PROXIMITY AS PRINCIPLE OR CATEGORY: NERVOUS SHOCK IN AUSTRALIA AND ENGLAND

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INTRODUCTION

There are significant differences in the approaches to the duty of care which are being undertaken in England and Australia at the moment. The two jurisdictions are moving in different directions with regard to the legal conceptual basis of the duty of care. Central to the difference between them is the issue of whether a general principle should be determinative or whether a more conservative categorical approach should be taken to issues involving negligence. The differences may be encapsulated as first, an increased emphasis on general principle in Australia as opposed to an emphasis on the categories of negligence in England: it appears that the duty of care in England is being decided category by category[1] with less scope for general principle than can be seen in the approach of the High Court of Australia.

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1 *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Murphy v Brentwood District Council* [1991] 1 AC 398.

Secondly, there is a difference between the two jurisdictions in the use of proximity. This may clearly be seen, for example, in the nervous shock cases, where proximity may be used within or outside the category of negligence which is at issue.

Both jurisdictions face the same difficulties of dealing with the categories of damage: the decision about what constitutes a particular type of harm may be difficult. This in turn will affect the question of the significance of particular categories of negligence, since the categories of negligence are largely, although not always, determined by the type of damage the plaintiff has suffered. These factors may alter the dominance of category or principle in determining negligence.

Nervous shock will be used in this paper as an example of the difference in approach. The nervous shock cases are of special significance in negligence, particularly in Australia, because they have opened up the way to other categories of duty of care where problems of indirectness or traditional immunities may arise, for example, where there is pure economic loss, negligent misstatement or liability of a statutory authority. Nervous shock in this paper refers to pure or non-consequential nervous shock. I have excluded from discussion those cases where there is some physical injury to the plaintiff which has led to consequential nervous shock. Nervous shock in those cases is of less consequence to the development of the law about the duty of care than it is where the nervous shock is the only injury to the plaintiff.

Pure or non-consequential nervous shock raises particular difficulties in relation to the duty of care. The reason for this is that it is essentially indirect. The damage is suffered indirectly by the plaintiff through harm or the possibility of harm to another person, that harm having been caused by the defendant. However, although there is this indirect element in nervous shock cases, the duty of care must be owed directly to the plaintiff. That is, the plaintiff must have been in some way directly in the contemplation of the defendant. The category of nervous shock damage developed out of the category of personal injury which is a firmly established category of negligence. The fact that nervous shock, although now established, is still in the process of having its scope defined, means that it can allow us to view some "pure" duty of care issues.

I will discuss some of the issues arising out of accepting the category of nervous shock and then the English cases arising out of the Hillsborough Stadium disaster in 1990 will be considered and used to compare the English approach with the Australian cases. The aim is to illuminate the way the two jurisdictions are dealing with the duty of care. The House of Lords and the Australian High Court have retreated from the use of foreseeability as a general principle in the retreat from

Anns v Merton London BC.[2] But they have chosen to take different paths. It is argued that the Australian use of proximity as a general principle is a more authoritative approach, because it can draw on the power of general social understandings of responsibility or fault in a way in which the English categorical approach to duty of care which continues to emphasise reasonable foreseeability cannot.

II. RECOGNITION OF THE CATEGORY OF DAMAGE

How the category of damage is recognised is a vital issue for the comparison of the English and Australian approaches because if the English retain their retreat to a categorical approach, the possibility of extension of categories will be severely limited. On the other hand, if a general principle is used, the category may be a "soft" barrier rather than a "hard" barrier. The classic illustration of this is in the occupier's liability cases in Australia where the old categories now have illustrative rather than binding force.[3] The House of Lords' emphasis on a categorical approach can be seen as an example of treating the category as "hard". The consequence of using hard categories is a corresponding difficulty in expansion or contraction of the category and hence a reduced flexibility or manipulability in the law. The advantage of hard categories lies in certainty. On the other hand, where a "soft" category is being used, the definition of the category will be more flexible and expansion and contraction of the category will be easier.

It is not suggested that there is at present any wide division between Australian and English jurisdictions in relation to the recognition of the category of nervous shock damage in negligence, but it is proposed to consider some of the issues that might be raised in relation to this category of damage. At some stage these might fuel arguments used to create either hard or soft categories, or to justify expansion or contraction of the category of damage itself through the use of a general principle or a rigid insistence on categories of liability.

Liability for nervous shock of tortious origin is, of course, based on legal acceptance of "nervous shock" as a recognisable category of damage. A look at the history of the cases shows a movement from scepticism about the existence of this kind of damage and its amenability to proof (and of psychiatry in general), and hence rejection of liability to an acceptance of psychiatric illness and also of the fact that it may be proved. In *Victorian Railway Commissioners v Coultas*[4] the railway gatekeeper had invited the plaintiffs to cross a level crossing as the train

2 Per Mason J in *Sutherland Shire Council v Heyman* [1985] 157 CLR 424.

3 *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479.

4 *Victorian Railway Commissioners v Coultas* (1888) 13 AC 222 (PC).

was about to appear and a collision was narrowly avoided. Mrs Coultas suffered from an illness as a consequence of her fright. The medical evidence agreed that she suffered from "nervous shock".[5] The Privy Council held that she could not recover because this would be too much of an extension of liability:

> ...[I]n every case where an accident caused by negligence had given a person a serious nervous shock there might be a claim for damages on account of mental injury. The difficulty which often now exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.[6]

Coultas was not followed in *Dulieu v White*,[7] in which a woman suffered nervous shock as a consequence of the defendant's driving a pair horse van into the building where she was. As a result she gave premature birth to a child who was "born an idiot".[8] The court held that she was entitled to recover only if there was a consequential accompanying physical injury. The physical injury operated as evidence of the nervous shock.

The present greater acceptance of psychiatric illness in the cases is not merely an alteration in the level of legal scepticism. It coincides with the development of psychiatry from an infant discipline in the early twentieth century to a developed branch of medical practice. It was easy to be sceptical about early psychiatry Diagnoses appeared to be vague, often mystical, and extremely subjective, having little validity from psychiatrist to psychiatrist. The last twenty years, however, have seen an increasing sophistication in classification of psychiatric illnesses and an accompanying increase in perceived validity of the classifications. For instance, the American Psychiatric Association publishes the Diagnostic and Statistical Manual of Mental Disorders, now in its third edition.[9] This is also extremely influential in Australia. What it means is that psychiatric disorders now have a much greater consistency of classification and hence validity, and are therefore much more likely to be viewed positively by a court. This is not to suggest that courts all know about such a manual, but that in an environment where such categorisations exist, there will be a generally greater acceptance of classifications which will trickle through general social acceptance to the courts.

