HAWKINS v. *CLAYTON* (1988) 164 C.L.R. 539: DOUBTS CONCERNING THE RATIO DECIDENDI

INTRODUCTION

The legal profession in the Common Law world is very much aware of its liability in negligence for malpractice.[1] "Solicitors", it would seem, "are much more open to suits for negligence than barristers".[2] It is difficult to say whether this reflects an increase in negligent conduct or an increased willingness "to complain about poor quality legal service".[3] One suspects that the latter reason rates above the former.

> However, whatever the reasons, it is clear that professional negligence cases are being litigated more often, and that the categories of negligent activity for which redress may be sought are being extended by the courts.[4]

The policy of the law is to provide a remedy to victims of professional negligence and to protect those who should not be held responsible from its censure.[5] To quote an essay co-authored by our present Chief Justice of the High Court of Australia: the challenge is to achieve a flexible yet principled development of the Common Law so that it retains certainty and does not involve the "revolutionary overthrow of patterns of legal thought".[6] His Honour continued that legal rules are only justifiable against

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[1] Gerry Bates, "Liability of Solicitors for Negligence to Beneficiaries Under a Will" (1985) 59 A.L.J. 327.

[2] Derrick Owles and Hugh Cockerell, *Liability for Defective Services* (1985), p. 119.

[3] *Supra* fn. 1.

[4] *Ibid.*; see fn. 2: *Midland Bank Trust Co. Ltd.* v. *Hett. Stubbs and Kemps* [1979] Ch. 384; *Aluminium Products* v. *Hill* [1981] Qd.R. 33; *Ross* v. *Caunters* [1980] Ch. 297; *L. Shaddock and Associates Pty. Ltd.* v. *Parramatta City Council* [1982] 56 A.L.J.R. 875; *Allied Finance and Investments Ltd.* v. *Haddow and Co.* [1983] N.Z.L.R. 22; *Gartside* v. *Sheffield* [1983] N.Z.L.R. 37.

[5] *Supra* fn. 2, p. 2.

[6] The Hon. Sir Anthony Mason and S. J. Gageler, "The Contract", pp. 1-34 at 31, in P. D. Finn (Ed.), *Essays On Contract* (1987).

the measure of "justice and social utility": precedent and tradition must be balanced against "the inevitable movement and diversity of society".[7] The judges of the High Court have attempted to do this in their individual ways in *Hawkins* v. *Clayton*.[8] It is now trite to observe that the law has changed radically since the decisions in *Clarke* v. *Kirby-Smith*[9] and *Bagot* v. *Stephens Scanlan and Co. Ltd.*[10] which held that "the only basis of [professional] liability was in contract, and that if for any reason the contractual remedy was insufficient, it was not open to the plaintiff to sue in tort".[11]

The case raises matters relating to a solicitor's liability in contract and in tort to an executor when the solicitor has safe custody of the relevant will and does not take positive steps to disclose its existence to the nominated person. Apart from the question of contractual and tortious duties, the High Court also deals with the operation of s. 14(1) of the *Limitation Act* 1969 (NSW) and with the existence of concurrent duties in contract and in tort. Although this paper is directed to other issues, a few words are in order in this connexion.

The High Court decided that s. 14(1) of the *Limitation Act* 1969 (NSW) does not operate from the moment damage is sustained but from the moment the cause of action first accrues.[12] As the section was not intended to bar a cause of action for a wrongful act on account of a "lapse of time" when "the wrongful act itself effectively precluded the bringing of proceedings", the cause of action was held to run from the moment the plaintiff was informed of his nomination as executor and beneficiary.[13]

Deane J. also enunciated some guidelines for regulating the existence of concurrent duties of care grounded in tort and in contract.[14] Stressing the conceptual differences between contract and tort,[15] his Honour concedes that, in theory, concurrent duties may exist.[16] His Honour

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[7] *Id.*, p. 30; cf. see also *Barwell* v. *Brooks* (1784) 3 Doug. 371 at 373 per Lord Mansfield, 99 E.R. 702 at 703.

[8] (1988) 164 C.L.R. 539; Brennan, Deane and Gaudron JJ. were in the majority, Mason C.J. and Wilson J. were in the minority.

[9] [1964] Ch. 506.

[10] [1964] 3 All E.R. 577.

[11] W. D. C. Poulton, "Tort and Contract" (1966) 82 L.Q.R. 346.

