

## JAENSCH V. COFFEY

### (FORESIGHT, PROXIMITY AND POLICY IN THE DUTY OF CARE FOR NERVOUS SHOCK)

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#### 1. Introduction

On 20 August 1984, the High Court handed down its decision in *Jaensch v. Coffey*.<sup>1</sup> To the extent that the history of this area of the law dealing with nervous shock<sup>2</sup> has been described as ‘involving the progressive dismantling of arbitrary barriers’,<sup>3</sup> the decision itself reflects a predictable abandonment of yet another of those barriers. However, there is some suggestion in the reasoning of some of the Justices<sup>4</sup> for new guidance in understanding the framework of the duty of care not just in respect of the question where to draw the line with nervous shock, but in respect of other duty problem areas.<sup>5</sup> The principal function of this note is to assess the efficacy of the suggested new guidance.

#### 2. Historical Limits on the Duty of Care for Nervous Shock

##### (a) Policy Objectives

As with the other areas<sup>6</sup> which have posed difficulties for the courts in arriving at the appropriate limit upon liability, the courts have been concerned over the decades with policy reasons for restricting the duty of care for nervous shock. In respect of nervous shock, the following six main reasons have been given for limiting the duty:

- (i) concern with a multitude of imaginary or pretended claims;<sup>7</sup>
- (ii) concern for the imposition of a burden upon individual defendants out of proportion to their moral responsibility and thereby imposing an unreasonable burden upon society in the conduct of normal activities;<sup>8</sup>

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1. (1984) 58 A.L.J.R. 426; (1984) 54 A.L.R. 417. (further references are to the A.L.J.R.)

2. Although as Lord Wilberforce suggested in *McLoughlin v. Brian* [1983] 1 A.C. 410 at 418, the term ‘nervous shock’ has become a ‘hallowed expression’, it seems anachronistic and as Brennan J. described it in *Jaensch* at 431, of ‘dubious medical acceptability’.

3. See e.g. G.L. Fricke, ‘Nervous Shock — The Opening of the Floodgates’ (1981) 7 *Uni. Tas.L.R.* 113.

4. Deane J. *supra* n.1 at 439, with whom Gibbs C.J. agreed at 427, and Brennan J. at 431.

5. Deane J. *supra* n.1 at 442 indicated:

• It may be, that in any such comprehensive framework, the requisite “proximity” of relationship, under that or some more appropriate name such as the phrase “the requisite duty relationship” which is used in this judgment, should be seen as an *anterior general requirement* which must be satisfied before *any* duty of care to avoid reasonably foreseeable injury will arise (emphasis added).

6. Principally negligent misrepresentation and recovery for pure economic loss where policy at first denied a duty but more recently admitted a limited duty based upon a special relationship narrower than reasonable foresight would dictate. See *M.L.C. v. Evatt* (1968) 122 C.L.R. 556; *L. Shaddock & Associates Pty. Ltd. v. Parramatta City Council* (1981) 150 C.L.R. 225; *Caltex Oil (Australia) Pty. Ltd. v. The Dredge “Willemstad”* (1976) 136 C.L.R. 529; *Junior Books Ltd. v. Veitchi Ltd.* [1983] 1 A.C. 520.

7. *Victorian Railways Commissioners v. Coultas* (1888) 13 App. Cas 222 but subsequently abandoned, see e.g. Lord Wilberforce *supra* n.2 at 421.

8. Also rejected by Lord Wilberforce *ibid* and Lord Bridge at 441.

- (iii) concern with the flood-gates argument and the problem of deciding where to draw the line;<sup>9</sup>
- (iv) problems associated with proof of causation, which is to some extent associated with the state of psychiatric knowledge and acceptance of it by the courts;<sup>10</sup>
- (v) the problem of assessment of damages;<sup>11</sup>
- (vi) the view that this is a matter for the Legislature rather than the courts.<sup>12</sup>

