

## THE NEEDLE IN THE HAYSTACK: PRINCIPLE IN THE DUTY OF CARE IN NEGLIGENCE

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### I. INTRODUCTION

The question of when a duty of care in the tort of negligence is owed by one person to another is a question about relationships and responsibility as recognised by the law. It is important that people should know what the law is and also that the law be flexible enough to change in the interests of justice. In negligence, the duty of care is usually the arena in which the battle between flexibility and predictability is fought, and it is frequently the area where novel categories or hard cases are decided. This suggests that the choice of test used for the duty of care is fundamental. In the words of McHugh J, what is needed is “a conceptual framework that will promote predictability and continuity and at the same time facilitate change when it is needed”.<sup>1</sup> Recent cases in the High Court show that developing such a conceptual framework is difficult, and has not yet been achieved.

### II. PRINCIPLES AND CATEGORIES IN NEGLIGENCE

As with all other areas of law, it is imperative in negligence to have ways to determine liability within an already well-recognised category. This makes it easy to know what rules apply, assisting in the maintenance of predictability and certainty of the law. Such categories within negligence are defined by the type of harm (for example, physical injury, nervous shock, property damage, pure economic loss), by the type of defendant (for example, employer, or statutory authority), and by whether the harm is caused by an act or words or an omission, and sometimes by the type of plaintiff (for example, child yet unborn, unforeseeable plaintiff). The categories which are now recognised include, for example, personal injury caused by a negligent act, nervous shock, pure

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1 *Perre v Apand* (1999) 164 ALR 606 at 629.

economic loss caused by a negligent act, pure economic loss caused by negligent misstatement and liability of public authorities. Within these categories various tests or criteria are very well recognised. For example, where there is a case of pure nervous shock we know that we may have to consider whether the plaintiff is in a close relationship with the victim (although that will not be determinative in Australia), whether there was a sudden sensory perception of the event, and whether the plaintiff suffered a recognisable psychiatric illness.<sup>2</sup> Where pure economic loss was caused by a negligent misstatement we consider factors such as whether the statement was made in a situation in which it was reasonable for the plaintiff to rely on it, and whether the defendant knew or ought to have known that the plaintiff (or a person in the class of which the plaintiff was a member) was likely to rely on it,<sup>3</sup> and possibly some other factors. Within these categories, these criteria are quite well-established, and function well in that they are clear and predictable.

However, it is also important to be able to consider whether liability should be extended into new categories, because a fundamental aspect of the common law has always been its ability to adequately meet change within the society of which it is a part.<sup>4</sup> These novel categories or 'hard cases' create particular difficulties. Negligence law has been a flexible area of law, dealing relatively well with the tension between change and certainty, predictability and flexibility. In 1932 Lord Macmillan said "[t]he categories in negligence are never closed".<sup>5</sup> However, that does not mean that the doors into new categories are wide open. On the contrary, they may be very difficult to open, and frequently appear locked. In the past many classes of case were not recognised as capable of sustaining liability in negligence – for example, pure economic loss was traditionally held to be in the domain of contract and was not generally thought of as something for which suit could be brought in negligence until *Hedley, Byrne v Heller*<sup>6</sup> was decided, and public authorities would have been regarded as immune except in public law.<sup>7</sup>

The method for extending categories or creating new ones has traditionally been that of general principle. How ideas about relationships and responsibility

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2 *Jaensch v Coffey* (1983) 155 CLR 549; *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310; *McLoughlin v O'Brian* [1983] AC 410; *Mt Isa Mines v Pusey* (1971) 125 CLR 383.

3 *Hedley, Byrne & Co v Heller & Partners Ltd* [1964] AC 465 ("*Hedley, Byrne v Heller*"); *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340 ("*San Sebastian*"); *Mutual Life & Citizens' Assurance Co v Evatt* [1971] AC 793; *Shaddock v Parramatta City Council* (1981) 150 CLR 225; *Caparo Industries plc v Dickman* [1989] QB 653; [1990] 2 AC 605 ("*Caparo*").

4 See P Vines, "Proximity as Principle or Category; nervous shock in Australia and England" (1993) 16(2) *UNSWLJ* 458.

5 *Donoghue v Stevenson* [1932] AC 562 at 619.

6 [1964] AC 465.

7 See the discussion of this in S Kneebone, *Tort Liability of Statutory Authorities*, Law Book Company (1998), esp ch 2. She notes that although tortious liability was accepted for negligent acts in *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93, this appears to have been forgotten until a concerted attempt to consider the issue of immunity was made in *Anns v Merton LBC* [1978] AC 728.

are mediated in the tort of negligence has varied since *Donoghue v Stevenson*<sup>8</sup> was decided. Since that time the tests for the duty of care have oscillated between greater emphasis on principle and greater emphasis on particular categories. A constant tension exists between these two approaches which has to be considered by each judge who decides on the existence or otherwise of a duty in a novel case. In *Donoghue v Stevenson* itself, the dissenting judgment of Lord Buckmaster, demonstrated the previous type of incrementalism when he made his famous remark about *Mullen v Barr & Co*, that it was “a case indistinguishable from the present excepting upon the ground that a mouse is not a snail”.<sup>9</sup> He refused to accept the imposition of a duty of care. Lord Atkin’s ‘neighbour principle’ is clearly a broad general principle which was induced from a range of previous cases and used to break the privity of contract barrier; but even after he had established the neighbour principle, *Donoghue v Stevenson* itself was at first treated as a case in the category of manufacturer’s liability for personal injury.<sup>10</sup> Later, the pendulum shifted to an approach based on a broad general principle culminating in England in the *Anns*<sup>11</sup> case with the two-stage test. That test was a general-principle test. Later, the English courts rejected this approach. The Australian courts did not embrace the *Anns* formulation, but similarly moved towards a general principle approach<sup>12</sup> culminating in Justice Deane’s formulation of proximity (hereafter referred to as “proximity-as-principle”). This general principle is presently in decline, and an approach governed by caution and categories has emerged. Even so, in the words of Kirby J,<sup>13</sup> there is still much “disorder and confusion” in the duty of care.

Each of the approaches using a general principle regards the categories as simply examples of the duty of care in operation. For example, in *San Sebastian*, the High Court held

the correct view is that, just as liability for negligent misstatement is but an instance of liability for 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.<sup>14</sup>

When cases fit comfortably into a category the general principle is not needed. But where there is a hard case general principles may alter or create new categories. An insistence on maintaining the categories may leave the law static and possibly unjust.<sup>15</sup>

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8 [1932] AC 562.

9 *Ibid* at 578.

10 See, inter alia, *Grant v Australian Knitting Mills* [1936] AC 85; *Haynes v Harwood* [1935] 1 KB 146; *Deyong v Shenburn* [1946] KB 227; *Farr v Butters Bros* [1932] 2 KB 606.

11 *Anns v Merton London Borough Council* [1978] AC 728 (“*Anns*”). This approach had been heralded by Lord Reid in *Home Office v Dorset Yacht* [1970] AC 1004 at 1027, when he said “the time has come when we can and should say that [the neighbour principle] ought to apply unless there is some justification or valid explanation for its exclusion”.

12 *Jaensch v Coffey*, note 2 *supra*.

13 *Perre v Apand*, note 1 *supra* at 668.

14 *San Sebastian*, note 3 *supra* at 354, per Gibbs CJ, Mason, Wilson and Dawson JJ.

15 For one analysis of problems with what she calls the ‘pockets of law’ approach see J Stapleton, “Duty of Care and Economic Loss: A Wider Agenda” (1991) 107 *Law Quarterly Review* 249.