[12] *Supra* fn. 8, p. 588 per Deane J.

[13] *Id.*, p. 590 per Deane J.; cf. p. 602 per Gaudron J., pp. 560-562 per Brennan J.; see also the several commentators on this aspect of the case: Karen M. Hogg, "Hawkins v. Clayton and Ors: Where There's A Will There's A Way" (1988) 15(1) U.Q.L.J. 90 at 97-99; Frank Riley, "Holding a client's will?" (1988) 26(5) Law Society Journal 47 at 50-51; Noela L'Estrange, "All for the Want of a Phone Call: Hawkins v. Clayton and Others" (1988) 18(2) Queensland Law Society Journal 95 at 97-98.

[14] *Supra* fn. 8, pp. 583-586 per Deane J.; for a detailed appraisal of this aspect of the case see Karen M. Hogg, "Hawkins v. Clayton and Ors: Where There's A Will There's A Way" (1988) 15(1) U.Q.L.J. 90 at 99-100.

[15] *Supra* fn. 8, per 583 per Deane J.

[16] *Id.*, p. 582 per Deane J.

continues that unless there is an express contractual term to the contrary, the relevant duty of care lies in tort and not in contract because of the difficulties associated with the implication of a contractual term corresponding to an applicable tortious duty of care.[17] To imply such a corresponding duty into a contract is not "necessary for business efficacy or the reasonable or effective operation" of the contract, nor is it "so obvious that 'it goes without saying' ".[18]

In this paper, the authors concentrate on the arguments put to the High Court in contract and in tort. In contract, the authors explore the possibilities raised by the decision in the context of the general law of contract and the concession by the High Court in the case that a contractual duty of care could exist in theory. In tort, the authors critically examine the arguments by which the Court found the defendants liable for negligence. More importantly, this paper argues that the consequences of the decision are not as sweeping as other commentators[19] have supposed. This is a point of some moment, since the unwarranted conclusions, reached *via* misapprehension of common law principles, create an exaggerated picture of the solicitor's responsibility, and in the end it is the solicitor who, through unneeded concern and effort, must pay for that exaggeration.

THE FACTUAL BACKGROUND

Mrs Brasier (the testatrix) sought to arrange the devolution of her estate. Her good friend Mr Hawkins (the appellant, and no relation to Mrs Brasier) lived with his family as tenants in her Blakehurst home in New South Wales. The solicitors, Clayton Utz & Co. (the respondents), prepared the will and oversaw its execution in January 1970. Mrs Brasier left two hundred dollars to her adopted daughter and her bank accounts to her brother. She nominated Mr Hawkins her executor and her residuary beneficiary,[20] and Clayton Utz & Co. retained the original will for safe keeping. Although Mr Hawkins had agreed to act as executor he did not know that he was to inherit. The brother later died and the gift to him failed. In 1973, after an argument, the testatrix evicted Mr Hawkins from her home. They did not communicate again. The testatrix told a partner of Clayton Utz & Co., Mr Hardwick, about the quarrel and that she desired a new will. Mr Hardwick telephoned her a month later, but she had not decided on her testamentary wishes. The testatrix died on 18th January 1975.[21]

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[17] *Id.*, pp. 583-584 per Deane J.

[18] *Supra* fn. 8, p. 583 per Deane J.

[19] *Supra* fn. 13; see also Andrew Lang, "Solicitors' Responsibilities and Entitlements Regarding Wills", pp. 53-62 in Andrew Lang, *Recent Developments For Companies: Reforms To The Execution And Revocation Of Wills* (University of Sydney, 1988); John G. Fleming, "Must a Solicitor Tell?" 105 L.Q.R. 15.

[20] *Hawkins* v. *Clayton and others trading as Clayton Utz & Co.* [1986] 5 N.S.W.L.R. 109 at 127 per McHugh J.A.

[21] *Supra* fn. 8, pp. 563-564 per Deane J.

The solicitors learnt of the testatrix's death on 20th January 1975. Mr Hardwick took possession of the testatrix's bank accounts and arranged payment of funeral expenses. At the request of Mrs Brasier's nephew, he made enquiries about the possibility that a later will had been made. He found none. In 1978, he told two of the testatrix's relatives that they had no interest in the estate. From 1975 to 1981 Mr Hardwick made no attempt to locate Mr Hawkins and the estate was thus unadministered. He refrained from making enquiries because he believed the testatrix's nephew when the latter told him that Mr Hawkins could not be found and that he had probably left the state as the police were pursuing him over a hire purchase matter.

