PROXIMITY AND THE STANDARD OF CARE — COOK v. COOK

by

N. L'Estrange*

In December 1986, the High Court decision in *Cook* v. *Cook*[1] heralded a new development in the concept of proximity and its relevance in negligence actions in Australia. Not only did four of the five sitting judges hand down a joint judgment,[2] thus formulating clearly the High Court interpretation and application of the general rule of proximity, begun by Deane J. in *Jaensch* v. *Coffey*,[3] but the general rule has, it is submitted, been extended in its application. It is to the joint judgment that the attention of this note is directed, though it is noted that Brennan J. has, in three recent decisions involving various categories of negligence actions,[4] given a separate judgment in which he confirms the view that '. . . I regard Lord Atkin's test of neighbourhood or proximity as satisfied by reasonable foreseeability of injury'.[5]

Brennan J. treats reasonable foreseeability as the objective criterion for the archetypal category of negligence, that is, a careless act causing personal injury.[6] He also states that 'ordinary prudence in the circumstances' is the relevant criterion for setting the standard of care owed in the particular case. He concludes:

> I am therefore unable in this category of case to adopt a concept of proximity other than reasonable foreseeability of injury as a tool for analysis or as a practical criterion for determining the existence of a duty of care . . . or . . . for determining the standard of care required for discharging a duty of care.[7]

However, in all three cases, Brennan J. although using a different test, reaches the same conclusion as the joint judgment in relation to liability. It is also interesting to note that Brennan J. has preserved his ability to use proximity as a possible primary test in areas other than 'this category of case', that is, negligence causing personal injury. In other areas of negligence, Brennan J. has preferred to base liability on the prime test of foreseeability, coupled with any specific rules of law (e.g. in relation to employers,[8] and occupiers[9]).

The facts of *Cook's* case involved a motor vehicle accident in which the appellant was an inexperienced and unlicensed driver, and the respondent was the passenger injured when the vehicle collided with a concrete electricity pole in South Australia. The full Court of the Supreme Court of South Australia (King C.J., Johnson and Matheson JJ.) held by majority,

---

*B.A. (Monash), LL.B. (Qld), Solicitor, Lecturer-in-Law, Queensland Institute of Technology.

1. (1986) 61 A.L.J.R. 25.
2. Mason, Wilson, Deane and Dawson JJ.
3. (1984) 155 C.L.R. 549.
4. *Cook* v. *Cook supra* n.1; *San Sebastian Pty Ltd* v. *Minister Administering the Environmental Planning and Assessment Act 1979* (1987) 61 A.L.J.R. 41; *Australian Safeway Stores Pty Ltd* v. *Zaluzna* (1987) 61 A.L.J.R. 180.
5. *Supra* n.1 at 31.
6. *Ibid.*
7. *Ibid.* at 32.
8. *Stevens* v. *Brodribb Sawmilling Company Pty Ltd* (1986) 60 A.L.J.R. 194 at 206.
9. *Australian Safeway Stores Pty Ltd* v. *Zaluzna supra* n.4.

King C.J. dissenting, that there had been a breach of the standard of care owed in the circumstances, although the respondent's damages were reduced by 70 per cent by reason of her contributory negligence in urging her sister-in-law to take control of the motor vehicle despite her (respondent's) knowledge that the driver was totally inexperienced and was not the holder of a permit which would have allowed her to drive a vehicle in the presence of a licensed driver. The appeal was brought to the High Court from that decision by the appellant (driver).

The joint judgment immediately states the basis on which the decision is to proceed:

> . . . we accept that a relevant duty of care will arise under the common law of negligence only in a case where the requirement of a relationship of proximity between the plaintiff and the defendant is satisfied.[10]

That is now the foundation purpose of proximity as it has developed since *Jaensch* v. *Coffey*[11], through *Sutherland Shire Council* v. *Heyman*[12] and *Stevens* v. *Brodribb Sawmilling Company Pty Ltd.*[13] That is, that the proximity of relationship between the parties is an overriding control on the test of reasonable foreseeability, and that the relationship of proximity will determine the categories of case in which the common law will recognize a duty to take reasonable care to avoid foreseeable injury to another. What constitutes that 'reasonable care', is, according to the High Court an objective test, that of the 'reasonably careful man in such circumstances', such as that proposed by Windeyer J. in *Voli* v. *Inglewood Shire Council.*[14]

