Proximity, the Standard of Care and Damage: Relating the Elements of Negligence

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The fashionable topic in the subject of negligence, and perhaps for the whole law of torts, is proximity, that is, whether the parties are so proximate in their relationship that one of them is under a duty not to cause foreseeable harm to the other. Whereas in the past, as Deane J. observed in *Council of the Shire of Sutherland* v. *Heyman*[1] the difference between the notions of "proximity" and "reasonable foreseeability" has been obscured, particularly in the cases where the duty of care went without saying, forensic submissions now place an emphasis on proximity, sometimes without any critical discrimination between that and other elements of the tort. This emphasis on proximity is usually agitated when the harm is confined to pure economic loss. The criteria necessary to the requisite proximity are yet to be finally established and the principles await to be extrapolated from the decided cases,[2] and the absence of settled principle is likely to continue to afford a distraction from other elements of the cause of action.

However, while the law awaits the solution to this mystical question by gazing at its own navel, which will be discussed further below, the demands of human society are not content to permit total absorption with this one issue and have thrown up circumstances which give rise to other and older questions, some of them related in a general sense to proximity, but requiring correct identification and suitable separate attention. The point of this paper is to emphasise the care that must still be directed to them.

One of these issues is the standard of care which is owed in circumstances where the required degree of proximity is present. Under the principle in *Donoghue* v. *Stevenson*[3] as enunciated by Lord Atkin, a person is under a duty of care to take reasonable steps to avoid causing harm to another which is reasonably foreseeable, where the parties are within the relevant degree of proximity to each other. It is only if all of these elements are present that there is such a duty of care. Then in order to determine whether a duty of care which exists has been breached, it is necessary to look to the standard of the care which is required, and in the classical formulation of the doctrine this has been set at that which is reasonable in the circumstances. Accordingly, just as with the element of foreseeability,[4] this factor is independent of proximity and remains just as important in its own right.

All of this may appear to be basic and clearly defined by authority. There is however a danger of confusion between the arguments of "No

1 (1985) 157 C.L.R. 424 at 496.
2 See, by the present author, "Limits of awards of Economic Loss through the Cases", (1989) 63 A.L.J.R. 13
3 (1932) A.C. 562
4 see *Prendagast* v. *Sam & Dee Ltd., Kozary and Miller* noted in (1989) 63 A.L.J. 506)

duty" and "No breach of duty", particularly when there is a certain degree of remoteness in the relationship between the parties.

The distinction was noticed in the House of Lords in *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd.*[5] and approved by Gibbs J. in *Council of the Shire of Sutherland* v. *Heyman*[6] as follows:-

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

The distinction is further illustrated in the recent decision in the House of Lords in *D. & F. Estates Ltd.* v. *Church Commissioners for England*[7]. There the plaintiffs were the lessees of premises from the first defendants who as owners employed the third defendants as the head contractors in the construction of the building, the plaster work in which was performed by subcontractors employed by the third defendants. When the plaster work proved to be defective, the plaintiffs suffered inter alia a substanial loss in the cost of its restoration which was held to be pure economic loss, and there was other economic loss in the form of disturbance during the restoration work. The defendant builders were successful on two grounds, the first being that because of the proximity principle they were under no liability to the lessees of the building for pure economic loss constituted by any dimunition in value or cost of repair of the building itself. The second ground was that in any case the duty of care in a builder does not extend to supervision of the quality of the work of a reasonably chosen subcontractor. The distinction must always be made between the contractual obligations of the builder to the owner of the building and his tortious liability to the owner or any other person taking through him.

The foregoing discussion demonstrated the established distinction of the question of the extent of the duty of care and the importance of that question as a separate issue. It is convenient now to turn to the other and more fashionable issue in *D. & F. Estates Ltd.*, that is, whether a duty of care exists at all in the particular case.

As for the first ground of the builder's success, it was held, following the dissenting judgment of Lord Brandon of Oakbrook in *Junior Books Ltd.* v. *Veitchi Co. Ltd.*[8], the decision of the Supreme Court of the United States of America in *East River Steamship Corporation* v. *Trans-America DeLaval Inc.*[9], and the majority decision of the Supreme Court of Canada in *Rivtow Marine Ltd.* v. *Washington Iron Works*[10], that just as the manufacturer of a product is not liable in tort to persons other than the direct buyer for damage to or loss in value of the article itself by reason of negligence in its manufacture, so too this principle will extend to protect a

5 [1985] A.C. 210 at 240,
6 (1985) 157 C.L.R. 424 at 441
7 [1988] 3 W.L.R. 368
8 [1983] 1 A.C. 520,
9 (1986) 106 S.Ct. 2295
10 (1973) 6 W.W.R. 692

builder in the building of a house from liability to one who afterwards takes the property from the owner for which it is built.

