

Lights in the fog: secondary victims and the recovery for mental injury in New Zealand

Andrew Barker*

Introduction

Lighthouse, him no good for fog. Lighthouse, him whistle, him blow, him ring bell, him flash light, him raise hell; but fog come in just the same.

The quotation comes from an article by William Prosser.¹ It was passed to him by a friend, and reportedly made by a West Coast Indian as he sat on a rock looking out to sea. The quotation clearly troubled Prosser. He knew it had something to do with the law. He showed it to a number of his colleagues - judges, lawyers, and so forth - to see what they made of it. While most agreed with him that it had something to do with the law, they could not agree on what that was. Except for one group. Professors of law, when shown the quotation, immediately replied with some apparent enthusiasm “That’s me!”²

As a comment on the inability of academic writing to influence the direction of substantive law, the quotation seems particularly relevant to the problem of when secondary victims of

* Faculty of Law, University of Otago. I would like to thank John Smillie, Stuart Anderson, and Donna Buckingham for their comments on earlier drafts.

¹ “Lighthouse no good” (1948) 1 *J Leg Ed* 257 at 257.

² *Ibid.*

negligent conduct can recover for mental injury they suffer.³ Over the last 20 years, the leading courts of England⁴ and Australia⁵ have accepted only a limited basis for recovery in such situations. In general terms, a secondary victim must show that:⁶

- 1 her mental injury is a recognised psychiatric illness;
- 2 she has a close tie of love and affection to the primary victim;
- 3 the development of a recognised psychiatric injury was a reasonably foreseeable consequence of the defendant's negligent conduct;
- 4 she witnessed the injury or death to the primary victim or its immediate aftermath;
- 5 this caused a sudden and unexpected shock to her nervous system.

While there have been a number of notable dissents from this approach,⁷ and reason to

³ A secondary victim is a person who “was no more than the passive and unwilling witness of injury caused to others”. A primary victim is one who was involved “either mediately or immediately, as a participant”. *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 407 per Lord Oliver [*Alcock*]. For a general discussion of the distinction see Hilson, “Nervous Shock and the Categorisation of Victims” (1998) 6 *Tort L Rev* 37.

⁴ See *McLoughlin v O'Brian* [1983] AC 410 (HL); *Alcock*, *ibid*; *Page v Smith* [1996] 1 AC 155 (HL); *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL) [*White*]; *W v Essex County Council* [2000] 2 All ER 237 (HL).

⁵ *Jaensch v Coffey* (1984-5) 155 CLR 549 (HCA). The position in Canada is unsettled, although tends to favour the limited approach to recovery of Australia and England. See Bélanger-Hardy, “Nervous Shock, Nervous Courts: the *Anns/Kamloops* Test to the Rescue” (1999) 37 *Alberta L Rev* 553.

⁶ See generally *Alcock*, above n 3 at 400-1 per Lord Ackner, at 411 per Lord Oliver; *White*, above n 4 at 472 per Lord Goff, at 502 per Lord Hoffman; Teff, “Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries” [1998] *CLJ* 91 at 106-7.

⁷ See the judgments of Lords Keith and Scarman in *McLoughlin v O'Brian*, above n 4, and Brennan J in *Jaensch*

believe that the strictness with which some of these criteria have been applied in the past may be relaxed in the future,⁸ there has been no indication from any leading commonwealth court that these limits on the right of recovery will be abandoned.

By contrast, academic writers have been almost universal in their condemnation of this approach. They have pulled no punches in their criticism. The limits on the right of recovery for secondary victims have been described as “an intolerable embarrassment” to the dignity of the law,⁹ as lacking in “clarity, logic, justice and perhaps even plain common sense”,¹⁰ as “ludicrous”,¹¹ “unsustainable and passé”,¹² “bizarre”,¹³ and reflecting “judicial misconceptions” and “ill-informed supposition”.¹⁴ The range of criticism has been vast, yet despite the strength with which commentators have argued against this limited right of recovery, they have been largely ineffective in influencing the direction of the courts. The court’s have recognised the academic criticism, at times even agreed with it, but have not been prepared to substantively alter their approach. The fog rolls in, despite the warnings

v *Coffey*, above n 5.

