Hawkins v. *Clayton & Ors:* Where There's A Will There's A Way

Karen M. Hogg*

Introduction

Most solicitors provide their clients with a facility for the storage and safekeeping of their wills. It is not suprising then that the High Court's decision in *Hawkins* v. *Clayton & Ors.*[1] which was handed down on April 8, 1988, attracted a considerable amount of attention. In that decision the High Court, by a majority of three to two, held that a firm of solicitors which retained a client's will in safe custody was liable to the executor of the client-testatrix's estate for the economic loss suffered by the estate as a consequence of the firm's failure, for six years after the testatrix's death, to locate the executor nominated in the will and advise him of its existence and contents.

The seriousness of the implications of this decision for solicitors who retain custody of their clients' wills cannot be underestimated. At the same time, however, the broader significance of the decision as a further step in the High Court's development of the law of negligence should also be recognised. A brief outline of the background of the plaintiff's successful appeal to the High Court is necessary before the importance of this decision, on these two levels, is assessed.

Factual Background to the Decision

The defendant solicitors prepared and retained for safe keeping the executed will of a long-standing client (the testatrix). The will appointed the plaintiff, Mr. Hawkins, as sole executor and the principal beneficiary of the testatrix's estate.[2] No steps were, however, taken to contact the plaintiff to inform him of the testatrix's death or that he was the sole executor and main beneficiary of the estate until March 1981. In the meantime, the main asset of the estate, a house, had fallen into disrepair and had remained unoccupied for a considerable period. After changing solicitors, the plaintiff obtained a grant of probate in October 1981 and the estate was duly administered.

*B.A.,LL.B.(Hons.)(U. of Q.), Lecturer in Law, University of Queensland.

1. (1988) Aust. Torts Reports at 80,163.
2. The testatrix died on January 18, 1975. After being informed of her death on January 20, 1975, the defendant solicitors undertook some work on behalf of the estate. The firm authorised the payment of funeral expenses from the funds in the testatrix's bank account. They also initiated inquiries as to whether the testatrix had made a subsequent will of which they were unaware. In addition, they advised some members of the testatrix's family of the contents of the will.

In November 1982, the plaintiff brought an action against the defendant solicitors in negligence and contract seeking to recover losses which were suffered as a result of the delay in taking possession of the estate as executor.[3] In the Supreme Court, the claim in tort was based on a duty owed to the plaintiff personally and the contractual claim was presented on the basis that there was a contract between the plaintiff and the defendant solicitors. The trial judge, Yeldham J., dismissed the action, holding that there was no such contract between the defendant solicitors and the plaintiff and that the firm owed the plaintiff no relevant duty of care. Accordingly, Yeldham J. did not consider the firm's defence based on s.14(1) of the Limitation of Actions Act (1969) (N.S.W.). The plaintiff's appeal to the N.S.W. Court of Appeal was also dismissed (Kirby P., Glass J.A.; McHugh J.A. dissenting). On appeal, the plaintiff had claimed that a duty of care was owed to him in his representative capacity. The majority of the Court of Appeal did not determine this issue as, in their view, even if the plaintiff had a good claim, it was statute-barred by virtue of s.14(1) of the Limitation of Action Act.

Before the High Court, the plaintiff's case was presented in the following manner:

(1) with respect to the claim in tort, that the defendant solicitors had breached a duty of care owed to the plaintiff personally as well as a duty of care owed to the plaintiff in his representative capacity;

(2) with respect to the claim in contract, that the defendant solicitors were in breach of a contract with the plaintiff as well as in breach of their contract with the testatrix.

As the pleadings were wide enough to encompass an action by the plaintiff on behalf of the testatrix's estate the High Court dealt with the case on this basis.

The fate of the contractual claim can be dealt with briefly. First, the High Court rejected the argument that the defendant solicitors had breached a contract with the plaintiff. In the absence of any communication between the defendant solicitors and the plaintiff until March 1981, the plaintiff had pointed to the fact that he had acceded to the defendant solicitors' request for payment for services rendered by the firm on behalf of the estate shortly after the testatrix's death. The plaintiff argued that a contract between himself and the defendant solicitors could be inferred from these circumstances. However, as Brennan J.[4] indicated this did not establish a relevant contractual relationship as it could not be inferred that the defendant solicitors had made a contract with the plaintiff by which they undertook a duty of care in performing the professional services which they had performed before obtaining instructions from Mr. Hawkins.