### (b) Turns of Fashion

Nowhere are Fleming's<sup>13</sup> quirks of precedent and elusive turns of fashion better exemplified than in respect of nervous shock. The turns of fashion have proceeded from total denial of any duty to the sufferer when narrowly missed being struck at a railway level crossing;<sup>14</sup> to recognition of a duty in the case of a horse and van entering a public house, provided the shock arose from a reasonable fear of immediate personal injury;<sup>15</sup> to denial of a duty to the pregnant housewife outside the area of motor vehicle impact based upon a test of presence within foreseeable range of impact;<sup>16</sup> to recognise a duty to relatives witnessing a scene with their own unaided senses;<sup>17</sup> later extended beyond relatives to rescuer workmates going to the assistance of fellow employees;<sup>18</sup> and to cases involving direct perception of some of the events which go to make up the accident as an entire event, including the immediate aftermath.<sup>19</sup> Perhaps at the extremes of the turns of fashion are the English Court of Appeal decision<sup>20</sup> which held that mourners were owed a duty when a coffin overturned even though there was no apprehension or actual sight of injury to any person, and the High Court decision<sup>21</sup> denying a duty, based upon reasonable foresight, to a mother who witnessed her child's body being dragged from the defendants' trench after drowning.

In many of these decisions, reasonable foresight was used as the means by which duty was limited, thereby masking the underlying policy considerations.<sup>22</sup> To this point I have left the two leading decisions in England and Australia prior to *Jaensch*, for special consideration.

### (c) The Two Leading Authorities Prior to *Jaensch*

In *Mount Isa Mines Limited v. Pusey*,<sup>23</sup> the plaintiff employee went to the scene of an industrial accident which caused horrific electrical shocks and burns to two fellow employees. Several weeks after viewing the scene and aiding the victims, he suffered a severe schizophrenic reaction resulting in an adverse personality change for which he was awarded

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- 9. Rejected by Atkin L.J. in *Hambrook v. Stokes Bros.* [1925] 1 K.B. 141 at 158 but accepted by the Court of Appeal in *McLoughlin v. O'Brian* [1981] Q.B. 599. Clearly it was rejected by the House of Lords in the same case, *supra* n.2 at 471 by Lord Wilberforce; at 424-5 by Lord Edmund-Davies; and by Lord Russell at 429.
  - 10. See P.G. Heffey, 'The Negligent Infliction of Nervous Shock in Road and Industrial Accidents', (1974) 48 *A.L.J.* 196 at 198.
  - 11. *Ibid* at 199.
  - 12. A view reflected in the maxim *judis est jus dicere, non dare* which found favour with Lord Scarman and Lord Bridge, *supra* n.2.
  - 13. J.G. Fleming, *The Law of Torts*, (1983) at 135.
  - 14. *Supra* n.7.
  - 15. *Dulieu v. White & Sons* [1901] 2 K.B. 669 (although Kennedy J. resorted to unforeseeability as a basis for limiting duty).
  - 16. *Bourhill v. Young* [1943] A.C. 92.
  - 17. *Hambrook v. Stokes supra* n.9.
  - 18. *Mount Isa Mines Limited v. Pusey* (1971) 125 C.L.R. 383.
  - 19. *Benson v. Lee* [1972] V.R. 879 especially at 880.
  - 20. *Owens v. Liverpool Corporation* [1939] 1 Q.B. 394.
  - 21. *Chester v. Waverley Corporation* (1939) 62 C.L.R.1.
  - 22. In addition to the cases referred to above, it also gained some prominence in the reasoning of Denning L.J. in *King v. Phillips* [1953] 1 Q.B. 429 and in a number of State court decisions such as *Spencer v. Associated Milk Services Pty. Ltd. and McNamara* [1967] Qd.R. 393.
  - 23. *Supra* n.18.

\$10,000 by the trial judge. The Full Court of the Supreme Court of Queensland dismissed an appeal, as did the High Court, which held that it was sufficient to found liability that the class of injury was foreseeable as a possible consequence of the particular conduct.

