote consequences such as the subsequent effect of the accident upon an injured person.'⁵⁷ In relation to the meaning of 'aftermath', his Honour stated:

The aftermath of an accident encompasses events at the scene after its occurrence, including the extraction and treatment of the injured. In a modern society, the aftermath also extends to the ambulance taking an injured person to hospital for treatment and to the hospital itself during the period of immediate post-accident treatment.⁵⁸

In defence of the extension of the accident to include its immediate aftermath, his Honour said:

It would, in my view, be both arbitrary and out of accord with common sense to draw the borderline between liability and no liability according to whether the plaintiff encountered the aftermath of the accident at the actual scene or at the hospital to which the injured person had been quickly taken. Indeed . . . in some cases the true impact of the facts of the accident itself can only occur subsequently at the hospital where they are known.⁵⁹

His Honour gave as examples of the latter point spinal injuries sustained in a

⁵⁷ Ibid.

⁵⁸ Id 607-8.

⁵⁹ Id 608.

bloodless accident, or as was the case in *Jaensch v Coffey* itself, internal injuries suffered by the victim.⁶⁰

However, in attempting to overcome one arbitrary barrier Deane J may only have succeeded in imposing another. For example, the 'true impact' of a spinal injury may not become clear until well after the period of immediate post-accident treatment at hospital. No two spinal injuries are the same: it is possible for a victim to recover from what might initially seem a serious injury with minimal or no permanent disability. Similarly, a victim rendered comatose after an accident might awaken some time after the period of immediate post-accident treatment at hospital with minimal or no permanent injury. In any event, it would be difficult to not regard as arbitrary a rule that would hold a mother suffering psychiatric injury from perceiving the immediate post-accident treatment of her child at hospital as causally proximate to the defendant's act but regarding as not proximate a mother suffering psychiatric injury from perceiving her permanently disabled child shortly after the conclusion of the immediate post-accident treatment and after the attending doctor has informed her that there is nothing more that medicine can do.

The absence of causal proximity in the case of psychiatric injury from subsequent contact was relied upon by the Full Court of the South Australia Supreme Court to deny liability in *Andrewartha v Andrewartha (No 1)*.⁶¹ Another illustration may be provided by *X and Y (by her tutor X) v Pal*⁶² where the New South Wales Court of Appeal assumed liability in the case of a mother suffering psychiatric injury from witnessing her child born with deformities as a result of her own undetected syphilis. There was evidence that the plaintiff's own feelings of guilt and the fact that her husband also blamed her for what had happened had contributed to her condition, and it may be possible to argue in such circumstances that the plaintiff's psychiatric injury did not result from the impact of matters that formed part of the negligent acts but rather more remote consequences.

The later Queensland case of *Spence v Percy*,⁶³ like *Andrewartha*, also involved psychiatric injury arising from contact away from the accident and its immediate aftermath. The plaintiff was living in Brisbane when she received news of her daughter suffering serious injuries as a result of a motor vehicle accident in Townsville in 1983. She travelled to Townsville on the following morning and there was shocked by the sight of her daughter in a pitiable state. Her daughter remained in that state until 1986 when, shortly before their return to Brisbane, she died unexpectedly. The plaintiff developed a chronic depressive reaction which, notwithstanding the numerous stresses to which she was subjected during the three year period, was attributed solely to her daughter's death.

The trial judge concluded that 'aftermath' had no temporal connotation but only one of consequence. Thus there was a direct causal connection between the accident and the daughter's death such as to satisfy the proximity require-

⁶⁰ Id 591.

⁶¹ (1987) 44 SASR 1.

⁶² (1991) 23 NSWLR 26.

⁶³ [1991] Aust Tort Reports 69,073.

ment. Since foreseeability was not in doubt, a relevant duty of care arose. On appeal, the three judges of the Full Court of the Supreme Court of Queensland were unanimous in rejecting the plaintiff's claim but differed on the appropriate approach.

Justice Shepherdson, like the South Australian Court in *Andrewartha*, was content to merely apply Justice Deane's dicta in relation to psychiatric injury from subsequent contact and the view that causal proximity is the predominant factor in such cases. The plaintiff's injury had resulted from her observations of the effects of the accident injuries long after the aftermath period had ended.⁶⁴

Justice Williams interpreted the evidence as establishing that the plaintiff's psychiatric injury had been occasioned to a large extent by her inability to cope with the void in her life created by her daughter's death, rather than being 'shock induced' in the sense of resulting from a sudden sensory perception of a distressing phenomenon.⁶⁵ Further, in relation to whether there was a relevant relationship of proximity, his Honour believed that no attempt had been made in *Jaensch* to define 'aftermath'. While it could hardly be considered as a term of art, the very use of the word indicated that 'the proximity test will not be satisfied where there is a significant time lapse between the tortious act and the onset of the psychiatric injury'. That was the case here.⁶⁶

The third judge, de Jersey J, disagreed with Williams J in relation to whether there had been a sufficient 'shock'. His Honour held that there was no justification for disturbing the trial judge's finding of fact that the awareness of the death brought about the psychiatric injury. However, despite Deane J preferring causal proximity to physical proximity as the reason for excluding a claim for psychiatric injury from subsequent contact with the victim away from the scene of the accident and its aftermath, on Justice de Jersey's analysis temporal proximity could still carry great significance in such circumstances. His Honour concluded:

The features which, in combination, persuade me that the requisite degree of proximity is absent in this case, are that very substantial time difference; that many events intervened; that those intervening circumstances included grief and sorrow which, while obviously bearing upon the ultimate injury, were nevertheless not themselves compensable; that the ultimate injury was produced by an immediate cause (the shock) separate and distinct from (although causally related to) the original act of negligence; and that the death which led to the shock which produced the injury was outside the temporal and geographical aftermath of the accident, using the word 'aftermath' in its ordinary sense of the further events arising from the accident.

