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# When Is There A Duty of Care?

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381 but see Hill (trading as RF Hill & Associates) v Van Erp (1997) 71 ALJR 487 where some forceful comments are made as to the notion of proximity as an underlying notion for the imposition of a duty of care.

<sup>2</sup> See Dawson J in Jaensch's case at p. 611-612.

<sup>3</sup> At p. 579.

<sup>4</sup> Mason CJ, Deane, Gaudron & McHugh JJ.

<sup>5</sup> At p. 277.

<sup>6</sup> (1997) 71 ALJR 487.

<sup>7</sup> At p. 496.

<sup>8</sup> Dawson J lists them as the need to avoid indeterminate liability, the need to avoid placing of impediments in the way of ordinary commercial activity and to avoid making negligence an all embracing remedy.

<sup>9</sup> At p. 531.

<sup>10</sup> In Esanda Finance Corporations Ltd v Peat Marwick Hungerfords (Reg) (1997) 71 ALJR 448, Brennan CJ, Dawson J, Toohey & Gaudron JJ (and to a lesser extent McHugh J and Gummow J) accepted proximity as a necessary ingredient in negligent misstatement cases.

<sup>11</sup> At p. 579-580.

<sup>12</sup> At p. 581-582. Again in Hawkins v Clayton & Ors (1988) 164 CLR 539 Deane J said at p. 576 that:

"In more settled areas of the law of negligence including direct physical injury or damage caused by negligent act, the reasonable foreseeability of such injury or damage is, of itself, commonly an adequate indication that the relationship between the parties possesses the requisite element of

proximity".

He then noted in that case that in cases of pure economic loss, the notion of reliance or dependence is required to be present before proximity can be established.

<sup>13</sup> At p. 586.

<sup>14</sup> At p. 585.

<sup>15</sup> At p. 600.

<sup>16</sup> See Heyman's case at p 501-502.

<sup>17</sup> At p. 584.

<sup>18</sup> At p. 584-585.

<sup>19</sup> At p. 586.

<sup>20</sup> Per Deane J in Jaensch's case at p. 607.

<sup>21</sup> Those cases which involve the duty of care owed by solicitors to intended beneficiaries may also provide a jurisprudential basis although in the writer's view those cases press heavily on the boundaries of imposition of a duty of care. See K Tapsell, The Negligence Juggernaut and Unjust Enrichment (1997) 16 Australian Bar Review 79, W Davis, Proximity - To be Privatised or Retrenched? (1997) 35 Law Society Journal 57 and M Gronow, Liability of Professional Advisers for Economic Loss (1997) 71 Law Institute Journal 38.

<sup>22</sup> The High Court in Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg) (1997) 71 ALJR 448 did not cite Jaensch v Coffey.

<sup>23</sup> Unreported, Court of Appeal (Victoria) 19/12/96 per Tadgell, Charles & Callaway JJ. Tadgell JA delivering the major judgement, the others, in essence, concurring.

<sup>24</sup> But see Dawson J in Hill (trading as RF Hill & Associates) v Van Erp (1997) 71 ALJR 487 wherein he noted Deane J in

Hawkins v Clayton (1988) 164 CLR 539 @ 576 to the effect that reliance and assumption of responsibility are not necessarily elements to establish a duty of care in a particular case in negligent misstatement.

<sup>25</sup> Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd & Ors [1990] 1 QB 665 @ 794 quoted in Bentley's case by Tadgell JA.

<sup>26</sup> See Shaddock & Associates Pty Ltd v Parramatta City Council [No 1] (1980) 150 CLR 225 cited in Bentley's case by Tadgell JA.

<sup>27</sup> Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd & Ors [1990] 1 QB 665 @ 794 quoted in Bentley's case by Tadgell JA.

<sup>28</sup> This issue is not conclusively determined by the Court of Appeal.

<sup>29</sup> See Professor PD Finn "Good Faith and Nondisclosure" in Essays in Tort (1989), Butterworths.

<sup>30</sup> A phrase used in Bentley's case by Tadgell JA.

<sup>31</sup> Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd & Ors [1990] 1 QB 665 @ 794 quoted in Bentley's case by Tadgell JA.

<sup>32</sup> See Hawkins v Clayton (1988) 164 CLR 539 per Gaudron J @ 493 quoted in Bentley's case by Tadgell JA.

<sup>33</sup> Bentley's case per Tadgell JA.

<sup>34</sup> Bentley's case per Tadgell JA.

<sup>35</sup> (1997) 71 ALJR 448.