3. The plaintiff's claim included the following:
   (1) a late lodgment fee on a death duty return and because the defendant solicitors had by October 1981 lost the original will, any additional costs involved in obtaining a grant of probate on a copy of the will;
   (4) with respect to the testatrix's house, the plaintiff claimed he had lost the opportunity to collect rent and, in addition, had been denied the financial advantage of residing in the house.
4. (1988) Aust. Torts Reports 67,469 at 67,483.

The court also rejected the argument that there was a relevant contractual relationship between the defendant solicitors and the testatrix upon which the plaintiff, as the personal legal representative of the testatrix, could base an action. The judgment of Deane J. devotes the most attention to this issue.[5] While His Honour was prepared to recognise that there were a number of terms relating to the firm's custody of the will which could be inferred,[6] as a matter of *actual* intention, into the contract between the testatrix and the firm, a term imposing an obligation on the firm to take positive steps to locate the persons named in the will, was not one of them. In refusing to imply such a term into the agreement between the testatrix and the defendant solicitors as a matter of *imputed* intention, Deane J. set out some guidelines for determining whether an action for professional negligence should be brought in contract or negligence. These important comments will be considered under another heading.

As already indicated, the plaintiff's success lay in the action based on negligence and, understandably, the discussion of this issue dominates the judgments. The significance of this discussion as a step in the further development of the law of negligence is assessed under the next heading.

Importance of the Decision as a Step in the Development of the Law of Negligence

In this case, the High Court, for the first time, allowed a plaintiff to recover pure economic loss brought about by a negligent omission. While any High Court decision in the developing areas of liability for economic loss and negligent omissions is important, the High Court's willingness to allow recovery in *Hawkins* comes as no surprise. There were clear indications in two recent High Court cases, *San Sebastian Pty Ltd* v. *Minister Administering Environmental Planning and Assessment Act 1979*[7] and *Sutherland Shire Council* v. *Heyman*,[8] that a negligent act or omission which causes pure economic loss could attract liability. The decision did, however, afford Gaudron J. with an opportunity to express her views on this developing area of negligence. It was probably not surprising that Gaudron J. joined her brother judges, Mason C.J., Wilson and Deane J.J. in endorsing the proximity test as the appropriate determinant of the existence of a duty of care. This approach, which evolved from the judgment of Deane J. in *Jaensch* v. *Coffey*[9] and attracted increasing support in subsequent High

5. (1988) Aust. Torts Reports at 67,494-67,497.
6. For example, the testatrix and the Firm could during the life of the testatrix each bring the bailment to an end by reasonable notice to the other party. (1988) Aust. Torts Reports at 67,495.
7. (1986) 61 A.L.J.R. 41.
8. (1985) 60 A.L.R. 1.
9. (1984) 54 A.L.R. 417.

Court decisions[10] must, in the light of the joint judgment in *San Sebastian* and now the *Hawkins* case, be regarded as the "orthodox" view. Brennan J., who reiterated his objections to the approach, was the only member of the Court to refuse to apply the proximity test. His judgment is significant in this regard as it indicates his determination to remain steadfast in his refusal to apply the test.[11]