I add that I interpret *Deane J's* preference for the logical or causal proximity concept as stemming from concern that the temporal and geographical requirement, focusing on the moment of the accident and its

⁶⁴ Id 69,081.

⁶⁵ Id 69,087, applying the definition of shock adopted by Brennan J in *Jaensch v Coffey* (1984) 155 CLR 549, 567.

⁶⁶ Id 69,087.

'aftermath', may impose artificial constraints. But I have great difficulty accepting that this incident, so far distant, should nevertheless be regarded as logically or causally 'proximate' to the accident.

It is clear, as *Deane J* said, that liability will not attach 'in a case where mere psychiatric injury results from subsequent contact, away from the scene of the accident and its aftermath, with the person suffering from the effects of the accident.' The subsequent 'contact' triggering the illness here was the death of the daughter. That became relevant because it led to 'shock'. To deny recovery in the former situation, but to allow it here where the shock was greatly distant from the accident, would shroud the concept of liability for nervous shock with extraordinary artificiality.⁶⁷

The emphasis placed on temporal proximity by Williams and de Jersey JJ is perhaps surprising. Certainly it does not necessarily follow from Justice Deane's preference for causal proximity as the explanation for denying a duty of care for psychiatric injury from subsequent contact with a victim of a road accident that causal proximity is the only aspect of proximity relevant for *all* cases of psychiatric injury resulting from road accidents.⁶⁸ However, the facts in *Spence* were directly on point with the example postulated by Deane J, as was held by Shepherdson J. Reference to an absence of physical proximity was therefore unnecessary.

The reference to physical proximity may have been unobjectionable in the particular circumstances of the case: the passage of three years between the accident and the psychiatric injury might be regarded as clearly too distant, just as psychiatric injury resulting from, for example, actually being involved in an accident might be seen as clearly proximate. The 'hard cases' will fall somewhere between these extremes. As foreshadowed by Deane J, emphasis on temporal proximity in cases of psychiatric injury from subsequent contact may lead to arbitrary, value judgment based, determination of these 'hard cases'.

The concept of proximity as an overriding control on the test of reasonable foresight has also been considered by the Court of Appeal of British Columbia in two recent nervous shock cases. Although the reasoning of Deane J figures prominently in the process of formulating the relevant control factor, the final result appears to differ significantly from that which Deane J envisaged. In particular, the meaning attributed to causal proximity by the Canadian judges seems at variance with that adopted in *Jaensch v Coffey* and its progeny.

In *Beecham v Hughes*,⁶⁹ the plaintiff and his de facto wife were involved in a motor vehicle accident in December 1982, as a result of which the plaintiff's de facto wife suffered severe brain damage and was rendered quadriplegic. After the accident the plaintiff was no longer social or active, his daily visits to her either in hospital or in the extended care facility to which she was later confined becoming the most important part of his life. In 1986 he was diagnosed as suffering from a depressive reaction from his continued contact with

⁶⁷ Id 69,089.

⁶⁸ See section 'Categories of Case' infra.

⁶⁹ (1988) 52 DLR (4th) 625.

his de facto wife and the constant reminder of his loss, as opposed to intrusive thoughts or anxiety relating to the motor vehicle accident itself.

In the British Columbia Court of Appeal, Taggart JA (with whom Carrothers JA concurred) reviewed the judgments in *Jaensch v Coffey* and the English case *McLoughlin v O'Brian*.⁷⁰ Significantly, though, he omitted reference to the passage in Justice Deane's judgment where he identified proximity as embracing physical, circumstantial and causal proximity.⁷¹ Instead, Taggart JA focused upon the obiter by Deane J that in the case of psychiatric injury from subsequent contact away from the scene of the accident and its aftermath, of the two possible rationales for denying duty, namely physical proximity and causal proximity, the latter is to be preferred. Justice of Appeal Taggart then appears to have ascribed a wider significance to causal proximity than that intended by Deane J:

I find the reasoning of Deane J most persuasive. I agree with his conclusion based on his analysis of the judgment of Lord Atkin that 'causal proximity' must have a role in controlling the application of the reasonable foreseeability principle. The concept of causal proximity provides an objective basis for limiting the undue expansion of liability which would flow from the unfettered application of reasonable foreseeability.⁷²

Accordingly the plaintiff failed:

It would seem that a very considerable period of time intervened between the first accident and the onset of the reactive depression. The interval is so long that I cannot say the first accident caused the depression. Here the causal proximity concept comes into play. If foreseeability alone governed, it could be said that it is reasonably foreseeable that negligent conduct will create a risk of injury to others, including injury in the nature of a reactive depression caused by the wearing and debilitating effect on the plaintiff on seeing his wife [sic] day after day in a condition utterly unlike her condition before the accident. But as Deane J points out, Lord Atkin did not intend his description of those who may be neighbours to be a class of persons limited in number only by reasonable foreseeability of risk of injury to them. Rather his language implies there must be (to use the expression of Deane J) a causal proximity between the tortious conduct and the class of persons affected by it.⁷³

