BLS

CONSTRUCTION LAW SEMINAR

Bryan v Maloney Judicially Revisited

Presented by

The Construction Law Committee
of the Business Law Section
Law Council of Australia
and
The Law Institute of Victoria

Tuesday 29 July 1997

Law Institute of Victoria, Melbourne

BRYAN v. MALONEY. THE JUDICIAL REACTION.

Introduction

Allan Bryan had completed an apprenticeship in carpentry, but had no other formal qualifications as a builder in 1979. Mr Bryan built a house for his sister-in-law, Mrs Manion, for cost plus a small margin. Mr Bryan did not know whether Mrs Manion intended to retain ownership and live in the house, or sell it after completion. There was no evidence given at the trial to suggest that Mrs Maloney, the third owner of the house, was ever aware of the identity of Mr Bryan as the builder of the house, before she decided to purchase. It was not suggested that Mrs Maloney made any inquiry either as to the builder's identity or as to his skill or reputation, before the purchase. Mrs Maloney's evidence was that she inspected the premises in the company of a real estate agent, and, finding them undamaged, decided that the house was "properly built". She made three inspections of the house, twice by herself, each inspection taking about fifteen minutes. Mrs Maloney made no inquiries of the municipal council to ascertain the nature of the drawings and specifications pursuant to which the house had been built nor as to the identity or qualifications of the builder. She therefore had no knowledge of the builder's skill or qualifications or even whether he was registered with an industry association such as the Housing Industry Association. Mrs Maloney did not retain an architect or expert consultant of any kind to inspect the property and advise her as to the quality of the building, or the foundations, before the purchase. Mrs Maloney relied on her own observations following her inspections rather than on the builder.

Housing Indemnity Act 1992

To the contractual liability undertaken by Mr Bryan to Mrs Manion would now be added the statutory warranty imposed on builders in Tasmania by the Housing Indemnity Act 1992. Section 7 of that Act implies a variety of warranties undertaken by the builder in a building work contract, and which (by s.8) are available to a subsequent purchaser. By s.9 proceedings for a breach of a statutory warranty must be commenced within six years after completion of the

succeeded in HC Ch of Builder negligent. No suggestion of danger to person or property. No use of negligence & Council damages awarded were cost recoverable.

building work. By s.22 any attempt to contract out of a statutory warranty is rendered void. This legislation was not in place in 1979 when the house the subject of these proceedings was built, nor in 1987, when proceedings were commenced. When the matter was heard by the High Court, comparable legislation was in place in all Australian States except Western Australia.

The Decision in Bryan v. Maloney

Mason, C.J., Deane and Gaudron, JJ., stated the question before the Court in the following terms in the majority joint judgment, as being -

> "Whether, under the law of negligence, a professional builder who constructs a house for the then owner of the land owes a prima facie duty to a subsequent owner of the house to exercise reasonable care to avoid the kind of foreseeable damage which Mrs Maloney sustained in the present case, that is to say, the diminution in value of the house when a latent and previously unknown defect in its footings or structure first becomes manifest." (182 C.L.R. 609, at 617).

There are, I think, two critical points in the process by which the majority answered the question in the affirmative. The first is the examination of the contractual relationship between Mr Bryan and Mrs Manion, and the judges' treatment of the relevance of their contractual relationship to the question whether a duty in tort also existed. The majority said that the law recognised the existence of concurrent duties and accordingly the fact that Bryan had built the house pursuant to a contract was no bar to the claim. But the existence of the contract was not irrelevant, for the majority said -

> "In some circumstances, the existence of a contract will provide the occasion for, and constitute a factor favouring the recognition of, a relationship of proximity either between the parties to the contract or between one or both of those parties and a third person. In other circumstances, the contents of a contract may militate against recognition of a relationship of proximity under the ordinary law of negligence or confine, or even exclude the existence of, a relevant duty of care." (at 621).

Can the crt impose a warranty longer than statutory warranty of 6.5 years?

The judges said that the position in relation to the relevance of contract had been correctly explained in a passage from the judgment of Le Dain, J. speaking for the Supreme Court of Canada in Central Trust Co. v. Rafuse (1986) 31 D.L.R. (4th) at pp.521-522 -

> "1. The common law duty of care that is created by a relationship of sufficient proximity ... is not confined to relationships that arise apart from contract. Although the relationships in Donoghue v. Stevenson, Hedley Byrne and Anns were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract. ...
>
> 2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, insofar as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.
>
> 3. A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of

liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence."

The second critical step was the reasoning by which the majority arrived at the view that the requisite proximity existed sufficient to found a duty of care in Mr Bryan owed to Mrs Maloney. The majority concluded that there was an assumption of responsibility on the part of the builder and known reliance on the part of Mrs Maloney. The process by which they arrived at this conclusion was as follows -

"Upon analysis, the relationship between the builder and subsequent owner with respect to the particular kind of economic loss is, like that between the builder and first owner, marked by the kind of assumption of responsibility and known reliance which is commonly present in the categories of case in which a relationship of proximity exists with respect to pure economic loss. In ordinary circumstances, the builder of a house undertakes the responsibility of erecting a structure on the basis that its footings are adequate to support it for a period during which it is likely that there will be one or more subsequent owners. Such a subsequent owner will ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner. Such a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner will be likely, if inadequacy of the footings has not become manifest, to assume that the house has been competently built and that the footings are in fact adequate." (at 627)

The High Court, by a majority of four to one, accordingly dismissed the appeal, with a strong dissent by Brennan, J. The Tasmanian Supreme Court, both at first instance, (Wright, J.) and in the Full Court (Cox, Underwood and Crawford, JJ.), had all decided in favour of Mrs Maloney.