### III. CHOICES FOR DETERMINING THE DUTY OF CARE

Presently in Australia Justice Deane's formulation of proximity-as-principle which was dominant throughout the eighties appears to be in decline. Recent High Court judgments appear to have rejected or weakened proximity as a conceptual determinant of the duty of care. It is submitted that the court is divided in its approach to the duty of care, even when judges appear to be using the same language. References to proximity, for example, do not always refer to proximity-as-principle, but may involve other approaches to the duty of care.

All the tests currently in use in negligence assume that satisfying the test of reasonable foreseeability of harm coming to the plaintiff (or a person in the class to which the plaintiff belongs) is necessary, but not sufficient, to establish that a duty of care is owed to the plaintiff. Reasonable foreseeability on its own became a less effective test when the test was diluted to mean "not fanciful or far-fetched"<sup>16</sup> which requires a very low probability in order for the test to be satisfied. The categorisation of tests which follows assumes that reasonable foreseeability of harm has been shown.

An examination of the cases since *Jaensch v Coffey* shows that at present four different approaches to the duty of care may be discerned. They may be called (1) proximity-as-principle, (2) rule-based proximity, (3) incrementalism and (4) policy-based decision-making. The approaches which are outlined here rarely appear in judgments in their pure form. The following analysis is not intended to suggest that they are mutually exclusive or that the separation between them is always clear. Indeed, sometimes several approaches may appear in a single judgment. However, the classification may still be useful to clarify the attempts to establish an effective and legitimate test for the duty of care.

In considering the tests for the duty of care it is helpful to distinguish between the use of a test when it is clear within which category of negligence duty must be determined, and the use of the test in a 'hard case' - that is, when what would be required in order to establish a duty would be to extend a category or create a new one.

#### A. Proximity-as-principle

The leading example of this approach is the judgment of Deane J in *Jaensch v Coffey*.<sup>17</sup> This approach uses proximity as an underlying conceptual determinant of whether the relationship between the parties is such that it is legitimate to make one party legally responsible to the other. It should be emphasised here that the focus of this approach is to consider the concepts of relationships and responsibility first, and only later to consider the category of case which is at issue. In order to use proximity this way, one would still proceed, when the category is clear, to look to those traditional requirements in the category which

16 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47. Justice Mason was discussing foreseeability in the context of breach and noted that "the concept of foreseeability in connexion with the existence of the duty of care involv[es] a more generalised enquiry". Thus foreseeability is even weaker in the context of the duty of care.

17 Note 2 *supra* at 584.

reflect human notions of relationships of responsibility. Such indicators include reliance, assumption of responsibility, control and vulnerability. In using this approach the factors relating to human notions of relations of responsibility are more significant than the category in which they appear, and so, when dealing with a hard case, proximity-as-principle involves the identification of those factors in the relationship between the parties which resonate with human notions of relationships of responsibility. As Sir Anthony Mason has observed, it

serves a useful purpose in directing attention to the relationship between the parties and the incidents of that relationship and relevant factors such as assumption of responsibility, reliance and control; at the same time, it does not exclude what is fair and reasonable.<sup>18</sup>

This approach to the duty of care will be considered further in section IV.

## B. Rule-based-proximity

'Rule-based-proximity' is an approach to the duty of care which uses the term 'proximity' as a catch-all for all the other requirements established in previous cases in the same category. If this choice is taken, the determination of the category of case and, in particular, the type of loss become all-important in establishing a duty of care. An illustration is *Alcock v Chief Constable of South Yorkshire*,<sup>19</sup> where the House of Lords examined the duty of care to prevent nervous shock. The first step in their reasoning was to see the category of pure nervous shock as a distinct category. Once they had done this they looked at the factors of proximity which had previously been determined to exist in nervous shock cases – namely, a close relationship between plaintiff and victim and closeness in time and space to the accident. There was no attempt to look at a broader principle in order to decide whether the law should be changed. Thus, the category or rule determined the content of proximity. In this approach then, what constitutes proximity depends upon the category of case.

Another example of a rule-based proximity is the second stage approach of the House of Lords in *Caparo*,<sup>20</sup> where the requirements for duty of care were (1) foreseeability of harm, (2) proximity, and (3) fairness, justice and reasonableness. Again, the meaning of proximity was determined by the category (in this case, negligent misstatement causing pure economic loss) and the term was not used as a general principle. The significance of the category was emphasised by Lord Bridge:

Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, 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.<sup>21</sup>

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18 Sir A Mason, "The Recovery and Calculation of Economic Loss" in Mullany N (ed), *Torts in the Nineties* (1997) 4.

19 Note 2 *supra*.

20 *Caparo*, note 3 *supra*.

21 *Ibid* at 618.

Using this approach, the term 'proximity' adds little or nothing to the process, which is merely an application of rules:

[Phrases such as 'proximity'] are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists...<sup>22</sup>

And:

'Proximity' is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists.<sup>23</sup>

This type of approach makes it difficult to extend or create new categories of liability when hard cases appear. Of course, in *Caparo* the third stage of the test, "fairness, justice and reasonableness" is intended to ameliorate the narrowness of the rule, and this is one of the reasons why Kirby J has found the *Caparo* test so attractive.<sup>24</sup> This element of the *Caparo* test takes it into the policy domain.

### C. Incrementalism

The retreat from *Anns* was followed by a move to what the House of Lords called an incremental approach.<sup>25</sup> This label encompasses some different meanings, but the central point for incrementalism is an insistence on considering categories (or "pockets"<sup>26</sup>) first, and extending them, if at all, by analogy in steady and small steps rather than large leaps. It involves a rejection of the expansionist or imperialistic march of negligence into new territory. In one form, incrementalism uses the same techniques as those for 'rule-based-proximity', but may dispense with the label 'proximity'. That is, within a category one proceeds by looking at the rules established for the category (such as negligent misstatement causing pure economic loss) and applies those rules. For example, in *Sutherland Shire Council v Heyman*,<sup>27</sup> Brennan J held that what was required to establish the duty of care was reasonable foreseeability and reliance because this was a case in the category of pure economic loss, omission or occupiers' liability. He said in a much-quoted passage:

22 *Ibid* at 628, per Lord Roskill.

23 *Ibid* at 655, per Lord Oliver.

24 *Perre v Apand*, note 1 *supra* at 676, per Kirby J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 419, per Kirby J; *Romeo v Conservation Commission* (1998) 192 CLR 431 at 476, per Kirby J.

25 *Caparo*, note 3 *supra*; *Murphy v Brentwood DC* [1991] 1 AC 398; *Yuen Kun Yeu v Attorney-General for Hong Kong* [1988] AC 175.

26 'Pockets' is the terminology used by K Stanton in "Incremental Approaches to the Duty of Care" in N Mullany (ed), *Torts in the Nineties* (1997) 34 at 39, and by J Stapleton in "Duty of Care and Economic Loss: a Wider Agenda" (1991) 107 *Law Quarterly Review* 249.

27 (1985) 157 CLR 424 at 481. See, also, his judgment in *Jaensch v Coffey*, note 2 *supra* at 567.