Barwick C.J.<sup>24</sup> accepted for the purposes of the case that liability was one question depending solely on foreseeability. McTiernan J. stated 'In my judgement this consequence fell within the range of reasonable foreseeability'.<sup>25</sup> Menzies J. took a similar view when he stated '... the kind of illness that followed was of a kind or type which was reasonably foreseeable by the defendant in a general way with the result that I hold the defendant is liable to the plaintiff for damages, even though the extent of the damage was not foreseeable'.<sup>26</sup> Walsh J. was to like effect<sup>27</sup> and Windeyer J. in a leading judgment, after an extensive consideration of foresight, which included the comment that 'the sense that the word "foreseeable" has acquired for lawyers may cause misgivings for philologists',<sup>28</sup> went on to indicate that 'Liability for nervous shock depends on foreseeability of nervous shock'.<sup>29</sup>

Learned commentators<sup>30</sup> have accepted that the case decided that liability depended solely on the test of reasonable foresight and in the face of the clearly expressed views of the Justices, that conclusion appears inevitable. However, that is not to say that the application of the test of foresight excluded policy. Windeyer J., for example, after recognising the presence of policy, introduced the caveat that it was not for an individual judge to determine the policy of the law according to his own view of what social interests dictate. 'The field is one in which the common law is still in course of development. Courts must therefore act in company and not alone.'<sup>31</sup>

In the leading English authority, *McLoughlin v. O'Brian*,<sup>32</sup> the presence of policy gained a more open treatment. In that case the plaintiff was at home some two miles away from a motor vehicle accident involving her husband and three children. A neighbour informed her and took her to the hospital where she discovered that her young daughter had died and witnessed the condition of the others. She suffered severe shock, organic depression and adverse personality change. The trial judge found for the defendants, holding that they owed no duty of care because the possibility of her suffering injury by nervous shock was not reasonably foreseeable in the circumstances. The Court of Appeal upheld the trial judge but on the different ground that it was reasonably foreseeable but there was still no duty. In doing so, there was explicit reliance upon policy factors operating outside the test of reasonable foresight.

The House of Lords allowed the appeal, holding that the nervous shock had been the reasonably foreseeable result of the injuries to her family and that there were no policy considerations inhibiting recovery. Lord Wilberforce clearly recognised that the boundaries of responsibility had to be fixed by policy when he stated:

... foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice to have been in contemplation. Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom duty may be

24. *Ibid.* at 389.

25. *Ibid.* at 391.

26. *Ibid.* at 398.

27. *Ibid.* at 412-3, 415, 416.

28. *Ibid.* at 398.

29. *Ibid.* at 402.

30. E.g., *supra* n.10 at 197.

31. *Supra* n.18 at 396.

32. *Supra* n.2.

owed . . . it is not merely an issue of fact to be left to be found as such . . . foreseeability does not of itself, and automatically, lead to a duty of care . . .<sup>33</sup>

His Lordship indicated such factors as relational ties, proximity of such persons in time and space to the accident, and the means by which the shock is caused are factors which the court should use in drawing the line at a policy level and his Lordship drew the policy line in stating, 'The shock must come through sight or hearing of the event or of its aftermath'.<sup>34</sup>

Lord Edmund-Davies agreed that the test of reasonable foresight could not be the sole test for duty.<sup>35</sup> In accepting the place of policy and holding public policy issues to be justiciable,<sup>36</sup> his Lordship added the caveat that ' . . . any invocation of public policy calls for the closest scrutiny . . .'<sup>37</sup> His Lordship found no policy reason for excluding liability.

Lord Russell in a brief judgment adverted to policy but took the cautious view that to attempt solutions in advance or even guidelines in hypothetical cases by a consideration of relationships or other circumstances, might do more harm than good.<sup>38</sup>

Lord Scarman took the view that ' . . . in this branch of the law it is not for the courts but for the Legislature to set limits, if any be needed, to the law's development'.<sup>39</sup> Further, he stated more bluntly ' . . . the policy issue as to where to draw the line is not justiciable'.<sup>40</sup> In seeking to explain the absence of a *casus omissus*, his Lordship unconvincingly drew a distinction between *policy* and *principle*. He stated 'Policy considerations will have to be weighed: but the objective of the judges is the formulation of principle . . . By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems . . .'<sup>41</sup>