Brennan refers to 3 situations
1. vendor discovers latent defect and sells at full price to uninformed purch.
2. purchaser knows, vendor does not and pays less than market value.
3. Vendor originally purchased at an undervalue

Woollahra Municipal Council v. Sved & Ors

The first Australian case in which Bryan v. Maloney was applied, was Woollahra Municipal Council v. Sved & Ors (1996) Aust. Torts Rep. §.81-398, a decision of the New South Wales Court of Appeal. Mr and Mrs Sved purchased a house from Mr and Mrs Goddard in Vaucluse in 1987. The Goddards had purchased the land in 1985 and built the house in 1986 as their home. Shortly afterwards growing matrimonial differences which later led to divorce caused them to decide to sell. Mr Goddard took overall charge of the building of the house. He made important building decisions at various stages. Mr L. and Mr G. Di Blasio oversaw and, through sub-contractors, did much of the construction work. Officers of the Woollahra Council from time to time inspected the building to see that its construction complied with plans and specifications approved by the Council. Mr and Mrs Goddard put the house on the market in May 1987. On 19 August 1987 they offered the house for sale at auction and Mr and Mrs Sved became the purchasers for a price of $1,820,000. Very soon after Mr and Mrs Sved moved in, heavy rain fell. Water came into the house. The rumpus room flooded. As time passed even light rain resulted among other things in water staining and rotting of woodwork. Ceilings and cornices cracked. Slab edges cracked and became stained. The render on walls cracked and raised.

Later investigations showed that there had been repeated departures from the approved plans and much defective workmanship in the construction of the building. One of the principal matters connected with the flooding was the incorrect installation of a sump and associated pumps. The sump, drains and pumps were not built and installed in accordance with the plan, and this was a principal reason for subsequent flooding. The trial judge found that both Mr Goddard and Mr L. Di Blasio were told about the undersized drainage pipes to the sump at a time when they could have been replaced and that they did nothing to replace them with larger pipes. He also found that they were told that the sump was not deep enough for the draining pipe coming from the rear of the

building. The judge found that Mr Goddard asked how much it would cost to replace the two undersized pumps with proper sized ones, and, when given a price, said they were too dear and asked whether something smaller could be put in which would pump the water out. Pumps were then obtained on advice from a pump supplier that they would have adequate capacity, although less than that specified, and those pumps were installed.

The ultimate decision of the Court of Appeal was that the Woollahra Council was liable to the Sveds, the Sveds having made inquiries of a council officer as to whether a certificate under s.317A of the Local Government Act 1919 was available, and having been assured by that officer that the certificate was available and about to issue, settled their contract with the vendors in reliance on that advice. The trial judge held that the Council had been negligent in representing to the Sveds that a certificate of compliance would issue pursuant to s.317A and that, had the Sveds been aware of the departures in relation to the drainage which would have made the Council refuse a s.317A certificate, they would have rescinded the contract. The Court of Appeal unanimously dismissed the Council's appeal against this conclusion.

It was in the consideration of the liability of the vendors (the Goddards) and the builders (the Di Blasios) that it became necessary for the Court to consider the application of Bryan v. Maloney. There are at least four respects in which Bryan might be thought not to have direct application. First, this was not a case of latent defects, but defects which would have been discoverable upon any reasonably comprehensive inspection. Secondly, there was intervening negligence in the actions, as found, of the relevant Council officer who told Mrs Sved that a s.317A certificate was available and "in the pipeline". Thirdly, the house might be said to have been built by two builders, one of whom, the owner, was not a professional builder but was supervising the building of what was intended then to be his matrimonial home. The Di Blasios were professional builders, but subject to the direction of Mr Goddard. Fourthly, there was clear evidence, accepted by the trial judge, that the Sveds acted in

settling the contract solely in reliance on the assurance as to the s.317A certificate, and not in reliance on the builder.

The most interesting judgment, in relation to the application of Bryan v. Maloney, is that of Clarke, J.A., and it repays careful reading. His Honour said of Bryan that -

> "the category of case directly falling within the scope of the decision is limited to the liability for economic loss of a builder, who built a permanent residence pursuant to a construction contract which contained no terms limiting or excluding its liability, to a subsequent owner arising from the existence of latent defects discovered after that owner purchased the residence in circumstances where there was no intervening negligence or other causative event.
>
> So understood the authority of the decision does not extend to, for instance, the construction of a commercial building, nor, presumably, a case in which other acts of negligence have intervened between the builders' negligence and the discovery of damage, such as occurs when a local council has been negligent, whether in the issue of a certificate or otherwise. Nor does it extend to the case of damage which, although discoverable on a reasonable inspection, was not in fact discovered until after the plaintiff had purchased the property." (at p.63,569)

Clarke, J.A. referred to each of the four matters previously mentioned as possibly distinguishing the present case from Bryan and said that in the light of those differences Bryan did not govern the present case. His Honour then proceeded to examine the notion of proximity and the test for ascertaining proximity according to decided cases and then attempted to determine whether the requisite relationship of proximity existed between the Di Blasios and the Sveds by turning first to the discussion of proximity in the judgment of Deane, J. in Sutherland Shire Council v. Heyman (1985) 157 C.L.R. 424 at pp.501-5, and the treatment of proximity by the trial judge.

