PROXIMITY AND THE DUTY OF CARE IN RECENT APPLICATIONS OF NEGLIGENCE LAW

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The notion of proximity has taken on a key importance in the reasoning of the higher courts of the jurisdictions of Australia and England and Wales in recent times when the broad issue is whether or not a duty of care with respect to negligent conduct on the part of one which has brought adverse consequences to another is to be imposed by the law in a social context which is relatively new.[1] In the present era a major, if not the major, policy concern of the judiciary is to maintain sufficient control over the extent of legal liability in the field of negligence law. The older appeal to 'reasonable foresight' as the primary mechanism of control has receded into the background. Objective reasonable foresight in the defendant of the plaintiff as a member of a class likely to be closely and directly affected by the defendant's activities is a necessary but not sufficient element in determining whether the duty of care exists.[2] In important areas of modern social activities, that objective foresight appears obvious and it would be uncomfortably unimpressive simply to resort to the legal fiction of deeming this to be otherwise. The answer then is to require that the relationship between the parties satisfy the requirement of proximity before the essential duty of care can arise. It is perhaps paradoxical that an essentially vague concept which forms a part of unifying principle will relate to differing factual considerations tending to conceptualise legal analysis in terms of different categories of cases.[3] This, however, is the

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1 See, for example, The Hon. Justice M. H. McHugh, 'Neighbourhood, Proximity and Reliance' IN Finn, P. (ed) *Essays on Torts*. Sydney: The Law Book Co., 1989, 5.

2 See, for example, the judgment of Deane J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 54, and that of Lord Keith in *Yuen Kun Yeu v Attorney-General for Hong-Kong* [1988] AC 175 at 191-192. Compare the judgment of Lord Reid in *Home Office v Dorset Yacht Co. Ltd*. [1970] AC 1004 at 1027.

3 A simple illustration is provided by comparing claims for negligently inflicted psychological injury with those in relation to pure economic loss; see, for example, Murphy, J in 'Negligently inflicted psychiatric harm: a reappraisal' (1995) 15 *Legal Studies*, 415; Compare Bogie, M. 'A Shocking Future: Liability for Negligently Inflicted Psychiatric Illness in Scotland' (1997) *The Juridical Review*, 39; Hogg, A. 'Negligence and Economic Loss in England, Australia, and Canada and England' (1994) 43 *ICLQ*, 116; His Hon. H.H. Glass, 'The Duty to Avoid Economic Loss' (1977) 51 *ALJ*,

practical consequence of the fact that the courts have been striving with the application of the principle to very different sets of circumstances; broadly, acts, omissions and representations.

More problematic than this is that the courts have differed in their views as to whether and how 'proximity' relates to what are widely termed considerations of 'policy'.[4] Some view the latter as a separate layer of considerations which are calculated to incline the decision on duty one way or the other; some apparently regard policy factors as a potential ingredient of proximity itself. Inevitably this has produced some confusion, if perhaps only for the short term, but this has not been assisted by the occasional, apparently random, appeal to what is 'fair, just and reasonable' in the social context presenting itself.[5] Whilst it is maintained in this paper that the higher courts ought not disregard the social consequences of their decisions it is argued that greater clarity and consistency in the law as well as fairness could be maintained if more emphasis were accorded to the role of breach of duty in the negligence action. The particular focus of this article is upon recent cases concerning the responsibility of local authorities and professionals engaged in their performance of statutory duties respecting the welfare of children for whom they bear responsibility.

X (Minors) v Bedfordshire County Council[6]: The Bedfordshire Case

An important series of consolidated actions appeared before the House of Lords in 1995. In the *Bedfordshire*[7] case the plaintiffs were five children, aged between two and five years at the time of the events under issue and the defendant was the local authority responsible for social services in the area in which they resided. From late November 1987 through to 1989 reports to the defendant authority were received variously from relatives of the children, neighbours, police, their general

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4 Differing meanings appear to be attributed to the term 'policy' in different contexts. See, for example, Lyons, D. 'Principles, Positivism and Legal Theory' (1977) 85 *Yale Law Journal*, 415. The judiciary appear to be alluding to what might be called 'background factors; matters that *may* influence the outcome of a case by impacting on the structure of the legal rules. There is no agreement on this, however, nor upon the broader issue as to whether it is appropriate to have regard to policy factors. Compare Dworkin, R. *Taking Rights Seriously*. London: Duckworth, 1977, 90-100; Dworkin, R. *A Matter of Principle*. Cambridge: Harvard University Press, 1985, Ch 3; and the judgment of Lord Denning MR. in *Spartan Steel & Alloys Ltd v Martin & Co. (Contractors) Ltd.* [1973] 1 QB 27 at 39.