If his Honour were addressing only the case of psychiatric injury resulting from subsequent contact, then by Justice Deane's formulation it would be unobjectionable. However, his judgment is capable of being read as elevating the aspect of causal proximity to the level of sole or predominant factor to be taken into account in determining whether there is the relevant relationship of proximity in *all* cases of nervous shock. In other words, he seems to have interpreted Justice Deane's preference for causal proximity over physical proximity not only for cases of psychiatric injury from subsequent contact but for all cases of psychiatric injury. Physical proximity has *no* role to play.

⁷⁰ [1983] 1 AC 410.

⁷¹ (1984) 155 CLR 549, 584.

⁷² (1988) 52 DLR (4th) 625, 663.

⁷³ *Id* 664.

This in fact stands in contrast to Justice Deane's approach. Causal proximity is only one aspect of proximity that may be taken into account when assessing whether there is a relevant relationship of proximity. Physical proximity is another aspect which in a given case may carry some significance. It is possible to conceive of a situation where the plaintiff's psychiatric injury occurs some time after the defendant's act, and yet for there to be a close or direct relationship between the act and the psychiatric injury. Suppose, for example, a defendant industrial company carelessly disposes of its toxic waste, which only becomes evident years later when persons living in the vicinity of the disposal site are poisoned.⁷⁴ It might be suggested that it would be reasonably foreseeable that residents in the area could suffer psychiatric injury from fear for their own or their families' lives. In relation to whether there is a relevant relationship of proximity it may be argued that there is a direct relationship between the act and the injury, and that if the relationship were not established it would be by reason of a lack of physical proximity. Justice Deane's preference for causal proximity in one circumstance does not necessarily mean that physical proximity is to be taken into account in no circumstances involving psychiatric injury.

The third judge, Lambert JA, advocated a holistic approach to the question of liability in negligence:

The questions of foreseeability, proximity, causation and remoteness are interlocked. There are not four answers to four questions, but one composite answer to one composite question . . . I do not consider that there is any one key which opens the door to a simple and straightforward answer. The plaintiff does not have to be present at the time of the event which triggered his psychological injury; the psychological injury does not have to arise from direct observation of an event by the plaintiff; the plaintiff does not have to be closely related to a person in danger or injured, nor does he have to be emotionally dependent on that person; the psychological injury does not have to be linked to a physical injury to the same person or any other person; and the psychological injury does not have to arise from a specific 'shock'. There is no single question which solves the problem. There is no single limiting factor other than the composite answer, based on foreseeability, proximity, causation and remoteness, to the composite question. . . . But an inquiry into each of the five points that I have just set out will tend to focus on aspects of the foreseeability-proximity-causation-remoteness [sic] problem in a way that will lead towards a properly considered answer. The presence or absence of some or all of those linkages will help to give an answer to the composite question in any particular case.⁷⁵

Justice of Appeal Lambert would seem to support the view that Taggart JA elevated causal proximity to the role of sole or dominant factor for determining proximity in all cases of nervous shock:

By the same token I would not put the entire emphasis on 'causal proximity', to the exclusion of 'temporal proximity', 'geographical proximity', or

⁷⁴ Compare the facts in *Heighington v The Queen in Right of Ontario* (1987) 41 DLR (4th) 208.

⁷⁵ (1988) 52 DLR (4th) 625, 665-6.

'emotional proximity'. I would try to balance them all. A close but foreseeable emotional bond, as between a parent and child, may compensate, in the determination of the composite answer on liability, for a more remote causal proximity, as where the parent is not present when the child is injured.⁷⁶

Thus while Lambert JA saw causal proximity as being but one of a number of factors to be taken into account in the 'melting pot' of the composite question, the meaning he ascribed to that term is not entirely clear, as demonstrated by his own example. His Honour would view an emotional bond between parent and child as compensating in the calculations for a more remote causal proximity 'as where the parent is not present when the child is injured' — a question which might have been thought relevant to 'temporal proximity' or 'geographical proximity' rather than 'causal proximity'.

Further, the inclusion of the notion of 'emotional proximity' in the equation at all is noteworthy. If it were the case that emotional proximity were to be considered alongside (in his Honour's terms) causal, temporal and geographical proximity in determining whether the relevant relationship of proximity was established, as an overriding control on foresight, an objection already noted could be raised. Emotional proximity involves an assessment of the closeness of the relationship between the plaintiff and the victim whereas causal, temporal and geographical proximity concern the closeness of the relationship between the plaintiff and the defendant. Justice Deane acknowledged this divergence in the frame of reference by regarding the relationship between the plaintiff and the victim as being relevant to the question of foresight, not proximity. Nevertheless, in terms of the holistic approach to liability advocated by Lambert JA, the inclusion of emotional proximity is not conceptually objectionable since his Honour rolls into a single composite question all factors relevant when considering reasonable foresight and proximity, as well as causation and remoteness.