Lord Scarman took the view that common law principle required the judges to follow the logic of the reasonable foresight test untrammelled by extraneous factors of proximity but he did conclude that although matters of space, time, distance, nature of injuries and relationships were to be weighed, they were not part of foresight.<sup>42</sup>

Lord Bridge shared Lord Scarman's view that this whole area stands in urgent need of review.<sup>43</sup> His Lordship postulated that foreseeability in any given set of circumstances is ultimately a question of fact<sup>44</sup> and that a case-by-case basis was to be preferred.<sup>45</sup>

#### (d) The Overlap Between Proximity, Foresight and Policy

Clearly in the area of nervous shock there has been a division of judicial opinion whether factors of proximity are part of the test of reasonable foresight or are policy factors standing outside that test. On the traditional view, factors such as time, space and relational ties form part of the foresight test.<sup>46</sup> Others have viewed these factors as external policy limits upon duty.<sup>47</sup> There is of course a well-recognised danger that the more extensive the policy intrusion into the test of foresight, the greater the mutilation of the factual operation of the test of foresight and the greater the concealment of the policy factors being masked by the purported application of that test. It is with this background in mind that the case in question is to be considered.

33. *Ibid.* at 420.

34. *Ibid.* at 423.

35. *Ibid.* at 426.

36. *Ibid.* at 428.

37. *Ibid.* at 426.

38. *Ibid.* at 429.

39. *Ibid.*

40. *Ibid.* at 431.

41. *Ibid.* at 430.

42. *Ibid.* at 431.

43. *Ibid.*

44. *Ibid.* at 432.

45. *Ibid.* at 443.

46. See e.g. per Windeyer J. in *Pusey supra* n.18 at 416-7.

47. See e.g. per Lord Wilberforce in *McLoughlin supra* n.34 and Lord Edmund-Davies *supra* n.36.

### 3. Jaensch v. Coffey

#### (a) The Facts

The plaintiff's husband, a traffic constable, was riding his motor cycle in Adelaide whilst on duty in the early evening of 2 June 1979. A motor vehicle negligently driven by Jaensch collided with the cycle and Mr. Coffey sustained serious physical injuries including a tear in the liver and acute kidney problems and later suffered a depressive psychiatric condition. He became unfit for work and resigned from the police force. Mrs. Coffey was not at the scene of the accident but police officers called at her home, informed her and took her to Royal Adelaide Hospital where she saw her husband in great pain on a table in the casualty section.

Mrs. Coffey waited whilst her husband was operated upon and after he was brought out, complications arose and he was returned to the operating theatre. Mrs. Coffey was informed that her husband was 'pretty bad' and advised to go home. At 5.30a.m. the next morning she was telephoned and advised that he was in intensive care. At 8.30a.m. she was advised, again by telephone, that his condition had deteriorated and she was requested to go to the hospital as quickly as possible. She went immediately to the hospital and waited there all day not knowing whether he would survive. He remained seriously ill for several weeks but gradually recovered and was discharged some six or seven weeks later.

The plaintiff was told that the defendant had visited her husband in hospital and some six days after the accident the plaintiff showed emergent signs of an anxiety depressant state. Her psychiatric condition included a delusion that the defendant had deliberately collided with her husband and had assaulted him whilst on the ground after the collision. Her condition deteriorated and she was admitted to a psychiatric ward. Ultimately, she suffered physical symptoms of pain and uterine bleeding and she underwent two operations in 1981, a tubal ligation and a hysterectomy.

She sued Jaensch for damages for her illness and at the trial the defendant did not contest that he had been negligent in driving or that the stress and anxiety caused the physical problems and had been caused in turn by the things she heard and saw as part of the aftermath of the accident.

#### (b) The Approach of the Supreme Court to Duty

The trial judge held<sup>48</sup> that Mrs. Coffey was entitled to recover damages for the psychiatric condition caused by what she heard and saw. Following an extensive analysis of the authorities, Bollen J. approached the duty question in terms of reasonable foresight<sup>49</sup> and concluded 'I think that the wrong-doer could foresee that a wife, hearing of the accident, would go to the hospital, wait at the end of the telephone and suffer mental shock at what she heard and saw . . . I think that the wrong-doer could have foreseen that Vicki would suffer mental shock'.<sup>50</sup>

In respect of policy considerations he stated 'I can see no policy reasons debarring Vicki's claim. I think that the traditional approach should beckon this Court to hold that Vicki's absence from the scene and her not going to the scene do not put her outside the area of success'.<sup>51</sup> The plaintiff was awarded \$48,000.16, including \$10,000 for loss of her husband's consortium.