The difficulty faced by the High Court was highlighted in the case of *The Council of the Shire of Wyong* v. *Shirt and Ors.*[15] In that case, also a personal injuries action, the plaintiff had been rendered a paraplegic after falling whilst water skiing, and striking his head on the bottom of the lake which was under the control of the appellant. The Council had erected signs warning of the depth of a dredged channel, in such a manner it was argued, as to mislead skiers like the respondent into thinking that the deep water was on the other side of the sign, where in fact the water was shallow, and where, in fact, the respondent had his fall and suffered his injuries. The issue put to the jury by Ash J. (also the trial judge in *San Sebastian*) in the Supreme Court of New South Wales was whether it was foreseeable to a body such as the Council that carelessness on its part was likely to cause damage to the plaintiff. The jury concluded in the affirmative, and the majority of the Court of Appeal saw no reason to disturb that finding. Glass J.A. in the Court of Appeal had described the test of foreseeability as 'undemanding'.[16] In the High Court, Mason J., with whom Stephen and Aikin JJ. concurred, indicated the possible problems with foreseeability as the prime test of whether a duty of care exists:

> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable.[17]

Mason J. went on to find that, applying the general test, the jury had not been unreasonable in finding that there was a foreseeable risk of injury, and that their conclusion of a breach of duty on the facts was open to be made. Mason J. concluded:

---

10. *Supra* n.1 at 27.
11. *Supra* n.3, at 554-5, 581-3.
12. (1985) 157 C.L.R. 424 at 441, 460-2, 470, 495-8.
13. *Supra* n.8. at 199, 208-9.
14. (1963) 110 C.L.R. 74 at 89.
15. (1980) 146 C.L.R. 40.
16. [1978] 1 N.S.W.L.R. 631 at 642.
17. *Supra* n.15 at 48.

> . . . I am mindful that the foreseeability of the risk . . . is a question on which minds may well differ . . . It is not a question which a judge is necessarily better equipped to answer than a layman.[18]

Indeed, in *Shirt's* Case, Wilson J. dissented, finding that the risk would have been brushed aside by a reasonable man, and was therefore not a risk sufficient to satisfy the test.[19]

The recognition by the High Court that the foreseeability test was neither predictable nor particularly legal in *Shirt's* case began to set the stage for the introduction of a more discriminating test. Indeed, Mason J. begins his judgment by stating, as a prerequisite to establishing any duty of care, that there must be '. . . a sufficient relationship of proximity'.[20]

The developmental step taken by the High Court in *Cook's* Case is the next step in the reasoning. Having established that the parties are indeed proximate, and thus, *prima facie*, owing a duty to take reasonable care, the High Court proceeds to extend the principle of proximity into the definition of the objective standard of care which will be owed by those proximate parties, by holding that:

> . . . the objective standard will depend upon the relevant relationship of proximity from which it flows and into which the reasonable person of the law of negligence will be projected . . .[21]

Therefore, the particular degree and relationship of proximity will affect the objective and impersonal measure of the standard of care owed in that particular circumstance. So, special and exceptional facts may alter the standard of care owed by one to the other proximate party. Consequently, even in areas of negligence law, such as drivers and their passengers, where the common law has recognised a general duty and general standard of care, this extension of the principle of proximity means that the duty may be established by reference to general principles, but that the standard owed may be varied, that is, expanded or contracted, according to whether the party asserting the variation can satisfy the court that such a special or different relationship exists as to allow the court to set the standard of care owed by reference to a reasonable man in that special or different relationship.

The circumstances must 'clearly transform the relationship'[22] before the Court can vary the general standard, but the scope is broad. For example, in the category of drivers' duty to their passengers, any special and exceptional circumstances may include (as in *Cook's* case) the known inexperience and incompetence of the driver, although the Court was careful to exclude from these circumstances matters relating solely to some physical characteristic or expertise or the usual carefulness or otherwise of the particular driver.[23] Once the party asserting a special and exceptional circumstance has satisfied the Court that such a situation exists, then the reasonable man, the objective tester of the standard of care owed, must be placed within the confines of the special relationship, and the standard measured accordingly.

In *Cook's* case, the Court measured objectively all the facets of the facts leading to the injury, thus allowing the Court to eliminate all actions referable to inexperience and lack of qualification as bases for any successful negligence action. So the Court looked to the type of turn the driver made, the need to manoeuver around a parked car, and the collision with

---

18. *Ibid.* at 48-9.
19. *Ibid.* at 54-5.
20. *Ibid.* at 44.
21. *Supra* n.1 at 27.
22. *Ibid.* at 29.
23. *Ibid.*

the power pole. None of these facts, in the Court's opinion, breached the varied standard of care brought about by the special circumstances of the case. However, the breach occurred in the driver accelerating deliberately in order to avoid the static object. That, it was held, was an '. . . element of carelessness over and above what would be attributed merely to the driver's inexperience',[24] and thus constituted a breach of the duty of care she owed to her passenger. Having so found, all members of the Court considered it unnecessary to apply the defence of *volenti non fit injuria.*

Thus has the principle of proximity developed. It is now the 'general determinant' of the categories in which the law of negligence recognizes a duty of care as owing, and further, it is the necessary basis on which the objective standard of that care rests, and by which the standard will be controlled.