Nervous shock was next considered by the British Columbia Court of Appeal in *Rhodes v Canadian National Railway*.⁷⁷ The plaintiff's son was killed in a train disaster in Hinton, Alberta. The plaintiff was near her home in British Columbia, when she heard of the accident on the radio and immediately travelled to Hinton to discover what had happened to her son. She saw pictures of the wreckage in the newspapers and over a period of several days came to the realisation that her son must have died. She did not see her son or his body because his remains had been consumed by fire in the accident. When the plaintiff eventually reached the scene of the accident eight days had passed since the collision and the wreckage had been removed. Subsequently, the plaintiff suffered a major depression.

Essentially three approaches emerge from the judgments, two of which involve the use of proximity as a limiting control on foreseeability. Justice of Appeal Wallace (with whose analysis MacFarlane JA agreed) acknowledged that liability for nervous shock is based not on foreseeability alone but

⁷⁶ Id 666.

⁷⁷ (1991) 75 DLR (4th) 248.

foreseeability limited by proximity considerations. His Honour thought that the 'requisite proximity relationship' comprised a combination of various relational elements or factors which included what he termed 'relational proximity' (the closeness of the relationship between the claimant and the victim of the defendant's conduct), 'locational proximity' (being at the scene and observing the shocking event) and 'temporal proximity' (the relation between the time of the event and the onset of the psychiatric illness).⁷⁸ His Honour continued:

I have not included 'causal proximity' as one of the relational factors because I have difficulty in ascertaining what the term encompasses. I view the various proximity relationships to which I have referred as constituting an evidentiary base from which an inference may or may not be drawn of foreseeability and causation. The term 'causal proximity' appears to me to describe proximity of a 'causal' nature, whatever that may mean and, if present, I presume would resolve the issue of causation. I do not find the concept to be of assistance in determining either foreseeability or causation.

It has been clearly recognized that no one proximity relationship is by itself, or in a combination with others, decisive in establishing reasonable foreseeability of psychiatric injury. However, the closeness of the relationship between the claimant and the victim is generally regarded as a predominant factor. All such factors, which together constitute the requisite degree of relational proximity between the complainant and the defendant's conduct are material in considering whether the risk of direct psychiatric injury was reasonably foreseeable 'in the sense of points on a continuum on which, as distance increases, foreseeability recedes'.⁷⁹

Whilst in his Honour's opinion Taggart JA in *Beecham* applied the 'causal proximity test of Justice Deane', he had difficulty in understanding what that test entailed and thus chose not to include it in his formulation of those aspects that constituted or should be evaluated in order to determine the requisite degree of proximity. This is despite the fact that in an earlier passage his Honour stated:

It is the proximity relationship of the claimant to the defendant's conduct which provides the evidentiary base from which the court may conclude, as a question of law, that a reasonable person should foresee that his conduct, in such circumstances, could create a risk of 'direct' psychiatric injury and so give rise to a duty of care to avoid such a result.

I use 'direct' throughout these reasons in the sense of the court, as a matter of policy, differentiating between a psychiatric injury caused by the 'shock' of the defendant's tortious conduct (categorized as 'direct'), and psychiatric injury resulting from a person's subsequent reaction to the death of, or injury to, a loved one and the sorrow, anxiety and grief one experiences as a consequence (categorized as 'indirect'). The latter psychiatric injury is not compensable.⁸⁰

This latter statement bears some similarity to the causal proximity utilised

⁷⁸ Id 265.

⁷⁹ Ibid; citing J G Fleming, *Law of Torts* (5th ed, 1977) 156.

⁸⁰ Id 264.

by Deane J in determining whether there is the relevant proximity relationship: 'causal proximity in the sense of closeness or directness of the relationship between the particular act or cause of action and the injuries sustained',⁸¹ or in other words: 'considerations of causal proximity in that in the one class of case the psychiatric injury results from the impact of matters which themselves formed part of the accident and its aftermath, such as the actual occurrence of death or injury in the course of it, whereas, in the other class of case, the psychiatric injury has resulted from contact with more remote consequences such as the subsequent effect of the accident upon an injured person.'⁸² Thus, it would seem that while professing not to understand and therefore preferring not to apply the 'causal proximity test' of Deane J, Wallace JA (and presumably MacFarlane JA) nevertheless would take into account the same considerations involved in determining that aspect.

His Honour perpetuated the error, however, made by Taggart JA in *Beecham* of interpreting Deane J as holding that causal proximity is the only criterion for determining whether the requisite proximity relationship was established. It is also apparent that his Honour's understanding of the role of proximity differs from that of Deane J. Justice of Appeal Wallace referred to proximity as 'constituting an evidentiary base from which an inference may or may not be drawn of foreseeability and causation' and as 'material in considering whether the risk of direct psychiatric injury was reasonably foreseeable "in the sense of points on a continuum on which, as distance increases, foreseeability recedes."' This approach reflects the first meaning of proximity identified by Deane J rather than the broader sense of designating a separate and general limitation upon the reasonable foreseeability which was adopted in *Jaensch v Coffey* and its progeny.