While it was conceded that under this principle there would have been sufficient proximity for liability if for example the defective workmanship of the article or house had led to personal injury or damage to property other than the article or house itself, however, even in the same circumstances this proximity was not attained where the harm consisted of pure economic loss consequent upon the necessity to repair it even in order to prevent its causing injury or damage to other property. In other words, although the relationship of the parties would have been sufficiently proximate if the defective workmanship had produced physical harm to persons or other property, it was not proximate enough when the harm consisted of physical harm to the property itself, which is classified as pure economic loss, or for other pure economic loss. In the latter circumstances there was just no duty of care to avoid causing such loss.

By contrast the alternative finding was that even if there were generally a duty of care to prevent such loss, then, there being no question of contractual obligations, the standard of care required did not impose upon an independent contractor a duty to a subsequent holder so high as to require supervision of the quality of the workmanship of an apparently competent subcontractor, just as the common law duty of a building owner to persons who may be injured by the work does not extend to supervising the work of an apparently competent builder. If there were the required degree of proximity such as where the defective workmanship produces personal injury or damage to other property, and if the contractor knows of the faulty workmanship and condones it, then he would make himself potentially liable for the consequences as a joint tort-feasor; but this would differ from the first position because the duty of care of a contractor invested with such knowledge is different from any duty of care to obtain it. However, the point is that in both cases the issue is the extent of the duty of care, as distinct from the existence of such a duty.

Although in *The Council of the Shire of Sutherland* v. *Hayman*[11] the circumstances were different from those in *D. & F. Estates* the principles applied which are relevant to the present discussion were remarkably parallel and in agreement.[12] A Local Authority was alleged to have been negligent in failing to carry out an inspection of a building in the course of construction in order to ensure that the footings in the foundation were constructed in accordance with the plans and specifications of which it had approved. The builder had neglected to comply with them and the foundations failed causing a subsequent purchaser to suffer loss because of the reduced value of the building and the cost of restoration. The purchaser had not made any enquiry of the Council and was not shown to

11 (1985) 157 C.L.R. 424

12 The Full Court of Queensland has held that on this issue these two cases are in conflict but the exposition of it is very limited. The High Court refused leave to appeal but because the striking out of part of a statement of claim was involved rather than the final determination of the matter, a point that could account for the refusal of leave, its effect is ambiguous. The final determination of the matter will be enlightening: See *National Mutual Life Association of Australia Ltd.* v. *Coffey & Partners Pty. Ltd.* (1991) Queensland Law Reporter, 18 May.

have relied generally upon its performance of its duties under the relevant regulations.

The High Court unanimously held that the Council was not liable to the subsequent owner of the house but it was divided in its reasons. Two of the members held that while the Council was under a duty of care to the purchasers there was simply no breach of duty because the duty did not extend so far as to require it to inspect the premises. Thus, Gibbs C.J. said:[13]

> "In deciding whether the necessary relationship exists, and the scope of the duty which it creates, it is necessary for the Court to examine closely all the circumstances that throw light on the nature of the relationship between the parties . . . If a relationship of neighbourhood is found to exist, then it is necessary to proceed to the second stage of the enquiry. None of this process will be necessary if the facts fall into a category which has already been recognised by the authorities as attracting a duty of care, the scope of which is settled — e.g. no trial Judge need enquire for himself whether one motorist on the highway owes a duty to another to avoid causing injury to the person or property of the latter, or what is the scope of that duty".

The other three members held that in the absence of any reliance or assumption of responsibility there was no duty upon the Council towards a person in the position of the subsequent buyer, that is, that there was no sufficient proximity between them. In addition, Brennan J. held that apart from the issues referred to, the standard of care required of a person does not extend to avoiding the omission of an act for the protection or preservation of another where the party has done nothing to cause the need for that protection or preservation. This is another example of the distinction between proximity and the standard of care where proximity exists.