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 persons to whom it is owed.<sup>28</sup>

When incrementalism is used for hard cases, then in its best form it will allow some flexibility in the law of negligence by considering the categories and by analogy (without any underlying conceptual theme) extend them or make new categories. Stanton suggests that there are two versions of incrementalism.<sup>29</sup> The first he calls 'gradualism'. This has been described above. He refers to it as "extremely formalist and positivist". It takes very little account of policy, wishing to leave major changes to Parliament. For example, he cites the refusal of the court in *F v Wirral Metropolitan Borough Council*<sup>30</sup> to extend negligence to a duty not to impair a parent's right to custody of a child. The second form is what he suggests is emerging in England in cases like *Marc Rich & Co AG v Bishop Rock Marine Co Ltd*.<sup>31</sup> This form "can take account of issues of fairness and policy and...is not tied to a mechanical search for close analogies in the existing case law". In this form incrementalism can be extremely flexible. For example, in emphasising that third stage in the *Caparo* test the court may use the notion of fairness, justice and reasonableness to transcend the category. Stanton has argued that in order to have any value incrementalism must be more than just "gradualism based simply on analogy".<sup>32</sup> If it is the latter then the law will simply stagnate.

#### D. Policy-based decisions

Policy has always been used as an element in judicial reasoning and it exists in some form in the previous three methods, but there are signs in some judgments of an increasing emphasis on policy. This can be seen in the third stage of the *Caparo* test and the second stage of the *Anns* test as it is in use in New Zealand and Canada.<sup>33</sup> In recent Australian cases, policy has been discussed significantly. In *Esanda*<sup>34</sup> and in *Hill v van Erp*,<sup>35</sup> McHugh J made substantial reference to matters such as the likely impact on solicitors as a profession, and on whether the category of pure economic loss should be able to expand. The

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28 *Sutherland Shire Council v Heyman*, *ibid* at 482, quoted, for example, in *Caparo*, note 3 *supra* at 618; *Yun Kun Yeu v Attorney General for Hong Kong*, note 25 *supra* at 191, per Lord Keith; *Murphy v Brentwood District Council*, note 25 *supra* at 461, per Lord Keith; *Crimmins (as executrix of estate of Crimmins, dec'd) v Stevedoring Industry Finance Committee* (1999) 167 ALR 1 at 72, per Hayne J ("*Crimmins Case*").

29 K Stanton, note 26 *supra* at 51.

30 [1991] Fam 69, cited by K Stanton, note 26 *supra* at 47.

31 [1996] 1 AC 211.

32 K Stanton, note 26 *supra*.

33 See Part IV, "The Rise and Fall of Proximity-as-principle".

34 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 142 ALR 750 at 781ff, per McHugh J ("*Esanda*").

35 *Hill v van Erp* (1997) 188 CLR 159 at 198 ff, per McHugh J.

emphasis on the latter issue is also apparent in all the judgments in *Perre v Apand*.<sup>36</sup>

Meaningful discussion of policy requires some classification.<sup>37</sup> Policy can draw on ideas of judicial administration. Typical policy arguments about judicial administration are, for example, that we need a strict rule or that we need to be flexible in order to achieve certainty/justice. Many arguments about the need to use proximity-as-principle or rule-based-proximity are based on this kind of argument. Policy arguments about institutional competence are typically seen as arguments about whether or not arguments are justiciable or that parliament should decide a matter.<sup>38</sup> The vast range of possible policy arguments include those about moral authority (eg, individual freedom, security); and utility arguments (eg, such a rule would be not be economically viable or would act as a deterrent); and, of course, there can be precedents about what policies are acceptable (eg, the 'bright line rule' that pure economic loss is not in the domain of negligence law is itself based on policy recognition of commercial reality<sup>39</sup> and it developed into a legal rule which requires special factors in order to overturn it). Stapleton has argued that with the demise of a general principle, judges increasingly go through 'checklists' of policy factors. They then run the risk of making their decisions because of their own personal synthesis of the importance of particular policy factors, and risk arbitrariness.<sup>40</sup>

Policy is a double edged sword. Overt discussion of policy may attract the charge of judicial activism<sup>41</sup>, while covert policy discussion attracts the charge of hypocrisy<sup>42</sup>. This is why policy has traditionally been used as a second order justification for decisions which have been made on the basis of precedent. Policy matters can affect a judge's decision about whether to make an incremental change to the law, as they did for McHugh J in *Hill v van Erp*<sup>43</sup> and *Perre v Apand*.<sup>44</sup>

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36 *Perre v Apand*, note 1 *supra*.

37 Possible classifications can be found in, for example, CR Symmons, "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 *Modern Law Review* 394 and J Boyle, "Anatomy of a Torts Class" (1985) 3 *The American University Law Review* 1003.

38 For example, Mason J in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633.

39 *Cattle v Stockton Waterworks* (1875) LR 10 QB 453; see the discussion of this by Gummow J in *Perre v Apand*, note 1 *supra* at 649 ff.

40 J Stapleton "Duty of Care Factors: a selection from the Judicial Menus" in P Cane and J Stapleton (eds), *The Law of Obligations; essays in celebration of John Fleming* (1998) 59.

41 For example, see criticism of Lord Justice Denning's creation of the 'deserted wife's equity' in *Pettit v Pettit* [1970] AC 777; and some media treatment of *Mabo v Qld (No 2)* (1992) 175 CLR 1.

42 Indeed the entire Critical Legal Studies movement is based on a view that law is a disguise for political policy. See, for example, M Kelman, *A Guide to Critical Legal Studies*, Harvard University Press (1987); M Tushnet, "Critical Legal Studies and Constitutional Law: An Essay in Deconstruction" (1984) 36 *Stanford Law Review* 623; and, J Boyle, note 37 *supra*; A Hunt "The Theory of Critical Legal Studies" (1986) 6 *Oxford Journal of Legal Studies* 1.

43 Note 35 *supra* at 210 ff.

44 Note 1 *supra* at 631 ff.



#### IV. THE RISE AND FALL OF PROXIMITY-AS-PRINCIPLE

By the 1980s it was clear that the test of reasonable foreseeability that it be merely “not fanciful or farfetched”<sup>45</sup> was too undemanding a test for the duty of care. The High Court’s response to this was the concept of proximity-as-principle.

Justice Deane formulated proximity-as-principle first in *Jaensch v Coffey*.<sup>46</sup> It will be remembered that he regarded it as “a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care”. He said it differed from reasonable foreseeability because it “involved both an evaluation of the closeness of the relationship and a judgment of the legal consequences of that evaluation”, and he emphasised that proximity could not be confined to physical proximity, but could include ‘circumstantial’ and ‘causal’ proximity. Unfortunately this statement was picked up and used as a ‘triumvirate’ and the list “physical, circumstantial or causal” was frequently seen by critics as exclusive rather than inclusive and descriptive.<sup>47</sup> Justice Deane’s formulation of proximity-as-principle as a major determinant of the duty of care in negligence was in the ascendant until he left the court. It was accepted in a large range of cases,<sup>48</sup> culminating in *Burnie Port Authority v General Jones*<sup>49</sup> and *Bryan v Maloney*.<sup>50</sup> It remained dominant for some time although resisted all the while by Brennan J<sup>51</sup> and latterly by McHugh J<sup>52</sup> and others.<sup>53</sup>

Proximity-as-principle was used by Deane J to develop a general principle of negligence which could operate either within or outside recognised categories of liability. Proximity-as-principle was used to overcome or extend various categories of liability including *Rylands v Fletcher*<sup>54</sup>, occupiers’ liability<sup>55</sup>, pure economic loss<sup>56</sup>, and nervous shock.<sup>57</sup> For example, occupiers liability had

45 *Wyong Shire Council v Shirt*, note 16 *supra*; see note 17 *supra* and the statement by Deane J in *Jaensch v Coffey*, note 2 *supra* at 583.