The significance of the *Hawkins* case in the development of the law of negligence lies, in part, in how the proximity test was applied to the facts of the case. In previous cases where the test had been applied to determine liability for economic loss, a relationship of reliance was seen as the crucial factor.[12] The Court's task in applying the test was simply to assess whether the requisite degree of reliance was present. In the joint judgment in *San Sebastian*,[13] the High Court recognised that the task of determining whether a sufficient relationship of proximity exists, could be more difficult in cases where this element of reliance was not present. As the Court indicated in *San Sebastian* this situation could arise where economic loss resulted from an act or omission outside the realm of negligent mis-statement. Of course, this was the situation before the Court in *Hawkins*. The loss suffered by the testatrix's estate did not come about due to actual reliance on the part of the testatrix or the plaintiff on any statement or representation made by the defendant's solicitors. Nor did this case involve any actual reliance by the testatrix or the plaintiff on the defendant solicitors taking reasonable care to ensure that the plaintiff as the executor of the testatrix's estate was notified of the contents of the will. It is, therefore, interesting to analyse the approach adopted by the High Court to the proximity issue in these circumstances. The task of determining the existence of a sufficient relationship of proximity was, as the Court had predicted in *San Sebastian*, not easy. The difficulties involved are reflected in the lack of uniformity in the reasoning of the four members of the Court who applied the proximity test. While Mason C.J. and Wilson J. (in a joint judgment) agreed with Deane J.'s reasoning in all other respects, their Honours parted way with Deane J. on the question of whether there was, in fact, a sufficient relationship of proximity. Gaudron J. on the other hand agreed with Deane J. that there was a sufficient relationship of proximity but on the basis of an entirely different proximity factor.

10. *Sutherland Shire Council* v. *Heyman* (1985) 60 A.L.R. 1; *San Sebastian* v. *The Minister* 61 A.L.J.R. 41.
11. Brennan J. could well stand alone on the High Court as the sole advocate of an alternative approach to the proximity test. Toohey J. is yet to express an opinion. However, it would not be surprising if he followed the 'orthodox' view.
12. For example, *Sutherland Shire Council* v. *Heyman* (1985) 60 A.L.R. 1 and *San Sebastian* v. *The Minister* (1986) 61 A.L.J.R. 41.
13. Gibbs C.J., Mason, Wilson and Dawson J.J. (1986) 61 A.L.J.R. 41 at 45.

Application of the Proximity Test

It is perhaps appropriate to deal firstly with the approach of the original proponent of this test, Deane J.[14] While Deane J. recognised that the identity and relative importance of the factors which determine the existence of a relevant relationship of proximity vary in different categories of case, his Honour did not develop a new proximity factor for the purposes of this case. Instead, Deane J. focused on the "primary relationship" between the testatrix and the defendant solicitors which contained the familiar proximity factors of reliance and an assumption of responsibility. Although there was no actual reliance by the testatrix or the plaintiff on the defendant solicitors performing the relevant task of locating the executor nominated in the will and advising of its existence and contents, and the defendant solicitors had not specifically assumed responsibility for that task, Deane J. saw the solicitor/client relationship as the basis from which liability could be extended to allow recovery. Starting with this "primary relationship" between the testatrix and the defendant solicitors, Deane J. then identified the relevant proximity factors as the related elements of reliance and an assumption of responsibility. According to Deane J., these factors give the ordinary relationship between a solicitor and his client the character of one of proximity with respect to foreseeable economic loss. His Honour indicated that the liability of a solicitor for forseeable economic loss was not limited to loss sustained by the client. It would extend to loss sustained by the *estate of the client* after his or her death. After pointing out that there is no need for physical proximity in all cases, Deane J. stated that:

> . . . a relationship of proximity can exist with, and a duty of care can be owed to, a class of persons which includes members who are not yet born or who are identified by some future characteristic or capacity which they do not yet have.[15]

According to Deane J., the case before him which involved economic loss sustained by the estate of an immediate party to the relationship, was an example of such a relationship of proximity. Accordingly, his Honour concluded that a solicitor can owe a duty of care to both the client and to the client's future legal personal representative (in his capacity as such) with respect to foreseeable economic loss.