The term used to describe "nervous shock" damage is "any recognisable psychiatric illness".[10] This was approved by Brennan J , and implicitly by Deane J in *Jaensch v Coffey*.[11] The law now accepts psychiatric illness as a type of

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5 *Ibid* at 224.
6 *Ibid* at 225-6.
7 [1901] 2 KB 669.
8 *Ibid* at 670.
9 DSM-III-R, American Psychiatric Association, Washington (1987).
10 Per Lord Denning MR in *Hinz v Berry* [1970] 2 QB 40.
11 *Jaensch v Coffey* (1984) 155 CLR 549 at 559 per Brennan J.

damage for which there may be liability. Such psychiatric illness must be distinguishable from "mere grief or sorrow"[12] so raising another problem. The implicit assumption in this distinction is that grief or sorrow is normal and that psychiatric illness arising out of that is abnormal (because it is defined as psychiatric) and is distinguished by its abnormality. There is some tension in this assumption because the tests of reasonable foreseeability and proximity imply that if particular relationships exist normal consequences will follow. The tests for duty of care in nervous shock cases based on types of relationship assume that these normal relationships (parent/child, spouse) produce a greater likelihood of grief (therefore normal) which is likely[13] to destroy a person's well-being altogether (therefore abnormal). The prevalence of mothers as plaintiffs who recover for nervous shock bears out this argument. Today the paradigm nervous shock case is the one where a mother sees a violent accident to her child and this causes her psychiatric harm because of the shock involved. An example of such a case is *Hambrook v Stokes Bros.*[14] In that case a mother saw a truck hurtle around the corner where she knew her three children were. She was then told that one of the children had been hit by the truck. She suffered nervous shock as a result. The court accepted that had she not died of this shock, she would have had a cause of action. This case was one of the earliest to allow the relationship of the mother to her child to found a case rather than only the mother's fear for herself. The relationship of mother to child is now the paradigm. If this is so, it means, for example, that if a child is harmed, the normal "of normal fortitude"[15] mother will suffer a psychiatric response, which is therefore not abnormal at all. Reasonable foreseeability (the level of risk being merely "not fanciful or far-fetched")[16] of nervous shock would therefore exist in every case where a child is horribly injured. Note that in New South Wales motor vehicle accidents and unintentional injury account for over one-third of all deaths of children between 5 and 14 years.[17] Such deaths are therefore not exceptional and each one is a potential nervous shock case.

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12 *Ibid* at 587.

13 Although what is required today is the reasonable foreseeability of the possibility of an "abnormal" response to the death of a child rather than the likelihood of that response as in *Chester v Waverley Council* (1939) 62 CLR 1, I think it remains true that the tests do presume a greater likelihood of that response from a normal parent. That is, of course, quite reasonable, because of the strength of those particular emotional ties. It does, however, make it very problematic to distinguish that reaction from "mere grief or sorrow".

14 [1925] 1 KB 141.

15 Per Deane J in *Jaensch v Coffey* note 11 *supra* at 610.

16 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44 per Mason J.

17 The total death rate for this age group is: male 27.1 per 100,000 population; female 17.1 per 100,000 population. I have used the 5-14 age group to eliminate the statistics for the younger group which has a far higher mortality rate overall (males 230.3 per 100,000 and females 181.8 per 100,000). Source: NSW Public Health Bulletin Supplement, Trends in Major Causes of Death, NSW, 1971-1987 (March 1992).

The other requirement for legally recognisable nervous shock is that there be a "shock": that is, what is required is suddenness or immediacy; "the sudden sensory perception" is Justice Brennan's phrase.[18] Thus a mother may be equally traumatised by having nursed a child who has had a long battle with AIDS caused by a blood transfusion, but this would not amount to a sudden sensory perception and she could not recover for nervous shock.[19] This is a major limiting factor in recognition of the category of harm, and is related to some aspects of proximity in nervous shock cases, notably the connection between the time of the accident and the type of sensory perception required.

The category of nervous shock has potential for an enormous number of cases. The judicial desire not to be seen to be wantonly expanding any category of damage should not be underestimated. Each category may be seen as a potential floodgate. This puts enormous pressure on the courts to have a limiting factor of some kind. *Anns v Merton London Borough Council*[20] offered a way to do this by having a broad general principle, and then a limiting process using policy factors. But this has been rejected by both the High Court[21] and the House of Lords.

III. PROXIMITY WITHIN THE CATEGORY OF NERVOUS SHOCK: *JAENSCH V COFFEY* IN AUSTRALIA, *ALCOCK* IN ENGLAND

The two major cases I have chosen to discuss are *Jaensch v Coffey*,[22] a decision of the Australian High Court, and *Alcock v Chief Constable of South Yorkshire*[23] as it was decided by the House of Lords in England.

In Australia the ascendance of Justice Deane's generalised approach to the duty of care with proximity as the major factor may be dated from the decision in the nervous shock case of *Jaensch v Coffey*, which has been a seminal judgment in Australian tort law. In that case Deane J considered and developed the proximity requirement which has been subsequently accepted by some members of the High

18 *Jaensch v Coffey* note 11 *supra* at 567.

19 For example in *Spence v Percy* (1991) Aust Torts Rep 81-116, the Supreme Court of Queensland Full Court held that a mother who had nursed her daughter who died "inevitably" three years after the accident caused her injuries was unable to recover for nervous shock. The High Court refused special leave to appeal.

20 [1978] AC 728 per Lord Wilberforce.

21 *Sutherland Shire Council v Heyman* note 2 *supra*.

22 Note 11 *supra*.

23 [1992] 1 AC 312 hereafter Alcock.

Court, notably Mason J and Gaudron J, and rejected as the 'touchstone' of the duty of care by Brennan J.[24]

In England the recent nervous shock case arising out of the Hillsborough stadium disaster, *Alcock v Chief Constable of South Yorkshire (sub nom Jones v Wright)*, highlights some of the differences between the English and Australian approaches to the duty of care. In that case the Court of Appeal and the House of Lords approached the situation by means of a strict categorical approach, quite at odds with the general tenor of the High Court of Australia's approach to the duty of care.