Mr Church was an employee of Clayton Utz & Co. In early March 1981 he consulted the Sydney telephone directory and, finding only three Hawkinses with the initials "C. H.", he made a few simple enquiries and located the beneficiary. It transpired that Mr Hawkins' name had been in the directory since 1973, he had lived continuously in Sydney since 1968, he had never been pursued by the police over any hire purchase matters during the 1970's and, prior to retirement in 1982, he had been a licensed real estate agent for approximately thirty years. Mr Hawkins first learned of the testatrix's death when contacted by Mr Church in March 1981.

THE PROCEEDINGS

Mr Hawkins took immediate steps to safeguard the estate and probate was obtained on 2 October 1981.[22] Mr Hawkins sued Clayton Utz & Co. both in his capacity as the executor of the testatrix's estate and in his personal capacity as the residuary beneficiary.[23] In the first place, he argued that Clayton Utz & Co. owed him a duty to take reasonable steps to inform him of his nomination as executor or beneficiary, arising in contract, either as the executor of the estate or as the residuary beneficiary. In the second, Clayton Utz & Co. owed him a duty of care, arising in tort, either as the executor of the estate or as the residuary beneficiary.[24] His argument continued that the solicitors had breached this duty when they failed to inform the plaintiff that he had been nominated as principal beneficiary and executor. As the result of this breach, Mr Hawkins had suffered damage by (a) the property falling into disrepair, (b) the loss of rental income, (c) the removal of furniture and furnishings and (d) a fine levied apropos the late lodgment of a death duty return.[25]

Clayton Utz & Co. responded in part that if there had been a breach of duty it had occurred in 1975 or by November 1976 at the latest.

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[22] *Supra* fn. 20 pp. 128-129 per McHugh J.; pp. 563-564 per Deane J.

[23] *Supra* fn. 8, p. 565 per Deane J.

[24] *Supra* fn. 20, p. 113 per Kirby P.

[25] *Id.*, p. 130 per McHugh J.A.

Therefore, any cause of action in either contract or tort would be statute-barred by virtue of sections 14(1)(b) and 63 of the *Limitation Act* 1969 (NSW) and, accordingly, not maintainable.[26]

At first instance, in the Supreme Court of New South Wales, Yeldham J. held that there was no duty of care either in contract or in tort and it was therefore unnecessary to consider whether or not the action was statute-barred.[27] The Court of Appeal was divided. Kirby P. and Glass J.A., in the majority, held that the action was statute barred and there was no need to determine finally the existence of a duty of care in contract or tort.[28] McHugh J.A. held in dissent that the solicitors owed a tortious duty of care to Mr Hawkins as beneficiary which they had breached, and that the claim was not statute-barred.[29] In the High Court it was held by Brennan, Deane and Gaudron JJ., in the majority, that there was a duty of care, arising in tort but not contract, owed to Mr Hawkins in his capacity as executor, and that this action was not statute-barred.[30] Mason C.J. and Wilson J. held in the minority that Clayton Utz & Co. did not owe a contractual or tortious duty of care to Mr Hawkins either in his capacity as executor or as beneficiary. Accordingly, the minority did not consider whether or not the claim was statute-barred.[31]

A DUTY IN CONTRACT?

The plaintiff argued before the High Court that Clayton Utz & Co. owed him a duty of care to take reasonable or positive steps to find him and disclose to him his nomination as executor and residuary beneficiary.[32] The High Court unanimously rejected any suggestion that this duty could have been founded in contract and all except Gaudron J. examined the question in some detail.[33] This unanimity was a salutary feature of the judgment because in many other respects the judges disagreed over the precise nature of the plaintiff's argument. For example, Brennan J. begins his judgment by describing the plaintiff's argument in contract. The plaintiff, according to his Honour, tried to establish that a contract existed between the solicitors and himself. This suggestion he dismisses on the ground that there was simply no evidence to support it. Brennan J. continues that the plaintiff should have attempted to argue the existence of a contract between the testatrix and the solicitors which imposed the

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[26] *Supra* fn. 8, p. 560 per Brennan J. and p. 565 per Deane J.

[27] *Id.*, p. 565 per Deane J.

[28] *Supra* fn. 20, pp. 118 to 119 per Kirby P. and p. 126 per Glass J.A.