However, while Deane J. reached this conclusion with little difficulty, it was not enough to establish liability in a case involving a failure to act. Deane J.'s judgment in *Sutherland* had left no doubt that foreseeability of harm is not enough to establish a common law duty to take positive action. This meant that the question of whether there was sufficient proximity of relationship to give

14. See (1988) Aust. Torts Reports at 67,497-67,501.
15. As Deane J. indicates, this reasoning also has important implications for the architects and builders who would owe a duty of care to members of the class of persons who would in the future be housed in a building designed or constructed by them to avoid a risk of injury by reason of faulty design.

rise to liability for an omission had to be addressed. Once again, his Honour concentrated on the solicitor/client relationship and considered whether the relevant duty to take positive action was owed by the defendant solicitors to the testatrix. Deane J. concluded that the solicitor/client relationship is a relationship of proximity of a character which may well give rise to a duty of care on the part of the solicitor which requires the taking of positive steps, beyond the specifically agreed professional task or function, to avoid a real foreseeable risk of economic loss being sustained by the client. According to Deane J., the question of whether the relationship does give rise to such a duty to take positive action will depend upon the nature of the particular professional task or function which is involved and the circumstances of the case. In the case before the Court, Deane J. isolated the acceptance by the defendant solicitors of custody of the will as the critical factor. By accepting responsibility for custody of the testatrix's will after her death, the defendant solicitors had, in Deane J.'s view, effectively assumed the custodianship of her testamentary intentions. On Deane J.'s approach therefore, the special nature of the relationship between the solicitors and the testatrix could give rise to a common law duty which extended beyond the firm's contractual obligations.

It was on this point that Mason C.J. and Wilson J. expressed their disagreement with the judgment of their brother Deane J.[16] While their Honours were prepared to agree with the "substance of all that his Honour has written", they were not able to accept that a common law duty to take positive action could arise in this case. According to Mason C.J. and Wilson J., the conclusion reached by Deane J. that when they accepted custody of the will, the defendant solicitors had assumed responsibility for their client's testamentary intentions was difficult to support in the absence of a contractual obligation to take positive steps to facilitate the client's testamentary intentions. It is suggested, however, that the conclusion that there was sufficient proximity of relationship to give rise to a duty on the part of the defendant solicitors to take positive action should not be rejected simply because the solicitors were not contractually obliged to perform the relevant task. It cannot be suggested that tortious liability depends on the existence and the extent of a contractual obligation. The relevant question for determination was whether the defendant solicitors had, according to the circumstances, assumed responsibility for their client's testamentary intentions not whether they had actually taken on the contractual obligation to perform the task. As the judgment of Deane J. indicates, the correct inquiry is whether the defendant firm, as the testatrix's solicitors and as custodians of her will, should be taken to have been responsible for that will and their client's testamentary intentions after her death.

The conclusion reached by Deane J. that there was sufficient proximity of relationship to give rise to a duty to take positive action is supported by the judgment of Gaudron J.[17] There were,

16. (1988) Aust. Torts Reports at 67,479-67,481.
17. (1988) Aust. Torts Reports at 67,507-67,511.

however, important differences in the approach taken by Gaudron J. to the application of the proximity test. First, unlike Deane J., her Honour focussed on the relationship between the plaintiff and the defendant solicitors as the relevant proximate relationship. In addition, Gaudron J. chose to formulate a new proximity factor.

The judgment of Gaudron J. shows concern about the absence of reliance as an element in the relationship between the plaintiff and the defendant solicitors. Her Honour recognised that the loss suffered by the estate did not flow from reliance on any statement made by the defendant solicitors but from their withholding of information necessary for the exercise or enjoyment of a legal right. Gaudron J. applied the distinction drawn in the joint judgment in *San Sebastian* between cases involving mis-statement and those outside the realm of mis-statement which involve an absence of reliance. Her Honour therefore saw the case before the Court as being in a different category from cases of economic loss referable to negligent mis-statement. Accordingly, Gaudron J. took the view that the issue of proximity in this case would be determined by reference to factors somewhat different to those applicable to a case involving negligent mis-statement.[18] It was therefore necessary to look for and identify a new proximity factor appropriate for this category of case.

While Gaudron J. was prepared to embark on this search for a new proximity factor, she was fairly cautious in her approach and did not stray far from the familiar concept of reliance. The first step taken in this formulation of a new proximity factor was to point out that it would not be "materially different" from the determinants used in negligent mis-statement cases. In fact, the new proximity factor which emerged was presented as an adaptation or a converted form of reliance appropriate for this type of case.