A. *JAENSCH V COFFEY*[25]

Mr Coffey was seriously injured in a road accident when his motorcycle was hit by a car driven by Mr Jaensch. Mrs Coffey was brought to the hospital and saw her husband in casualty, still in severe pain. For several weeks she did not know if he would survive. As a result of this she suffered a psychiatric condition which in turn caused gynaecological problems necessitating a hysterectomy. She claimed damages for nervous shock.

The High Court unanimously dismissed Mr Jaensch's appeal against the judgment which awarded damages to Mrs Coffey. The judgments of greatest interest here are those of Deane and Brennan JJ. Chief Justice Gibbs generally followed the reasoning of Deane J and Dawson J agreed that the appeal should be dismissed without deciding between the reasoning of Deane J and Brennan J. The judgment of Murphy J does not affect the development of the tests relating to duty since he assumed negligence and saw no policy reasons to exclude Mrs Coffey from obtaining damages.

(i) Justice Deane's approach

Justice Deane's reasoning is significant because it includes his early statement on proximity as a major indicator of a duty of care. His view of proximity, while it has since been refined from the statement which he made of it in *Jaensch v Coffey*, has since been substantially followed by the members of the High Court.[26]

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24 For example, inter alia, *Sutherland Shire Council v Heyman* note 2 *supra* per Mason at 467 (reliance), rejected by Brennan J at 481; *Gala v Preston* (1991) 172 CLR 243 per Mason CJ, Deane, Gaudron and McHugh JJ at 253, rejected by Brennan J at 261 and Dawson J at 276.

25 (1984) 155 CLR 549.

26 See inter alia *Sutherland Shire Council v Heyman* note 2 *supra* per Mason J at 467 (reliance) and per Deane J at 497; *San Sebastian Pty Ltd v Minister Administering the Environment Planning and Assessment Act* 1979 (1986) 162 CLR 340 per Gibbs CJ, Mason, Wilson and Dawson JJ at 355; *Gala v Preston* (1991) 172 CLR 243 per Mason CJ, Deane, Gaudron and McHugh JJ at 253 with the exception of Brennan J at 261, and Dawson J at 276; *Hawkins v Clayton* (1988) 164 CLR 539 per Mason CJ and Wilson at 545, per Deane J at

Justice Deane accepted the distinction between mere grief or sorrow and nervous shock. He considered the previous authority, including *Chester v Waverley Corporation*[27] in Australia and *McLoughlin v O'Brian*[28] in England, and argued that the nervous shock cases had generally been dealt with by the use of reasonable foreseeability and some external policy constraints. He then went on to re-examine Lord Atkin's "neighbour principle" and argued that the test used to establish a duty of care should include the elements of reasonable foreseeability and "proximity" and then policy limitations. It is significant that he argued that reasonable foreseeability has been diluted as an adequate test, referring to Justice Mason's words in *Wyong Shire Council v Shirt*:[29]

> 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.[30]

The dilution of the reasonable foreseeability test in regard to risk, Deane J argues, also removes "the requirement of 'directness' as an independent overriding control of recoverable damages for foreseeable injury".[31] He goes on to conclude that reasonable foreseeability needs some other restraint, and that it alone cannot be "the sole determinant of the existence of a duty of care".[32]

Previous nervous shock cases had given a much stronger role to reasonable foreseeability. For example, in *Mt Isa Mines Ltd v Pusey*[33] the whole High Court (Barwick CJ, McTiernan, Menzies, Walsh, Windeyer JJ) gave their judgments in terms only of reasonable foreseeability. In *McLoughlin v O'Brian*[34] in the House of Lords, reasonable foreseeability was the main test to be used. It might be affected by some issues of public policy.[35] Lord Wilberforce referred to proximity, but his meaning of proximity was different from that in Justice Deane's formulation. For Lord Wilberforce, proximity was an aspect of policy:

> there remains ... just because "shock" in its nature is capable of affecting so wide a range of people [ie reasonably foreseeably], a real need for the law to place some

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576, per Gaudron J at 593 (where she discusses proximity in general terms), at 596 (where she discusses reliance), and at 597 (where she extends proximity to include reasonable expectation).

27 (1939) 62 CLR 1.

28 *McLoughlin v O'Brian* [1983] 1 AC 410.

29 Note 25 *supra* at 580-1.

30 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44.

31 Note 25 *supra* at 581.

32 *Id.*

33 (1970) 125 CLR 383 per Barwick CJ at 389, per Menzies at 392, per Windeyer J at 401 and per Walsh J at 415.

34 Note 28 *supra* per Lord Wilberforce at 420; per Lord Edmund Davies at 423, Lord Bridge at 443.

35 Lord Scarman dissented from this point, holding that policy matters were non-justiciable. Lord Bridge at 443 also held that foreseeability alone was relevant here.

> limitation on the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused.[36]

So in the case of Mrs McLoughlin who saw the aftermath of the accident involving her husband and children, but not the accident itself, her geographic or temporal proximity to the accident was held to be sufficient as a matter of policy, in Lord Wilberforce's formulation, to allow her to recover.

Justice Deane's treatment of proximity worked in this way: He made proximity an antecedent part of the duty question, reasonable foreseeability then being controlled by that antecedent part. The control was not over the individual situation in the case in issue, but over the category of cases to which the one in issue might belong. Once this was done, other policy matters (for example floodgates arguments and exclusionary rules like barristers' immunity etc) could operate. According to Deane J proximity operates as a "touchstone for determining the existence and content of any common law duty of care to avoid reasonably foreseeable injury of the type sustained"[37] and it designates "a separate and general limitation upon the test of reasonable foreseeability in the form of relationships which must exist between the plaintiff and defendant before a relevant duty will arise".[38] He distinguished this from a use of the term proximity to mean "no more than a consideration relevant to whether there was a reasonably foreseeable risk of injury or a breach of any duty of care".[39] This, it is submitted, is exactly what the House of Lords is using "proximity" to mean. Justice Deane's formulation of proximity could include some judgments of policy.[40] It is "an anterior general requirement which must be satisfied before any duty of care to avoid reasonably foreseeable injury will arise".[41] That is, Deane J was arguing for a use of proximity which operated not only inside a category of negligence, but also *outside* whichever category of negligence was being considered.