46 Note 2 *supra*.

47 See, for example, the discussion of *Gala v Preston* (1991) 172 CLR 243 by H Luntz, “Torts” in R Baxt and AP Moore (eds), *An Annual Survey of Australian Law 1991* (1992) 47. H Luntz appears to regard the physical closeness of the parties as decisive of whether or not proximity existed in the sense that either one is close or not. However, arguably the Court’s view was that what was involved was a characterisation of the relationship in terms of whether the defendant should be held responsible.

48 *Sutherland Shire Council v Heyman*, note 27 *supra*; *San Sebastian*, note 3 *supra*; *Gala v Preston*, note 47 *supra*; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513; *Cook v Cook* (1986) 162 CLR 376; 68 ALR 353.

49 (1994) 179 CLR 520.

50 (1995) 182 CLR 609.

51 See, for example, *Jaensch v Coffey*, note 2 *supra* at 572, per Brennan J; *Sutherland Shire Council v Heyman*, note 27 *supra* at 481, per Brennan J; *Gala v Preston*, note 47 *supra* at 259-61, per Brennan J; *Hawkins v Clayton* (1988) 164 CLR 539 at 555.

52 J McHugh, “Neighbourhood, Proximity and Reliance” in PD Finn (ed), *Essays on Torts* (1989) 5.

53 For example, Lord Cooke, “An Impossible Distinction” (1991) 107 LQR 46; the Canadian Supreme Court in *Canadian National Railway Co Ltd v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021 at 1114; J Keeler “The Proximity of Past and Future” (1989) 12 *Adel L Rev* 93.

54 (1866) LR 1 Ex 265; affd (1868) LR 3 HL 330 as cited in *Burnie Port Authority v General Jones*, note 49 *supra*.

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

56 *Sutherland Shire Council v Heyman*, note 27 *supra*; *Bryan v Maloney*, note 50 *supra*.

previously been dependent on a series of rules based on particular categories of occupier and entrant onto property.<sup>58</sup> The question had to be asked, for example, is the plaintiff an invitee or a licensee? and whether the duty existed and its scope was determined by the answer to that very specific question. In *Australian Safeway Stores Pty Ltd v Zaluzna*<sup>59</sup> proximity was used to soften the categories of occupiers liability - they lost their determinative nature, and became merely guides. In that case the majority rejected the categorical approach, referring to the statement of Deane J in *Hackshaw v Shaw*:

All that is necessary is to determine whether, in all the relevant circumstances, including the fact of the defendant's occupation of the 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.<sup>60</sup>

In *Hackshaw v Shaw*, Deane J referred to the notion from *Southern Portland Cement v Cooper*<sup>61</sup> that a trespasser has caused the neighbourhood relationship to be forced on an occupier by his or her trespassing. This fact transformed the relationship of proximity into one which reduced the scope of the duty requirement. Justice Deane said that more would be required in such a situation to establish a duty of care than the mere status as an entrant. In *Hackshaw v Shaw* the usual relationship between trespasser and occupier was altered by the occupier's shooting into the car in which the appellant trespasser was huddled as a passenger. This created a level of risk (reasonably foreseeable) which operated to transform the relationship from what it would have been within the pure category of occupier's liability.

Similarly, using proximity-as-principle, negligence overtook the *Rylands v Fletcher* category in *Burnie Port Authority v General Jones Ltd*,<sup>62</sup> and the judgment of Mason CJ, Deane and Gaudron JJ in *Bryan v Maloney*<sup>63</sup> expanded the duty of care into a new category. In that case the court held that a builder could owe a duty of care to a subsequent purchaser of a house. The court did that, not by analogy between builders and purchaser's contracts, but by use of proximity-as-principle – that is, they looked to see if there were in the relationship elements resonating with moral ideas of responsibility - assumptions of responsibility, reliance and vulnerability. Chief Justice Mason, Deane and Gaudron JJ said:

57 *Jaensch v Coffey*, note 2 *supra*.

58 See, among myriad examples, *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.

59 Note 55 *supra*.

60 (1984) 155 CLR 614 at 662.

61 [1974] AC 728.

62 Note 49 *supra*.

63 Note 50 *supra*.

Upon analysis, the relationship between builder and subsequent owner...is marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss.<sup>64</sup>

Here, the assumption of responsibility and reliance was based on the level of control the builder had over the situation (the foundations of the house) compared to the control of a subsequent purchaser (who could not inspect the foundations because they had been built over). The judges referred to the categories of case, but what they were looking for was an underlying conceptual determinant of liability which transcended the categories.

Of course, transcending the categories brings with it the prospect of an ever-expanding negligence law. For example, in *Northern Territory v Mengel*,<sup>65</sup> the majority (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ, in a joint judgment, with Deane J in a separate judgment), using proximity-as-principle thought negligence could cover the area of misfeasance in public office, but Brennan J disagreed, strongly distinguishing the two torts.<sup>66</sup> Throughout the period of proximity-as-principle's ascendancy, Brennan J continued to resist it.<sup>67</sup> His approach was incremental, using reasonable foreseeability and analogy.<sup>68</sup> The House of Lords has consistently preferred the approach taken by Brennan CJ.<sup>69</sup> Though the Law Lords referred to this approach as 'incrementalism', they have largely used incrementalism in relation to a three-stage test, which appears to be somewhat different from Justice Brennan's practice in incrementalism. The three-stage test involves

- (a) reasonable foreseeability
- (b) proximity (in the sense that there should be the required type of relationship between the parties in particular categories of duty) and
- (c) that it should be "fair, just and reasonable" to impose a duty in the situation.<sup>70</sup>

Thus, the House of Lord's incrementalism and rule-based proximity are very similar. Incrementalism may be contrasted with the approach of the Canadian Supreme Court, which continues to use a test derived from Lord Wilberforce's two-stage test in *Anns*<sup>71</sup> - that is: (1) relationship of neighbourhood between the

64 *Ibid* at 627; 128 ALR 163 at 171-2.

65 (1995) 185 CLR 307.

66 *Ibid* at 359, per Brennan J.

67 See, for example, *Hawkins v Clayton*, note 51 *supra* at 555; *Gala v Preston*, note 47 *supra* at 259.

68 *Sutherland Shire Council v Heyman*, note 27 *supra* at 482 and accompanying text which sets out the quotation.

69 *Caparo*, note 3 *supra*; *Murphy v Brentwood District Council*, note 25 *supra*; *Yuen Kun Yeu v Attorney General Hong Kong*, note 25 *supra* at 191.

70 *Caparo*, note 3 *supra* at 617, per Lord Bridge.

71 *Anns*, note 11 *supra* at 751; in Canada: *Nielsen v City of Kamloops* (1984) 10 DLR (4<sup>th</sup>) 641; *Diversfield Holdings Ltd v The Queens in right of the Province of British Columbia* (1982) 143 DLR (3<sup>rd</sup>) 529; *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd*, note 53 *supra*; *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SC R 85.

parties leads prima facie to a recognition of duty unless<sup>72</sup> (2) policy factors prevent liability. New Zealand has also continued to use the two-stage test,<sup>73</sup> the Court of Appeal defending the New Zealand approach as an indigenous form of the *Anns* test.<sup>74</sup>

All these judges resisted the notion of proximity as it was posited by Deane J and the majority of the High Court in the 1980s. It is submitted that proximity was much misunderstood, and that there was an unfortunate failure of communication from the Bench when using it. For example in *Burnie Port Authority v General Jones Ltd*, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said of proximity-as-principle:

[I]ts practical utility lies essentially in understanding and identifying the *categories* of case in which a duty of care arises under the common law of negligence, rather than as a test for determining whether the circumstances<sup>75</sup> of a particular case bring it within such a category, either established or developing.

