

# CASE NOTE - HIGH COURT

by Mark Hunter

Perre & Ors v Apand Pty Ltd

High Court No. HCA 36/99

Judgment of Full Court  
delivered 12 August 1999.

## CIVIL LAW, NEGLIGENCE, PURE ECONOMIC LOSS

In separate judgments the Full Court considered the utility of a general, but not exclusive, 'rule' that in the absence of a contractual or fiduciary relationship a person owes no duty to avoid pure economic loss to another person.

The appellants owned or held other interests in South Australian potato farms within the neighbourhood of another farm which was in 1992 negligently infected by the respondent, through seed potatoes, with a disease known as bacterial wilt.

Western Australia subsequently imposed a five year prohibition on the importation of potatoes grown within a twenty kilometre radius of the infected land. The appellants claimed the breach of a duty of care owed to them by the respondent and resultant loss of export income.

The respondent, in an internal memorandum, had adverted to the risk of financial loss to potato growers within a specified radius of any bacterial wilt infection. The Full Court of the Federal Court held that no duty was owed by the respondent to the appellants, primarily because they were seen to not constitute or form part of any identifiable class of claimants. The Federal Court considered that the imposition of a duty on the respondent would in these circumstances have created a situation of indeterminate liability.

### HELD (unanimously)

1. The appeals (High and Federal Courts) should be allowed with costs.
2. The respondent had breached a duty of care owed to the appellants.
3. Orders 6 and 10 of Von Doussa J set



aside and matter remitted for further hearing; costs before trial judge to follow the event.

per Gleeson CJ - Liability for pure economic loss must be determined on a case by case basis. The imposition of a duty on the respondent did not create a situation of indeterminate liability. The loss was foreseeable and the plaintiffs were unable to protect themselves against this risk of loss.

per Gaudron J - A governing legal principle applicable in all cases of economic loss may never be enunciated. The existence of a duty of care to guard against impairment of the legal rights of another depends upon *reasonable knowledge* by a defendant of the risk to the plaintiff whether as an individual or member of a class, as well as *proximity* between the 2 parties flowing from the plaintiff's *vulnerability* to the defendant's control of the exercise by the plaintiff of his legal rights.

per McHugh J - Proximity between the parties should not be a duty of care determinant but it can be a factor in determining the question of the existence of a duty of care. The most satisfactory means of developing principles in this area of the law of tort is by way of an incremental approach on a case by case basis, rather than by reverting to an exclusionary rule with numerous exceptions to its application. Indeterminacy and legitimate commercial conduct are merely factors negating the existence of a duty. Decisive to the existence of a duty will be the defendant's knowledge of the risk of loss and the

extent of the plaintiff's vulnerability to loss as a result of the defendant's actions.

per Gummow J - The law of negligence in relation to the recovery of damages for pure economic loss is subject to 'inherent indeterminacy'. There is no simple formula which can mask the necessity for examination of the particular facts. Case law will advance from one precedent to the next.

Kirby, Hayne and Callinan JJ - The three stage approach established by the House of Lords in *Caparo Industries v Dickman* (1990) should be adopted as a method of general application. Three issues for determination are foreseeability, proximity and policy. Determination of the policy issue requires a consideration of whether it is 'fair, just and reasonable' for the law to impose a duty.

### Appearances

#### Appellants

Counsel - Gray QC, Roder and Rochow  
Solicitors - Townsends

#### Respondent

Counsel - Garling SC, Frayne and Harris  
Solicitors - Phillips Fox

### Commentary

All the judges of the High Court appear to acknowledge the desirability of rules of law to guide legal practitioners in advising clients with confidence. At present, however, this part of the law of tort remains unsettled - but hopefully evolving.

This decision arguable represents a narrowing of the legal policy of excluding a duty of care in respect of economic loss where the imposition of a duty would lead to indeterminate liability and unreasonably restrict the freedom of individuals to legitimately protect business or social interests. The Court defended its decision in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) against subsequent Canadian and British criticism but appeared to distance itself from the 'identified plaintiff' requirement of Mason J favouring *membership of an identifiable class* as the test for determinate liability.