In the result Deane J held that Mrs Coffey was not prevented from recovering compensation by the fact that she was not present at the scene of the accident. He expanded the 'aftermath' of the accident to include the scene at the hospital, and decided that the fact that she did not suffer psychiatric injury solely as a result of what she saw with her unaided senses, but also by what she was told did not prevent her recovery: that is, the proximity test did not preclude recovery but could be used more broadly than it had been used in previous cases to mean that she was

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36 Note 28 *supra* at 422.
37 Note 25 *supra* at 583.
38 *Ibid* at 584.
39 *Ibid* at 584.
40 *Ibid* at 583.
41 *Ibid* at 587.

in the type of relationship to the defendant and the accident that meant that she should recover damages.

In *Jaensch v Coffey*, Deane J explained his use of proximity by saying that proximity could be physical, circumstantial or causal.[42] Physical proximity obviously means a physical closeness between plaintiff and defendant (and it is clearly relevant to the nervous shock cases; and when there has been a motor vehicle accident or other physical impact between plaintiff and defendant, physical proximity is so clearly satisfied that it need not be discussed. Circumstantial proximity includes for example, the relationship between employer and employee; and causal proximity concerns the directness of the relationship between the wrong and the damage suffered.

The formulation of "proximity" in *Jaensch v Coffey* was Justice Deane's first statement of it. It is important to note that it has since been refined and increased in its subtlety. It is argued that the triumvirate of physical, circumstantial and causal proximity should not be seen as definitive of the content of proximity. Proximity is a multilayered concept which needs to be seen in the context of the attribution of social responsibility. Physical proximity is not definitive of the social responsibility in an accident, but it may lead us to an understanding of it. Circumstantial and causal proximity will operate in the same way. Physical, causal and circumstantial proximity are not an exhaustive list of the types of proximity which might exist. Proximity needs to be understood in terms of relationships between people, places and things : that is what Justice Deane's statement of physical, causal and circumstantial proximity was meant to indicate.

(ii) Justice Brennan's approach

Justice Brennan agreed in the result, but took a different approach to the question of the existence of a duty of care, rejecting Justice Deane's formulation of the proximity principle as a major component of the test.

In his opinion, reasonable foreseeability and causation are sufficient to decide any case of nervous shock. He discussed the importance of the aetiology of the nervous shock, ie that it must be caused by a shock: "The sudden sensory perception - that is, by seeing, hearing or touching...".[43] Mere knowledge is not enough. However, in his view this does not mean that the plaintiff cannot rely on things other than the accident itself. In Justice Brennan's view reasonable foreseeability is an objective standard which is sufficient both to determine the existence of a duty and to prevent a floodgates problem. It requires a normal standard of susceptibility. He deals with the questions of separation in time, space

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42 *Ibid* at 584 ff.

43 *Ibid* at 567.

and personal relationship from the accident also by the use of reasonable foreseeability. This may sound as if he is using a universal principle, but he specifically rejected the notion of using Lord Atkin's neighbour principle as a universal, preferring to see the development of negligence law as the development of categories of negligence out of previous categories, and "What will suffice to establish a duty of care in one category of negligence is not necessarily enough in another".[44]

While this is clearly true - we all know that negligence will be differently treated in different categories of situation - it does not necessarily mean that there is no overriding conceptual basis of negligence. Indeed, the use of reasonable foreseeability and causation alone, as tests, suggests that the reverse is the case.[45]

The level of reasonable foreseeability that is required for negligence is only that the risk be "not fanciful or far-fetched"[46] On the analysis below in the section on categorising the damage it appears that nervous shock to a mother would always be foreseeable and therefore always meet this test. Clearly the courts are not going to accept such a wide rule and will seek a limiting factor.

To foresee nervous shock requires an extended chain of foreseeable events. Where personal injury is the original traumatic event it is most frequently physical injury. The defendant is required to foresee harm to the plaintiff who has been injured. To foresee nervous shock may be easy given a prior accident, but first, although this is frequently elided in argument, the physical injury itself must be foreseeable. Where the injury is nervous, shock foreseeability is required of, first, harm causing physical damage and secondly, of a causal link with some other person resulting in their suffering psychiatric illness because of the original injury. While the High Court has said that foreseeability of a specific chain is not necessary[47] it remains true to say that because of the "secondary nature"[48] of nervous shock, there is a tension between foreseeability of nervous shock and the fact that the plaintiff is a secondary victim. The necessity to foresee nervous shock is highly specific because of the definition of nervous shock which has been

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44 *Ibid* at 575.

45 Brennan J consistently refuses to be seen as using a general principle, and emphasises that he is coming to each progression by analogy and increment. J Keeler says that his approach is very cautious: "the view is so cautious that it is hard to see how the decisions in *Donoghue v Stevenson* and *Hedley Byrne v Heller* could have been made compatibly with it" "The proximity of past and future: Australian and British approaches to analysing the duty of care" (1989) 12 *Adelaide Law Review* 93 at 100. If this is the case it is also hard to be positive about it. But it seems to me that Justice Brennan 's approach is more than a mere "incremental creep" and that it is informed by a "larger" use of reasonable foreseeability as a general principle, which at times is affected by matters of public policy, eg in *Gala v Preston* (1991) 172 CLR 243 at 262ff. The other majority judgments in *Gala v Preston* will be discussed later.

46 *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

47 *Chapman v Hearse* (1961) 106 CLR 112.

48 See, for example, Lord Oliver's discussion in *Alcock* note 23 *supra* at 411.

discussed above. It is specific in the sense that although it is clearly merely a variant of personal injury it has been distinguished from personal injury, and it requires the shock element to found liability.

The English cases refer frequently and approvingly to Justice Brennan's position that change must proceed "incrementally and by analogy".49 Their approach is generally to try to avoid a single-principle approach to negligence, and to proceed category by category. Confusingly, however, in some categories they frequently refer to proximity. However, the English view of proximity is not the same as the Australian one.

B. *ALCOCK V CHIEF CONSTABLE OF SOUTH YORKSHIRE*[50]

The issue to be decided in this case was the liability of the police for nervous shock suffered by sixteen people who had lost or feared the loss of loved ones in the Hillsborough Stadium disaster in 1990. The disaster was caused when a crush developed in two pens of the stadium from which a crowd was watching a soccer game. This happened because the police allowed more people into areas which were already full. Ninety-five people were killed and some 400 were injured. The Chief Constable admitted liability for those people injured or killed but argued that the police owed no duty of care to the plaintiffs who were claiming damages for nervous shock. Some of those who suffered nervous shock learned of the disaster through live television coverage or radio coverage, others were present at the game. There were television broadcasting guidelines which prevented the broadcasting of the suffering of recognisable individuals and these had been adhered to.