It is submitted that this is an example of failure to communicate what proximity-as-principle means rather than a failure of the concept. Implicit in the statement is that one understands and identifies any categories of case where a duty might exist by reference to human notions of responsibility and relationships, which include reliance, vulnerability and control. But the statement should have been explicit in order for people to see it as substantive rather than a vague allusion to morality. The reference to categories in the statement draws the reader away from the ideas of social responsibility and focuses them on the categories, when the concept of proximity-as-principle was intended to be directed at the ideas of responsibility first, and then only secondarily to the categories of negligence law.<sup>76</sup> The context in which this statement was made refers us to reliance, vulnerability, control and responsibility within the context of human relationships. To say proximity is not a test for determining whether the case is within the category is simply another way of saying that within the category the doctrine of precedent will govern the category in the ordinary way. The major role for proximity-as-principle was therefore in examining new categories.

Proximity-as-principle was an attempt to provide criteria outside established categories on the basis of underlying conceptual determinants which would be acceptable to the legal and general community. The use of a principle is often attractive to lawyers, because it appears to promise coherence. However, principles operate at a relatively high level of abstraction or generality when compared with rules. This can give them flexibility, but they may then not work adequately in application to particular cases. If it had been possible to articulate

72 The Canadian version emphasises the relationship where Lord Wilberforce emphasised reasonable foreseeability.

73 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282; *Invercargill City Council v Hamlin* [1996] AC 624; *Scott Group v McFarlane* [1978] 1 NZLR 553; *First City Corporation Ltd v Downsvieview Nominees Ltd* [1990] 3 NZLR 265; *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314.

74 *Brown v Heathcote County Council* [1986] 1 NZLR 76 at 79, per Cooke P; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513.

75 Note 49 *supra* at 543.

76 See P Vines, note 4 *supra*.

that notion of human responsibility more clearly – with more concrete examples, for instance – proximity-as-principle might have been accepted and worked in a predictable way. All the factors which were seen as important to proximity-as-principle were about power – where power was unbalanced between two parties, a duty of care was more likely to be found. Reliance, vulnerability and control are all aspects of power relationships. Ultimately the court might have developed a law of negligence which operated to redress power imbalance. This would have been a substantive issue, not merely a label and it would also be more predictable in that the highly abstracted nature of the general principle would be more readily applied to particular situations.

## V. RECENT CASES IN THE HIGH COURT – MOVING FROM PRINCIPLE TO RULE?

Recent cases in the High Court have shown that the use of proximity-as-principle as outlined above has been eroded. It seems that the court is retreating to a rule- or category-based (rather than principle-based) approach to the law of negligence. The following cases illustrate the shift away from principle and towards rule-oriented analogy. However, this has not led to certainty. Each case is complex, and it is relatively difficult to establish a *ratio decidendi* because of the differences amongst the judgments in each case.

### A. Recent decisions

In *Hill v van Erp*,<sup>77</sup> a solicitor failed to prevent the witness-beneficiary rule from invalidating a gift under a will. *Hill v van Erp* illustrates the fragmenting of the treatment of proximity in the High Court. Five judges held that the appeal should be dismissed, but their reasons differed. Justice McHugh dissented. Chief Justice Brennan, as one would expect, dealt with the case by an incremental approach, much of it based on the House of Lords judgment in *White v Jones*.<sup>78</sup> Chief Justice Brennan's reliance on *White v Jones* is significant because the majority of the House of Lords in that case emphasised the small category or 'pocket' of solicitor's liability.<sup>79</sup> He thus treated the case as a case in the category of solicitor's liability for negligence and applied the test of the specifically foreseeable plaintiff from *Caltex Oil*.<sup>80</sup> He did not mention proximity at all, but he did discuss some of the policy problems raised by pure economic loss, such as indeterminate liability. He said they did not apply in this case.

Justice Dawson discussed proximity extensively. He said in effect that proximity is the label given to the "something extra" needed in addition to reasonable foreseeability to justify the duty of care. He said the first question is

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77 Note 35 *supra*. See M Vrankin, "Negligent Solicitors and Compensation for Economic Loss: *Hill v van Erp*" (1997) 5 (1) *Torts Law Journal* 1.

78 [1995] 2 AC 207.

79 But note that Lord Mustill, in dissent, specifically refused to create such a category: *White v Jones*, *ibid* at 291.

80 *Caltex Oil(Aust) Pty Ltd v the Dredge 'Willemstadt'* (1976) 136 CLR 529 ("*Caltex Oil*").

to decide what category of case is being dealt with and that “proximity expresses the result of a process of reasoning rather than the process itself, but it remains a useful term because it signifies that the process of reasoning must be undertaken”.<sup>81</sup> In his judgment, the content of proximity is determined by the use of decided cases and analogy. He suggested that Justice Deane’s proximity and Justice Brennan’s incrementalism are very similar “in that the reasoning employed to formulate the particular requirements of proximity do not reflect a unifying theme”.<sup>82</sup> This reflects a frequent mistake which conflates rule-based proximity with proximity-as-principle. He also decided the case as a case in the category of solicitor’s liability on the basis that the proximate relationship arises from the fact that the solicitor is a professional person of specialised skill and knowledge who has control over the situation – and indeed, that is the very purpose for which the solicitor was engaged.

Justice Toohey generally agreed with Dawson J but he made a special statement on proximity in which he said that proximity is concerned with categories of cases rather than whether proximity exists in the particular case.<sup>83</sup> At the same time he was concerned to maintain the view of proximity as a general conceptual determinant of the duty of care. He appeared to be attempting to maintain proximity-as-principle, but his emphasis on the categories as the first consideration suggests he was actually using a form of incrementalism.

Justice Gaudron championed proximity-as-principle, and argued that the charge of imprecision applied just as much to incrementalism as to proximity. Her view of the test for the duty of care was that a special relationship of proximity was required and she referred to *Burnie Port Authority v General Jones Ltd*<sup>84</sup> and *Hawkins v Clayton*<sup>85</sup> as cases where control was central to the duty of care. Justice Gummow agreed with Dawson and McHugh JJ that proximity is the expression of a result rather than a principle, but said that it was going too far to say that no principles emerge from it. He took a categorical (rule-based) approach to proximity, and then appeared to deal with the case by deciding whether there was a gap in the law which negligence should fill. He decided that it should on the basis of the solicitor’s level of control in the situation.

Although Dawson, Toohey, Gaudron and Gummow JJ all used the term ‘proximity’, only Toohey and Gaudron JJ saw it as a conceptual determinant of the duty of care. Thus most references to proximity were to ‘rule-based’ proximity. All the judges thought ‘something extra’ was required to establish the duty; they all discussed policy factors - in particular those associated with pure economic loss, namely indeterminate liability, economic advantage and the effect on other areas of law. Only McHugh J, who dissented, saw these as significant problems - these policy issues were central to his denial of the duty of care. However, the issue of the level of control the defendant had over the

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81 *Hill v van Erp*, note 35 at 178.

82 *Ibid.*

83 *Ibid* at 189, per Toohey J.

84 Note 49 *supra*.

85 Note 51 *supra*.

situation of the plaintiff appeared to emerge as the major factor in determining the duty of care, whether couched in terms of proximity or not. Thus the label for the test for the duty of care was uncertain, but there was substantial agreement about the outcome.