[29] *Id.*, p. 140 to 145 per McHugh J.A.

[30] *Supra* fn. 3, pp. 560 to 562 per Brennan J., pp. 581, 590 to 591 per Deane J., pp. 598, 602 per Gaudron J.

[31] *Id.*, pp. 543, 547 per Mason C.J. and Wilson J.

[32] *Supra* fn. 8, p. 548 per Brennan J., p. 565 per Deane J., pp. 543-544 Mason C.J. and Wilson J.

[33] *Id.*, pp. 544-545 per Mason C.J. and Wilson J., pp. 548-549 per Brennan J., p. 582 per Deane J.

relevant duty of care. Such a contract would have been enforceable by the executor. Pity, he adds, the argument held great merit.[34]

This was the end of the matter for Brennan J. For Deane J., as well as for the two minority judges—Mason C.J. and Wilson J., the issue of contract was a matter well worth considering.[35] This is probably because those learned judges were under the impression, either rightly or wrongly, that the plaintiff was relying on the very argument that Brennan J. said he should have raised but did not. Deane J. expressly states that the plaintiff presented to the High Court an argument based on a contract existing between the testatrix and the solicitors.[36] By sheer weight of numbers Deane J. and the two minority judges would seem to be correct in their description of the plaintiff's argument. For Gaudron J. there was no anomaly: her Honour omitted to mention the argument in contract at all.[37] The possibilities flowing from such a contract are worth pursuing. As Brennan J. said: if such a contract existed, "the benefit of the solicitor's promise would have passed on her death to her executor".[38] This is because upon the death of a person, most causes of action in or against the deceased survive under s. 2(1) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW). Hence, "the legal representative may enforce or be sued on contracts entered into by the deceased during his lifetime".[39]

When the will had been properly executed, the original was retained by the solicitors for safe keeping. This safe keeping was incidental to the overall contract of the preparation and execution of the will. The safe custody involved no extra charge and was an aspect of the goodwill of the solicitors' practice.[40] Several terms could be implied or imputed into the bailment. However, the chief issue was whether the firm was merely authorised to communicate to Mr Hawkins his nomination as executor and/or residuary beneficiary, or whether the solicitors were duty bound, as the bailees of the will, to make this communication?[41]

A bailment is a "delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose, for which they were bailed, shall be answered".[42] A bailee is only obliged to keep the "thing" bailed "with a degree of care proportioned to the nature of the bailment" and

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[34] *Id.*, p. 549 per Brennan J.

[35] *Id.*, pp. 569-574 and 582-587 per Deane J., and pp. 544-545 per Mason C.J. and Wilson J.

[36] *Id.*, p. 566 per Deane J.

[37] *Id.*, pp. 591-602 per Gaudron J.

[38] *Id.*, p. 549 per Brennan J.

[39] G. L. Certoma, "The Law of Succession in New South Wales" (1987), p. 250; cf. *Marshall* v. *Broadhurst* 1 Cond.J. 403 at 404; 148 E.R. 1480.

[40] *Supra* fn. 8, p. 569 per Deane J.

[41] *Ibid.*

[42] William Jones Esq., "An Essay On The Law Of Bailments" (1781): reprinted 1978 (Garland Publishing, Inc.), p. 1; cf. *Re S. Davis and Co. Ltd.* [1945] q Ch. 402 at 405 per Cohen J.

"the investigation of this degree in every particular contract is the problem, which involves the principal difficulty".[43] The burden of a bailee for reward is more onerous than that of a gratuitous bailee. However one characterises the bailment of the will in the case, the duty that was involved required the solicitors to protect the testamentary document itself and not the estate of the testatrix.[44] It is possible, as the above definition states, for a bailee to be under an obligation to deliver the thing bailed to a certain person at the direction of the bailor. Such a direction would need to be given clearly as it is not necessary to give efficacy to the bailment and it does not "go without saying".[45] The decision of the High Court that a contractual duty of care could not be implied on the facts of the case is quite sound.

Deane J. states that a further reason that a contractual duty of disclosure could not be implied into the contract was that the testatrix and the solicitors would not have intended to create a contractual duty of disclosure when a Common Law duty of disclosure already existed.[46] This view is flawed in the present case because the Common Law duty of disclosure, of which Deane J. was speaking, did not exist at the time the contract for the execution, preparation and safe custody of the will was entered into by the testatrix and the solicitors. This so called "duty of disclosure" was first enunciated in the present case.