Like Lambert JA in *Beecham*, Wallace JA included the relationship between the plaintiff and the victim, which he termed 'relational proximity', as being a relevant factor, indeed the 'predominate' factor to be taken into account. Again, while 'relational proximity' can be said to involve a different frame of reference from, for example, the physical proximity between the plaintiff and the defendant and would therefore be inappropriate as part of a general control on foresight, its inclusion under this approach as merely a consideration relevant to the question of reasonable foresight and causation is unobjectionable.

Justice of Appeal Taylor (with whom Wood JA concurred) was also of the view that Taggart JA in *Beecham* had applied 'the test of causal proximity as developed by Justice Deane'. His Honour attempted to reconcile that approach with the factors identified by Lambert JA in *Beecham*:

It seems to me the expression 'causal proximity' can in cases of this sort be viewed as including considerations of physical proximity to the accident itself and also the relationship between the plaintiff and the person or persons involved in the accident and whose injury or death plays a part in the psychological injury alleged.

⁸¹ (1984) 155 CLR 549, 584-5.

⁸² *Id* 606.

I believe that the concept of 'causal proximity' when so understood, establishes a practical boundary to recoverable loss or 'nervous shock'.⁸³

Thus, in an effort to conform to his misconceived view of Justice Deane's approach, Taylor JA effectively turned full circle, redefining 'causal proximity' to *include* physical proximity, when Deane J is supposed to have chosen causal proximity *in preference to* physical proximity in a particular instance. Further, although not entirely clear, Taylor JA appeared more inclined to treat proximity as serving the role of a general limitation on the test of reasonable foresight rather than merely a relevant factor for foresight, that is, his Honour seems to have adopted the approach favoured by Deane J rather than Wallace and Macfarlane JJA. If that is a correct interpretation of his Honour's judgment, then the difficulty arises in including within the scope of causal proximity consideration of the closeness of the relationship between the plaintiff and the victim, since as has been seen the proximity control is on the relationship between the plaintiff and the defendant, not the plaintiff and the victim.

Causal proximity, on the approach adopted by Deane J, involves an assessment of the closeness or directness between the defendant's act and the plaintiff's injury. It is evident from cases following *Jaensch v Coffey* and the variety of interpretations and reformulations of the concept that it is not a concept easily understood. Moreover, while it was preferred by Deane J as being a *less* arbitrary explanation for the denial of the existence of a duty of care in a particular instance, it is evident that in determining causal proximity arbitrary value judgment decisions may still result.

Categories of Case

In *Jaensch v Coffey* Deane J held that the factors to be taken into account in deciding whether there is a relevant relationship of proximity are to be determined as a matter of law rather than fact, the same factors to be taken into account for each category of case.⁸⁴ As his Honour explained in *Sutherland Shire Council v Heyman*⁸⁵:

Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case. That does not mean that there is scope for decision by reference to idiosyncratic notions of justice or morality or that it is a proper approach to treat the requirement of proximity as a question of fact to be resolved merely by reference to the relationship between a plaintiff and defendant in the particular circumstances. The requirement of a relationship of proximity serves as a touchstone and control of the *categories* of case in which the common law will adjudge that a duty of care is owed. Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction. On

⁸³ (1991) 75 DLR (4th) 248, 295.

⁸⁴ (1984) 155 CLR 549, 585.

⁸⁵ (1985) 157 CLR 424.

the other hand, the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is 'fair and reasonable' . . . or from the considerations of public policy which underlie and enlighten the existence and content of the requirement.⁸⁶

Justice Deane saw the general conception of proximity as being able to recognise new categories of case. An existing category grows as instances of its application multiply until the time comes when the cell divides, creating a new category of case with its relevant proximity factors.⁸⁷

In *Jaensch v Coffey* Deane J embarked upon a process of induction and deduction from previous nervous shock cases to determine the factors that had been identified as operative, external limitations or controls upon the test of reasonable foreseeability. The first two limitations his Honour identified were that risk of psychiatric injury rather than personal injury must be foreseen, and that, on the present state of the law, no duty of care will exist unless the reasonably foreseeable psychiatric injury was sustained as a result of the death, injury or peril of someone other than the person whose carelessness is alleged to have caused the injury. Whilst acknowledging that these two limitations might be seen as constituting some other and special controlling rule based on policy considerations, his Honour preferred to see them as 'necessary criteria of the existence of the requisite proximity of relationship in the sense that, for policy reasons, the relationship will not be adjudged as being "so" close "as" to give rise to a duty of care unless they are satisfied'.⁸⁸

Given that both of those criteria were satisfied in this case, the critical question was the identification of any further criteria included in the 'general line of demarcation which can, in the light of the cases, properly be drawn "between what is and is not a sufficient degree of proximity"'.⁸⁹ His Honour referred to three Australian decisions as enabling the identification of the boundary which lies between what will and what will not satisfy the overriding requirement of proximity, at least in cases involving mere psychiatric injury sustained as a result of carelessness in the use of a public road.⁹⁰ These cases had been confined to circumstances where the psychiatric injury resulted from the direct sensory observation of the scene of the apprehended or actual injury, which subsequent authority and commonsense extended to include the aftermath of the accident.⁹¹ As already mentioned, while his Honour acknowledged that the relationship of the plaintiff with the victim may be relevant to the question whether the risk of psychiatric injury was

⁸⁶ Id 498. See also *Burnie Port Authority v General Jones* (1994) 179 CLR 520, 543 where the majority described the practical utility of proximity as lying essentially in the understanding and identification of the categories of case where a duty of care arises.