⁸ See the recent decision of the House of Lords *W v Essex County Council*, above n 4.

⁹ Stapelton, “In Restraint of Tort”, in Birks ed, *The Frontiers of Liability* Oxford University Press, Oxford, (1994) vol 2 at 94. She also describes the area as one where “the silliest rules now exist and where criticism is almost universal.” At 95.

¹⁰ Trindade, “Nervous Shock and Negligent Conduct” (1996) 112 *LQR* 22 at 27.

¹¹ Mullany & Handford, “Moving the Boundary Stone by Statute - The Law Commission on Psychiatric Illness” (1999) 22 *U New South Wales LJ* 350 at 350.

¹² Mullany, “Fear for the Future: Liability for Infliction of Psychiatric Disorder” in Mullany ed, *Torts in the Nineties*, Law Book Co, Sydney (1997) at 105.

¹³ Teff, “Liability for Psychiatric Illness after Hillsborough”, (1992) 12 *OJLS* 440 at 442.

¹⁴ *Ibid* at 440.

from the lighthouse.¹⁵

Adding to this apparent conflict between courts and the academics is the recent decision of the New Zealand Court of Appeal in *van Soest v Residual Health Management Unit*.¹⁶ It was the Court of Appeal's first consideration of the substance of the right of recovery for secondary victims,¹⁷ and perhaps not surprisingly, the majority of the court favoured the approach taken by the English and Australian courts. That point alone makes the case worthy of note. But the real interest in the case comes from the contrast in the approach of the majority, comprising Gault, Henry, Keith and Blanchard JJ, and the separate concurring judgment of Thomas J.¹⁸ Justice Thomas argues that the limited right of recovery favoured

¹⁵ An interesting explanation for this divergence has recently been suggested by Charles Fried in "Scholars and Judges: Reason and Power" (2001) 23 *Harv J L and Publ Pol* 807. His argument is that judges and scholars are doing essentially different jobs. Unlike scholars, judges face the prospect that their decision will have real life consequences, a prospect which may cause them to think "differently and perhaps more deeply, more responsibly" (823). They also face certain institutional constraints in making their decision, for example their need to maintain a continuity of doctrine or to mould a judgment capable of obtaining majority support. Scholars, however, face none of these restraints, and indeed Fried notes a need for young scholars in particular to stand out by making original and different arguments (831). It is of interest to note, given the focus of this article, that it is the concurrence or dissent that in his view most resembles the work of scholarship (827). See also Duxbury, *Jurists and Judges: an Essay on Influence*, Hart, Oxford (2001).

¹⁶ [2000] 1 NZLR 179 [*van Soest*].

¹⁷ Their previous decision in *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 had confirmed that claims by secondary victims were available under the Accident Rehabilitation and Compensation Insurance Act 1992, but had concerned a situation where the husband of the primary victim had witnessed the death of his wife and suffered a recognised psychiatric illness as a result. It had not required any consideration of the limits on recovery.

¹⁸ His opinion is described as a dissent in the official report. This is not accurate. In the final paragraph of his

by the majority is unprincipled and arbitrary. In his view, a more principled approach to recovery should be recognised, based on the reasonable foreseeability of mental injury. It is an approach that is derived from his consideration of the substantial academic writing in the area. In this comment, I consider Thomas J's criticism of the orthodox approach. I question his characterisation of that approach as 'arbitrary', and the alternative he offers as 'principled'. I suggest that the principle on which he contends liability should be determined, namely the foreseeability of mental injury, is not the basis on which we determine the duty question in negligence. Rather, that question, at least in New Zealand, is determined by reference to a broad inquiry into questions of proximity and policy, and the particular criteria that the court has previously found relevant in determining the duty of care in similar circumstances. Understood in these terms, the limited approach to recovery for secondary victims, favoured by the majority in *van Soest*, is consistent with the general approach the New Zealand Courts have adopted to the duty of care.