The issue for the High Court in *Esanda*<sup>86</sup> was whether, in an action for negligence for pure economic loss, it is sufficient to argue only that it was reasonably foreseeable by the auditor that, in entering into financial transactions, creditors and financiers of a corporation might rely on the audited accounts of the corporation along with an unqualified auditor's report on them. The High Court held unanimously that the appeal should be dismissed, and the judges accepted *San Sebastian*<sup>87</sup> as correctly stating the law as to negligent misstatement. Neither Brennan CJ nor McHugh or Gummow JJ mentioned proximity, and they all, in separate judgments, determined the case on the basis that the category required reasonable reliance and that the information should be communicated for a purpose likely to lead the plaintiff to enter into a transaction. This followed the content of proximity in *Caparo*.<sup>88</sup> Justice Dawson, and Toohey and Gaudron JJ in a separate joint judgment, all discussed proximity. Justice Dawson said proximity was required and could be shown in a number of ways, the relevant ones here being reasonable reliance and recognition of the purpose for which the statement was made. Justice Toohey and Gaudron J acknowledged some of the indeterminacy of proximity but held that it must be shown in order to establish a duty of care. Once again they related the content of proximity to control and the assumption of responsibility (that is, where it is or should be known that the information will be acted on for a serious purpose).

Thus the factors required to establish the duty of care in this category were very similar for all the judges. The only judge to discuss policy issues was McHugh J, who did so in depth, considering policy problems created by the extension of liability (including a likely increase in the cost of auditing, the reduction in competition for auditors and a reduction in standards of auditors) and its effect on the administration of the court system, and the further policy question of who are better placed to absorb losses - auditors, or investors and creditors.<sup>89</sup>

In *Northern Sandblasting v Harris*,<sup>90</sup> the respondent, Nicole Harris, was nine when she was electrocuted by the garden tap in her garden, and suffered brain damage, leaving her in a vegetative state.<sup>91</sup> The respondent argued, inter alia, that the landlord owed a common law duty to ensure that the electrical system in the premises was let in a safe condition (that is, they should have inspected the switch box), and that the landlord owed a non-delegable duty to Nicole in

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86 Note 34 *supra*. See C Phegan, "Reining in Foreseeability: Liability of Auditors to Third Parties for Negligent Misstatement" (1997) 5(2) *Torts Law Journal* 123.

87 Note 3 *supra*.

88 Note 3 *supra*.

89 *Esanda*, note 34 *supra* at 781 ff.

90 (1997) 188 CLR 313.

91 She died some three weeks before the High Court handed down its decision.: G Orr, "The Glorious Uncertainty of the Common Law? *Northern Sandblasting Pty Ltd v Harris*" (1997) 5(3) *Torts Law Journal* 208.

relation to the stove, to ensure that reasonable care was taken with the electrician's work. In the result the landlord was held liable by a majority of four (Brennan CJ, Toohey, Gaudron and McHugh JJ) to three (Dawson, Gummow and Kirby JJ dissenting), but there was no majority holding on any one of the arguments.

A majority of the judges clearly dealt with ordinary duty of care by reference to *Donoghue v Stevenson*, or ordinary foreseeability of harm, rejecting the rule in *Cavalier v Pope*.<sup>92</sup> Only Toohey and McHugh JJ thought that the landlord owed a non-delegable duty to Nicole. In considering non-delegable duty, Brennan CJ and Dawson and Gaudron JJ appeared to consider whether it was a hazardous activity. Justice Toohey, McHugh, Gummow and Kirby JJ all emphasised the elements of special vulnerability, and control, referring to *Burnie Port Authority v General Jones Ltd*.<sup>93</sup> Justice Gaudron, Toohey and McHugh JJ discussed proximity specifically, and Dawson and Kirby JJ did so implicitly when they used the language of 'special relationship'. All the judges except Toohey J were using rule-based proximity. In his discussion of proximity, Toohey J emphasised, as he had in the previous two cases, the use of proximity in relation to novel categories – he said that the first step is to establish an analogy with a previous category, and then to decide by the use of policy whether the category should be added or extended. His judgment appears to be a mixture of proximity-as-principle and rule-based proximity or incrementalism.

The approaches taken by the judges to the duty of care in *Pyrenees Shire Council v Day*<sup>94</sup> once again varied a great deal. The case concerned the council's failure to notify the occupiers of a defect in a fireplace which ultimately caused damage to the premises next door. Justice Toohey approached the duty of care on the basis that the requirements of reasonable foreseeability and proximity must be met, and that, in this case, the scope and content of proximity depended on reliance. Here he drew on the treatment of general reliance by the House of Lords in *Stovin v Wise*<sup>95</sup> (that is, where the plaintiff is dependent on the local authority for protection). He said that proximity embraces reasonable foreseeability and fairness of application of duties.

Justice McHugh also used the language of general reliance. His approach to the duty of care was to say that, where there was an omission, in order to establish a common law duty there must be a special relationship. Such a relationship might arise from ownership, occupation or control of land or chattels, from the receipt of a benefit, or from assumption of responsibility. In this case the relationship arose because of general reliance. He pointed out that general reliance only arises where the situation is too complex or of such magnitude that ordinary individuals cannot take care of themselves in relation to it – or where individuals are especially vulnerable.

The majority, who held that a duty was owed to both the Days and the owners and tenants of the other property, took other approaches. Chief Justice Brennan

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92 [1906] AC 428.

93 Note 49 *supra*.

94 Note 24 *supra*.

95 [1996] AC 923.



rejected the general reliance approach and held that the duty arose as a breach of statutory duty, taking the incremental approach. Justice Gummow also rejected general reliance. To determine the duty of care he took the approach of Dixon J in *Shaw Savill and Albion Co Ltd v Commonwealth*,<sup>96</sup> namely that the circumstances of the defendant are significant and where an omission is alleged, the character in which he acted and the nature of the duties the defendant was performing are significant to the duty, and the court should consider both reason and policy. He held that the touchstone of the shire's duty was its control (including its knowledge that the possibility of the fire was great, and the fact that only shire officers knew) over the safety of persons from fire. This established a duty of care.

Justice Kirby preferred to consider general reliance in the context of proximity in the three stage test from *Caparo*. Applying that test here, he considered the first two stages to be met, and in relation to the third stage he emphasised the policy issues relating to statutory authorities and concluded that they were not sufficient to preclude duty. He held the council was liable to all the defendants.

Another strong illustration of varieties of incrementalism appeared in *Romeo v Conservation Commission of the Northern Territory*<sup>97</sup> where the majority proceeded in classic common law form to look at the rules established within particular categories, and applied those rules in a fairly narrow form of incrementalism. Justice Brennan used the category of breach of statutory duty. Justice Toohey, Gummow and Gaudron JJ all considered the issue by considering the duty owed to members of the public who enter onto public land. Justice Kirby's approach, with its emphasis on justice and fairness in the *Caparo* test could be characterised in Stanton's terms as broader incrementalism when he observed that "the law of negligence must ultimately respond to common notions of fairness and justice".<sup>98</sup>

## B. What approach to the duty of care binds courts below?

In *Richards v State of Victoria*,<sup>99</sup> in the Victorian Court of Appeal, Callaway JA considered the problem of how to approach the duty of care in Australia. He noted the confusion engendered by the range of different approaches being made by recent judgements and decided to resolve it by use of the strict doctrine of precedent. He said that the High Court had made binding statements requiring a two-stage test of reasonable foreseeability and proximity as a conceptual determinant of the duty of care in a series of cases, stating the test as it was posited in *Gala v Preston*<sup>100</sup> and referred to *Bryan v Maloney*<sup>101</sup> as the last authoritative statement where a majority of the High Court stated a test for the

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96 (1940) 66 CLR 344 at 360-361 cited by Gummow J in *Pyrenees SC v Day*, note 24 *supra*.