The test of foreseeability has been used, (and still is by Brennan J.) at differing levels of abstraction for different purposes. As already discussed, *Shirt's* case showed the test being used to establish a *prima facie* duty of care, and then to set the standard at which that duty of care would be owed in the circumstances. *Cook's* case clearly shows the High Court in its joint judgment using proximity for both of those functions.

The third area in which liability must be assessed is that of damage. Historically, the test propounded by the Privy Council in *Wagon Mound No. 1.*[25] altered the previous 'direct' damage rule in *Re Polemis.*[26] The Wagon Mound test was '. . . is the damage of such a character as a defendant could reasonably by expected to have anticipated? The test is objective, viz., what a reasonable man would have foreseen.'[27]

The *Wagon Mound* test of foreseeability of damages has been accepted and applied in cases such as *Mount Isa Mines* v. *Pusey.*[28]

If proximity is now the 'touchstone and control for establishing a duty of care within a relevant category',[29] and proximity is also the controlling factor in assessing the standard at which that duty will be owed in the particular circumstance, it is, arguably, a short and logical step to extend the principle of proximity to the third area historically governed by foreseeability.

Indeed, as the Judicial Committee pointed out in *Wagon Mound No. 1.*, '. . . to acknowledge the existence of one rule as to liability and another and different rule as to the unforeseeable consequential harm means that closely related aspects of the same problem are governed by rules expressing widely divergent policies'.[30]

Having extended proximity into two areas of importance in assessing liability in negligence, it is submitted that the ground work has been done for a further extension of the same objective rules to the extent of liability for a breach of a duty of care.

Bearing in mind the views of the High Court in relation to the recovery of purely economic loss in the *Caltex* case,[31] the special and exceptional facts that may allow the standard of care to be measured objectively within the particular proximate relationship could well be argued as being relevant to the type and extent of damage recoverable from a breach of the duty so recognized.

Finally, there is a statement made in the joint judgment, and concurred in by Brennan

---

24. *Ibid.* at 30.
25. *Overseas Tankship (U.K.) Ltd* v. *Morts Dock and Engineering Co. Ltd* (The Wagon Mound) [1961] A.C. 388.
26. [1921] 3 K.B. 560.
27. *Supra* n.25 at 400.
28. (1971) 125 C.L.R. 383.
29. *Supra* n.1 at 27.
30. *Supra* n.25 at 400.
31. *Caltex Oil (Australia) Pty Ltd* v. *The Dredge 'Willemstad'* (1976) 136 C.L.R. 529.

J.[32] that, apart from Privy Council decisions given during the period in which appeals to that court lay, '. . . the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning'.[33] Apart from being a general statement of policy on the supremacy of the judicial decisions of the High Court, this also allows for the further development of proximity into the area of types of damage recoverable, as the English Courts have been notable in their refusal to allow recovery of purely economic loss resulting from negligence.[34]

As at July 1987, having the direction of the High Court on the precedential authority of other legal systems, it may even be a brave lower court which accepts the implicit challenge to extend the proximity principle into the final area of negligence law which remains untouched, to date, by the High Court's initiatives in developing a new and more practical approach to liability in negligence.

If such an extension is made, it will be interesting to see whether the proximity principle is applied at differing levels of abstraction, as has occurred with the foreseeability test, or whether there will be a greater degree of overlap between the objective proximity required to establish a duty and the standard at which it is owed in the particular instance, and the proximate damages which arise from the particular breach.

It is, it is submitted, only a matter of time before the logical extension will be made.

---

32. *Supra* n.1 at 32.
33. *Ibid.* at 31.
34. Although allowed in *Junior Books Ltd* v. *Veitchi Co. Ltd* [1983] 1 A.C. 520, more recent cases have isolated that case, together with *Caltex* - see for example *Candlewood Navigation Corporation Ltd* v. *Mutsui OSK Lines Ltd* [1986] 1 A.C. 1, a decision of the Privy Council noted by Judith Miller in (1986) 2 *Q.I.T.L.J.* 111, and *Tai Hing Cotton Mill Ltd* v. *Lin Chong Hing Bank Ltd* [1986] 1 A.C. 80 (P.C.).