5 Some examples are Lord Keith in *Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd.* [1985] AC 210 at 241; Slade LJ in *Investors in Industry Commercial Properties Ltd. v South Bedfordshire District Council* [1986] 1 All ER 787 at 805; and Perry J in *Hillman v Black & Ors* (1996) 67 SASR 490.

practitioner, the head of the school which the two elder children attended, a social worker, a health worker and The National Society for the Prevention of Cruelty to Children. These reports were to the effect that the children were locked out of the house for long periods of time with the eldest child supervising the others. One child was found to have injuries consistent with cigarette burns. The oldest child was said to be 'pale, depressed, hungry and pathetic'; the family home was in a disgusting condition; their bedroom squalid with faeces smeared on the walls and their beds sodden with urine. The two older children appeared at school dishevelled and smelly and generally the children were said to be at risk of emotional damage and physical and sexual abuse.

In December 1989 the authority, without resort to a case conference, rejected the health visitor's recommendation that four of the children be placed on the child protection register. More reports came in between March 1990 and January 1991 when a case conference was held and the authority decided against placing the children on the child protection register or applying for court orders in respect of their welfare. Twice, in July 1991 and May 1992, their father asked the authority to take them into care for adoption. No action was taken.

In August 1991, on their mother's application, the three eldest children were placed for nine days with foster parents who found them to be underfed, dirty and ignorant of personal hygiene. In September 1991 the authority was informed that the condition of their bedroom had deteriorated; the children continued to be locked out of the house for long periods, screaming constantly. Otherwise they were left in their bedroom during which times they smeared faeces on the windows. Three of them had been seen stealing food.

In November 1991, at the mother's request, the authority provided short-term respite care for the three older children and they spent the early months of 1992 with foster parents where they gained weight. The authority recommended further periods of respite care and monitoring. In April 1992 the mother asked the authority to take two of the children and place them for adoption. No action was taken. In July of that year she told the authority that unless the children were removed from her care she would batter them. They were finally removed and placed with foster parents. At the end of 1992 the authority applied to the court for care orders which were granted.

M (A Minor) v Newham BC[8]*: The Newham Case*

In the *Newham*[9] case the first plaintiff was a young girl and the second

6 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152.
7 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152.

plaintiff was her mother, who was aged seventeen at the time of the child's birth in January 1983. The first defendant was the local authority responsible for child-care services in the area, the second defendant was the local Area Health Authority and the third defendant was a consultant child psychiatrist employed by the Area Health Authority. Between 1984 and 1986 mother and daughter had dealings with the local authority and the Area Health Authority whose officers thought that the child had been sexually abused. In June 1987 a social worker employed by the local authority visited their home and obtained details of their present situation, noting that the mother's current boyfriend was 'X'. A subsequent case conference decided to place the child on the child protection register.

In 1987 the child's doctor gave an opinion that the child might have been subjected to sexual abuse and an interview was arranged for her with the Area Health Authority's psychiatrist and social worker. This was recorded on videotape and transcribed. The mother was not present at the interview and she was never provided with any details from the transcript or recording. The conclusion reached was that the child had been abused and that X, whose name she had mentioned, was the abuser. In fact the child had been referring to a cousin who bore the same first name as X and who had at some previous time been in residence with the mother. Later the mother asked her daughter privately whether X had done anything to her and she replied in the negative. But when the mother raised this with the social worker, he and the psychiatrist took this to be an attempt to persuade the child to withdraw her allegation. On their recommendation the local authority applied that same day for a court order removing the child from her mother's care which was granted on an interim basis. As a result the mother excluded X and all other men from her home and, eleven days following the first order, applied to have the child made a ward of court with care and control to herself. The court accepted the recommendation of the local authority that the child be made a ward of court with care and control to the authority, and that the child be placed with foster parents and the mother's access to her child be limited. Only coincidentally did the mother obtain sight of the transcript of interview from which it was immediately apparent to her that her daughter had not identified X as the abuser. Almost a year then elapsed before the child was returned to her care under a court order. Both contended negligence on the part of those for whom the local authority was responsible, and claimed that their enforced separation had caused them both to suffer from anxiety neurosis.