The decision in *van Soest*

The case arose out of the alleged failings of the thoracic surgery unit at Christchurch Hospital, and in particular operations carried out on 5 patients of that unit, four of whom died following surgery. The claims advanced by the various plaintiffs were complex, but fell into two broad categories. The patients themselves, either through their personal representatives or, in the case of the patient who survived, on her own behalf, brought claims based on personal injuries they had suffered as a result of the surgery. The personal representatives sought damages for the deceased patients' lost expectations of life, and for the mental injury

decision he accepts that, even on the lower standard for mental injury he suggests, the plaintiffs were unlikely to succeed, and that the appeals should be dismissed. Above n 16 at 210.

suffered prior to death, while the surviving patient brought a claim for her own mental injury and for exemplary damages (a claim that was not at issue in the appeal). I do not propose to consider these claims in any detail. They were clearly misconceived in light of the statutory prohibitions on claims arising out of personal injuries in New Zealand,¹⁹ and were not supported by the evidence before the court. The Court of Appeal had no difficulty in dismissing these claims.

The second category of claims is where the interest in the case lies. Three of the personal representatives were also the next of kin of deceased patients (two sons and a husband) and they brought personal claims for the mental injury they suffered once they were made aware of the alleged deficiencies in treatment and the subsequent death of their relative.²⁰ The court accepted these as claims by “secondary” victims. There were, however, two unusual features about these claims. First, the plaintiffs did not allege that the mental injury they suffered amounted to a psychiatric disorder or illness. It was simply described as “grief, shock, trauma and anxiety as well as outrage”.²¹ This mental injury appears not to have been outside the range of human experience.²² Second, it was apparent that none of the plaintiffs were at the hospital either during or immediately after the operation. They first learnt of the deaths from an employee of the hospital, and only discovered the circumstances surrounding

¹⁹ See s 27 Accident Compensation Act 1982 and s 14 Accident Rehabilitation and Compensation Insurance Act 1992. They were unable to bring a claim for exemplary damages because s 3(2)(a) of the Law Reform Act 1936 bars actions for exemplary damages on behalf of a deceased person.

²⁰ It appears that the next of kin also brought claims for exemplary damages, although these were not considered in the Court of Appeal decision, being dependent on the plaintiff first establishing a right to compensatory damages.

²¹ *van Soest*, above n 16 at 192 per Gault, Henry, Keith and Blanchard JJ.

²² *Ibid* at 210 per Thomas J.

that death some days or weeks later.

The majority judgment considers in detail the substantial case law in England and Australia, and to a lesser extent Canada and the United States, on the right of recovery for a secondary victim. They agreed with the broad approach outlined in those cases, requiring something more than mere foreseeability of mental injury to the secondary victim. In their view, three further matters have been treated as relevant by other Commonwealth courts: the nature of the mental injury, the physical proximity of the secondary victim to the primary victim's accident, and the closeness of the relationship between the primary and secondary victim. The focus of their judgment was on the first of these.

The majority agreed with the approach of other Commonwealth courts that “a claim by a secondary victim for mental suffering caused by awareness of death or injury to a primary victim through the negligence of the defendant will not lie unless the effect on the mind of the secondary victim has manifested itself in a recognisable psychiatric disorder or illness.”²³ The attraction for the court of this standard was that once it was accepted that a plaintiff could not recover for mere grief suffered as the result of the death of a loved one, it offered an alternative, ascertainable description of the type of injury for which recovery could be allowed. It was a standard that was recognised by psychiatry. It was also a flexible standard that could shift as psychiatry recognised more conditions as giving rise to psychiatric illness. By contrast, some standard between “grief per se” and a recognisable psychiatric illness would, the majority thought, be hopelessly vague, and create the potential for a flood of litigation.²⁴ In addition, there was an attractive symmetry between this definition and the

²³ Ibid at 197 per Gault, Henry, Keith and Blanchard JJ.

²⁴ Ibid at 198.

right of recovery for a primary victim for mental injury under the Accident Rehabilitation and Compensation Insurance Act 1992, which also required a recognisable psychiatric illness.²⁵ Accordingly, as the plaintiffs had not alleged a recognisable psychiatric illness, their claims were dismissed.