Clarke, J.A. then turned to consider the relative degrees of physical, circumstantial and causal proximity in deciding whether a duty of care should be found to exist, and pointed to the fact that reliance and assumption of

responsibility were factors to which the majority in Bryan undoubtedly accorded fundamental importance. His Honour then said -

> "These conclusions involve, as I later explain, a significant development of the concepts of known reliance and assumption of responsibility. Further, they were not based upon evidence but on a number of perceptions. One, at least, of these perceptions troubles me. When their Honours said that 'such a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment' they were clearly not adverting to evidence in the case. Nonetheless, they regarded these factors as important considerations. I do not know whether the perceptions there expressed are correct or not. Frankly, I doubt that they are. Most purchasers in New South Wales have, until recently, retained solicitors. Now some may use conveyancers. Both would, I venture to suggest, advise their clients about the desirability of an independent inspection of the home to be purchased. Legal advisers also know that there are a number of builders specialising in the inspection of houses on behalf of potential purchasers. It may be that I am overstating the position but what I would seek to emphasise is that no assumption should be made as to the knowledge of, or the incidence of, the use of solicitors or building inspectors by potential home purchasers in the absence of evidence." (at pp.63,572-3)

The majority had also referred to the remarks of Thayer, J. in Lempke v. Dagenais (1988) 547 A. 2d 290, at pp.294-5 with apparent approval. Thayer, J. had observed, inter alia, that it is likely that a builder will be better qualified and positioned to avoid, evaluate and guard against the "financial risk imposed by latent defects in the structure of a house". Clarke, J.A. said of this that Thayer, J. -

> "may be correct but having regard to the potential passage of time between the completion of a building and the actual claim and the practices of insurers, particularly since the advent of asbestos and pollution claims, I wonder whether he is. How does a builder protect itself from an ancient claim? Surely, with respect, if that is a relevant consideration it should be proved. And, if it is to be taken into account, should it not be balanced against the ability of a purchaser to protect himself or herself by appropriate

> conditions in the contract of purchase or by insurance cover. It may be that a vendor would not be prepared to indemnify a purchaser against loss from a latent defect and it may also be that insurance cover may not be available but in the absence of evidence it is not open, in my respectful view, to express any opinion on the point." (at p.63,573)

Clarke, J.A. rejected the Sveds' claim against the Di Blasios since he could see no basis upon which it could properly be said that the Di Blasios were accepting some wider responsibility by undertaking to perform the building work for the Goddards. He concluded that this was not the case of a latent defect; secondly, there was present intervening negligence; and, upon the reasoning of the majority in Bryan, the absence of causal proximity. His Honour also concluded that there was no relevant assumption of responsibility, no special or general reliance, and no considerations of justice pointing towards a relationship of proximity.

Insofar as the Sveds claimed against the Goddards, Clarke, J.A. rejected that part of the Sveds' claim on the basis that the Sveds had agreed by clause 28(b) of the contract that they had satisfied themselves as to any defects in the building and that they would not make any objection, requisition or claim in relation thereto. His Honour said that in Bryan the majority had directed attention to the relevance of a contractual exclusion or limitation and had recognised that the terms of the contract might militate against the recognition of a relationship of proximity. Clarke, J.A. found that the Sveds by clause 28(b) had taken the risks of defects in the building upon themselves and therefore their claim must fail.

Cole, J.A. found against the Sveds, in relation both to the builders and the Goddards, on the basis that the trial judge had found that there had been no reliance at all, not even general reliance, by Mr and Mrs Sved upon either. The trial judge had found that they had relied solely upon the s.317A certificate and his Honour held that that finding of fact was not open to challenge. Cole, J.A. said that there could co-exist both a general reliance and a specific reliance upon a different person or entity, and continued -

"Normally one would expect there to be a general reliance by a subsequent purchaser upon a professional builder, coupled with a specific reliance by that purchaser on either or both of the vendor or a council concerning the quality of the property being purchased. In those circumstances, if all were sued, a question of apportionment would arise. In a singular case, however, it is possible that the evidence may be such as to negate entirely the general reliance on the professional builder, or the specific reliance upon either the council or the vendor. This case, it seems to me, is such a case ... " . (at p.63,583)

In dissent, Priestley, J.A. gave Bryan a wide application. His Honour said that one important feature of that case was that it appears to have made the concept of general reliance part of its ratio decidendi. He regarded Mr Goddard as falling into the class of persons to be regarded as builders for the purposes of the category which the High Court was considering in Bryan, since it was by his authority that the negligent acts were carried out in regard to the installation of the sump and its pipes and pumps and the negligent decision was made not to use the waterproofing membrane. Priestley, J.A. regarded the finding of the trial judge that the Sveds had relied consciously on the s.317A certificate as entirely consistent with a general reliance by them on the builder of the house. His Honour referred to the fact that the Sveds had inspected a house that had only been finally completed earlier in the year, and their assumption -

"must have been, whether or not consciously stated in these terms, that such a house would have been properly built without hidden departures from proper building standards likely to cause severe damage. It seems to me perfectly sensible in such circumstances that prospective purchasers contemplating laying out $1.8 million would want confirmation of what they were expecting of such a building." (at pp.63,557-8)

Priestley, J.A. did not think that clause 28 of the contract created a contractual exclusion or limitation of liability for the actions of Mr Goddard insofar as they constituted a tort, and accordingly that he was liable in negligence to Mr and Mrs Sved, together with the Council. His Honour also concluded that the Messrs Di Blasio should be treated as within the relevant category of builders and adapting the words of Bryan -

Can the builder reject responsibility Bryan v. Maloney
can exclusionary terms be included in
contract?

"should have been aware that a subsequent owner was likely to assume that the house had been competently built and that the storm-water drainage system and waterproofing arrangements above the rumpus room were in fact adequate. The fact that the Messrs Di Blasio regarded Mr Goddard as someone whose directions they were bound to carry out may be a factor in working out questions of contribution between the various tortfeasors, but they provide no answer to their liability to Mr and Mrs Sved ... ". (at p.63,559)

There was no question of any contractual exclusion of liability in relation to the Di Blasios.