In the High Court eight of the plaintiffs succeeded when Hidden J accepted that seeing the disaster live on television could amount to sufficient proximity to the accident. In the Court of Appeal and the House of Lords all the plaintiffs lost. The Court of Appeal and the House of Lords rejected Justice Hidden's view that live television coverage could amount to sufficient proximity to the accident to found a duty of care. It was accepted by the House of Lords that the test for a duty of care is the reasonable foreseeability of nervous shock. Within this test, proximity was a vital element.

In the House of Lords, Lord Keith held that reasonable foreseeability of nervous shock to the plaintiff is the determinant of which kind of relationship will satisfy the requirements. If it is a foreseeable harm, then the proximity of the plaintiff to the accident in time and space may be considered. He took Lord Wilberforce's approach in *McLoughlin v O'Brian* that the shock must come "through sight or

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49 For example in *Caparo v Dickman* [1990] 2 AC 605 per Lord Bridge at 618, Lord Roskill at 628 and Lord Oliver at 651.

50 Note 23 *supra*.

hearing of the event or its immediate aftermath ... [and] the law should not compensate shock brought about by communication with a third party".[51] He therefore held that the television viewing was not sufficient for the three people for whom he considered nervous shock foreseeable, and he refused to extend the category.

Lord Ackner refused to go beyond the position in *McLoughlin v O'Brian*. The relationship between plaintiff and victim (as a member of a class of people) could be dealt with by reasonable foreseeability. No-one in this case who met the relationship requirements had been in the immediate aftermath, and television was not sufficiently similar to "sight or hearing of the event or its immediate aftermath".[52]

Lord Oliver regarded the element of proximity as "critical"[53] referring to Lord Bridge's use of proximity in *Caparo v Dickman*.[54] He said there must be a:

> ... degree of physical propinquity between the plaintiff and the event caused by the defendant's breach of duty to the primary victim.... The necessary element of proximity between plaintiff and defendant is furnished, at least in part, by both physical and temporal propinquity and also by the sudden and direct visual impression on the plaintiff's mind of actually witnessing the event or its immediate aftermath.[55]

What was required was immediacy and direct perception. So the plaintiffs who were present at the ground did not recover because their perception of the danger was gradual and those who saw it on television did not recover because they did not directly perceive it. (That the television did not show any suffering of recognisable individuals because the broadcasting code of ethics did not allow it was also emphasised by Lord Keith and Lord Ackner). Lord Oliver regarded the question of the relationship between plaintiff and victim and the consequent question of liability for the plaintiff's injury in the same way that Brennan J did in *Jaensch v Coffey*. That is, it can be dealt with by reasonable foreseeability. However, Lord Oliver clearly did not contemplate an extension of the proximity of the relationship between them. "I equally believe that further pragmatic extensions of the accepted concepts of what constitutes proximity must be approached with the greatest caution".[56] He further added a policy limitation to this, so the duty of care tests for nervous shock cases in Lord Oliver's view include reasonable foreseeability (including proximity of relationship, space and time), and policy.

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51 *Ibid* at 398.
52 *Ibid* at 403.
53 *Ibid* at 415.
54 Note 54 *supra*.
55 Note 23 *supra* at 416.
56 *Id.*

Lord Jauncey also referred to the judgment of Deane J in *Jaensch v Coffey* when he mentioned proximity as a control on reasonable foreseeability and added the means by which the shock is caused as another control. He regarded the proximity of relationship as using the logic of reasonable foreseeability (that is, parents and spouses are foreseeable as likely to suffer such harm). With respect, however, Lord Jauncey was referring wrongly to Justice Deane's view of proximity when he referred to it as a control on reasonable foreseeability. It is clear from Lord Jauncey's judgment that he was discussing proximity within the category of nervous shock, while Justice Deane's reference to proximity as a control on foreseeability is, it is submitted, a reference to proximity outside and operating on the category. If all other requirements are met, Lord Jauncey continued, the question of the type of relationship will be dealt with by asking if it is "so close a relationship of love and affection to the victim as might reasonably be expected in the case of spouses or parents and children".[57] He also held that no-one met all the requirements of relationship and immediacy of sight and hearing.

The English view of proximity may be called the narrow view or "proximity by analogy".[58] It consists of the use of an internal proximity requirement within some categories of the duty of care. What is required to found a duty of care in nervous shock cases in England is reasonable foreseeability of nervous shock. This is shown by proximity which includes closeness to the scene, closeness in relationship between victim and plaintiff, and closeness (that is, directness) of perception of the traumatic event. Thus the proximity is used as an indicator of reasonable foreseeability within the category of nervous shock and the category itself has the major role in determining what proximity means there.

This is different from the Australian view of proximity. It looks very similar because the categories of discussion of proximity have very similar names; however the Australian High Court has gone on to use proximity in a quite different way. Theirs is a broader view of proximity because it is antecedent to the duty of care, operating on the categories rather than within them. Proximity is used within the category of negligence in both the English and the Australian approaches.

III. PROXIMITY AS PRINCIPLE

This article aims to look at the use of proximity outside the categories as well as inside them. It is argued that Justice Deane's claim that proximity is

57 *Ibid* at 423.

58 R Martin "Categories of Negligence and Duties of Care: Caparo in the House of Lords" (1990) 53 *Modern Law Review* 824 at 827.

"antecedent"[59] to the categories indicates that the Australian use of proximity is also "outside" the category and that this distinguishes it from the English use of proximity.

At times this is indeed a distinction without a difference, and the outcome is no different; but when proximity is allowed to be used as a tool on the categories, the distinction becomes significant. So for example, where reliance is used as a major part of the content of proximity it may open up a new category or alter previous perceptions of the likely outcome of a case. That is, where the tortfeasor must have "known or ought to have known of that reliance" as in *Sutherland Shire Council v Heyman*[60] proximity could then operate on the category of negligence to open it up. The Australian approach is to operate on the category rather than only inside it.[61]

The problematic category in question in *Heyman's* case was that of an omission causing pure economic loss. The wrong the council was responsible for could be characterised as an omission to properly inspect the foundations of the house the plaintiff later purchased. If the wrong was so characterised that raised all the difficulties posited by the law's traditional reluctance to impose duties, most notably seen in the "no duty to rescue" cases. This was compounded by the difficulties of dealing with pure economic loss, which had traditionally been regarded as in the domain of contract. *Hedley, Byrne v Heller*[62] opened the door for actions for pure economic loss caused by a negligent misstatement, but these categories are relatively closed. In *Heyman's* case, the use of reliance as the major content of the proximity element of the duty of care allowed the court to impose a duty on the council without having to rely on the *Anns* formula which was decisively rejected. Reasonable foreseeability appeared to be inadequate to deal with the problem of omissions causing pure economic loss. Proximity (in the form of reliance) may not have dealt with this problem perfectly, but the use of reliance indicated the kind of language of social responsibility which the High Court has gone on to use.[63]

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59 Note 25 *supra* at 587.