⁸⁷ (1984) 155 CLR 549, 585, citing Lord Devlin in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 524–5.

⁸⁸ Id 604–5.

⁸⁹ Id 605.

⁹⁰ Namely *Storm v Geeves* [1965] Tas SR 252; *Benson v Lee* [1972] VR 879 and *Pratt v Pratt* [1975] VR 378.

⁹¹ (1984) 155 CLR 549, 606 citing *Benson v Lee* [1972] VR 879, 880; *Storm v Geeves* [1965] Tas SR 252; *Chadwick v British Transport Commission* [1967] 2 All ER 945.

reasonably foreseeable, he expressly rejected the view that that relationship has any bearing on whether the requirement of proximity is satisfied.⁹²

It has also been noted that his Honour saw the denial of a duty of care in the case of psychiatric injury resulting from subsequent contact away from the accident and its aftermath as resting on notions of either causal proximity or physical proximity, and that he preferred causal proximity as less arbitrary and better attuned to legal principle and public policy. That statement may lead to the suggestion that, of the three aspects of proximity identified by Deane J in *Jaensch v Coffey*, causal proximity is to be regarded as the relevant control, at least in cases of psychiatric injury resulting from road accidents.⁹³ However, there may be circumstances where causal proximity will not be in issue but physical proximity will be significant, such as where the psychiatric injury suffered by a plaintiff is as a result of being told of a road accident involving a loved one.

Justice Deane expressly declined to deal with the issue of psychiatric injury as a result of being told of an accident, since previous authorities indicated that a plaintiff could recover where the psychiatric injury was the result of the *combined effect* of what he or she had observed and what he or she had been told while at the accident or its aftermath, which accounted for the facts in *Jaensch v Coffey*.⁹⁴ However, his Honour thought that it would be difficult to discern an acceptable reason why a rule based on public policy should preclude recovery for a wife and mother so devastated at the news of the death of her husband and children that she was unable to attend at the scene while permitting recovery for psychiatric injury sustained by a wife who attends the scene of the accident or at its aftermath at hospital when her husband has suffered serious but non-fatal injuries. His Honour did not, however, address the case where a plaintiff is told of the accident but is unable to attend for reasons other than his or her devastation at the news, for example where the plaintiff is so far distant that it would be impossible to reach the scene of the accident or its aftermath at hospital in time, as occurred in *Kelley*. Thus the preference expressed by Deane J for causal proximity in one given instance should not be taken to mean that the limit of direct sensory observation of the scene of the accident or its aftermath up to the time of immediate post-accident treatment at hospital does not entail physical as well as causal aspects of proximity.

In a number of places in his judgment Deane J stressed that his comments were confined to the criteria relevant in determining the proximity relationship for psychiatric injury resulting from a road accident.⁹⁵ As much was made plain when he concluded:

What has been written above in relation to the class of case on the part of a

⁹² (1984) 155 CLR 549, 606.

⁹³ As Taggart JA in *Beecham v Hughes* (1988) 52 DLR (4th) 625 and Wallace and Taylor JJA in *Rhodes v Canadian National Railway* (1991) 75 DLR (4th) 248 seemed to have assumed.

⁹⁴ (1984) 155 CLR 549, 609, citing *Hambrook v Stokes Brothers* [1925] 1 KB 141; *Storm v Geeves* [1965] Tas SR 252; *Benson v Lee* [1972] VR 879.

⁹⁵ Id 600, 602, 605, 607.

user of a public road to avoid mere psychiatric injury by use of the road for conventional purposes may prove to be inapplicable to, or may require modification in its application to, other situations in which a more or less extensive duty of care may be recognised: cf *Mount Isa Mines Ltd v Pusey*; *Brown v Mount Barker Soldiers' Hospital Incorporated*; *Wilkinson v Downton*; and *Bunyan v Jordan*.⁹⁶

Essentially, therefore, Deane J identified two factors (foreseeability of psychiatric injury and that the psychiatric injury must not follow death or injury self-inflicted by the victim) that were common to the question of proximity in all cases of psychiatric injury and a further factor (direct sensory observation of the scene of the accident or its aftermath) relevant at least in the class of cases of psychiatric injury suffered as a consequence of a road accident.

The question that this approach raises is whether in doing so Deane J was suggesting that the number of instances of psychiatric injury had grown to the extent that the time had come for the 'cell to divide'. In other words, his Honour might be interpreted as recognising not only a broad category of cases of psychiatric injury but *subcategories* of psychiatric injury including a subcategory of psychiatric injury resulting from road accidents.

This view is supported by the cases his Honour chose to highlight in contrast. *Mount Isa Mines Ltd v Pusey*⁹⁷ concerned a psychiatric injury sustained as a result of an industrial accident, *Brown v Mount Barker Soldiers' Hospital Incorporated*⁹⁸ concerned a psychiatric injury sustained by a mother recovering in hospital after childbirth when told that her child had been burnt when the hospital nursery caught fire, *Wilkinson v Downton*⁹⁹ concerned psychiatric injury sustained as a result of a practical joke and *Bunyan v Jordan*¹⁰⁰ concerned psychiatric injury sustained as a result of hearing a gunshot after the defendant had threatened to shoot someone. As already pointed out, Deane J himself sought to explain *Mount Isa Mines Ltd v Pusey* as resting upon the circumstantial proximity of the employer-employee relationship. The existence of a duty of care owed by the hospital in *Brown* might similarly be justified as involving notions of circumstantial proximity. This aspect of proximity, however, has no relevance to, for example, psychiatric injury resulting from road accidents.