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48. [1984] 33 S.A.S.R. 254.

49. *Ibid.* at 275.

50. *Ibid.* at 276.

51. *Ibid.* at 275.

On appeal, the Full Court<sup>52</sup> dismissed the defendant's appeal, except for substitution of an amount of \$7,500 instead of \$10,000 for loss of consortium. The leading judgment delivered by Wells J.<sup>53</sup> was agreed in by Mitchell A.C.J.<sup>54</sup> and Cox J.<sup>55</sup> It was suggested in the leading judgment that 'the appropriate progress of ratiocination and guiding rules to be followed'<sup>56</sup> involved three questions:

- (i) The initial question is whether the injury was 'of a kind and degree that ought to sound in damages'.<sup>57</sup> That question was to be determined by policy considerations<sup>58</sup> but not based upon the unlimited subjective discretion of each judge since the exercise of discretion would be 'informed by tradition, methodized by analogy, disciplined by system and subordinated by the primordial necessity of order in social life'.<sup>59</sup>
- (ii) Secondly, whether the injury comes within the class of untoward consequences that ought reasonably to have been foreseen. This test fell to be determined by reference to the test that has been markedly refined since its first exposition by Lord Atkin in 1932.<sup>60</sup> Wells J. was content to accept the formulation provided by Mason J. in *Wyong Shire Council v. Shirt*.<sup>61</sup> Wells J. relegated 'proximity' to an importance no greater than a convenient label that might inhibit inspired and effective flexibility of the received principles of negligence if erected into 'some norm having the status of a rule of law'.<sup>62</sup>
- (iii) The final question concerned breach. 'Once it is decided that a particular injury was foreseeable in accordance with the foregoing test the final inquiry must be: what was reasonably required of the defendant expressed as obligatory compliance with a designated standard of care'.<sup>63</sup>

In summary, the approach of the Supreme Court recognised the role of policy and of reasonable foresight in determining the duty question. The approach of the trial judge reflected the orthodox principal reliance upon reasonable foresight whilst that of the Full Court divided out policy factors as part of an initial question. On both views the result was the same.

### (c) The Approach of the High Court

Since this was only the third case to reach the High Court in some forty-five years, its approach to the duty of care in respect of nervous shock is of considerable interest. The whole court dismissed the appeal,<sup>64</sup> holding that the plaintiff was entitled to recover from the defendant damages for the psychiatric condition she suffered. There were several issues addressed by the court including the question of the kind of psychiatric damage capable of

52. [1984] 33 S.A.S.R. 279.

53. *Ibid.* at 279.

54. *Ibid.*

55. *Ibid.* at 300.

56. *Ibid.* at 289.

57. *Ibid.*

58. *Ibid.*

59. *Ibid.* See also Cox J. at 301.

60. *Ibid.* at 289.

61. (1979-1980) 146 C.L.R. 40. The reliance upon that authority for that point is curious for as Mason J. stated at 47, 'I am of course referring to foreseeability in the context of breach of duty, the concept of foreseeability in connexion with the existence of the duty of care involving a more general inquiry'. In that case the duty issue did not arise because the defendant conceded that it was under a duty and contested only the question of breach.

62. *Supra* n.52 at 286. A similar criticism of the term was made in *Grant v. Australian Knitting Mills Ltd.* [1936] A.C. 85 at 104.

63. *Supra* n.52.