The Law

Much attention was given by the House to the question of whether the

statutory duties and powers relevant to the defendant authorities' procedures were such as to confer a private law right of action on each of the plaintiffs. This is essentially a matter of construction of the statutes, but the modern trend is clear; the courts incline strongly against imposing such a duty.[10] In the *Newham*[11] case the important provisions were those in the *Children and Young Persons Act 1969* (UK) and the *Child Care Act 1980* (UK).

Section 2(2) of the 1969 Act provides:

> 'If it appears to a local authority that there are grounds for bringing care proceedings in respect of a child or young person who resides or is found in their area, it shall be the duty of the authority to exercise their power under the preceding section to bring care proceedings in respect of him...'[12]

The 1980 Act provides:

> 'It shall be the duty of every local authority to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care under this Act or to bring children before a juvenile court...'[13]

Also,

> 'Where it appears to a local authority with respect to a child in their area appearing to be under the age of 17... that his parents ... are, for the time being or permanently, prevented by reason of mental or bodily disease or infirmity or other incapacity or any other circumstances for providing for his proper accommodation, maintenance and upbringing; and ... in either case, that the intervention of the local authority under this section is necessary in the interests of the welfare of the child, it shall be the duty of the local authority to receive the child into their care ...' [14]

The *Child Care Act 1989* (UK) came into force on 14 October 1991 and was therefore applicable to the later stages of the *Bedfordshire*[15] case. Several of the general provisions of the Act fell to be considered in the light of the facts but the most important were:

> 'It shall be the general duty of every local authority ... to safeguard and promote the welfare of children within their area who are in need; and so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services

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8 *M (A Minor) v Newham BC* [1994] 2 WLR 554.
9 *M (A Minor) v Newham BC* [1994] 2 WLR 554.
10 Recent examples are *Wentworth v Wiltshire County Council* [1993] 2 All ER 256; *Christmas v Hampshire County Council* [1995] 3 WLR 152; *Harris v Evans* [1998] 1 WLR 1285; and see the dicta of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152 at 166.
11 *M (A Minor) v Newham BC* [1994] 2 WLR 554.
12 *Children and Young Persons Act 1969* (UK) s2(2).
13 *Child Care Act 1980* (UK) s1(1).
14 *Child Care Act 1980* (UK) s2(2).

> appropriate to those children's needs.'[16]

Also,

> 'Where a local authority ... have reasonable cause to suspect a child who lives, or is found, in their area is suffering, or is likely to suffer significant harm, the authority shall make, or cause to be made, such inquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare ...' [17]

According to the judgment of the House, the use of phrases 'where it appears to the authority'; 'it shall be the general duty'; 'have reasonable cause to suspect', indicated a high degree of discretion delegated to the authority in its decision making powers which would be inconsistent with any intention of the legislature to subject the authority to a private law duty of care under the statutes themselves. Lord Browne-Wilkinson said:

> 'I find it impossible to construe such a statutory provision as demonstrating an intention that even where there is no carelessness by the authority it should be liable in damages if a court subsequently decided with hindsight that the removal, or failure to remove, the child from the family either was, or was not 'consistent with' the duty to safeguard the child.'[18]

Apart from the argument based upon statutory duty the plaintiffs contended that the social worker and the psychiatrist in the *Newham*[19] case and the servants of the council in the *Bedfordshire*[20] case were in breach of their professional duty of care for which the authority was liable in negligence either directly or vicariously. The House of Lords also rejected this. In the leading judgment Lord Browne-Wilkinson gave a number of reasons as to why the ordinary common law duty was inappropriate. By Act of Parliament, the Secretary of State had issued directions in 1991 for the establishment of a complaints procedure by the local authority through which complaints could be directed relating to all the authorities' duties under the child welfare legislation. In addition the whole statutory system for the protection of children was complex and involved many parties. Under the ministerial directions, a process of consultation and recommendation had been established which could involve beside the authorities' personnel, police, educational bodies and doctors. The focal organisation was the Child Protection Conference, consisting of various personnel which made the decision whether or not to place the child on the Child Protection Register.