Although the High Court ultimately dismissed the plaintiff's submissions in contract, they gave the argument currency and conceded that, theoretically, a contractual duty of disclosure may exist. If the duty of disclosure is expressed in the contract then there is little or no difficulty in giving it effect. If the contract does not have such an express contractual term and it must therefore be implied, Deane J., with the concurrence of the two minority judges, Mason C.J. and Wilson J., has laid down a formidable test.

> Where it is apparent that the parties have not attempted to spell out the full terms of their contract, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case.[47]

It is therefore a rare case in which there will be a term implied into a contract giving rise to a duty of disclosure. The nature of bailment and the traditional step of solicitors taking their clients' wills for safe

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[43] *Ibid.*

[44] *Chitty On Contracts* (Vol. II: Specific Contracts), 25th Edn. (1983), pp. 89, 109-112, paras. 2341, 2366-2368.

[45] *Supra* fn. 8, p. 571 per Deane J.

[46] *Id.*, pp. 583-584 per Deane J.

[47] *Ibid.*; this test is based on the test in *BP Refinery Pty. Ltd.* v. *Hastings Shire Council* (1977) 52 A.L.J.R. 20.

keeping as an aspect of the good will of their practice means that it is unlikely that an express contractual duty of disclosure will arise. In the normal course of events, executors will not be able to sue safe custodians of wills for non-disclosure.

A DUTY IN TORT?

The decision of the High Court in *Hawkins* v. *Clayton* broke new ground in the law of negligence, for it held for the first time that a negligent *omission* which resulted in pure economic loss could attract liability in tort. Prior to this case the law applied only to negligent acts and negligent misstatements.[48] In providing a new category of liability *Hawkins* v. *Clayton* is an interesting study in the progression of the law of negligence, particularly with respect to standards of professional care. These issues have been dealt with in other commentaries.[49] Rather than attempt to contribute further in that discussion this paper concentrates on other aspects of the case.

Although the majority in *Hawkins* v. *Clayton* agreed that the solicitors owed Mr Hawkins a duty of care, the judges did not agree on the reason. Moreover their respective reasoning is not always sound. In what follows we hope to bring out some of the sources of worry. More importantly, this paper is concerned with misunderstandings which have developed over the case. In this part the criticism is directed at the commentators,[50] for they have exaggerated the consequences of the decision. The principle to be drawn from this case is a specific one.

THE JUDGMENT OF DEANE J.

Deane J.'s argument for the existence of a duty of care seems to run as follows. Firstly, he stresses that:

> . . . a relevant duty of care will arise under the common law of negligence only in a case where the requirement of a relationship of *proximity* between the plaintiff and the defendant is satisfied.[51]

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[48] *Hedley Byrne and Co. Ltd* v. *Heller and Partners* [1964] A.C. 465; *Sutherland Shire Council* v. *Heyman* (1985) 60 A.L.R. 1.

[49] See for example: S. Quinlan & D. Gardiner, "New Developments with Respect to the Duty of Care in Tort" (1988) 62 A.L.J. 347; The Hon. Mr Justice D. K. Errington, "The Limits of Awards of Economic Loss Through the Cases" (1989) 63 A.L.J. 13; Mark Lunney, Negligence and the Recovery of Pure Economic Loss; The Re-Opening of Pandora's Box?" (1989) Qld Law Society Jnl 59.

[50] Andrew Lang, "Solicitors' Responsibilities and Entitlements Regarding Wills", in *Recent Developments For Companies: Reforms To The Execution And Revocation Of Wills* (University of Sydney, 1988); John G. Fleming, "Must a Solicitor Tell?" 105 L.Q.R. 15; Karen M. Hogg, "Hawkins v. Clayton & Ors: Where There's a Will There's a Way" (1988) 15(1) University of Qld Law Jnl 90; Frank Riley, "Holding a Client's Will? Consider the Duty of Care" (1988) 26 Law Society Jnl 47; Noela L'Estrange, " 'All for the Want of a Phone Call' ": Hawkins v. Clayton and Others (1988) Qld Law Society Jnl 95.

[51] *Supra* fn. 8 per Deane J. at 576 (emphasis added).