While this was sufficient to dispose of the case, the majority made further comments on the other limits on recovery for secondary victims that have been favoured by overseas jurisdictions.²⁶ In respect of the closeness of the relationship between the primary and secondary victims, the Court favoured the general limit that the relationship need only be shown to be close and loving. It expressed no view on whether a secondary victim could bring a claim for a recognisable psychiatric illness that was not consequent upon a shocking incident involving actual or threatened physical injury to a primary victim. The Court also expressly reserved its position on whether physical and temporal proximity to the accident or misadventure was needed, expressing some scepticism about the restrictiveness of the English decisions.

The judgment by Thomas J, however, is a powerful dissent to the majority approach. Justice Thomas agreed with the concerns expressed by many commentators. He thought that the current state of the law in this area was “indefensible”,²⁷ and that the restrictive approach of the majority was “arbitrary and illogical”.²⁸ He proposed two central reforms to make the

²⁵ See the definition of “mental injury” in s 3 Accident Rehabilitation and Compensation Insurance Act 1992.

²⁶ *van Soest*, above n 16 at 199 per Gault, Henry, Keith and Blanchard JJ.

²⁷ *Ibid* at 200 per Thomas J.

²⁸ *Ibid* at 201.

law more “coherent and just”:²⁹ the rule that recovery should be allowed only where the plaintiff has suffered a recognisable psychiatric illness should be relaxed to include any injury “plainly outside the range of ordinary human experience”,³⁰ and an abandonment of all rules relating to geographical, temporal and relational proximity. In his view, liability should be determined solely by reference to the reasonable foreseeability of psychiatric injury.

Justice Thomas argued that what is needed in this confused area of the law is a return to principle. In his view, the fundamental principle of liability in negligence is that people are legally responsible for the reasonably foreseeable consequences of their negligent conduct. In some circumstances, policy reasons may require a departure from this general principle of liability, but such reasons must be articulated with “refinement and logic”.³¹ The primary policy argument the courts have advanced in support of these limits is the “floodgates” argument. This argument, in his view, was not justified in the context of claims by secondary victims. The historical evidence from the gradual development of liability at common law was that the floodgates had not opened with each expansion in the potential range of claimants, and in addition, the little empirical evidence that exists tended to suggest that disincentives to litigating were more effective regulators than any particular liability rule.³²

Having rejected any refined or logical policy reason for these limits on the right of recovery, he also rejected them as inconsistent with an approach based on reasonable foreseeability of

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid at 203, adopting comments by Teff in “Liability for Psychiatric Illness After Hillsborough”, above n 13 at 451.

injury. His view on the requirement for proof of a recognisable psychiatric illness is well captured in the following passage.³³

Yet, there is no necessary relationship between the fundamental concept of reasonable foreseeability and psychiatry's classification of psychiatric illnesses. A negligent wrongdoer may be able to reasonably foresee mental and emotional harm to a third person; he or she will not contemplate a particular or any psychiatric illness.

In his view, a standard of suffering "plainly outside the range of ordinary human experience" would more accurately reflect his general principle.³⁴ He did recognise, however, that the standard of recognisable psychiatric illness does provide a convenient handle, and that in practice a plaintiff would be well advised to prove such a condition. What he objected to was it being used as an absolute standard. He was less restrained with regard to the geographical, temporal and relational limits to recovery. As absolute preconditions to recovery, they could not be reconciled with the principle of reasonable foreseeability of mental injury and ought to be abandoned.

Comment

Justice Thomas' judgment raises some difficult issues. My primary concern in this comment is his assertion that the principle on which liability in negligence is determined, and by this I take him as meaning the existence of a duty of care, is the reasonable foreseeability of injury, and his characterisation of the limited right of recovery for a secondary victim as arbitrary and

³³ Ibid at 205.

³⁴ Ibid at 206.

unprincipled.³⁵ In this comment I wish to consider both of these claims, at least to the extent that they are relevant to liability in negligence in New Zealand, although the comments are, I believe, equally applicable to England and Australia.