In the view of the House, to impose a duty of care would in some way

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15 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152.
16 *Child Care Act 1989* (UK) s17(1).
17 *Child Care Act 1989* (UK) s47(8).
18 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152 at 181.

disturb this statutory procedure, and to impose liability on any one participant would be unfair, whilst to impose the duty on all would involve serious difficulties in attributing responsibility for a decision.[21] Further, the legislation requires the authority to weigh the physical well being of the child against the disadvantage of disrupting his family environment and whilst it is proper to give primary consideration to the interests of the children, it is also necessary to give due regard to the rights of the parents. To impose the duty would have the effect of influencing authorities to adopt a cautious and defensive approach to their functions in relation to these matters.[22] Finally, according to the House, when the relationship between a social worker and parents is so often characterised by ill-feeling and hostility this situation would provide a fertile ground for litigation, which should not be encouraged.[23]

HILLMAN V BLACK & ORS[24]

The Full Court of the Supreme Court of South Australia in *Hillman's* case cited the above authorities extensively. After the birth of her second child Mrs Hillman began to suffer from depression and Mr Hillman took over the day to day care of both children, including feeding, bathing and changing nappies. Mrs Hillman's depression worsened and she was admitted to hospital as an in-patient where she informed a doctor of her long-term obsession with the idea that she was suffering from one form or another of terminal illness and of her thoughts of knifing her daughter and suiciding. She returned home but continued to attend counselling at Community Outreach at the same hospital where she told a health worker that she suspected her husband of sexually abusing their daughter, then aged three years. She was put in touch with the Department of Community Welfare and the Sexual Assault Referral Centre and an examination of the child was arranged with one Dr Black. Dr Black's view was that whilst she could observe no physical symptoms of the child having been abused, judging by what the child had told her and her response to the examination and to questions put to her, she felt it to be more likely than not that some sort of molestation had taken place. A care worker at the centre subsequently informed the police.

After this, Mrs Hillman took both children and left the family home, shortly afterwards making application in the Family Court of Australia for sole custody of the children. The Department decided to take no

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19 *M (A Minor) v Newham BC* [1994] 2 WLR 554.
20 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152.
21 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152 at 183.
22 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152 at 183-184.

active part in these proceedings but did arrange for the daughter to be seen by a child psychiatrist, who had been nominated by Dr Black, for the purpose of advice over supervised access. In a report provided to Mrs Hillman's solicitors he stated that 'it is probable that some form of sexual impropriety took place'. Mr Hillman at all times denied the allegations and no criminal charges were ever laid. He brought an action in negligence against the Department and others contending that the investigations had been deficient in several respects, including the failure to consider any innocent interpretation of the child's statements, the failure to consider the extent to which Mrs Hillman had been talking to the child and the role of her own mental illness, and the lack of any peripheral detail to what the child had said. He contended that the psychiatrist had relied upon Dr Black's diagnosis rather than reaching his own independent one. Mr Hillman claimed damages for psychiatric illness caused by the allegations and by his separation from his family.

The Supreme Court ruled that none of the defendants owed any duty to the plaintiff. The medical practitioners were not retained by the authority to advise the plaintiff and he was not their patient. It was for the child alone that they had been invited to exercise their professional judgment.[25] Furthermore the same 'policy' considerations canvassed by the House of Lords in *Bedfordshire*[26] provided the reasons why the relationship of proximity was lacking in the instant case:

> 'Compelling considerations outweigh the dictates of individualised justice. To acknowledge a duty of care in favour of the appellant would be unfair and unreasonable. It would create risks of a conflict of interest and duty upon those seeking to carry into effect the protective measures contained in the Community Welfare Act, and impede the effective administration of it. The tendency to inhibit the expression of opinions and action in a defensive frame of mind are but factors contributing to the conclusion that the appellant's alleged right of action must be rejected. Another is the unjustifiable diversion of money and human resources resulting from the existence of such a remedy.'[27]