In formulating this new proximity factor, Gaudron J. relied on the Court's discussion in the *San Sebastian* case of the duty to exercise care in the giving of information or advice and the situation where such information or advice is not requested. Gaudron J. expressed the view that reliance, as a criterion of proximity, was relevant in cases relating to the provision of information because damage flowed from the reliance upon that informaton as the basis for action or inaction. Her Honour went on to say that in such cases the relevant duty could be identified as a duty to exercise reasonable care to give reliable information. Having so identified the duty, Gaudron J. concluded that the relevant proximity factor could, in cases involving an absence of a request, be stated in terms of "reasonable expectation". In such a case, her Honour saw the relationship of proximity being constituted as follows:-

> . . . a relationship of proximity may be constituted by the 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.

18. Which her Honour recognised would not involve the infringement or impairment of a legal right. See p. 67, 509.

While Gaudron J. was prepared to suggest that this reasonable expectation factor could indicate a relationship of proximity in a case involving the provision of information, she was not prepared to reach a definite conclusion on this point. It was sufficient for the purpose of the case before the Court for Gaudron J. to limit her conclusion as to the relevance of this new criterion of proximity to the following situation:

> . . . 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.

There is nothing to be gained from an enquiry into which of these approaches to the application of the proximity test is to be preferred. Instead it is more worthwhile to point out that each approach is significant in its own way. On the one hand, the manner in which Deane J. chose to approach the proximity issue is significant because it illustrates the extent of liability which can flow from a very close relationship of circumstantial proximity, such as the solicitor/client relationship. On the other hand, the judgment of Gaudron J. deals directly with the fact that there was no actual reliance by either the testatrix or the plaintiff on the defendant solicitors performing the relevant task. It therefore provides an important guide for future courts in determining how to approach such a situation. Perhaps the real significance of her judgment, however, lies in the fact that it provides a precedent for the formulation of a new proximity factor.

Significance of the Decision with Respect to Limitation Periods in Tort

The High Court unanimously held that the plaintiff's action was not statute-barred. In reaching this conclusion, the High Court made some important observation with respect to limitation periods in economic loss cases.

The defendant solicitors had argued that should they be found otherwise liable for breach of duty, s.14(1) of the Limitation of Action Act provided an ultimate defence.[19] They contended that the damage caused by any breach of duty on their part began in 1975 or, in any event, not later than six years before the action was commenced on November 22, 1982. It is clear that the assets of the estate were being wasted as early as 1985. An application of the general rule that a cause of action first accrues when damage is sustained would, therefore, have resulted the claim being statute-barred. It was, however, submitted on behalf of the plaintiff that this general rule should be qualified in the case of a claim in

19. Section 14(1) provides that an action on a cause of action founded on contract or tort is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims.

negligence for damages for economic loss. The plaintiff argued that in such a case, time does not commence to run for the purposes of provisions such as s.14(1) until the plaintiff discovers or could on reasonable inquiry have discovered, that the damaged has been sustained. While the High Court concluded that the plaintiff's action was not statute-barred, it did not accept the plaintiff's submission that the general rule was not applicable simply because the case involved economic loss.

For instance, Deane J. (with whom Mason C.J. and Wilson J. agreed) [20] saw no reason why the general rule that a cause of action accrues when damage is sustained could not be applied in economic loss cases. His Honour took this opportunity to reiterate the view expressed in *Sutherland* that the damage suffered by a building owner/occupier in cases involving latent structural defects is economic loss. Deane J. drew a distinction between this type of damage caused by a latent defect and economic loss where the damage is directly sustained. In this second type of case, the application of the general rule is, according to Deane J., straightforward. The damage is sustained when it is inflicted or first suffered and the cause of action accrues at that time. In the case of a latent defect, Deane J. repeated his view that the economic loss suffered could only be sustained when the defect was actually discovered or became manifest.[21]

Deane J. took the view that in the case before the court the economic loss caused by the defendant solicitor's breach of duty was first sustained within twelve months of the testatrix's death when the rent was not earned by the estate. His Honour, however, refused to allow the defendant solicitors this defence. After canvassing the "miscellany of problems" raised by the question of when the case of action first accrued to the plaintiff, his Honour provided a "general answer" to this defence. According to Deane J., the reference in Section 14(1) to the cause of action first accruing must be read as excluding any period which the wrongful act itself effectively precluded the institution of proceedings. Accordingly, in the case before the Court:

> . . . the negligent failure of the firm to notify Mr. Hawkins of the existence or contents of the testatrix's will effectively precluded the institution of the present proceedings against the firm until he was finally informed of his appointment as executor. The present proceedings were instituted within six years of that time. That being so the firm's defence based on the Limitation Act fails.