97 Note 24 *supra*.

98 *Ibid* at 476. The main issue in the case was the standard of care, but naturally the court considered how the duty of care should be approached.

99 *Richards v State of Victoria* [1998] VCSA 103 ("*Richards*").

100 *Ibid* at [8], per Callaway JA, citing *Gala v Preston*, note 47 *supra*.

101 *Ibid* at [8], per Callaway JA, citing *Bryan v Maloney*, note 50 *supra*.

duty of care. He then interpreted *Hill v van Erp* as having possibly relaxed the test somewhat, except in cases of physical injury caused by failure to warn. He then said:

We cannot depart from binding statements simply because a majority of the present members of the High Court of Australia might be thought to take a different view.<sup>102</sup>

By contrast, in *CSR v Wren*,<sup>103</sup> the NSW Court of Appeal took a different view of what authority in the High Court required of them. In this case an employee of a subsidiary of CSR developed asbestosis and mesothelioma from breathing in asbestos fibres at the factory where he worked. The question was whether CSR owed a duty of care to Wren, even though he had been employed not by them, but by their subsidiary. The case thus raised issues about competition between corporate law and tort law.<sup>104</sup> Justices of Appeal Beazley and Stein relied on Justice Dawson's approach in *Hill v van Erp*. They emphasised, as had the majority in *Hill v van Erp*, that proximity's role was to provide the extra requirements beyond reasonable foreseeability that would establish a duty of care, but that proximity is the result rather than a process. They appeared to see the establishment of a duty of care in three stages – first determine reasonable foreseeability of harm and use the category of case to decide what extra is needed to establish a duty; then if this is a new category, use analogy with established categories to incrementally establish new ones, and third, use policy to decide whether the new categories can be justified. This is an amalgam of general incrementalism and the *Caparo* test.

The recent decision in *Perre v Apand*<sup>105</sup> does not appear to relieve the situation. The case concerned pure economic loss caused to potato producers because a seed company, Apand, had negligently introduced infected seed into an adjacent property. There was a strong emphasis on policy issues in all the judgments – both in relation to indeterminate liability, and to the need to deal with pure economic loss in a way which does not interfere with commercial imperatives. Justice Gaudron noted that commercial imperatives often impliedly allow pure economic loss with impunity, and Gleeson CJ and Gummow J both emphasised that contract would normally govern such losses in a commercial setting. They both discussed the matter in terms of interference with other legal doctrine. Justice Gummow emphasised a concern that debate about pure economic loss may turn on an 'unarticulated premise' that the common law values competitive conduct.

Chief Justice Gleeson agreed with Justice Gummow's reasons that the duty of care existed, noting that actual foresight of the likelihood of harm had existed. Gummow J held that the test was reasonable foreseeability of harm, with the emphasis on reasonableness. He said the first step should be to identify the interest to be protected (this was similar to the judgment of Gaudron J in *Hawkins v Clayton*). Courts may deal with pure economic loss differently if the

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102 *Ibid.*

103 (1997) 44 NSWLR 463.

104 See P Edmundson and P Stewart, "Liability of a Holding Company for Negligent Injuries to an Employee of a Subsidiary: *CSR v Wren*" (1998) 6 *Torts Law Journal* 123.

105 Note 1 *supra*.

act or omission amounts to an impairment of an existing right. If so, the approach to be taken is to see if the risk to the interest or right was foreseeable and whether sufficient proximity exists to establish a duty, and the second step is to look at the defendant's conduct. Here the commercial interests had been impeded by a denial of access to their main market. He said that the area of pure economic loss caused by such acts was a 'gap' in the common law and the question was whether negligence could fill it. He answered that it could if it would not cut across a well-developed body of doctrine and if the particular connections between the parties showed that the relationship was so close that the duty of care arose. Here the salient features of the relationship were knowledge and control by the defendant and the vulnerability of the plaintiff.

Justice Kirby was the only judge to think the solution to the issues created by the duty of care in this case lay in using the *Caparo* test.<sup>106</sup> His approach to policy was to consider it as part of the third stage of the duty inquiry as formulated in *Caparo*. That is, as part of the "just, fair and reasonable" part of the test.

Justice Gaudron's approach to the duty of care was also to ask what interest had been infringed. She referred to three previous pure economic loss cases<sup>107</sup> which she characterised as in the category of cases where pure economic loss is caused by impairment of a legal right, noting that all these cases had arisen where plaintiff depended on the defendant, or the defendant had control over the ability to maintain that legal right. She said that the factors of control and the other's dependence together give rise to a relationship of proximity or may be regarded as special factors which lead the law to impose liability.<sup>108</sup> She accepted that proximity now signified only the special factors of significance required to establish a duty of care, and observed:

In my view, where a person knows or ought to know that his acts or omission may cause the loss or impairment of legal rights and that latter person is in no position to protect their rights there is a relationship giving rise to a duty of care.<sup>109</sup>

Justice McHugh noted that the search for a new framework for negligence law "may be a long one", and that proximity-as-principle was in demise. He referred approvingly to the *Caltex Oil* case but said that it is not necessary to have a specifically foreseeable individual to establish a duty of care. He said one should use the incremental approach to the duty of care. If the case fits into a category, apply the rules of the category; if not, ask if the harm was reasonably foreseeable. If it was not, there is no duty; if it was foreseeable, then one should

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106 *Ibid.* Chief Justice Gleeson at 610 and McHugh J at 624-626 rejected the *Caparo* test. Justice Gummow did not discuss it. Justice Gaudron at 613-614 mentioned it but did not want to use it. Justice Hayne at 698-699 mentioned it but thought it was not very useful, and thought the third stage of the test – "fair just and reasonable" – was particularly problematic. Justice Callinan at 716 thought it unnecessary to consider *Caparo* because the High Court of Australia has been taking a different path from the House of Lords.

107 *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 (right to bring action for damage for personal injury); *Hawkins v Clayton*, note 51 *supra* (right to apply for probate) and *Hill v van Erp*, note 35 *supra* (right to inherit).

108 *Perre v Apand*, note 1 *supra* at 617, per Gaudron J.

109 *Ibid.*

examine the analogous cases to decide whether a duty was owed. He then gave some guidance about how to examine those analogous cases - the reasoning in those cases which established whether a duty existed or not should be treated as principles in that category, and if really decisive, in other categories. This is an echo of the treatment of duty of care by Toohy J in *Hill v van Erp* and *Northern Sandblasting v Harris*, and of Justice Dawson's approach in *Hill v van Erp* and is the foundation of the approach taken by the NSW Court of Appeal in *CSR v Wren*.

In cases like this one about pure economic loss, McHugh J said, one should ask whether the defendant should have had the interests of the plaintiff in mind. In determining this, policy issues will be important factors. If imposing a duty would create indeterminacy (the floodgates problem) or prevent conduct legitimately protecting or pursuing business interests, then no duty will be imposed. However, the fact that neither of these problems arises, does not automatically mean the duty will exist. The decisive factor, he said, is often vulnerability and actual knowledge of the risk and its magnitude. Vulnerability may include reliance and assumption of responsibility.<sup>110</sup>

Justice Hayne agreed that proximity works only as a description of a result. He also saw policy as highly significant in establishing a duty of care where the loss is purely economic. He agreed with the other judges that the policy issues were indeterminate liability and the need "not to establish a rule that will render 'ordinary' business conduct tortious".<sup>111</sup> In order to deal with this question one should ask what the position would have been if the action had been done deliberately. Justice Callinan echoed this concern when he said that what had happened was not the result of ordinary legitimate commercial activity. Justice Callinan followed *Caltex Oil* and noted that the law was still developing piecemeal. He said one has to consider "proximity, foreseeability, a special relationship, determinacy of a relatively small class, a large measure of control on the part of the respondent, and special circumstances justifying the compensation of the appellants for their loss".<sup>112</sup>

Once again, a range of approaches seemed to arise in *Perre v Apand*, despite the discussion by the judges of the need to develop a coherent approach to the issue.<sup>113</sup> As McHugh J said

Indeed, since the fall of proximity, the Court has not made any authoritative statement as to what is to be the correct approach for determining the duty of care question. Perhaps none is possible. At all events, the differing views of the members of this Court in the present case suggest that the search for a unifying element may be a long one.<sup>114</sup>

Consistent themes appear in the judgments, however, notably the fact that McHugh, Kirby, Hayne, and Callinan JJ all emphasised policy matters in their

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110 *Ibid* at 631ff, per McHugh J.