Reasonable foreseeability as the basis for the duty of care in negligence

Justice Thomas presents reasonable foreseeability as the general principle of liability in negligence, and characterises the approach of the majority as arbitrary and unprincipled because it is not consistent with this principle. This assertion, at least in the general terms in which it is presented, is simply wrong. Possibly, at some point in the early 1980's, it could have been argued that in New Zealand reasonable foreseeability alone was sufficient to establish a prima facie duty of care.³⁶ But since at least 1992, and the decision of the Court of Appeal in *South Pacific Manufacturing v New Zealand Security Consultants and*

³⁵ Justice Thomas is not alone in suggesting that reasonable foreseeability of psychiatric injury is sufficient to establish a duty of care to a secondary victim. It appears to have been the approach prior to the decision in *McLoughlin v O'Brian*, above n 4. It was also favoured by Lord Scarman and Lord Bridge in *McLoughlin v O'Brian* and Brennan J in *Jaensch v Coffey*, above n 5. In addition, there is strong academic support for this approach. It is the approach taken by Mullany and Handford in the leading text in the area, *Tort Liability for Psychiatric Damage*, Law Book Company, Sydney (1993). Mullany has already described Thomas J's judgment as a "tour-de-force". Mullany, "Distress, Disorder and Duty of Care: the New Zealand Front" (2001) *LQR* 182 at 183.

³⁶ For Court of Appeal decisions where foreseeability alone was held as sufficient to establish a prima facie duty of care see *Scott Group Ltd v MacFarlane* [1978] 1 NZLR 553 at 574 per Woodhouse J; *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at 47 per Richardson J; *New Zealand Social Credit Political League v O'Brien* [1984] 1 NZLR 84 at 97 per Casey J.

Investigations,³⁷ the approach in New Zealand has been to ask whether it is “fair, just, and reasonable” to recognise a duty of care, a question that is answered by reference to the inquiries into proximity and policy.³⁸ As Thomas J himself recognised in *Connell v Odlum*,³⁹ the inquiry into proximity, while it includes within it the concept of reasonable foreseeability, has a much broader focus.⁴⁰ It considers those factors which bear on the relationship between the plaintiff and defendant, and asks whether a sufficiently close and direct relationship between the two has been established.⁴¹ The inquiry into policy looks beyond the relationship between the individual parties, and “examines the broader implications for the community in recognising or denying the existence of a duty of care.”⁴² This approach has been affirmed on numerous occasions by the Court of Appeal as the general approach to the duty of care in New Zealand.⁴³

³⁷ [1992] 2 NZLR 282 [*South Pacific Manufacturing*].

³⁸ *Ibid* at 305-6 per Richardson J. Richardson J also stated that this approach is in substance the same as that in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. For a discussion of the development of the modern approach to the duty of care in New Zealand see Barker, “Divining an Approach to the Duty of Care: The New Zealand Court of Appeal and Claims for Negligent Misstatement” (2001) 10 *OLR* 91 at 101-5.

³⁹ [1993] 2 NZLR 257 (CA).

⁴⁰ Given his approach in *van Soest*, Thomas J’s comments on the relevance of foreseeability are of particular interest: “While the notion of foreseeability is not, and never has been, the only criterion for determining whether such proximity as would warrant the imposition of a duty of care exists ...”. *Ibid* at 265.

⁴¹ See *South Pacific Manufacturing*, above n 37 at 306 per Richardson J.

⁴² *Connell v Odlum*, above n 39 at 265 per Thomas J.