PROXIMITY AND POLICY

What is important in these decisions is that they leave an issue of grievance on the part of an individual who has to deal with the apparatus of the state in effect non-justiciable, and for reasons which appear confused. If the implication of the Parliamentary intention to confer a private law remedy in a statute is a legal fiction,[28] then surely it is an equally fictional inference that the Parliament's intention was to

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23 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152 at 184.
24 *Hillman v Black & Ors* (1996) 67 SASR 490.
25 *Hillman v Black & Ors* (1996) 67 SASR 490 at 502 per Matheson J.
26 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152.

exclude all possibility of civil redress for harm inflicted. Again, the availability of procedures for enforcing the statutory duties within the legislation itself, as with the *Bedfordshire*[29] case, surely go to the question of statutory duty rather than the common law duty of care in negligence. Overlooking all the practical difficulties for an individual in a disadvantaged position, the 'complaints procedure', for example, goes to making the process work (and one may note that complaints were made and the process still didn't work).

The action in negligence is about redress for damage suffered and the machinery for administrative review does not have this objective. In addition the introduction of so-called 'policy' factors into the concept of proximity contended for in *Hillman*[30] would appear to rob the notion of logic. A broad description of proximity was provided by Deane J in *Sutherland Shire Council v Heyman*:

> 'The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between 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 what may (perhaps loosely) be referred to as causal proximity in the sense of closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained...'[31]

Beyond this it is necessary to think in terms of the class of plaintiff to which the claimant belongs. In the above cases it is not particularly wide and the claims as postulated were, after all, for physical injury, not for pure economic loss where most difficulty over proximity has recently been experienced. Particularly in the *Bedfordshire*[32] case, if not *Hillman*[33], the plaintiff children were the very people with whom the authority's staff were directly dealing. Two other points should be made. The fact that professionals are engaged to advise an authority should not of itself mean that they are not in a position of proximity to those with whom they directly deal when the implications of that are quite clear. Secondly, where, as is often the case, a person is under no duty to act for the benefit of another, there may still be liability in negligence if the person chooses to act and causes damage. Again this is manifestly so with cases involving economic loss[34]; one would have

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27 *Hillman v Black & Ors* (1996) 67 SASR 490 at 511 per Prior J.
28 Fleming, J. *The Law of Torts*. 9th ed. Sydney: The Law Book Co., 1998, 138.
29 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152.
30 *Hillman v Black & Ors* (1996) 67 SASR 490.
31 *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 55.
32 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152.
33 *Hillman v Black & Ors* (1996) 67 SASR 490.

thought in relation to claims for physical injury it is *a fortiori*.

No one would deny the difficulties involved in dealing with children in need and their families and making balanced decisions about what is, on the whole, best for their welfare. Lord Browne-Wilkinson in the *Bedfordshire* case said:

> '...the task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. Legislation requires the local authority to have regard not only to the physical wellbeing of the child but also to the advantages of not disrupting the child's family environment. ... In one of the child abuse cases, the local authority is blamed for removing the child precipitately: in the other, for failing to remove the child from their mother'.[35]

This might be overwhelming if the choice was between liability in every case, or no liability in every case; it is not. It is submitted that these are matters to be addressed in terms of breach of duty rather than in terms of the very existence of any duty of care. The standard of care is that of the ordinary competent professional measured as a matter of fact. This can be difficult but again, not always so. With respect, in the *Bedfordshire*[36] case it doesn't appear difficult at all; the authority did next to nothing when the appropriate course seems quite obvious. Difficulty about assessing a standard of care is not unique to these situations and is commonly met in other situations, such as medical procedures which cause harm, where often enough it presents the sole issue. But it is the proper part of the negligence equation when it comes to assessing action in the light of risks and balancing individual and community interests. At least this is quite possible without resort to an out-and-out denial of remedy which results from a finding as a matter of law that no duty of care is owed.

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34 In decisions stemming from *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465. A recent example is *Welton v North Cornwall District Council* [1997] 1 WLR 570.

35 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152 at 183.

36 *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152.