64. *Supra* n.1.



giving rise to a duty,<sup>65</sup> the issue of a plaintiff's susceptibility or pre-condition to psychological illness<sup>66</sup> and the question of the framework for establishing the duty of care. The object of this note is directed at this last issue and for that purpose it is convenient to divide the Justices into three groups. Brennan J. adopted the conventional approach of principal reliance upon reasonable foresight, whilst recognising a supplementary role of policy. Two Justices, Deane J. with whom Gibbs C.J. agreed, *re-discovered* proximity in Lord Atkin's seminal exposition of the duty formula. The other two Justices, Murphy and Dawson JJ. do not contribute significantly to the structure of the duty framework.

(i) **The Via Trita**

At first sight, Brennan J. expresses what appears<sup>67</sup> to have been the prevailing orthodoxy when he stated 'Reasonable foreseeability determines the existence of the duty of care and the measure of damages recoverable for its breach'.<sup>68</sup> After indicating that the foreseeability of shock-inspired illness had gained a more ready acceptance by courts in both Australia and England over the last half-century, Brennan J. reflected that 'The fact that the plaintiffs in *Pusey's* case and in *McLoughlin v. O'Brian* succeeded no doubt reflects the broadening of the legal criterion of reasonable foreseeability and the contemporary acceptance of the foreseeability of shock-induced psychiatric illness'.<sup>69</sup>

Whilst appreciating an objective aspect to the foresight test, Brennan J. stressed that it was a question of fact whether a set of circumstances might induce psychiatric illness.<sup>70</sup> The factual question was one not proveable by evidence but was a matter of impression.<sup>71</sup> Time and distance were viewed as matters going to causation and reasonable foresight and were not matters of policy limiting liability.<sup>72</sup> In respect of policy, his Honour found it undesirable to use policy to create limits, preferring to rely upon the exigencies of proof of the elements of the cause and as imposing their own limits such that 'The thing will stop where good sense on the finding of facts stops it'.<sup>73</sup>

Proximity was regarded as meaning '... no more than the neighbour principle, the question in the present case is whether there are any considerations which, on moving to Lord Wilberforce's second stage, negate the duty of care which would arise by application of the criterion of reasonable foreseeability'.<sup>74</sup> None were found. Brennan J. posited that the elements of the different categories of negligence were not identical so that material sufficient to establish a duty in one category would not necessarily establish it in another.<sup>75</sup>

The approach of Brennan J. clearly places the emphasis upon the test of reasonable foresight but in a literal or factual sense which frees it from philological mutilation caused by the intrusion of policy factors. This attempt to disengage foresight from policy seeks to avoid much of the concealment and illusion which has surrounded the test of foresight in the

65. The kind of damage required is not a contentious one and appears unchanged from the formulation in *Pusey* that it be true mental illness rather than mere fright but that the particular or precise form or extent need not be foreseeable.

66. The Court did not need to consider the issue in depth after the finding by Bollen J. that the plaintiff was of normal fortitude but there is sufficient support for the view that the egg-shell skull rule, confirmed in *Pusey*, remains unchanged.

67. It is suggested that the view provides only an *appearance* of orthodoxy because in reality it is used in a literal factual sense whereas the prevailing view may well have included some policy considerations as part of the test of reasonable foresight.

68. *Supra* n.1 at 431.

69. *Ibid.* at 433.

70. *Ibid.* at 434, 435.

71. *Ibid.* at 435.

72. *Ibid.* at 435, 436.

73. *Ibid.* at 436.

74. *Ibid.* at 438.

75. *Ibid.* at 437, referring in particular to the other difficult cases of pure economic loss and negligent misrepresentation.

past. However, the object is over-zealously pursued and results in the fallacious conclusion that the foresight question is one for the tribunal of fact, rather than remaining a question of law for the judge, whether it is a jury trial or not.<sup>76</sup>

### (ii) Rediscovery of Proximity

Deane J., with whom Gibbs C.J. agreed,<sup>77</sup> returned to the seminal duty case and an exacting analysis of the words used by Lord Atkin to discern a proximity requirement constituting an overriding control test of reasonable foresight.<sup>78</sup> It was regarded as differing in nature from the test of reasonable foresight as involving both an evaluation of the closeness of the relationship and a judgment of the legal consequences of that evaluation.<sup>79</sup> One of the supporting features in the rediscovery of proximity and its elevation to the position of an anterior duty requirement<sup>80</sup> was the avoidance of the circuitry for which the neighbour principle had long been criticised.<sup>81</sup>