Zumpano v. Montagnese

The second case in which Bryan v. Maloney has been considered in Australia is Zumpano v. Montagnese, (unreported, Court of Appeal of Victoria, 3 October 1996). Mr and Mrs Zumpano were professional builders, who in 1985 built a house on land they owned by Darebin Creek. It was built as their family home and they moved in in July 1985. In October 1986 they sold the house to Mr and Mrs Montagnese, who moved in February 1987. In 1991 the Montagneses experienced several times a blockage in the sewerage system. These blockages have nothing to do with the fact that the sewerage system had no boundary trap but in the course of a plumber's efforts to deal with the blockage in December 1991, the Montagneses learned that a boundary trap had not been installed by the Zumpanos' plumber when the house was built. In the litigation which followed, it was found that the plumber employed by the Zumpanos did not install a boundary trap and the magistrate who first decided the case concluded that the Zumpanos owed the Montagneses a duty of care and were in breach. The Zumpanos appealed, and the first judge dismissed the appeal, applying Bryan. The Court of Appeal allowed the builders' appeal, Tadgell and Phillips, JJ.A. resting their conclusion on the ground that it was not open to the magistrate to find any negligence on the part of the appellant builders. Brooking, J.A. however dealt at great length with the scope of Bryan and the significance of that case for the law in Victoria. The issues raised by

Brooking, J.A. were grouped under twelve headings, and I paraphrase his Honour's questions as follows -

1. What kinds of buildings fall within the decision? Bryan plainly applies to dwelling houses, but is the decision confined to cases in which the defendant builder has himself erected the house as a whole? If there are consecutive builders, each building part of the house, does each of them come under the prima facie duty of care to subsequent purchasers? What is the position if a builder is employed, not to erect a dwelling house which includes a garage, but to build a garage for use as part of a pre-existing dwelling? Does the duty of care spring up where the builder is engaged, not to erect a house, but to renovate one extensively or to enlarge one? Does the decision apply not only to dwelling houses, but to residential apartments in a multi-storey development? Does it apply to "mixed" buildings like a shop and dwelling, or only to the residential part of such a dwelling? Does Bryan apply to dwellings which are not the principal residence of the purchaser? Does it make any difference if the value of the dwelling is only a small part of the total value of the house and land? If the decision is not confined to houses, or to houses or other dwellings, then to what other buildings does it apply?

2. Is the decision confined to cases where the defendant builder erected the house under a contract? What is the position of a builder who erects a house intending to occupy it himself? Does it apply to a "spec" builder, who builds a house without an order and with a view to selling it after he has completed it? Does it apply to a builder who having partly built a house without any contract, changes his mind and sells the house

under a contract requiring him to complete the building? Does it apply to a builder who having partly finished a house, sells it without contracting to finish its construction?

3. Does the decision apply to all purchasers of dwellings, regardless of the occupation, intentions and conduct of the purchaser? Does it apply to purchase for the purpose of investment, to purchase with a view to resale at a profit, purchase by a builder or architect, or purchase by a person who employs an expert agent to inspect the house before buying with a view to ascertaining latent defects?

4. Is the duty owed not only to purchasers but also to mere occupiers?

5. To which "builders" does the decision apply? Brooking, J.A. raises the possibilities of consecutive builders, or concurrent builders, or an active proprietor directing the building operations of a building contractor (such as occurred in Sved)? Is the decision confined to "professional" builders?

6. To what defects does Bryan apply? The decision is apparently confined to latent defects, but is the decision unlimited in the sense that it applies to all defects except defects which are trifling? Is the decision limited to "major" or "serious" defects? Is a possible distinction that between defects which are sufficiently serious as to affect the value of the house? Is the decision confined to defects affecting the "structure" in the sense of those parts of the building which carry load in addition to their own weight?

7. How is one to determine whether there has been negligence in fact? Since the builder does not warrant freedom from defects but has cast upon him a duty to exercise reasonable care, the question is not whether a "defect" exists but whether

the existence of the suggested defect shows lack of reasonable care on the builder's part. How is one to determine whether something is defective, so that reasonable care must be taken to avoid it?

8. What is the significance of reliance? Under this heading, Brooking, J.A. referred to the fact that Mrs Maloney neither knew nor enquired about the identity of the builder, inspected the house and specifically looked for cracks in the outer walls. If reliance in some sense is necessary to the existence of the duty of care, can the builder prove that there was in fact no reliance in the given case, as by showing that the purchaser relied on his own expertise or on that of his consultant, in order to show that the particular purchaser falls outside the class to whom a duty of care was owed? Can the builder negative reliance by eliciting the fact that the purchaser was not interested in the condition of the building? The questions raised under this heading were, of course, considered in Woollahra v. Sved. Brooking, J.A. said in relation to the judgments in that case that -

> "The judgment especially of Clarke, J.A. will in my respectful opinion merit careful consideration when the High Court is called upon (as it inevitably will be) to elucidate the scope of Bryan v. Maloney or should the High Court (if I may say so) ever think it appropriate to reconsider Bryan v. Maloney."

9. Brooking, J.A. next pointed to the wider uncertainty involved in the manner in which the majority in Bryan set out to articulate the factual components of the relevant category of relationship, namely a professional builder of a house and a subsequent owner, for the purpose of determining whether that relationship possesses the requisite degree of proximity

to give rise to a duty of care. The majority judgment categorised the "ordinary" relationship between a builder and first owner, observing that there was nothing to suggest that the relationship between Mr Bryan and Mrs Manion did not have those characteristics. What circumstances would cease to be "ordinary" for this purpose and what characteristics would be relevant to change that relationship in such a way as to remove the necessary degree of proximity?