"Proximity" is not a new concept: It is one which Deane J. has endorsed and developed in many cases before.[52] What is interesting is his application of the proximity test in this case. In cases of pure economic loss proximity is required in addition to reasonable foreseeability of loss in order to establish liability for negligence. What determines whether or not the proximity requirement is satisfied? Deane J. refers to two cases of pure economic loss[53] in which the requisite proximity relationship was satisfied by the elements of *responsibility* and *reliance.* In cases such as these a relationship is sufficiently proximate if it can be shown that it is based on reliance by one party on the responsibility undertaken by the other party. Since this case is one involving pure economic loss, liability will depend on finding these elements in the relevant relationship. By focussing on this reliance/responsibility factor Deane J. is forced to reason from the standpoint of what he calls the 'primary relationship' (that between solicitor and client) since that is the only one in which there is an element of reliance or responsibility.

It is clear that a duty of care exists between a solicitor and client in respect of the performance of professional work. But that is not the question. The question is whether the solicitor and *executor* (or beneficiary) are in a sufficiently close relationship. It cannot be argued that the relationship between solicitor and executor is sufficiently proximate just because there is a proximate relationship between solicitor and testatrix. Something more is required to complete the argument. For instance, it may be possible to bring the case under the principle of *Voli* v. *Inglewood Shire Council*[54] if it can be shown that there was negligence in the performance of the work undertaken by the solicitors. In that case a third party was allowed damages for loss caused by professional negligence.

In *Hawkins* v. *Clayton,* however, the solicitors prepared and executed the will properly and also kept the will safely as promised. There is no evidence that the testatrix hoped for anything more than this or that Mr Hardwick undertook responsibility for anything more.

Deane J. resolved the problem by arguing that, by accepting custody of the will, the solicitors assumed custodianship of the testatrix's testamentary wishes.[54] With respect, this simply does not follow. The most we can safely assume is that they were obliged not to lose the will. The facts of the case support this assumption since the testatrix had informed Mr Hawkins of her intention that he be executor, which

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[52] See for example, *Jaensch* v. *Coffey* (1984) 155 C.L.R. 549; *Hackshaw* v. *Shaw* (1984) 155 C.L.R. 614; *Fapatonakis* v. *The Australian Telecommunications Commission* (1985) 156 C.L.R. 7; and more recently in *Sutherland Shire Council* v. *Heyman* (1985) 157 C.L.R. 424; *San Sebastian Pty Ltd* v. *The Minister Administering the Environmental Planning Assessment Act* (1986) 61 A.L.J.R. 41; *Australian Safeways Stores Pty Ltd* v. *Zalusna* (1987) 61 A.L.J.R. 180.

[53] *Supra* fn. 8, p. 576 refers to *Sutherland Shire Council* v. *Heyman* (1985) 60 A.L.R. 1; *San Sebastian* v. *The Minister* 61 A.L.J.R. 41.

[54] *Voli v Inglewood Shire Council* (1963) 110 C.L.R. 74.

demonstrates that she hoped that *he* would carry out her testamentary wishes. Further support comes from Mason C.J. and Wilson J., neither of whom could find any assumption of the alleged responsibility.[55] At the very least, it is by no means obvious that by assuming custody of the will the solicitors also assumed custodianship of the testatrix's testamentary intentions. This is a considerable defect in such a crucial part of Deane J.'s argument.

THE JUDGMENT OF BRENNAN J.

Is the reasoning of Brennan J. more satisfactory? Although he avoids the problems associated with reliance, Brennan J.'s judgment shares with Deane J.'s a lack of cogency. His judgment, however, is interesting from a tort point of view because he rejects the "proximity test" for determining the existence of a duty of care in cases of pure economic loss.[56] For Brennan J.:

> . . . when the existence of a duty in a new category of case is under consideration, the question for the court is whether there is some factor in addition to reasonable foreseeability of loss which is essential to the existence of a duty.[57]

"Some factor in addition" is explained thus:

> a duty of disclosure arises from custody of the will after the death of the testator, the nature of the will and the purpose for which custody was accepted.[58]

The problem with his judgment is that it says too little. For example, what is it about the *nature* of the will or the *custody* of the will which could support a duty to disclose? The question brings us back to Deane J. Neither he nor Brennan J. has identified anything in the will or in its custody which is a reason for holding the solicitors responsible for more than its safety.

Brennan J. also argues that the duty to disclose arises from the *purpose* for which custody of the will is accepted. This takes us no further. For it is one thing to say that a purpose of holding a will in safe keeping is to ensure that the beneficiary benefits and it is another thing to say that the person who offers to hold it thereby accepts responsibility for achieving that purpose. Consider the duty of a layperson who offers to take care of a friend's will while his friend is travelling. In such circumstances we would feel uncomfortable with a law that imposed a positive duty on this person to fulfil the friend's purposes. Why then do we feel differently in the case of a solicitor?

