TORT LIABILITY OF CONSULTANTS
- Philip Davenport

Although it establishes no new legal principles, the judgment of Derrington J in the Supreme Court of Queensland, 12 December, 1989, in *National Mutual Life Association of Australasia Limited v Coffey & Partners Pty Ltd & Ors* is a classic illustration of the present state of the law with respect to the liability of a consultant to a subsequent owner of a defective building.

The defendants were consultant soil engineers engaged by the builder. The plaintiff was the present owner of the defective building. For the purposes of the application, it was assumed that the foundations of the building were defective and that it was the negligence of the consultants that caused the harm. The consultants successfully argued that the Court should strike out the claim on the ground that in law it disclosed no cause of action.

The decision illustrates the principle which Deane J in *Sutherland Shire Council v Heyman* [1985] 157 CLR 424 expressed as follows:

> "The common law imposes no general duty to avoid loss or injury to another merely because it is reasonably foreseeable that one's actions or omissions are likely to cause it. Nor, under the common law, is a person liable in damages for loss or injury to another merely because such loss or injury would not have been sustained if he or she had acted with reasonable care to avoid it. Such a duty arises and such a liability exists under the common law only if there be the requisite element of proximity in the relationship between the parties with respect to the relevant act or omission."

The plaintiff's problem was to demonstrate that there was the requisite element of proximity in the relationship between the consultants and the plaintiff. The plaintiff had no contract with the consultants or the builder and did not acquire the building until after it was completed and until after the faulty foundations first became apparent.

A vital element in the Court's decision was the fact that in the opinion of the court the plaintiff's loss was what the law categorises as economic loss. Had there been personal injury or physical damage to property of the plaintiff, then in the words of Derrington J "the proximity is usually beyond question".

The plaintiff argued that there was damage to property, namely the building but the plaintiff did not allege any damage distinct from that flowing from a defect in the foundations which was known or manifest at the time when the building was owned by an earlier owner. Derrington J relied upon the judgments of the High Court in *Sutherland Shire Council v Heyman*, particularly the statement of Deane J that:

> "... any loss involved in the actual inadequacy of the foundations by a person who acquires an interest in the premises after the building has been completed is merely economic in its nature."

Having categorised the plaintiff's loss as economic, Derrington J then reviewed a number of recent cases in tort on economic loss to see whether the plaintiff's claim came within an established category of duty. He came to the conclusion that the elements in the plaintiff's case were analogous to those which in the cases reviewed were held to be insufficient to establish the necessary proximity to give rise to a legal duty upon the defendant to prevent economic loss to the plaintiff.

The economic loss cases relied upon by Derrington J were *Sutherland Shire Council v Heyman*, where the High Court decided that a council was not in a relationship of sufficient proximity to a subsequent owner of a house; *D & F Estates Ltd v Church Commissioners for England* where the House of Lords decided that the builder of a house was not in a sufficient relationship of proximity to lessees from the building owner, and *Simaan General Contracting Co v Pilkington Glass Ltd [No. 2]* [1989] 2 WLR 761 where the Court of Appeal in England decided that a supplier of glass to a subcontractor was not in a sufficient relationship of proximity to the head contractor.

Derrington J said "reliance or an assumption of responsibility is the major factor supporting the necessary proximity", but he did not attempt to define "proximity". The difficulty of defining proximity is the subject of the essay "Neighbourhood, Proximity and Reliance" by The Hon. Justice McHugh in Essays on Torts, Ed. PD. Finn Law Book Co. 1989 where at p39 he says:

> "In truth, the notion of proximity seems to record the result of a finding of duty rather than a criterion for determining duty."

Two recent cases where a consultants have been held to be in a sufficient relationship of proximity to a subsequent owner of a building to render the consultant liable in tort for economic loss are *Smith v Bush* and *Harris v Wyre Forest District Council* [1989] 2 WLR 790. Both cases involved valuers instructed by the mortgagee prior to purchase by the plaintiff. In both cases, the plaintiff paid for the valuation and relied upon the valuation, notwithstanding a disclaimer and, in the second case, without even seeing the valuer's report.