10. Where the builder has erected the dwelling under a contract, what is the significance of the terms of the contract? For example, can the duty of care be prevented from arising, or have its content limited, where the builder has acted under a contract limiting liability for defects or has contracted in circumstances in which the builder may be said to be "building down to a price"? As Brooking, J.A. points out, a not unrelated question arose in Woollahra v. Sved, Mr Goddard being in charge of the building operations, and bearing a considerable degree of responsibility for some of the major defects.

11. What is the position if the defect results from negligence on the part of a sub-contractor or supplier?

12. Is there legislation in the State or Territory concerned which bears on whether the duty of care should be imposed? As his Honour pointed out, the significance of Bryan in Victoria, as regards the particular matter of the liability of a house-builder to those who later buy the house, will be diminished by Domestic Building Contracts Tribunal Act 1995, s.8 of which Act imports into every "domestic building contract" a number of warranties on the part of the builder about the work to be carried out. These warranties, which no contract can exclude

(s.132) inure for the benefit of any person who is the owner for the time being of the building or land in respect of which the work was carried out (s.9). There is a very real question whether it is appropriate, in a case in which work has been carried out under a "domestic building contract", to impose on the builder a duty of care held to exist in Bryan. In Bryan, the relevant Tasmanian legislation did not come into operation until 1992.

Canada. The Winnipeg Condominium Case

In Winnipeg Condominium Corporation (No.36) v. Bird Construction Co. (1995) 121 D.L.R. (4th) 193, the Supreme Court of Canada was concerned with a claim relating to an apartment building which was constructed in 1972, the plaintiff becoming the owner of it in 1978. In 1989 a section of exterior stone cladding collapsed necessitating repairs. The plaintiff brought an action against the company which had acted as general contractor in 1972, against a sub-contractor that had installed the cladding, and against the architects employed by the owner in 1972. The Supreme Court held that where negligence in planning or constructing a building caused the building to be dangerous, the owner could recover the costs of making the building safe. The cost of such repair in such circumstances was a means of mitigating a more serious loss, a course of conduct that the law should encourage. The decision is limited to defects which cause the building to be dangerous, and emphasises the strong underlying policy justification for imposing liability. La Forest, J. pointed out that under English decisions such as D. & F. Estates Ltd. v. Church Commissioners for England [1989] A.C. 177 and Murphy v. Brentwood District Council [1991] 1 A.C. 398, the plaintiff who moves quickly and responsibly to fix a defect before it causes injury to persons or damage to property must do so at his or her own expense. By contrast the plaintiff who allows a defect to develop into an accident may benefit at law from the costly and potentially tragic

consequences. La Forest, J. said that allowing recovery against contractors in tort for the cost of repair of dangerous defects serves an important preventative function by encouraging socially responsible behaviour.

Bryan had been decided by the Full Court of the Supreme Court of Tasmania, when Winnipeg was decided, and was referred to by La Forest, J. in his judgment. La Forest, J. said, in relation to the wider issue discussed in Bryan that -

> "Given the clear presence of a real and substantial danger in this case, I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings. It was not raised by the parties. I note that appellate courts in New Zealand, Australia, and in numerous American States, have all recognised some form of general duty of builders and contractors to subsequent purchasers with regard to the reasonable fitness and habitability of a building. In Quebec it is also now well-established that contractors, sub-contractors, engineers and architects owe a duty to successors in title in immoveable property for economic loss suffered as a result of faulty construction, design and workmanship.
>
> Without entering into this question, I note that the present case is distinguishable on a policy level from cases where the workmanship is merely shoddy or sub-standard but not dangerously defective. In the latter class of cases, tort law serves to encourage the repair of dangerous defects and thereby to protect the bodily integrity of inhabitants of buildings. By contrast, the former class of cases brings into play the questions of quality of workmanship and fitness for purpose. These questions do not arise here." (at 215)

New Zealand. Invercargill City Council v. Hamlyn

A like problem arose in New Zealand in Invercargill City Council v. Hamlyn [1996] 2 W.L.R. 367. In 1972 a firm of builders in New Zealand built a house for the plaintiff. During the course of its construction a building inspector employed by the city council carried out

a number of inspections and approved the foundations. In 1974 cracks began to appear in the building and in 1989 the plaintiff called in another builder, who told him that the foundations were defective. In 1990 the plaintiff commenced proceedings against the builders and the council claiming $64,250 as the cost of repairs. The judge held that the builders had been in breach of contract, since the foundations had not been laid in accordance with the specification, but they were no longer in business. With regard to the plaintiff's claim in tort against the council, it was admitted, for the purposes of the hearing before the judge, that under the common law as developed in New Zealand, the council was under a duty of care towards the plaintiff. The judge held that the building inspector had been negligent and, applying the test that the plaintiff's cause of action accrued when the defects could with reasonable diligence have been discovered, held that since a reasonably prudent home owner would not have suspected the foundations until the date when the plaintiff had called in the second builder, the plaintiff's claim had been brought in time. The New Zealand Court of Appeal dismissed an appeal from this judgment, and reaffirmed that the council owed a duty of care to the plaintiff in respect of its inspection of the foundations, notwithstanding the decisions of the House of Lords to the contrary in D. & F. Estates and Murphy, its judgment being handed down after Bryan was argued in the High Court. The judgment of the Privy Council is particularly interesting in approving the Court of Appeal's decision, for New Zealand conditions, not to follow three decisions of the House of Lords in D. & F. Estates, Murphy, and Pirelli General Cable Works v. Oscar Faber [1983] 2 A.C. 1. Lord Lloyd, in giving judgment for the Privy Council, said that the New Zealand judges were entitled consciously to depart from English case law on the ground that New Zealand conditions were different. Reference was made to the different path followed in Canada in City of Kamloops v. Nielsen (1984) 10 D.L.R. (4th) 641; Canadian National Railway Co. v. Norsk