On the issue of proximity, both Brennan and Deane JJ. discussed the distinction between damage to or loss of value of the house itself and damage to other property or personal injury, and they came to the same conclusion as that later reached in *D. & F. Estates Ltd.* although their reasoning was not identical.[14]

In each of these cases the difference between the elements of the existence of a duty of care through proximity and the standard of care demanded when a duty exists was expressly recognised by the respective Courts. It will have been noticed however that in respect of the former another element, the nature of the damage, was a crucial point in otherwise identical circumstances. It may be difficult to understand how proximity can be altered by the accidental factor whether the damage is caused to the property itself or to other property. See the views of Lord Denning in *Dutton* v. *Bognor Regis U.D.C.*[15]

The explanation is provided in passing by Brennan J. in *Sutherland Shire Council*[16] where he says:-

> "It is impermissible to postulate a duty of care to avoid one kind of damage — say, personal injury — and, finding the defendant guilty of failing to discharge that duty, to hold him liable for the damage actually suffered that is of another and independent kind — say, economic loss. Not only may the respective du-

13 (1985) 157 C.L.R. 424 at 441.
14 See Wallace: Negligence and Defective Buildings — (1989) 105 L.Q.R. 46.
15 [1972] Q.B. 373 at 396.
16 (1985) 157 C.L.R. 424 at 487.

> ties differ in what is required to discharge them; the duties may be owed to different persons or classes of persons. That is not to say that a plaintiff who suffers damage of some kind will succeed or fail in an action to recover damages according to his classification of the damage he suffered. The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it."

Here we see how the nature of one element of negligence, that is, the damage, while a distinct element in itself, may be such as to affect the quality of other elements, in this case more particularly the existence of the duty.

In this context it is desirable to turn to another issue, that is, the theoretical basis of the relationship of proximity in order to provide some foundation for the prediction in a new class of case whether the relationship between the parties was sufficiently proximate to give rise to a duty of care. First it is well to begin by mention of the limitations of the scope of the duty in the famous "two stages" passage from the judgment of Lord Wilberforce in *Anns* v. *Merton London Borough Council*[17]

That formulation attracted considerable discussion. Indeed it has now been overruled by the House of Lords[18] after the High Court in *Sutherland Shire Council* had declined to follow it but only on the specific determination of proximity in the category of situation then under discussion. There will be important debate as to whether , in the determination of whether liability exists in a particular class of case, there should be any reference to what is called "proximity" or whether, as Brennan J. said in *Sutherland Shire Council*:[19]

> "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'"

This approach was not taken by the other members of the Court in that case and the recent case of *Gala* v. *Preston*[20] that division continued. That the House of Lords in *Murphy* v. *Brentwood District Council* expressly adopted the view of Brennan J. means that this diversity of view must continue to attract the attention of the High Court. While the different paths will usually lead to the same destination, as in *Sutherland Shire Council* and *Gala* v. *Preston*, it may not necessarily do so and consequently it is desirable that there should be a resolution of the question. At the moment the "proximity" approach is clearly favoured by a majority of the High Court.

There is much to be said for that view that regards the development merely as the gradual recognition of a "family" of distinct areas of actionable liability in negligence. It is the mode which can now be recognised in the development of the law of tort generally and of the law of restitution.[21]

17 [1978] A.C. 720 at 751, 752.
18 *Murphy v. Brentwood District Council* (1990) 3 W.L.R. 414.
19 (1985) 157 C.L.R. 424 at 481.
20 High Court of Australia 28 May, 1991
21 This is also consistent with the overview of the proximity cases taken in the author's article referred to in note 2.

That is not to say that in the determination of these various heads of liability in negligence, there is no room for policy. It is often subject to considerations which include matters of policy such as the undesirability of imposing liability upon a wrongdoer in respect of an indeterminate class of person. A similar philosophy may be the foundation for the principle limiting the liability of a manufacturer or builder, the principle being metamorphosed into a limitation of the liability of a fabricator for loss of value to the object itself to that which he undertakes contractually, although it may also have its source in the theoretical ascription of the time at which the compensable damage is done to the property in the case of defective fabrication. That is another issue. This content of the reasoning is the same as that adopted in the "proximity" decisions.

It appears that the concept of proximity is intended to emphasise the element of relationship between the parties as the appropriate issue on this point. It does not seem to be used as a determinant but as a compendious description of the result of the application of the various factors cogent to that case towards the decision whether the relationship between the parties is one which the court decides should give rise to liability. If the factors used and reasoning applied are the same as those employed under the alternative system, it is not easy to see any reason for disparity in the result from this cause. This is distinct from disagreement as to the relevant factors and their comparative weight, which have equal potential for dissent internally within either of the respective systems. However, despite the absence of apparent practical difference between these theories, such difference as there is has attracted some profound judicial debate. It will become necessary to be watchful for the occasion where it may provide a true source of divergence in result.

The purpose of this paper has been to distinguish the features which apply to two distinct elements of a claim in negligence which are sometimes confused, that is, whether the parties are in such a relationship as to produce a duty of care, and if so the extent of that duty. With understanding of that topic to which authoritative discussion is addressed will come freedom from confusion and a correct attribution of authority and principle in these closely related areas.