60 Note 2 *supra* at 497.

61 This is a broad brush approach by the High Court, though not lacking in a rigour of its own. It is possible that it is part of a larger High Court agenda. The High Court has been developing the equitable jurisdiction through the use of estoppel and unconscionability: See CJ Rossiter and M Stone "The Chancellor's New Shoe" (1988) 11 *UNSWLJ* 11 at 25-7. The development of proximity by the High Court may be in parallel with the High Court's development of these equitable doctrines. There are echoes of unconscionability in the notion of reliance as used in for example Re San Sebastian. Another parallel of significance may be the genesis of the new equity from Justice Deane's work: in the article referred to above (at 25-6) Rossiter and Stone refer to him as recognising "the residual category of unconscionability" in *Hospital Products Ltd v US Surgical Corporation.*

62 [1964] AC 465.

63 Extended by Gaudron J in *Hawkins v Clayton* (1988) 164 CLR 539 to reasonable expectation at 597.

I have said that the High Court of Australia is actually using proximity outside the category as well within the category. It is using it in combination with reasonable foreseeability (but antecedent to it) as a general guiding principle which operates to define the scope of negligence.

(i) The value of "proximity"

It has been argued against the Australian proximity requirement that:

> The sole utility of the proximity concept is 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...[64]

While there is no doubt that the courts are interested in the appearance of value-free adjudication, the proximity principle is of greater subtlety than the above comment suggests. In the nervous shock situation, for example, proximity as it is used by both the House of Lords and the High Court of Australia allows some flexibility without violating the logic of community understandings of personal relationships.[65] Clearly the proximity principle is capable of recognising the closeness of emotional ties between the consistent carer for a child and the child. However, the English courts show a great reluctance to extend the already recognised categories of relationship, although in *Alcock's* case Lord Keith,[66] Lord Ackner[67] and Lord Oliver[68] recognised the possibility of opening the proximity requirement up to other relationships of love and affection. The reason for this reluctance is that the English courts are restricting themselves to a strict categorical approach, using proximity within the category, while the High Court of Australia has freed itself from this position and is using proximity as a tool on the category, that is, proximity is an outside operator on the category. Expansion can, of course, come from inside or outside a category.

In *Precedent and Law*[69] Julius Stone discussed judges' confusion between rules and principles in their treatment of reasonable foreseeability. He argued that the

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64 JA Smillie "The Foundation of the Duty of Care in Negligence" (1989) 15 *Monash University Law Review* 302 at 315.

65 The logic of community relationships is used here as a loose term to cover the well-understood relationships that people in the general community hold themselves in . Logic here is shorthand for the usual expectations of relationships which people in the community might hold. There is some psychological backup for the view that there can be general community understandings of moral judgments, although there are clearly complex factors at work and it is impossible to posit a monolithic "community" whose every mood and thought can be tested. See, for example, M Ross and D Ditecco "An Attributional Analysis of Moral Judgments" (1975) 31 *Journal of Social Issues* 91 at 92.

66 Note 23 *supra* at 397.

67 *Ibid* at 403.

68 *Ibid* at 403.

69 J Stone *Precedent and Law* 1985

majority judges in *Home Office v Dorset Yacht Co Ltd*[70] confused principle and rule because they did not see the "principle" of reasonable foreseeability as the end of the decision process - they then made it subject to policy:[71] "While they accepted Lord Atkin's principle as applicable, they held its applicability to be not decisive but subject to a separate and later policy determination as to whether a duty should arise". This criticism could also apply to the *Anns* case[72] from which both the House of Lords and the Australian High Court have retreated.

He went on[73] to say that in *McLoughlin v O'Brian* Lord Bridge did not make this mistake because he did not separate the policy elements from the reasonable foreseeability principle on which he based his decision. Lord Scarman's assertion of the non-justiciability of policy is clearly in error in Stone's view. It does not accord with reality where policy choices must always be made by judges before they make their initial decisions about which legal constructs to use to decide cases. Stone goes on to point out that Lord Wilberforce's decision based on reasonable foreseeability, but with a later, separate attention to policy matters, also falls into the same trap, in making "(t)he implication that policy considerations are illicit in relation to determining whether damage was reasonably foreseeable, but also both licit and necessary after this criterion has been satisfied".[74]

In his discussion of *Jaensch v Coffey*, Stone characterises Justice Deane's formulation as a "further new-fangled bifurcation [which] would submerge this whole area of law in an ocean of raging chaos".[75] Stone characterises it in this way because he thinks Justice Deane's understanding of "proximity" is wrong. Stone is correct that Lord Atkin's formulation clearly used proximity as an explanation of the neighbour principle rather than as another step, but as Deane J and the majority of the High Court have used this concept its flexibility and subtlety have developed so that this "wrong premise" from which Deane J started is no longer important.[76] David Cole has applied Harold Bloom's literary theory to legal reasoning. He suggests that "there is a fundamental tension in the law between legitimacy and greatness"[77] and that those who are seen as great are those who break radically from tradition by acts of "misreading".[78] Justice Deane's

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70 [1970] AC 1004.

71 Note 69 *supra* at 257.

72 [1978] AC 728.

73 Note 69 *supra*

74 *Ibid* at 261.

75 *Ibid* at 264-5.

76 For Stone the issues of policy were covered by the "reasonableness" part of reasonable foreseeability. In his view, "reasonableness" did not cover risk level; "foreseeability" did that: note 69 *supra* at 145.

77 David Cole "Agon at Agora: Creative Misreadings in the First Amendment Tradition" (1986) 95 *Yale Law Journal* 857 at 859.