Pacific Steamship Co. (1992) 91 D.L.R. (4th) 289; and Winnipeg Condominium Corporation (No. 36) v. Bird Construction (1995) 121 D.L.R. (4th) 193. Lord Lloyd then referred to the position in Australia, saying that the High Court had at first declined to hold local authorities liable for economic loss suffered by reason of houses being built with defective foundations, but then referred to Bryan, and said -

> "Their Lordships cite these judgments in other common law jurisdictions not to cast any doubt on Murphy's Case, but rather to illustrate the point that in this branch of the law more than one view is possible; there is no single correct answer. In Bryan v. Maloney, the majority decision was based on the twin concepts of assumption of responsibility and reliance by the subsequent purchaser. If that be a possible and indeed respectable view, it cannot be said that the decision of the Court of Appeal in the present case, based as it was on the same or very similar twin concepts, was reached by a process of faulty reasoning, or that the decision was based on some misconception: see Australian Consolidated Press Ltd. v. Uren [1969] 1 A.C. 590, 644.

In truth, the explanation for divergent views in different common law jurisdictions (or within different jurisdictions of the United States of America) is not far to seek. The decision whether to hold a local authority liable for the negligence of a building inspector is bound to be based at least in part on policy considerations." (at 378)

After dealing at length with the decision in Pirelli, Lord Lloyd said that it was regrettable that there should be any divergence between English and New Zealand law on a point of fundamental principle. He continued that whether Pirelli should still be regarded as good law in England was not for their Lordships to say. What was clear was that it was not good law in New Zealand.

Implications of Bryan v. Maloney

The decision of the majority in Bryan leaves numerous unresolved questions. Counsel for Bryan raised with the High Court various problems

which would follow a verdict in favour of Mrs Maloney, including the following -

(a) The builder would be subjected to a duty of care which is comparable to an additional warranty. It is not clear to what extent the nature and extent of that warranty is affected by the terms of the building contract. Insofar as the entitlement of the first purchaser to take proceedings was limited by certificates of practical completion or otherwise, subsequent purchasers would be given greater rights than the first purchaser had by contract;

(b) To the extent that the duty of care found in favour of the subsequent purchaser enlarges rights given under a statutory warranty, there would be conflict between rights granted by the relevant Parliament, and those found to exist by an extension of the common law. The High Court was made aware that relevant legislation applied then in all States other than Western Australia (although not in Tasmania, before 1992);

(c) The duty of care owed by the builder would attract liability for indeterminate periods, with a limitation period commencing to run only upon the occurrence of damage and knowledge of that damage, causing in turn economic loss in the form of the cost of repairs or a reduction in the value of the house. Claims would be capable of being made many years after the construction of the house was complete and at a time when the assessment by a court of what was reasonable conduct for a builder at the time of construction had become very difficult. In the present case, Bryan himself was clearly a small builder of limited experience. It was, from an examination of the judgment of the trial judge, not an easy task to work out in 1992 whether Bryan had been negligent in 1979. A reading of the judgment at first instance inevitably leaves one with some sympathy for the problems of a builder who is fixed with

a finding of negligence when, in his inexperienced state, problems of reactive clay soils were only becoming generally known in the mid to late 1970's;

(d) Builders might be subjected to repeated claims in relation to the same damage, in circumstances where a proprietor claimed the cost of repairs and, having received compensation, sold the property without applying the proceeds in repairs to the structure, and without any reduction in the price;

(e) The imposition of such an extended obligation would seriously affect the ability of builders to determine the future conduct of their businesses and to assess their financial situation, and/or add significantly to the cost of insurance;

(f) Relevant social policy might be thought to include that subsequent purchasers of house properties should be encouraged to increase the extent of their inspection and investigation of the properties they contemplate acquiring, particularly if as the majority thought the purchase of a house is "likely to represent one of the most significant, and possibly the most significant, investment which the subsequent owner will make during his or her lifetime" (at p.625). The imposition of an extended obligation on the original builder might tend to discourage purchasers from seeking expert assistance when inspecting the property they contemplated acquiring;

(g) The tortious liability imposed on a builder would substantially exceed that imposed on the manufacturer of a chattel to subsequent purchasers of the chattel.

Furthermore, there remains the issue of the builder who, acting for a particular client, offers the building owner faced by a problem in construction the choice of solutions (a) or (b). Let it be assumed that (b) is the less expensive and less safe option and that it is accepted. The building owner may not have been prepared to pay, or be able to afford, the additional cost of solution (a). Let

it be assumed that solution (a) would have avoided the damage later encountered of whatever kind, and whenever it occurs. In these circumstances how can the builder fairly be held liable for damage resulting from the use of solution (b)? Even though the building contract contains no relevant exclusion or limitation clause, nonetheless the scope of the work carried out was effectively limited. It would surely be unfair in these circumstances to hold the builder liable for employing solution (b) rather than solution (a). Is the subsequent purchaser, on a like argument of proximity, to have an action against the first proprietor for negligence in opting for the less expensive alternative.

What of the subjection of builders to repeated claims for compensation? Is it now necessary for Torrens system titles to permit further information to be recorded on the title, for example particulars of any claim paid by the original builder in relation to alleged defects in the premises or of the circumstance that the original builder refused to offer any warranty beyond the now required statutory warranty?