It is not open to conclude that on the facts of some cases involving psychiatric injury proximity is established by the presence of, for example, physical or causal proximity while in others it is established by the presence of circumstantial proximity. The relevant proximity factors for a category of case are determined by law and are not dependent upon the facts of individual cases or 'idiosyncratic notions of justice or morality'. A process of induction and deduction from previous cases involving psychiatric injury from road accidents will identify external limits on the test of reasonable foresight that may be explained in terms of causal or physical proximity but not circum-

⁹⁶ Id 611.

⁹⁷ (1970) 125 CLR 383.

⁹⁸ [1934] SASR 128.

⁹⁹ [1897] 2 QB 57.

¹⁰⁰ (1937) 57 CLR 1.

stantial proximity while the same process applied to cases involving, for example, psychiatric injury from industrial accidents or medical malpractice may disclose limits that include the relationship or circumstance existing between the parties.

The danger that this analysis raises is whether such cases can be rationally and logically ordered into subcategories of case that share some degree of commonality in the same way that road accidents may be said to do. It might be said that identifiable subcategories of psychiatric injury could be discerned in relation to that suffered as a result of road accidents, industrial accidents and medical malpractice. Certainly, statistics show that road and industrial (work related) accidents account for approximately 43 percent of all illnesses and injuries (both physical and psychiatric) caused by accident¹⁰¹ and claims for emotional distress resulting from medical malpractice are already a common phenomenon in the United States.¹⁰² However, beyond the subcategories that may perhaps seem obvious, the process of rational and logical subcategorisation becomes difficult. Psychiatric injury may result from a wide variety of circumstances,¹⁰³ not all of which can be neatly fitted into distinct subcategories, each of which yield by a process of induction and deduction relevant proximity factors. It would not be satisfactory to recognise a nebulous remainder class of cases not fitting into subcategories already recognised such as psychiatric injury resulting from road accidents and that resulting from industrial accidents, with new subcategories 'peeling' away from the remainder when a sufficient number of like cases can be discerned, because such an approach would not provide for a mechanism to determine the relevant proximity factors for a novel case.

This difficulty of precise subcategorisation attends even the more 'obvious' subcategories. *Brown v Mount Barker Soldiers' Hospital Incorporated*¹⁰⁴ involved negligent care by a hospital for a mother recovering after childbirth, but did not involve medical malpractice in the sense of, for example, the

¹⁰¹ Australian Bureau of Statistics, *1989-90 National Health Survey: Accidents, Australia* (1991) 4.

¹⁰² See eg, *Molien v Kaiser Foundation Hospitals* 616 P 2d 813 (1980) (California); *Reilly v United States* 547 A 2d 894 (1988) (Rhode Island); *Johnson v Ruark Obstetrics* 395 SE 2d 85 (1990) (North Carolina); but cf *Strachan v John F Kennedy Memorial Hospital* 507 A 2d 718, 727 (1986) (New Jersey); *Maloney v Conroy* 545 A 2d 1059, 1064 (1988) (Connecticut).

¹⁰³ For examples of claims for nervous shock or emotional distress arising in unusual circumstances which have been considered, see *Owens v Liverpool Corporation* [1939] 1 KB 394 (coffin knocked from hearse in collision with funeral procession); *Anderson v Smith* (1990) 101 FLR 34 (NT Sup Ct) (plaintiff's infant child drowned in unfenced backyard pool); *Rowe v Bennett* 514 A 2d 802 (1986) (Maine) (defendant sex counsellor moved in with plaintiff's lesbian lover); *Montinieri v Southern New England Telephone Company* 398 A 2d 1180 (1978) (Connecticut) (plaintiff held hostage by ex-convict when defendant telephone company released plaintiff's unlisted phone number); *Eyrich v Earl* 473 O 2d 539 (1984) (New Jersey) (child in plaintiffs' care attacked by a leopard belonging to defendant circus); *Bass v Nooney Co* 646 SW 2d 765 (1983) (Missouri) (plaintiff trapped in elevator); *Johnson v Supersave Markets Inc* 686 P 2d 209 (1984) (Montana) (plaintiff wrongly imprisoned notwithstanding prior payment of an outstanding debt to the defendant market).

¹⁰⁴ [1934] SASR 128.

negligent performance of a medical procedure.¹⁰⁵ How wide a subcategory of medical malpractice should be extended and what functions of a hospital should be caught gives rise to the risk of an idiosyncratic response to the problem, for not all cases of medical malpractice will occur in a hospital setting.