78 *Id.*

treatment of the neighbour principle is such a "creative misreading". The misreading of the text has allowed a new movement away from either a narrow categorical approach or a reliance on reasonable foreseeability alone as a general principle. It has had the effect of allowing "proximity" to operate as one of Stone's principles; it can include policy issues within itself, and so it has reduced the need to operate incrementally within the categories by which the English still feel bound.

The argument against the use of a general principle is said by McHugh J to be that each is a category of indeterminate reference.[79] All principles have some flexibility in them and there can be many arguments about the problems of uncertainty arising from such flexibility. My argument is that proximity is not so much a category of indeterminate reference as a category of broad reference - and that broad reference is to be seen psycholinguistically[80] as a reference to social understandings of culpability. It is not its weakness that it operates by reference to a moral view of responsibility, but in fact its strength. Proximity can take the connotations of relationship of persons, places and things including consideration of policy and weave them in with things like considerations of exceptional circumstances.[81] It can then operate to guide the use of reasonable foreseeability of risk in a way that is consistent with judicial understandings of social responsibility for harm. In my view this is what being a "touchstone" means. In *Donoghue v Stevenson*,[82] reasonable foreseeability (the neighbour principle) alone did this job. Reasonable foreseeability alone can no longer do this. If the judicial understandings are congruent with community understandings of attribution of responsibility, then proximity will have also legitimated the finding of liability. This legitimation is not the sole function of proximity, but it is one of its roles and as such it is valuable.

Nervous shock cases are significant in the development of the scope of negligence law in Australia because the relational element which informs the notion of proximity is of central importance to the action. The relationship is the essence and source of the harm. The treatment of the duty of care in these cases thus paves the way for the development of a way of treating situations where some relational element can be seen to be the source of the harm - reliance in economic loss cases, a slightly different form of reliance in the occupier's liability cases and so on: in other words, using a proximity principle. Nervous shock was a good category with

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79 The Hon Justice MA McHugh "Neighbourhood, Proximity and Reliance" in PD Finn (ed) Essays on Torts (1989) p 5 at 13.

80 Psycholinguistics is an area of study where psychology and linguistics meet. One area of particular interest to tort lawyers may be psycholinguistic studies of the attribution of responsibility.

81 *Gala v Preston* (1991) 172 CLR 243 at 253 per Mason CJ, Deane, Gaudron and McHugh JJ. Note that McHugh J has joined the majority in accepting the proximity principle in this judgment, while Dawson J who accepted it in *Cook v Cook* has rejected it in *Gala v Preston* at 276.

82 [1932] AC 562 per Lord Atkin at 580.

which to start the discussion of proximity because in the context of nervous shock the concept of proximity operates as a descriptive and powerful metaphor. It does not violate the logic of personal relationships. It clearly has the power to appeal to naive social justice ideas of the community, while retaining the possibility of limits satisfying the legal community.

Once taken outside the category of nervous shock, the concept of proximity is also easily transplanted to other areas such as negligent mis-statement, where reliance is important. Reasonable foreseeability referred to the logic of places and things; proximity refers to the logic of personal relationships and places and things. It overlaps somewhat, but once the meaning of reasonable foreseeability became so diffuse, the choice was either a retreat back to categories and incremental analysis, or a movement to a different general principle.

(ii) The development of proximity in Australia

After the decision in *Jaensch v Coffey*, the High Court of Australia proceeded to develop its use of proximity in the category of negligence to give some coherence to the cause of action itself. In *Sutherland Shire Council v Heyman*[83] the Court held that the Council would have had a duty to take reasonable care to ensure that the council did not fail to inspect the foundations or inspection of the foundations if the kind of relationship had existed between Council and plaintiff which could support such a duty. Mason J reaffirmed the use of the proximity concept in this way and emphasised that the foundation of the duty of care was in the reliance (the aspect of proximity which he used) rather than in mere foreseeability. In this way the High Court departed from a purely categorical approach to the case. Such an approach would have been to ask whether it was a case of an omission, pure economic loss, or statutory authority where the type of power that the authority used was vital to the issue Mason J rejected a categorical approach in so far as he rejected the view that it mattered in this case whether the damage was economic or physical.[84] He also rejected the *Anns* two-stage test. What was required to attract a duty of care was some conduct on the part of the authority arising out of their proximate relationship such that it was reasonably foreseeable that there would be reliance by the plaintiff on the statutory authority.

Deane J discussed his view of proximity again. It is clear that it remains fundamental to the duty of care in his view:

> ...the requirement of proximity remains as the touchstone and control of the categories of case in which the common law of negligence will admit the existence

83 Note 2 *supra*.

84 Mason J was not suggesting that the distinction between economic loss and physical damage never mattered, but merely that here, the basis of the duty of care was reliance which should not be defeated merely because of a "legal characterisation of the respondent's loss as economic" *ibid* at 466.

> of a duty of care ... the ultimate question in the present case is whether the relationship between the Council and the respondents possessed the requisite degree of proximity to give rise to a relevant duty of care on the part of the Council to the respondents.[85]

The High Court held in *Re San Sebastian* that:

> ...the correct view is that, just as liability for negligence misstatement is but an instance of liability for negligent acts and omissions generally, so the treatment of the duty of care in the context of misstatements is but an instance of the application of the principles governing the duty of care in negligence.[86]

This was a case of negligent misstatement causing pure economic loss. The majority emphasised the element of reliance as a vital part of proximity in such cases. That is, the mutuality of relationship between the parties is the essential factor of proximity which moderates reasonable foreseeability in order to decide whether or not a duty of care exists in the instant case.

In *Australian Safeway Stores Pty Ltd v Zaluzna*[87] the general principles of negligence triumphed over the old rules of occupiers' liability. This was a confirmation of the power of the reasonable foreseeability - proximity principle over the old categories of occupier's liability. Previously occupiers of property had particular duties and liabilities which depended on this particular category of entrant was injured on their property.[88] The majority of the High Court rejected this categorical approach in *Zaluzna*'s case, referring to the statement of Deane J in *Hackshaw v Shaw* [89]:

> All that is necessary is to determine whether, in all the relevant circumstances, including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be a necessary degree of proximity of relationship.

Gala v Preston[90] has been suggested to be an example where the use of proximity has been inadequate. In that case Mason CJ, Deane, Gaudron and McHugh JJ continued to accept proximity as "the general determinant of the categories of case in which the common law of negligence recognises the existence of a duty to take care to avoid a reasonably foreseeable risk of injury".[91] The facts were that three youths had stolen a car and drunk a large amount of alcohol. They

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85 *Ibid* at 495.