111 *Ibid* at 699, per Hayne J.

112 *Ibid* at 717, per Callinan J.

113 *Ibid* at 613, per Gaudron J; at 659, per Gummow J; at 668, per Kirby J at 668; at 698, per Hayne J; at 716, per Callinan J.

114 *Ibid* at 624.

analysis of rules about the duty of care. Similarly, the emphasis on control and vulnerability as determinative factors for the establishment of a duty of care continues to be fundamental to all the judgments.

More recently, in *Crimmins Case*,<sup>115</sup> the High Court again considered the duty of care in deciding (Gleeson CJ, Gaudron, McHugh, Kirby and Callinan JJ, Gummow and Hayne JJ dissenting) that a duty was owed by the waterside authority to a worker who developed mesothelioma as a result of exposure to asbestos cargoes. The leading judgment is that of McHugh J, with whom Gleeson CJ agreed. Justice McHugh held that a duty was owed because of the vulnerability of the plaintiff as a result of the directions of the authority. The issue of control and vulnerability as the factual determinant of the duty of care was also a central factor in many of the other judgments.<sup>116</sup>

Justice McHugh observed that the correct approach in determining whether a duty of a statutory authority arises is “to commence by ascertaining whether the case comes within a factual category where duties of care have or have not been held to arise”.<sup>117</sup> He thus began with a strongly incrementalist approach, but he continued:

The policy of developing novel cases incrementally by reference to analogous cases acknowledges that there is no general test for determining whether a duty of care exists. But that does not mean that duties in novel cases are determined by simply looking for factual similarities in decided cases or that neither principle nor policy has any part to play in the development of law in this area. On the contrary, the precedent cases have to be examined to reveal their bases in principle and policy.

He went on to explain that close use of analogical reasoning can allow the principle and policy in earlier cases to be adapted and “[i]n this way, the reasons in each new case help to develop a body of coherent principles...”.<sup>118</sup> Justice McHugh acknowledged the risk that an extreme incrementalism could become so fragmented that it ultimately becomes merely “the exercise of a [judicial] discretion”.<sup>119</sup> His approach to incrementalism attempted to deal with that by a sophisticated use of analogy. But he still yearned towards principle of some kind.

## VI. CONCLUSION

The history of negligence law, like that of all areas of law, has been a history of change and competing dominant rules and theories, and this is nowhere more true than in the history of the duty of care. *Donoghue v Stevenson* established the neighbourhood principle, which itself was a departure from what might be seen as the previously dominant incrementalism. Since then, various tests have come

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115 Note 28 *supra*.

116 *Ibid* at 13, per Gaudron J; at 72ff, per Hayne J (with whom Gummow J generally agreed; the dissenters thought the authority was not in control); at 87, per Callinan J. Justice McHugh, Gummow, Hayne and Callinan JJ all clearly took an incrementalist approach. Justice Kirby continued to use the *Caparo* test, and Gaudron J emphasised the vulnerability of the worker in her use of the doctrine of general reliance.

117 *Ibid* at 16.

118 *Ibid* at 19.

119 *Ibid* at 20; Gummow J also noted this problem at 40.

and gone.<sup>120</sup> But part of the dynamic of the common law is the constant search of judges for doctrinal coherence, and this frequently leads to a search for an underlying principle.<sup>121</sup> Proximity-as-principle could have gone further towards dealing with the problem of predictability, if the court had been willing to articulate more clearly what its view of the relationship between legal and moral responsibility was. Proximity-as-principle was founded, as the neighbourhood principle was, on a moral idea.<sup>122</sup> Whether proximity-as-principle is something unique or just a different way of expressing the constant flow between levels of generality in legal reasoning may not be important. The fact that the tests vary and that the judgments run them together may not be important either. Does this lead us to the conclusion that the tests don't matter at all? What role do the tests play?

The answer may be that it is necessary for the tests to swing between the emphasis on the principle and the emphasis on the category so that a sense of coherence is maintained over time - a purely principled approach can lead to a sense of uncertainty or lack of concreteness and a purely categorical approach will lead to a sense of rigidity and arbitrariness. But, as the judges themselves acknowledge, at present we seem to have the worst of both worlds. Narrow forms of incrementalism may seem arbitrary and unreal because the choice of category is itself arbitrary. Some kind of framework is necessary, and the judges need to agree on what it is.

These cases illustrate the difficulties of discerning a test for the duty of care in negligence in Australia at present. It is clear that proximity-as-principle is in decline. Its last adherents are Toohey and Gaudron JJ, only one of whom remains on the High Court Bench, and she appears to have conceded defeat.<sup>123</sup> Where proximity is discussed it appears to be rule-based proximity. The elements of proximity within categories appear to be the same as the 'extra factors' used for incrementalism - that is, reliance and purpose, professional relationships, the elements of control and vulnerability. Policy factors are clearly important - but again, they are most likely to be determined by the category and therefore to fit into a form of incrementalism. However, although they might all be called incrementalist, there is no agreement on a framework which would assist with predictability. The incrementalism itself is fragmented.

This suggests that the narrow form of incrementalism (which includes rule-based proximity) is unlikely to remain satisfactory for long, and we are likely to see either, a form of incrementalism which allows greater scope for principle (which is what McHugh J is clearly looking for in *Crimmins*), or, the

120 As J McHugh points out in "Neighbourhood, Proximity and Reliance", note 52 *supra*.

121 See, *inter alia*, N MacCormick, "Donoghue v Stevenson and Legal Reasoning" in P Burns and S Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence* (1991) 191; G Christie, "The Uneasy Place of Principle in Tort Law" in D Owen (ed), *Philosophical Foundations of Tort Law* (1995) 113.

122 *Donoghue v Stevenson*, note 5 *supra* at 580, per Lord Atkin. He noted the basis of the rule as "a general public sentiment of moral wrongdoing for which the offender must pay" and went on, "[t]he rule that you are to love your neighbour becomes in law, You must not injure your neighbour, and the lawyer's question, Who is my neighbour? receives a restricted reply... The answer seems to be - persons who are so closely and directly affected by my act...".

123 *Perre v Apand*, note 1 *supra* at 614, per Gaudron J; *Crimmins*, note 28 *supra* at 4, per Gaudron J.

development before long, of yet another principle in the long chain which began with the neighbour principle in *Donoghue v Stevenson*. The court is looking for a framework which can reconceptualise the duty of care. They seem to trust that this will emerge eventually,<sup>124</sup> but until they agree with each other the fragmentation and confusion will continue.

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124 *Ibid* at 624, per McHugh J at 624; at 658-660, per Gummow J; at 667ff, per Kirby J; at 696ff, per Hayne J; at 717, per Callinan J.