⁴³ For example *Connell v Odlum*, *ibid* at 535 per Thomas J; *Kavanagh v Continental Shelf Company (No 46) Ltd* [1993] 2 NZLR 648 at 654 per Hardie Boys J; *Fleming v Securities Commission* [1995] 2 NZLR 514 at 526-527 per Richardson J; *Wilson & Horton v AG* [1997] 2 NZLR 513 at 520 per Hammond J; *AG v Prince* [1998] 1 NZLR 262 at 268 per Richardson P, Thomas and Keith JJ; *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331 at 336 per Richardson P; *Riddell v Porteous* [1999] 1 NZLR 1 at 9 per Blanchard J; *B v AG* [1999] 2 NZLR

An alternative version of Thomas J's argument, although it is not one that is expressly made, is that the approach in *South Pacific Manufacturing* applies only to claims for *economic loss*, and that claims for *personal injury* should be resolved solely by reference to the reasonable foreseeability of that injury. Certainly, in countries where personal injury claims form a more substantial component of the tort of negligence, reasonable foreseeability of injury often appears to be sufficient to establish a duty of care.⁴⁴ But it is not clear that such claims represent a different approach to the duty of care. Rather, questions of proximity, and the appropriateness of imposing a duty of care, are treated as self-evident or as determined by previous authority in most cases of personal injury, and rarely arise as a matter of dispute.⁴⁵ It does not mean that questions of proximity in particular are never relevant to claims for personal injury.⁴⁶ Courts do look at additional factors to limit the range of reasonably foreseeable victims where issues of proximity and policy are not self-evident or determined by previous authority.⁴⁷ Indeed, in those few cases of personal injury in New Zealand which

290 at 300–1 per Keith & Blanchard JJ.

⁴⁴ For example, *Page v Smith*, above n 4; *Alcock*, above n 3 at 396 per Lord Keith; *White*, above n 4 at 492 per Lord Steyn, at 501 per Lord Hoffman.

⁴⁵ *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] 1 AC 211 at 235 per Lord Steyn (HL); *Hawkins v Clayton* (1987-8) 164 CLR 539 at 576 per Deane J (HCA); *Bryan v Maloney* (1994-5) 182 CLR 609 at 617-8 per Mason CJ, Deane & Gaudron JJ (HCA). See also Law Commission, *Liability for Psychiatric Illness*, Consultation paper n 137, HMSO, (1995) at 62-5; Trindade & Cane, "The Law of Torts in Australia", 3rd ed, OUP, Melbourne (1999) at 353-5.

⁴⁶ See *Jaensch v Coffey*, above n 5 at 582 per Deane J; *Alcock*, above n 3 at 415 per Lord Oliver.

⁴⁷ For example, *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL); *Stovin v Wise* [1996] AC 923 (HL); *Barrett v Enfield London Borough Council* [1999] 3 All ER 193 (HL); *Phelps v London Borough of Hillingdon* [2000] 4 All ER 504 (HL); *Waters v*

are not covered by our statutory compensation scheme, and where an issue has arisen as to the duty of care, the courts have used the broader approach to liability set out in *South Pacific Manufacturing*.⁴⁸ I suggest that Thomas J is wrong to describe the approach to recovery for secondary victims as arbitrary and unprincipled because it is not consistent with a general principle of liability in negligence based on the reasonable foreseeability of injury.

The South Pacific Manufacturing 'test'

If it is accepted that the duty of care in negligence is not determined simply by reference to the reasonable foreseeability of injury, the question remains whether the limited approach to recovery for secondary victims, favoured by the majority in *van Soest*, is consistent with the approach outlined in cases such as *South Pacific Manufacturing*. That is, is the limited approach to recovery “unprincipled and arbitrary” because it does not represent the

Commissioner of Police of the Metropolis [2000] 1 WLR 1607 (HL). This is also the approach taken in Canada: see generally Bélanger-Hardy, “Nervous Shock, Nervous Courts: The *Anns/Kamloops* Test to the Rescue”, above n 5 at 567- 70.