A further consideration which was put to the High Court (but which plainly did not sway the majority) is that some latent defects may become apparent during the occupation of the first - or an early - purchaser; as, for example, that underfloor heating is defective, or that plumbing is vulnerable at times of heavy rain. The defect might remain latent, at least to a purchaser of the premises on superficial inspection. Should a greater obligation be imposed on vendors of dwellings to volunteer the truth as to known or suspected defects? Most domestic house construction is carried out by comparatively small builders. They are required in most of Australia now to insure for the length of the statutory warranty periods. These builders will be very much affected if the warranty is, by judicial legislation, taken beyond six or seven years and extended, say, to 25 years or even longer.

The judicial reception thus far of the majority judgments of the High Court in Bryan has not been enthusiastic. The criticisms of Clarke, J.A. and Brooking, J.A. are both pointed and substantially based. An application for

leave to appeal to the High Court has already been lodged in Woollahra Council v. Sved. Two of the members of the majority in Bryan have departed. McHugh, J. in May 1988, at an extra-judicial seminar expressed doubts as to whether the doctrine of proximity as recently expounded would become a permanent feature of the law of negligence. His Honour said "The difficulty with the notion of proximity, as I see it, is that it is a legal rule without specific content and merely records the result of a finding reached on other grounds." Dawson, J. has accepted proximity as a test, but might not be prepared to impose liability even on a professional builder, for defects beyond those likely to cause danger to person or property. The views of Gummow and Kirby, JJ., as judges of last resort, in this area remain unknown quantities. It therefore remains, unfortunately, impossible to predict the future direction of the law in these respects, to answer with any certainty the questions posed by Brooking, J.A. in Zumpano or to forecast the final result of Woollahra Council v. Sved.

Limiting Responsibility:

1. contractual indemnity by purchaser.
2. covenant to inform the future purchaser
3. notation on TLA C/T.
4. oblige to inform subsequent purchaser that V. has received comps for damage to be included under Sale of Land Act

"*Bryan v. Maloney* Judicially Revisited"

Construction Law Seminar, Business Law Section, Law Council of Australia

July 1997

Hon. Justice P. de Jersey

The historical setting

To appreciate the significance of *Bryan v. Maloney* (1994-5) 182 CLR 609, one should recall its context - both Australian, and in other common law jurisdictions. In this case, the High Court allowed the subsequent purchaser of a house damages against its builder for "pure economic loss" comprising the cost of rectifying defects arising from inadequate foundations. The previously held orthodox view in Australia was that a claim in tort could not in those circumstances succeed. I begin by offering a brief historical overview.

Twenty years before *Bryan v. Maloney*, in *Caltex Oil (Aust) Pty Ltd v. The Dredge "Willemstad"* (1976) 136 CLR 529, the High Court had reached the then radical conclusion that damages could be recovered for "pure economic loss", that is, loss not consequent upon injury to personal property. Stephen J referred there to the need "for some control mechanism", "based upon notions of proximity between tortious act and resultant detriment" (pp.574-5). His Honour considered that "insistence upon sufficient proximity" and the "articulation, through the cases, of circumstances which denote sufficient proximity (would) provide a body of precedent productive of the necessary certainty". Of this sanguine hope, Brennan J (dissenting) would later counter in *Bryan v. Maloney* that "the law of negligence should be capable of application in solicitors' offices; it should not have to await definition in litigation" (p.653).

A few months after *Caltex*, in *Anns v. Merton London Borough Council* [1978] AC 728, the House of Lords upheld a cause of action against a local authority which had

approved the construction of a building which presented imminent danger to the health and safety of its occupants. Their Lordships embraced a notion of "proximity or neighbourhood", tempered by the possibility of excluding liability where policy considerations warranted exclusion. This generally influential case led to the House of Lords' decision a few years later in *Junior Books Ltd v. Veitchi Ltd.* [1983] 1 AC 520. In circumstances (very) broadly suggestive of *Bryan v. Maloney*, the House of Lords allowed damages for pure economic loss to a building owner, against a specialist flooring subcontractor, in respect of defectively laid flooring.

Back in Australia the following year saw the High Court attempt to develop its concept of proximity more comprehensively, through *Jaensch v. Coffey* (1984) 155 CLR 549, a nervous shock case. Deane J explained the concept by reference to considerations of physical proximity between the parties, and causal proximity between the relevant act and the occasioning of the damage. (The special categories applicable to occupiers' liability were debunked later that year in favour of the more general negligence approach, in *Hackshaw v. Shaw* (1984) 155 CLR 614.) The following year, 1985, saw the High Court reaffirm the applicability of the concept to proximity to a claim for pure economic loss against a local authority for an allegedly negligent approval of construction, in *Council of the Shire of Sutherland v. Heyman* (1985) 157 CLR 424. Other cases followed in Australia, in which the High Court developed the notion of proximity further.

Then dramatically in England, in 1991, the House of Lords overturned *Anns*. In *Murphy v. Brentwood District Council* [1991] 1 AC 398, the House of Lords disallowed a claim in negligence for pure economic loss against a local authority for negligently approving plans, confining recovery to situations where injury to person or damage to property had actually occurred. The House of Lords thereby reverted to the law as expressed prior to the

Caltex case: subject to recovery for negligent misstatement on the principle of *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465, damages for economic loss not related to damage to property or person were not recoverable.

Also dramatically, in Australia in 1994, the High Court abandoned the rule in *Rylands v. Fletcher - Burnie Port Authority v. General Jones Pty Ltd* (1992-4) 179 CLR 520 - and in so doing offered yet further elaboration on the notion of proximity. It was later that year that the court gave judgment in *Bryan v. Maloney*. Some, perhaps many, would have seen that judgment as a natural extension of the reasoning evident in High Court decisions over the preceding decade or so. On the other hand, and also of some significance, it denoted a very important divergence from the position in England, so plainly and, as I have suggested, dramatically, established only three years earlier in *Murphy*.