Deane J. explained that the apparent exclusive reliance on foresight in past cases was a mistaken tendency to '... see the test of reasonable foresight as a panacea'.<sup>82</sup> The ascendance was explained by the fact that in cases involving direct physical damage, separate reference to the notion of proximity became unnecessary.<sup>83</sup> However, in other comparatively uncharted areas, such as pure economic loss and negligent misrepresentation, proximity has become a touchstone for deciding upon duty.<sup>84</sup>

Having rediscovered proximity as an antecedent control mechanism, Deane J. was faced with defining its bounds. His Honour was conscious that the term had been used to convey a variety of different meanings in the past.<sup>85</sup> His Honour described it as:

... the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and causal proximity in the sense of the closeness or directness of the relationship between the particular act or cause of action and the injury sustained . . .<sup>86</sup>

Whilst Deane J. clearly recognised the relationship of proximity as a question of law, he suggested that it be 'either ostensibly or actually divorced from the considerations of public policy which underlie or enlighten it'.<sup>87</sup>

Later in his reasons, Deane J. set out the three components going to duty as reasonable foreseeability, his rediscovered proximity, and finally, the absence of any statutory provision or common law rule, such as joint criminal activity, which might preclude duty.<sup>88</sup> The suggestion is that policy will play its greatest part in proximity, be totally absent from reasonable foresight and perhaps relevant to the third consideration. It is noticeable also

76. *Ibid.* at 435.

77. *Ibid.* at 439 and 427.

78. *Ibid.* at 439 and Gibbs C.J. at 428.

79. *Ibid.*

80. *Ibid.* at 442.

81. *Ibid.* at 439, seeking to overcome such criticism of concealed circuitous reference as that of Professor Julius Stone, *The Province and Function of Law*, (1961) at 181-2. It should be noted that Professor Stone in later writings criticised the 'neighbour' test as involving a 'flat contradiction and thereby a category of meaningless reference' rather than of concealed circuitous reference. See *Legal System and Lawyers' Reasonings*, (1964) at 227.

82. *Ibid.* at 440.

83. *Ibid.*

84. *Ibid.* at 441 and Gibbs C.J. at 428.

85. *Ibid.*

86. *Ibid.*

87. *Ibid.* at 440.

88. *Ibid.* at 442.



that the stress placed upon proximity as an *anterior* general requirement is not reflected in the logical ordering of the three factors discussed immediately above, thus suggesting that foresight might still be looked to first and the so-called anterior proximity only afterwards as an exclusionary limit upon foresight.

It is to be noted also that whilst factors considered by Deane J. to be relevant to proximity were considered in *Pusey*<sup>89</sup> and *McLoughlin v. O'Brian*<sup>90</sup> as relevant to foresight, Deane J.'s formulation frees the foresight test from the mutilation caused by the operative but concealed considerations of policy, and to that extent shows at least one common feature with the approach of Brennan J.

At least one commentator has already overlooked this important result of Deane J.'s treatment of proximity by suggesting that the approach was to treat proximity '*as part of reasonable foreseeability*'<sup>91</sup> (emphasis added) whereas the object appears to have been to disengage policy considerations inherent in Deane J.'s conception of proximity, from reasonable foresight.

### (iii) The Other Judgments

Murphy J. repeated the view that we have become accustomed to,<sup>92</sup> that persons causing damage by breach of duty should be liable for all the loss unless there are acceptable reasons of public policy for limiting recovery.<sup>93</sup> He extended the view in the present case in concluding that 'The Court should not adopt a view of public policy more restrictive of recovery than has been adopted by those Australian legislatures which have dealt with it'.<sup>94</sup>

The other Justice, Dawson J. accepted that '... the basic test of liability in negligence for nervous shock is whether injury of that kind was reasonably foreseeable in all the circumstances of the particular case'.<sup>95</sup> However, his Honour declined to decide whether that was the sole test in stating '... whether there is some other limit upon the recovery of damages for nervous shock which is based upon conceptions of public policy — referred to by Deane J. in this case as the proximity test — remains a matter of controversy'.<sup>96</sup>