Brennan J.[22] also took the view that there was no reason why the general rule should not be applied to cases involving economic loss. According to Brennan J., the difficulties encountered by the

20. (1988) Aust. Torts Reports at 67,504-67,507.
21. In *Sutherland*, Deane J. had pointed out that a building constructed on defective foundations does not suffer any physical damage. It has always been a defectively built structure. It would not therefore be said that damage – physical damage – was first sustained when the house was built. (1985) 60 A.L.R. 1 at 60-61.
22. (1988) Aust. Torts Reports at 67,489-67,490.

English courts in applying the rule in cases involving latent structural defects did not provide a reason to doubt the applicability of this "orthodox view". Like Deane J., however, Brennan J. saw the case before him as special, not an "ordinary case". In most cases, the last element of the cause of action to occur is damage, therefore, a cause of action does not usually accrue until the damage is sustained. In the case before the Court, Brennan J. saw the last element to occur as the nominated executor's assumption of the office of executor. Accordingly, in Brennan J.'s view, the cause of action was not complete and the limitation period did not begin to run until March 1981.

Gaudron J.[23] was the only member of the court to see the distinction between economic loss and physical damage as important in determining when the loss has occurred. Her Honour focussed on the fact that economic loss can, due to the various and complex economic relationships which are a feature of present day economic organisation, manifest itself in various forms. Accordingly, Gaudron J. saw the relevance of the distinction between economic loss and physical damage and the need in economic loss cases to identify precisely the interest that has been infringed. Gaudron J. identified the economic loss suffered by the plaintiff as executor as follows:

> . . . the difference between the value of the assets of the estate when they came under his control as executor and the value they would have enjoyed had he held them in the same capacity and had they been properly managed from the time of the death of the testatrix.

Her Honour concluded that this loss was not sustained by the plaintiff until the assets came under his control.[24]

Concurrent Duties in Tort and Contract

In his judgment in *Jaensch* v. *Coffey* and in subsequent decisions, Deane J. has made a significant contribution to the rationalisation and development of the law of negligence. In *Hawkins*, Deane J. makes a further contribution by providing guidelines for determining whether an action for professional negligence should be brought in tort or contract. In a typically well-reasoned and straight-forward judgment, Deane J.[25] indicates that, apart from certain limited cases, the liability of a solicitor for professional negligence will be tortious and not contractual. At the centre of His Honour's reasoning is the rejection of the notion that a contractual term identical to a common law duty of care should, in the absence of actual intention, be implied into the relevant contract.

23. (1988) Aust. Torts Reports at 67,511-67,513.
24. According to Gaudron J. this occurred, at the earliest, when he was informed of the existence of the will in March 1981.
25. (1988) Aust. Torts Reports at 67,502-67,504.

Deane J. questioned the need to imply such a term into a contract when there was an identical duty of care imposed by the common law. As there was a duty of care under the law of negligence, such a term did not comply with the usual tests for implying a term as a matter of the parties imputed intention. It could not be regarded as necessary for the reasonable effective operation of the contract. According to Deane J., the fact that the incidence of these duties differ made it even more difficult to rationalise the implication of a contractual duty. His Honour reached this conclusion by viewing the system of law as one coherent body of rules. Deane J. saw any attempt by legal theorists to describe as "concurrent" what were in fact *conflicting* duties as only impeding the rationalisation and principled development of the law. In Deane J.'s view, a conflict between the different division of the law such as contract and tort should be resolved rather than encouraged.