⁴⁸ A good example is the Court of Appeal decision in *AG v Prince*, above n 43. The exact injuries on which the claims were based are not clear from the report, but it appears that one of the claims at least involved an issue regarding the duty of care in a claim for personal injury (an exemplary damages claim based on a duty to prevent psychiatric injury to a primary victim). That issue was dealt with by the court on the basis of the approach in *South Pacific Manufacturing*. A similar comment could also be made in respect of *B v AG*, above n 43, although again the exact basis of the plaintiffs’ claims is unclear. For examples of the High Court adopting this approach to the duty of care in personal injury claims (psychiatric injury to primary victims) see *Kingi v Partridge* (unreported, HC Rotorua, 2 August 1993, Thorp J, CP 16/93); *Van de Wetering v Capital Coast Health* (unreported, HC Wellington, 19 May 2000, Master Thomson, CP 368/98, 372/98, 25/99); *Maulolo & Ors v Hutt Valley Health Corporation Ltd* (unreported, HC Wellington, 20 July 2001, Master Thomson, CP 212/99).

application of the general approach to the duty of care that has developed in New Zealand.

In my view, the answer to this question must be that the limited approach to recovery for secondary victims is consistent with broad inquiries into proximity and policy which form the substance of the approach outlined in *South Pacific Manufacturing*. As such, it does represent a principled approach to the duty of care in the particular situation of secondary victims.⁴⁹ A few examples should illustrate this point. The need for a close tie of love and affection between the primary and secondary victims is often understood in terms of reasonable foreseeability, in the sense that it is not reasonably foreseeable that a person who did not have a close and loving relationship with the primary victim would suffer a psychiatric illness as a result of witnessing an injury to them.⁵⁰ As such, it can be understood as relating to the idea of proximity in the specific context of secondary victims. The same could be said of the requirement for a direct perception of the injury to the primary victim or its aftermath. It also informs the inquiry into the closeness and directness of the relationship between the plaintiff and the defendant.⁵¹ The concern with the potential flood of litigation, if the approach to recovery is substantially expanded, is a classic illustration of a policy concern.

This is no great insight. Few challenge the *relevance* of the questions raised by these limits

⁴⁹ For examples of attempts to incorporate these limits on recovery within a more general approach to the duty of care see Murphy, “Negligently Inflicted Psychiatric Harm: a Re-appraisal” (1995) 15 *Legal Stud* 415, and Teff, “Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries”, above n 6.

⁵⁰ Thomas J in *van Soest* recognised this possibility, above n 16 at 209. See also *Alcock*, above n 3 at 397 per Lord Keith, at 404 per Lord Ackner, at 416 per Lord Oliver. A similar point is made by Murphy, *ibid* at 425-6.

⁵¹ Murphy, *ibid*.

on recovery. But the particular objection made by a number of commentators,⁵² and certainly this is at the heart of the objection of Thomas J, is that the Courts do not seek to derive these criteria from any general test for the duty of care, such as that outlined in *South Pacific Manufacturing*, but rather use them as pre-determined rules for the existence of a duty of care that make no reference to the particular relationship at issue. An example should illustrate this concern. The distinction between a primary and secondary victim can be vitally important in establishing a sufficient relationship of proximity; a primary victim need only show that it was foreseeable that they would suffer some physical injury, while a secondary victim must satisfy all the requirements of the limited right of recovery.⁵³ But the distinction between a primary and secondary victim may not, as a matter of fact, reflect the proximity of the relationship between the plaintiff and defendant. Using an example suggested by Lord Ackner in *Alcock*, where a petrol tanker careens out of control into a school and explodes,⁵⁴ Trindade has pointed out that the range of people who foreseeably could have suffered physical injury may have no relation to the group of people we think most deserving of recovery for any mental injury they may suffer as a result of witnessing the accident.⁵⁵ In effect, the question of whether there is a sufficient relationship of proximity between the plaintiff and defendant has been answered by the application of a factor that seems to have nothing to do with the actual content of the relationship between them.

The problem with this objection, however, is that it misunderstands how we use general

⁵² For example Teff, “Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries”, above n 6 at 113.

⁵³ See *Page v Smith*, above n 4.

⁵⁴ *Ibid* at 403.