In both cases, the valuer negligently failed to report defects in the building. Both cases involved economic loss, rather than injury to person or physical damage to property. In both cases, there was no contract between the plaintiff and the valuer. What distinguishes these cases from the House of Lords earlier decision in *D & F Estates* [supra] or the decision of Derrington J ? The element appears to be "reliance". The purchasers of the homes relied upon the valuation whereas the plaintiff in the Queensland case did not rely upon the soil investigation carried out by the consultants.

However, the even more recent decision of the House of Lords, *Caparo Industries Plc v Dickman & Ors* [1990] 2 WLR 358 demonstrates that reliance alone is not sufficient to establish the degree of proximity necessary to establish a duty on the part of a professional to avoid causing economic loss to another. That case concerned a

claim by a company against the auditors of another company. The plaintiff company alleged that the auditors were negligent in carrying out their audit and that, in reliance on the accounts, the plaintiff made investments in the company. The plaintiff argued that the auditors owed a duty of care to potential investors and to shareholders. The plaintiff was both a shareholder and an investor.

The House of Lords held that liability for economic loss due to negligent misstatement is confined to cases where the statement or advice has been given to a known recipient for a specific purpose of which the maker was aware and upon which the recipient has relied and acted upon to his detriment. The auditors did not owe a duty of care to potential investors. Lord Bridge said that previous decisions "have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and if so its scope".

It seems that it is only by analogy with previous cases, rather than recourse to any general principle of proximity, that a legal adviser can predict whether a particular professional will be liable to someone in tort for economic loss. In the essay referred to above, McHugh J suggests that rather than applying the proximity doctrine, there is a preferable approach. He suggests that where a new case lacks the elements that in an analogous case gave rise to a duty, a court in making its decision should consider policy factors, namely administrative, ethical or moral, economic, justice and public interest factors. Only if the plaintiff could obtain a favourable finding in respect of each of these factors should a court impose a duty of care in a novel situation. He concludes "But unless the High Court decides otherwise, Australian courts are bound to apply the proximity doctrine".

NEW TRAINING LEVY

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New legislation imposes a levy on firms which do not spend a specified minimum amount on approved workforce training.

The Training Guarantees Act (Clth) is expected to commence from 1 July 1990 and requires all employers with a national annual payroll of $200,000 or more to spend a specified minimum amount on "structured training". The minimum expenditure on training has been set at:

- 1% of national payroll for 1990/91, 1991/92
- 1.5% of national payroll for 1992/93 and subsequent years.

If this expenditure is not achieved, a levy will be imposed equal to the shortfall. The levy, unlike training expenses, will not be tax deductible. The scheme applies to both the public and private sectors and those eligible to receive training include owner managers, managers, other employees and cadets.

"Eligible training expenditure" is broadly defined to include structured off-the-job and on-the-job training. Expenditure attributable to the program includes:

- that incurred by the employer in determining needs, developing, providing, evaluating and administering the program
- costs associated with the development and administration of associated accounting and information systems
- money paid to external consultants
- travel, meals, accommodation and childcare directly attributable to employees undertaking programs
  payment or reimbursement of fees and contributions under the Higher Education Funding Act
- buildings or depreciable property used solely in such programs.

Employers should start keeping records from 1 July 1990 and by the end of that financial year should be in a position to self-assess their liability to pay the levy. By 30 September 1991 an employer who is liable to pay a training guarantee charge must lodge a training guarantee statement together with payment of the shortfall with the Commissioner of Taxation. If there is no shortfall no statement is required.

The Commissioner will have the right to investigate liability and to issue default assessments and any amending assessments. The usual provisions relating to additional taxes and penalties are included in the legislation.

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