## 4. Conclusion

Apart from the unanimous extension of duty on the facts, which was to be expected after *Pusey*, the two leading judgments are significant for their differing attempts to disengage policy factors from the test of reasonable foresight. Brennan J. stressed the literal or factual nature of that test, leaving policy considerations as external limits to the operation of the test. Although no policy considerations applied to Mrs. Coffey, Brennan J. indicated that foresight might dictate a limitation of the duty to persons receiving sudden sensory perception of a person, thing, or event (thus ruling out mere passers-by and relatives suffering shock through subsequent nursing).<sup>97</sup>

Deane J. recognised two policy elements, the anterior duty relationship based upon proximity, as well as more general policy factors, both separate from the test of reasonable foresight, now left free from policy intrusion. The rediscovery of the proximity device

89. *Supra* n.23.

90. *Supra* n.2.

91. A. O'Connell, 'Nervous Shock', (1984) November *Law Institute Journal*, 1294, states 'Deane J.'s approach is to say that as part of reasonable foreseeability, there is an additional test, that of "proximity", and that this gives rise to some limiting criteria.'

92. See *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* *supra* n.6 at 606.

93. *Supra* n.1 at 429.

94. *Ibid.*

95. *Ibid.* at 453.

96. *Ibid.*

97. *Ibid.* at 434.

provides the means by which those cases requiring limitation of liability based upon some special relation, can now be explained by virtue of proximity, and this might extend to explaining the existing special relationships found necessary for negligent misrepresentation and pure economic loss.

A great advantage of both of the leading formulations is that they attempt to bring to the fore what was concealed in Lord Atkin's seminal statement, the element of policy. The decades of philological mutilation of the reasonable foresight test by the inclusion of masked policy factors may be avoided in the future. However, unless there is a consistent continuation of this approach to duty, the pronouncements may only add to the semantic confusion already in existence as a result of the different meanings accorded to foresight, proximity and policy. As Wilson J. said in a related context 'It may be that in this area of discourse semantic difficulties will occur whatever words are used . . .'<sup>98</sup>

### Postscript

Since the above note was written, in November 1984, there have been encouraging signs in the earliest subsequent negligence cases (unreported as at early March, 1985), that the attitudes of the two leading proponents discussed in the note, remain unchanged.<sup>99</sup>

Although the subsequent cases do not involve the same depth of treatment as was accorded to the issues in *Jaensch* itself, the individual judgments do satisfy, at least in the short term, the precatory call for consistency contained in the concluding portion of the note.

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98. *Wyang Shire Council v. Shirt* *supra* n.61 at 400.

99. Firstly, in what will become another landmark case, *Hackshaw v. Shaw* (judgment delivered 11 December 1984), Deane J's consideration of the basis for the duty owed by the defendant occupier/neighbour to the trespasser/neighbour included the following at 54:

'All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk.'

Subsequently, in *Papantonakis v. The Australian Telecommunications Commission and Northern Research Pty. Ltd.* (judgment delivered 5 February 1984), Deane J. in considering the existence of the duty owed by the occupier/neighbour to the invitee/neighbour said at 27-8:

'There was plainly a relationship of proximity between Northern as occupier of the land and the appellant who was present on the land as invitee attending to a malfunctioning extension line of Northern's telephone system pursuant to a complaint which Northern had made to Telecom. Unknown to Telecom and the appellant, Northern had tampered with the actual telephone cable. In the absence of any applicable overriding statutory provision or common law rule, the question whether Northern was under a relevant duty of care to the appellant depends upon whether it was reasonably foreseeable that Northern's action in tampering with the telephone cable and failing to inform Telecom or the appellant of what it had done would give rise to a real risk that injury of the kind sustained by the appellant would be sustained by him or by a member of a class which included him.'

In the same case, Brennan J. in a joint judgment with Dawson J at 25, treated the existence of the duty as based upon the exclusive test of reasonable foresight, relying upon the facts found by the trial judge and the allowable inferences to be drawn from them as sufficient to give rise to a duty if there was a foreseeable risk.