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[55] *Supra* fn. 8 per Mason C.J. & Wilson J. at 545.

[56] *Id.*, p. 555 per Brennan J.

[57] *Id.*, p. 556 per Brennan J. referring to *Jaensch* v. *Coffey* (1984) 155 C.L.R. 549.

[58] *Id.*, p. 553.

Some special feature of the solicitor/client relationship is being assumed. It may be argued that the solicitor is to be distinguished from a lay person because the solicitor has been approached for legal advice. His advice will be in response to a question of this sort: How do I best ensure that certain people benefit from my estate when I die? He has an obligation to answer fully and correctly, and this will entail describing the usual allocation of further responsibilities. He may undertake responsibility for the will's safe keeping, but none of this implies any further duties. Insofar as there is a duty to defend the client's *purposes*, the commonsensical approach seems to be to hold responsible the person who undertakes that responsibility—the executor. In this case, Mr Hawkins undertook that responsibility when, prior to the death of the testatrix, he agreed to be the executor of her will.

THE JUDGMENT OF GAUDRON J.

Gaudron J. joins Deane J. in accepting the proximity test for determining liability in cases of pure economic loss. However, unlike Deane J., she recognises the inapplicability of reliance and instead introduces her own proximity factor.

> . . . a relationship of proximity may be constituted by the reasonable expectation of a person (including a reasonable expectation that would arise if he turned his mind to the subject) that the other person will provide relevant information or give reliable information, if that expectation is known or ought reasonably to be known by the person against whom the duty is asserted.[59]

If it is accepted that a proximity relationship can arise when there is a reasonable expectation of the kind here described, the following problem arises: The expectation that information be given is reasonable only if the possessor of the information has a duty to furnish it; but whether he has this duty is the very question at issue. So, we submit, Gaudron J. has committed a fallacy of *petitio principii.*

She says more about her new test for proximity:

> It is one which I would adopt as appropriate where the information is necessary for the exercise or enjoyment of a legal right and the person against whom the duty is asserted knows or ought to know of that right and the necessity for the information before the right can be exercised or enjoyed.[60]

This condition can be seen as a new characterisation of the test, or perhaps as a new test. In any case, there is no vagueness or circularity here. Moreover, it is clear that the condition obtains in the case of *Hawkins*

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[59] *Id.*, p. 596 per Gaudron J.

[60] *Id.*, p. 597.

v. *Clayton*. It cannot, however, be a sufficient test, since it draws no distinction between the position of a solicitor and the position of any other person who is apprised of the facts.

THE *RATIO DECIDENDI*?

The reasoning of the judges has been criticised, but nevertheless their decision now takes its place in legal precedent. It is important to identify clearly the principles involved so that relevantly similar cases may be recognised in future. Unfortunately some comments in the literature indicate a misunderstanding of the case. In particular, the commentators fail to emphasise the importance of the circumstances upon which the duty arose.

Consider the following statement by Brennan J.:

> I would state the common law duty which a custodian of a deceased testator's will owes to the executor named in the will in this way: where the custodian has reason to believe that disclosure by him to the executor of the existence contents or custody of the will is needed in order that the will may be made effectual, the custodian is under a duty promptly to take reasonable steps to find, and to disclose the material facts to, the executor.[61]

It is clear from this that the liability of a solicitor will depend on his knowledge in the circumstances. What counts as knowledge sufficient for giving rise to the duty may be inferred from Gaudron J.'s judgment. For her the requisite knowledge was possessed by the solicitors by the end of February 1975, when inquiries concerning any subsequent will had been completed.[62] At this time the solicitors knew (1) that the testatrix had died, (2) that an argument with Mr Hawkins had precluded communication between them until her death and (3) that they held the last will and testament of Mrs Brasier in which Mr Hawkins was appointed sole executor. Deane J. also alluded to the importance of these facts for he said that:

> it was unlikely that it would occur to Mr Hawkins, after his dispute and loss of contact with the testatrix, that he might be the executor and, for practical purposes, sole beneficiary under her last will.[63]

In those circumstances the solicitors must have known that their disclosure to Mr Hawkins of their custody of the will was essential for it to be made effectual. Accordingly, (so the court decided) they were obliged to take reasonable steps to do this.