86 (1986) 62 CLR 424 at 354 per Gibbs CJ, Mason, Wilson and Dawson JJ .

87 (1987) 162 CLR 479.

88 For example, *Indermauer v Dames* (1866) LR 1 CP 274 (duty to invitee), *Lipman v Clendinnen* (1932) 46 CLR 550 (duty to licensee). There were up to five other possible categories of entrant and the duty would differ according to each category.

89 (1984) 155 CLR 614 at 662

90 (1991) 172 CLR 243.

91 *Ibid* at 252.

had then driven the car some distance, having decided to go and commit some breaking and entering offences. The drive culminated in the car leaving the highway and hitting a tree. The respondent Preston was injured in the accident, and sued his driver and companion in the whole escapade for damages. The majority in the High Court decided that the fact that the parties were combined in an illegal jaunt in a stolen car at the time of the accident meant that they were not in the kind of relationship of proximity in which the law is interested in basing a duty of care.

It has been argued that this is an example of a failure of proximity as a principle[92] because "the relationship between a passenger and a driver could hardly be closer." It could be argued in this vein that it would have seemed correct in principle, to have accepted liability here as the true outcome of the proximity principle in this case.

But, although *Gala v Preston* may appear to pose a problem for proximity, it is submitted that in fact it does not. Proximity is a multi-layered concept whose meaning should not be confined to mere "closeness", whether causal, physical or circumstantial. The meaning of proximity has developed since the earliest statements in *Jaensch v Coffey* and *Sutherland Shire Council v Heyman*, and closeness clearly means closeness in the sense of the social responsibility which can be expected within the relationship of plaintiff and defendant. Justice Gaudron's judgment in *Hawkins v Clayton* offered a further direction to take proximity which has not yet been taken up by the High Court, when she suggested that "reasonable expectation" could be the basis of proximity where economic loss was in issue.[93] In *Gala v Preston*, the majority did not posit a blanket bar on illegal behaviour as a basis for compensation, but rather a more subtle consideration of the fact that the embarking on the illegal jaunt together was itself fraught with quite high risk, and that this was a strong element of the relationship between the two parties. An analogy was drawn with *Cook v Cook* where the standard of care was lowered because of the particular knowledge the plaintiff had of the defendant's standard of driving skill.[94]

(iii) Comparing the two approaches

In so far as it is possible to look at the general situation regarding the duty of care in England, the position is that proximity itself is dealt with incrementally and by analogy. That is, proximity will be referred to only in the terms in which

92 H Luntz "Torts" in R Baxt, AP Moore (eds) *Annual Survey of Australian Law* 1991 Adelaide Law Review Association 1992 p 471 at 472.

93 (1988) 164 CLR 539 at 597.

94 Note 90 *supra* at 253.

previous cases have discussed it. So, in nervous shock as we have seen, it is dealt with narrowly to mean particular relationships as previously specified in a particular category of case as Lord Bridge said in *Caparo v Dickman.*[95] "I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."

So, for example, in the cases on economic loss arising from negligent misstatement, proximity refers to a specific test. The use of this test arises from a recognition that this is one of a category of cases in a line derived from Lord Denning's dissent in *Candler v Crane, Christmas.*[96]. In *Caparo v Dickman,*[97] the test for duty of care consisted of reasonable foreseeability, proximity and a fairness test. David Howarth[98] argues that in the context of pure economic loss the proximity requirement outlines an exception rather than the general rule that there should be no liability for pure economic loss; and that the problem with proximity in the English sense is that it focuses on the exception rather than the rule, with expansion of the exception rather than of the rule likely to follow. This does not seem to me to be the major criticism of the English view of the duty of care. Expansion of anything seems the least likely alternative in the present climate. What does appear to be happening is a retreat to the categorical treatment of negligence, where what is required of the lawyer is a quick pigeonholing of the facts, and from then on the answer is easy.

By contrast, in Australia the High Court is drawing on underlying understandings of culpable and nonculpable behaviour and using the language of proximity to allow this to be done within the context of a general principle.

Proximity in Australia clearly means much more than mere closeness. It is a flexible concept which is capable of dealing with the complex web of relationships and difficult decisions that have to be made by any actor in our society today. The word "proximity", it is submitted can usefully take on the task that reasonable foreseeability can no longer do. It is 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. Reasonable foreseeability has lost its power to connect up with these social understandings and no longer connotes relationships. Proximity, which has a central meaning of closeness, also has penumbral and metaphorical connotations which refer to connectedness. In connection with the duty of care the connotations of proximity can link up with

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95 *Caparo v Dickman* [1990] 2 AC 605.

96 [1951] 2 KB 164.

97 Note 95 *supra.*

98 "Negligence after Murphy: Time to Rethink" (1991) 50 *Cambridge Law Journal* 58.

community understandings of moral responsibility. I am not suggesting that proximity is to be equated with moral responsibility, but I am suggesting that the power of proximity lies in the possibility of a more relational and relationship-based understanding of the duty of care.

V. CONCLUSION

A look at the nervous shock cases in England and Australia gives a superficial appearance of similarity of approach. However this similarity is misleading. Both jurisdictions approach the duty issue using the terms "reasonable foreseeability" and "proximity". However, there the resemblance ends. In Australia the approach to negligence in general is by a widening and a flexibility of approach which looks very much like general principles of negligence. The flexibility of the use of a principle like proximity which combines policy elements in its search for legal responsibility is important. The power of the Australian use of proximity is reinforced by the fact that it can link with general social understandings of moral culpability. The English approach is to deal with a category of nervous shock cases in which the terms reasonable foreseeability, proximity and policy appear, because that is the way that category is dealt with. Where economic loss is at issue, it will be reliance, where occupier's liability is at issue a different set of terms will come up. It is indeed a categorical approach, with the category determining the meaning of the concepts used to define the duty of care within that category. The two jurisdictions are further apart than they have ever been. And an examination of the High Court of Australia's similar activity in the areas of equitable estoppel in contract, in property disputes (constructive trusts) and new emphasis on unconscionability would indicate that the expansion of doctrines by the High Court is not confined to tort.[99]

99 J F Keeler also refers to this expansion in his article "The Proximity of Past and Future: Australian and British Approaches to Analysing the Duty of Car" (1989) 12 *Adelaide Law Review* 93 at 125, connecting it to the High Court's emphasis on principle over rigid rules in recent times.