

PRECONTRACTUAL DUTIES OF DISCLOSURE*

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Professor Waddams' paper (of which a summary is reproduced here) will be published as "Precontractual Duties of Disclosure" in Essays in Honour of Patrick Atiyah, (Oxford University Press (forthcoming)). Professor Farnsworth, in his comment to Professor Waddams' paper, infra, at p. 351, makes references to the pages of the draft paper that Professor Waddams produced for the Workshop. These references have been retained as it has not been possible to make them correspond to the version of the paper that will be published and because it would detract from the value of Professor Farnsworth's paper to omit them. It is hoped that when the text of Professor Waddams' paper is published, readers of Professor Farnsworth's paper will not have difficulty finding the appropriate references [Ed.].

It is usually asserted that there is no general duty to disclose material facts to another party to a proposed contract. Thus, in a passage often cited, Chief Justice Cockburn said, in 1871, that a buyer of land would not be bound to disclose to the seller the presence of valuable mineral deposits under the land.¹

Nevertheless, the law is more complex than this statement suggests and, by a variety of techniques not always thought of in this context, the law does impose duties of disclosure or their practical equivalent, in many cases.

The techniques used to impose duties of disclosure include the following. Conduct is often construed as giving a misleading impression, even though there are no express words of misrepresentation. Silence may be taken as an assertion that there is nothing of significance to disclose. Some contracts, notably insurance contracts, are treated as contracts of utmost good faith, where full disclosure is required. Disclosure of material facts has been required in maritime salvage agreements. Implied warranties may be imposed. Relief may be given for mistake, or unconsciona-

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¹ *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at p. 604.

bility. There is a duty to disclose material facts in a fiduciary relationship.

Reform of the law has been proposed, on moral and economic grounds, in the direction of requiring a general duty to disclose material facts of which a contracting party knew, or ought to have known. The difficulty with this proposal is that it would introduce much uncertainty, especially if the dispute occurred many years after the transaction in question. In case of dispute, there would be much difficulty in determining what facts were material, what facts were known, and what facts ought to have been known at the time of the transaction. Both parties have an interest in the finality of completed exchanges, and it is not obvious that it would be an improvement in the law to encourage the reopening of land sales, for example, after completion.

The Restatement of Contracts makes the duty to disclose dependent on "failure to act in good faith and in accordance with reasonable standards of fair dealing".² This formulation provides little guidance for the disposition of actual disputes, as is shown by the indication, in one of the illustrations, that the drafters did not envisage the imposition of a duty of disclosure in Chief Justice Cockburn's hypothetical case of the buyer of land who knows of valuable mineral deposits.

It is doubtful whether a simple rule one way or the other will meet our needs. Most feel instinctively that an applicant for employment is not bound to disclose, to a prospective employer, all potentially damaging aspects of the applicant's employment history; on the other hand, in certain circumstances, the very fact of the application may carry with it an implied assertion that the applicant is qualified in certain ways.

This example suggests to me that the desirable solution lies in the development of existing techniques, such as those of implied warranty, and the notion that silence with other conduct may amount to an assertion, rather than in the adoption of any general obligation to disclose material facts in all cases.

² American Law Institute, *Restatement of the Law Second: Contracts* (St. Paul, American Law Institute Publishers, 1981), s. 161(b).