

Henderson v. Merrett Syndicates Ltd. (HL(E))

1995 2AC 145

Facts:

The plaintiffs were Lloyd's "names" who were members of syndicates managed by the defendant underwriting agents. The relationships between the "names", and member's agents were regulated by agency and sub-agency agreements which gave the agents absolute discretion in respect of underwriting business conducted on behalf of the name. The names had given the agents the exclusive rights to undertake risks and re-insurance on their behalf. There was an implied term in the agreement that the agents would exercise due care and skill in the exercise of their functions as managing agents. The case concerned the alleged negligence of Lloyd's members' agents and managing agents of syndicates in the conduct and management of the "names" syndicates which had suffered heavy losses.

There were two types of plaintiff:

1. Direct names - names who had a contract with members' agents - Agency agreements.
2. Indirect names - names who had a contract with members' agents who in turn had a contract with managing agents - Sub-agency agreements.

Pre-Henderson:

In his judgment, Lord Goff of Chieveley relied heavily upon Hedley Byrne and while some say that the case is simply an application of the principles of that case, it is clear that the approach in Hedley Byrne has been widened.

Henderson dealt with the situation where a defender's acts or omissions cause the pursuer economic loss by rendering existing contracts less profitable or inducing him to enter unprofitable contracts or preventing him from entering profitable contracts.¹

Prior to Henderson, there had been other cases dealing with such issues:

Junior Books, Smith v Eric S Bush and Spring v Guardian Assurance. In each of these cases, the plaintiffs were successful. Some believe though that Henderson provides a more detailed and principled explanation for these decisions.²

Henderson:

Henderson initially dealt with 3 issues which Lord Goff chose to simplify somewhat and so came up with 7 different issues instead:

1. Duty of Care - Liability of managing agents to Names (direct and indirect) in Delict.
2. The argument of the managing agents.
- 3. The governing principle.**
- 4. The application of the principle to managing agents at Lloyd's.**
5. Absolute Discretion.
6. The impact of the contractual context.
7. Application of the above principles in the present case.

¹This is sometimes categorised as relational economic loss.

² See in particular, "Delictual Liability for Pure Economic Loss: Recent Developments" Joe Thomson 1995 SLT 139

Many of the areas above are more relevant in considering the law of agency and also in considering the co-existence of delictual as well as contractual liability. For the purposes with which we are concerned, It is more appropriate to focus on issues 3 and 4 which simply deal with the law prior to Henderson and then apply it to the case at hand.³

The Henderson Principle:

Where a defender **voluntarily assumes responsibility** for the economic interests of a pursuer and where they **know or ought to know** that their **skill or expertise** will be relied upon by that pursuer, a duty of care will arise.

There are a number of other areas at page 181 which Lord Goff chooses to elaborate on in order to clarify the above principle.

- The principles extend not only to the provision of information but further to the provision of services.
- The voluntary assumption of responsibility must be objectively ascertained and applies more commonly to those possessed of a particular degree of skill or expertise. This would in practice more commonly affect solicitors, bankers, surveyors, and all others in a professional or quasi-professional position.
- In Henderson, it is doubtful if it would have been fair, just and reasonable to impose a duty of care. Lord Goff states though that if a case is found to fall within Hedley Byrne's criteria, it will not be necessary to consider the fair, just and reasonable test. This is due to the air of mutuality between the parties. With the assumption of responsibility in this instance comes the reliance forming a high degree of proximity between the parties.
- He stresses that if the information or service is provided on an informal occasion, it is unlikely that there will be an assumption of responsibility even though the information is freely given or the service voluntarily provided.
- The voluntary assumption may be negated by an appropriate disclaimer. Assuming such a disclaimer satisfies the requirements of reasonableness under the Unfair Contract Terms Act 1977.
- An assumption of responsibility will cover not only negligent acts but also negligent omissions.

The floodgate provisions:⁴

- The reliance Lord Goff refers to is "concomitant"⁵ reliance which highlights the fact that the test must be applied in a specific way. It is the exact advice which must be relied upon, not a variation thereon. It is the thing which for which responsibility is voluntarily assumed which must be relied upon, not something which was not freely ventured and certainly not something which
- The fact that a defender must know or ought to know that their advice will be relied upon serves to limit the scope of potential claimants. For example, a stockbroker chatting on a radio show is not liable to its listeners if they act upon his advice since he does not know of their existence. A banker is liable to his customer but not to a friend of a customer who acts upon the same advice the customer was given.

³This is dealt with at pp178-183 in the judgment.

⁴i.e. How do we limit the effect of this judgment?

⁵Concomitant - adj. accompanying, conjoined.

Conclusions:⁶

We are all possessed ideally with a sufficient degree of intelligence to know that things which we hear and see around us everyday may not be entirely trustworthy or capable of being relied upon. Hearsay, newspapers, radio and the like all have a part to play in feeding us false, misleading or negligent information.

Henderson accepts this. The decision by the Lords serves only to deal with those situations where human nature steps in. There are in everyday life situations which arise and relationships which form where one person is in a position to offer expert advice or provide professional services or one which should command a great deal of trust. This is where we are justified in allowing ourselves to succumb to human instinct and trust people with our affairs. This is also why the law protects us if the above criteria are met.

A full text of this is available at
http://www.geocities.com/scots_law

⁶"Serves you right for trusting them argument" or "You can't trust a lawyer argument"