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[61] *Id.*, p. 555 per Brennan J.

[62] *Id.*, p. 598.

[63] *Id.*, p. 581 per Deane J.

What emerges is that the situation will rarely arise in which a testator appoints an executor who, at the time of the testator's death, is unaware of the death, the existence of the will or its whereabouts. The point is that the facts of *Hawkins* v. *Clayton* (in particular the argument between the testatrix and her appointed executor, the subsequent absence of communication and the non-existence of a subsequent will) created these circumstances.

Why then do commentators stress the importance of this case for practitioners? For instance, one commentator claims that "the seriousness of the implications of this decision for solicitors who retain custody of their clients' wills cannot be underestimated".[64] The concern stems from the issues raised in the dissenting judgment of Mason C.J. and Wilson J.

> There is nothing particularly special about the circumstances of this case that would not be capable of application to every solicitor having the custody of a will. If the fact of the custody is to make the practitioner the custodian of the testator's testamentary intentions it would seem to follow that he must take reasonable care to learn not only of the whereabouts of the executor but also of the death of the testator.[65]

With respect, it is submitted that there *is* something special about the circumstances of the case that would set it apart from others. The facts of the case were unusual and they created a situation which would rarely arise. Furthermore, it is submitted that an obligation to find out about the client's death does not follow from the decision of the majority. First, the solicitors' knowledge of the testatrix's death was one of the reasons for holding them responsible. Moreover, both Brennan and Gaudron JJ.[66] clearly decided that the duty arose *after* the testatrix's death, for it was only then that the solicitors were in the position whereby their failure to act would deprive the executor of his rights. Before the death of a testatrix a solicitor would have no reason to believe that his non-disclosure would result in any loss at all, since it is always open to a testatrix to revoke her will before her death.

What then is the *ratio* of the case? That is a difficult question since the three judges in the majority differed in their reasoning. Furthermore it has been suggested in this paper that neither of the judgments are very persuasive. The only thing which is clear is that the facts of the case were important for the decision. If we are forced to draw a principle of law from the case it will be a very specific one. The case may stand as an instance of liability in the area of professional negligence. However, to attempt to conclude any more general principles from the case is a mistake.

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[64] Karen M. Hogg, "Hawkins v. Clayton & Ors: Where There's a Will There's a Way" (1988) 15(1) University of Qld Law Jnl 90 at 90.

[65] *Supra* fn. 8 at 546 per Mason C.J. and Wilson J.

[66] *Id.*, p. 555 per Brennan J. and p. 598 per Gaudron J.

CONCLUSION

In *Hawkins* v. *Clayton*, three members of the High Court considered in detail whether the contract between the testatrix and the solicitors contained by implication a term requiring the solicitors to inform Mr Hawkins that they held the will. The High Court lays down a strict test governing the implication of terms into contracts—such as those regulating the preparation, execution and safe keeping of wills—which leave their terms largely unarticulated. A duty to disclose will be implied only if it goes without saying and is necessary to make the contract effective.

Such a duty will rarely be so obvious that it goes without saying, because hitherto a duty of this kind has not been present in contracts regulating the preparation, execution and safe keeping of wills and it is independent of the other obligations existing under those contracts. Moreover, the delivery of the will to the executor and/or beneficiary is separate from the preservation of the testamentary document itself. This is a reason against the view that a duty to disclose is necessary to make the contract effective. One cannot automatically assume, as Brennan J. does, that the duty of safe custody requires a solicitor to give effect to the will,[67] although in special circumstances that may also be required. In those circumstances the safe custodian will normally expressly undertake that *further* duty.

Although in this case the majority held that the defendants were liable in tort for failing to disclose their custody of the will to the plaintiff, there are good reasons not to infer a general common law principle or a new category of liability for professional negligence. No two of the majority agreed in their reasons for finding a duty of care. The judgments themselves may be criticised. One thing is clear: the facts of the case are the key to a proper understanding of the law it decides. That is not surprising, for this is the Common Law and to decide and interpret cases this way is as it should be. A misunderstanding of the operation of this system can lead to unwarranted and unsafe conclusions. In particular it may lead us to suppose that the consequences of a decision are more sweeping than they are. We should remember this when we participate in the Common Law's evolution.

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[67] *Supra* fn. 8, pp. 551-552 per Brennan J.