⁵⁵ Trindade, “Nervous Shock and Negligent Conduct”, above n 10 at 25.

approaches to the duty of care as outlined in a case such as *South Pacific Manufacturing*.⁵⁶ It does not prescribe a universal “test” for the duty of care that can be used in any particular fact situation to determine the duty of care. Individual decisions cannot be reviewed on the basis of whether or not they conform to some objective notion of proximity, or to a necessary range of permissible policy considerations. The concepts involved are too general for that. Proximity simply directs us to consider whether the relationship between the parties is sufficiently close to attract a duty of care, policy to whether any duty of care would achieve a useful social purpose. Any substantive content these criteria have, which could act as a useful guide to the existence of a duty of care in any particular fact situation, is found in those considerations the courts have treated as relevant to the questions of proximity and policy in previous, similar cases.⁵⁷ The result is that modern negligence law, in New Zealand at least, is best understood not as the single expression of a general principle (or test) for liability, but as a collection of different fact situations in which courts have set different requirements for the duty of care, and that reflect in only the broadest sense the concepts of proximity and policy outlined in *South Pacific Manufacturing*. Consistent with this understanding, taking the example of proximity, the requirements for determining the existence of that relationship may or may not be the same in different fact situations. For example, although parties may be in an identical factual relationship, claims between them for personal injury are likely to be

⁵⁶ It should also be recognised that the trend is away from any rigid application of these limits on recovery. The House of Lords has recently questioned the rigidity of the distinction between primary and secondary victims, and an unduly narrow view of the immediate aftermath of an accident. See *W v Essex County Council*, above n 4. Likewise, the majority in *van Soest* did not express any view on the need for a shocking incident, and appeared to favour a relaxing of the strictness with which the English courts have applied the needs for physical and temporal proximity

⁵⁷ This is the point made by Lord Bridge in *Caparo Industries Plc v Dickman*, above n 38 at 617-8.

treated differently to claims for property damage,⁵⁸ and differently again if the claim is one for economic loss.⁵⁹ If the claim is for an economic loss, the requirements for proximity are likely to be different if the loss was suffered as a result of the purchase of a residential house,⁶⁰ rather than as a result of a negligent misstatement,⁶¹ and different again if it involves two commercial entities rather than a potentially vulnerable individual.⁶² These differences cannot be explained as the application of a single, simple test for the duty of care. Rather, they are illustrations of the broad ideas of proximity and policy as applied to particular fact situations. The limited right of recovery for secondary victims should not be rejected as an arbitrary and unprincipled limit on the right of recovery for secondary victims, but welcomed as giving some substance to the broad concepts of proximity and policy in the specific situation of mental injury to a secondary victim.

Conclusion

The limited right of recovery for secondary victims has, over the years, provided a rich source for academic comment. There have been easy points to score. When courts attempt to justify

⁵⁸ See *South Pacific Manufacturing*, above n 37 at 297 per Cooke P.

⁵⁹ See Todd ed, *The Law of Torts in New Zealand*, 3rd ed, Brookers, Wellington (2001), at 169.

⁶⁰ See *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); *Riddell v Porteous*, above n 43.

⁶¹ For recent examples see *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA); *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA); *McKay Hill v Eksteen* (unreported, Court of Appeal 161/99 30 May 2000); *R M Turton & Co Ltd (in liq) v Kerslake & Pts* [2000] 3 NZLR 406 (CA).

⁶² Compare the authorities *ibid* with *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA). See generally Barker, "Divining an Approach to the Duty of Care: The New Zealand Court of Appeal and Claims for Negligent Misstatement", above n 38.

the limits using arguments such as “thus far and no further”,⁶³ they present an easy target. In this comment, I have tried to mount something of a defence of the approach of the courts. I have suggested that Thomas J in *van Soest*, as with many critics in the area, assumes an idealised and unrealistic approach to the duty of care. Not only is he wrong to suggest that reasonable foreseeability is the principle against which liability in negligence should be assessed, but wrong to assume that there is any single, workable “test” for liability at all. The approach in cases such as *South Pacific Manufacturing* is a test in only the most general sense. In its practical application, it simply provides a way to organise relevant criteria. Understood in these terms, the limited right of recovery for secondary victims, and the decision of the majority in *van Soest*, should be welcomed as giving substance to this general conception of liability in the specific situation of the secondary victim.

⁶³ *White*, above n 4 at 500 per Lord Steyn.