Deane J. was, however, quick to point out that a solicitor could be under a concurrent co-extensive contractual duty of care to his client in the case where the parties had, as a matter of *actual* intention, imposed such a duty on the solicitor. Deane J. also indicated that in some cases the term had been implied into the contract between a solicitor and client which operates upon the existing common law duty of care.

In making these observations, Deane J. was supported by his brother judges Mason C.J. and Wilson J. It is pointed out that the judgments of Brennan and Gaudron J.J. do not contain anything to contradict Deane J.'s comments. It is suggested that this part of Deane J.'s judgment could well prove to be as significant in the development of the law as his proximity concept.

The Significance of the Case for Solicitors

As indicated earlier this decision is also important on another level. The implications for solicitors are too important to be ignored. First, the defendant solicitors were held to owe a duty to take positive action to locate the executor and advise him of the existence and contents of their client's will even though they had not been specifically retained to undertake that task and it was not part of their relevant contractual relationship. For both Deane and Brennan J.J. the fact that the solicitors had accepted custody of the will was enough to attract liability. Similarly, for Gaudron J. the fact the solicitors retained information necessary for the plaintiff to exercise and enjoy his legal right as executor was enough. As the dissenting judges pointed out the consequences of this decision will be far reaching as:

> 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.

In this case, the High Court held that the defendant solicitors owed a duty to the plaintiff as the *executor* of the testatrix's will.

There was, however, the suggestion made in the judgments of Brennan and Deane J.J. that this liability could extend to the loss suffered by a *beneficiary*. For example, Deane J. states there could well be circumstances in which a failure by a firm of solicitors to communicate the existence or contents of a will in its custody to a person named in it as executor and principal beneficiary would constitute an actual breach of a duty of care owed under the common law of negligence to that person in his personal capacity as beneficiary.[26]

While the High Court recognised the existence of a duty of relevance to probably all solicitors, practitioners were given little indication of the sorts of steps required to be taken in order to fulfil this duty. Brennan J.[27] was the only member of the Court who gave any guidelines as to what might constitute breach of duty. While it was clear in the case before the Court that the solicitors' failure to locate the plaintiff in the Sydney telephone book constituted a failure to take positive steps, only Brennan J. was prepared to provide any guidelines for future cases. According to Brennan J. the duty is not absolute. If the executor knows of the will and its contents the custodian is charged from further disclosure. If, however, disclosure is required Brennan J. indicated that the steps which need to be taken are those which are reasonable in the circumstances including the contents of the will, the custodian's knowledge and means of knowledge of the identity and location of the parties interested under the will and of their relationship with one another. In addition, Brennan J. saw the cost of extensive enquiries and the expected value of the estate as relevant considerations in determining what steps are reasonable.

The High Court decision also raises the question whether a solicitor as the custodian of a client's will is under a duty to take reasonable steps to learn of the client's death. According to the dissenting judges, Mason C.J. and Wilson J.,[28] if the acceptance of custody of a client's will is sufficient to make the practitioner the custodian of the testator's testamentary intentions, then it would seem to follow that the solicitor must also take reasonable care to learn of the death of the testator.

Certainly, an obligation to take resonable steps to learn of the testator's death was not part of the duty formulated by the court in *Hawkins*. That duty involved taking reasonable steps to locate the executor and inform him of the existence and contents of the will. At the same time, however, the duty recognised by the Court could arise in circumstances where the solicitor has no actual knowledge of the testator's death. The imposition of this duty depends on solicitor's custody of the will rather than his knowledge of the client's death. The steps taken by the solicitor to learn of the client's death could, therefore, be relevant in determining whether there has been a breach of duty. It may be that a solicitor who failed to take any positive steps to learn of the client's death would be

26. (1988) Aust. Torts Reports at 67,501.
27. (1988) Aust. Torts Reports at 67,486.
28. (1988) Aust. Torts Reports at 67,481.

regarded as having constructive knowledge of that event so that his consequent failure to locate and notify the executor constitutes a breach of the *Hawkins* duty. Perhaps another lesson for solicitors from *Hawkins* is that they should not depart from their usual practice of checking the death notices.