A subcategorisation that included a range of services beyond mere medical malpractice may also raise the spectre of an overlap of categories, where the case shares the attributes of two or more subcategories. Suppose, for example, that while a mother is recovering after childbirth it becomes necessary for a hospital to transport her newborn infant to another institution and that while being driven in an ambulance owned and operated by the hospital the infant sustains severe injuries in a collision caused by the ambulance driver, an employee of the hospital. Suppose further that the mother sustains psychiatric injuries from her contact with her child subsequent to the immediate post-accident treatment the child receives. Viewed from the perspective of psychiatric injuries resulting from a road accident, it might be concluded that those injuries arose from contact with the subsequent effect of the accident upon the child rather than the impact of the accident itself and that due to the absence of causal proximity no duty of care arose. On the other hand, since the mother would still be in the care of the hospital an argument proceeding by a process of induction and deduction from the subcategory of cases which includes *Brown* might indicate that a duty of care was owed.

But what is the alternative? If cases of psychiatric injury are not to be sub-categorised into cases dealing with that resulting from road accidents, industrial accident, medical negligence and so on but instead is to be treated as a single category of negligently caused psychiatric injury, the problem of the multitude of different situations in which psychiatric injury may arise is still apparent. Thus while in the cases of, for example, industrial accidents and medical malpractice circumstantial proximity may figure prominently, circumstantial proximity may be of no relevance to road accidents. But the criteria for the category of case are to be determined as a matter of law and do not depend upon the facts of individual cases. On Justice Deane's approach, therefore, some degree of subcategorisation is necessary. The difficulty is in finding a way of rationally and logically subcategorising when the instances of the class may be so disparate.

CONCLUSION

The practical utility of proximity as an overriding control on the test of reasonable foresight depends upon the level of abstraction with which it is viewed. Proximity provides an explanation and basis for comparison of the areas in which the law will recognise that a duty to exercise care arises. Further, proximity enables those policy considerations that figure in the duty equation to be removed from a 'subterranean' role mutilating reasonable

¹⁰⁵ As in, for example, *X and Y (by her tutor X) v Pal* (1991) 23 NSWLR 26.

foresight and instead be identified and examined in an overt fashion, and thereby may be seen as capable of reflecting general social understanding and consciousness.

On a different level of abstraction, however, several difficulties with proximity may be identified. The majority in the High Court recently admitted that:

It is true that the requirement of proximity was neither formulated by Lord Atkin nor propounded and developed in cases in this Court as a logical definition or complete criterion which could be directly applied as part of a syllogism of formal logic to the particular circumstances of a particular case.¹⁰⁶

A syllogism of formal logic that can be directly applied to the particular circumstances of a particular case, however, is the very kind of direction sought by those at the 'coal face' — the litigants, their legal advisers and trial judges. As matters presently stand, these parties know that in order for a duty of care to arise there must be a relevant relationship of proximity. In determining whether such a relationship exists, the relevant proximity factors for the various categories of case are identified by a process of induction and deduction from previous authorities and are a question of law not fact. Beyond those broad guidelines, though, several issues of detail arise. As the proximity factors will differ from category to category, the precise identification of the relevant category will be of importance. In the nervous shock context, the question is whether the relevant category is defined as nervous shock cases in general or whether a more specific classification is required, such as nervous shock resulting from road accidents.

The latter approach would appear to have support from the dicta of Deane J himself, but carries a number of inherent dangers. Nervous shock may arise in a wide range of circumstances, not all of which lend themselves to easy categorisation. Also, some cases may rest at the fringe of what may be considered to be a relevant subcategory, or may share the attributes of two or more subcategories. By the same token, treating nervous shock in general as the relevant category is problematic since the wide range of circumstances in which nervous shock may arise is a barrier to the process of induction and deduction that is to determine the relevant proximity factors. Such an approach may involve concluding from cases such as *Mount Isa Mines Ltd v Pusey* that circumstantial proximity is an essential aspect of the proximity relationship required for psychiatric injury resulting from a road accident. On the other hand, limiting the process of induction and deduction to cases of nervous shock arising in like circumstances may merely amount to a de facto subcategorisation of nervous shock.

Even if the relevant category can be defined, and the relevant aspects of proximity identified, difficulties may still arise. In the absence of a mechanism or formula for determining the closeness or otherwise of a relationship, physical and causal proximity in particular may lead to arbitrary, value judg-

¹⁰⁶ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 543; see also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 52.

ment conclusions. There may be no objection to a trial judge declaring that in particular circumstances the relationship between the parties is sufficiently proximate, or not sufficiently proximate, and to justify that conclusion in the name of, for example, physical proximity or lack of physical proximity. This approach is found wanting, however, in the 'hard case', the case not easily yielding an answer. Without a mechanism for resolving the competing considerations in such a case, a trial judge may be left to make an intuitive decision. Such a decision is no more sound than an intuitive decision as to whether a test of reasonable foresight simpliciter is satisfied, a difficulty proximity as an overriding control on foresight is supposed to overcome.

There may, therefore, be much force in the criticism repeatedly directed by Brennan J at the concept of proximity as an overriding control on the test of reasonable foresight. As his Honour observed in *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979*:¹⁰⁷

[The proximity approach does not define] the legal rules which apply in those classes of case where foreseeability of loss alone does not suffice to give rise to a duty of care. Yet 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. . . . The variable content [of proximity] denies its applicability as a particular proposition of law. . . . 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 but such a rule none the less confers a discretion. Damages in tort are not granted or refused in the exercise of a judicial discretion.¹⁰⁸

¹⁰⁷ (1986) 162 CLR 340.

¹⁰⁸ *Id* 367-8.