In the meantime, in *Invercargill City Council v. Hamlin* (1994) 3 NZLR 513, the New Zealand Court of Appeal had held that a local authority was liable to a house owner, and a subsequent owner, for damages for pure economic loss referable to defects attributable to the negligence of a building inspector. Interestingly, the Privy Council later upheld that decision ([1996] AC 624) - although contradictory of the decision of the House of Lords in *Murphy* - on the basis that the New Zealand Court of Appeal should be left free to develop a common law of New Zealand on the basis of New Zealand's own community standards and expectations, not governed by pronouncements of the House of Lords albeit on factually identical situations.

It remains to mention the decision of the Supreme Court of Canada, *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co Ltd* (1995) 121 DLR (4th) 193, which also preceded the High Court's decision in *Bryan v. Maloney*. That Court allowed damages in tort, for what it styled pure economic loss, to a subsequent owner of a building

against its builder, in respect however of defects posing danger to the health and safety of the occupants. The court (per La Forest J) did not consider the *Bryan v. Maloney* factual situation, and therefore whether a duty would exist with respect to non-dangerous defects. The Canadian Supreme Court followed the decision of the House of Lords in *Anns* - consistently with the trend of previous Canadian cases - and accordingly refused to follow the succeeding decision of the House of Lords in *D & F Estates Ltd v. Church Commissioners for England* [1989] AC 177.

Of this background of relative eventual comparability amongst the Commonwealth courts, but striking contrast with the position now adopted in the United Kingdom, it is interesting to note what Cooke P said in the Court of Appeal in *Invercargill* (p.523):

> "...it is inevitable now that the Commonwealth jurisdictions have gone on their own paths without taking English decisions as the invariable starting point. The ideal of a uniform common law has proved as unattainable as any ideal of a uniform Civil Law. It could not survive the independence of the United States; constitutional evolution in the Commonwealth has done the rest. What of course is both desirable and feasible, within the limits of judicial and professional time, is to take into account and learn from decisions in other jurisdictions."

And as put by Lord Lloyd when that case reached the Privy Council (p.640):

> "The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other..."

Bryan v. Maloney

In 1979 Mr Bryan, a professional builder, built a house for his sister-in-law, Mrs Manion, on land at Launceston. They had an ordinary business relationship with no relevant exclusion or limitation of liability. Mrs Manion later sold the house to Mr and Mrs Quittenden, and in 1986 Mr and Mrs Quittenden sold to Mrs Maloney. Mrs Maloney made

three cursory inspections before buying and noticed no cracks. The cracks in fact developed about six months later. The cause was inadequacy of footings. The reactive clays in the area necessitated special precautions against failure of footings. The trial judge awarded Mrs Maloney approximately $34,000 damages against the builder in negligence - the cost of repairing the cracks and underpinning the footings. The Tasmanian Full Court, and ultimately the High Court, upheld the judgment.

There was considerable common ground between the parties before the High Court: that Mr Bryan had negligently built the house with inadequate footings, that the measure of Mrs Maloney's loss (if recoverable) was the cost of rectification, that she suffered her damage when the inadequacy of the footings became apparent through cracks, and that damage of that character was a foreseeable consequence of the negligent construction. The only issue, therefore, was whether Mr Bryan, the builder, owed Mrs Maloney, as subsequent purchaser, a duty of care.

The majority judgment (Mason CJ, Deane & Gaudron JJ)

Their Honours began by acknowledging the need, for there to be a duty of care, to be able to identify "proximity between the parties with respect to both the relevant class of act or omission, and the relevant kind of damage". They mentioned Stephen J's reference in *Caltex* to the significance in that process of "policy considerations". They went on to describe as "special", the categories of pure economic loss situations in which a duty of care might be erected, and advanced two reasons for that: first, the need to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class"; and second, possible interference with the legitimate pursuit of personal advantage "in a competitive world where one person's economic gain is commonly another's loss" (pp.618-9).

Such cases would be "special", "commonly, but not necessarily" where they involved "an identified element of known reliance (or dependence) or the assumption of responsibility or a combination of the two" (p.619). Although there was here no evidence of actual reliance or assumption of responsibility, their Honours observed that:

> "In ordinary circumstances, the builder of a house undertakes the responsibility of erecting a structure on the basis that its footings are adequate to support it for a period during which it is likely that there will be one or more subsequent owners. Such a subsequent owner will ordinarily have no greater, and will often have less, opportunity to inspect and test the footings of the house than the first owner. Such a subsequent owner is likely to be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner will be likely, if inadequacy of the footings has not become manifest, to assume that the house has been competently built and that the footings are in fact adequate." (p.627)

In finding the existence of the requisite proximity, their Honours were also substantially influenced by what they called "the connecting link of the house itself", described as:

> "...a permanent structure to be used indefinitely and, in this country ... likely to represent one of the most significant and possibly *the* most significant, investment which the subsequent owner will make during his or her lifetime. It is obviously foreseeable by such a builder that the negligent construction of the house with inadequate footings, is likely to cause economic loss, of the kind sustained by Mrs. Maloney, to the owner of the house at the time when the inadequacy of the footings first becomes manifest. When such economic loss is eventually sustained and there is no intervening negligence or other causative event, the causal proximity between the loss and the builder's lack of reasonable case is unextinguished by either lapse of time or change of ownership." (p.625)

As to contrary indicators, their Honours referred to the quality of the damages, as being pure economic loss. But as they pointed out, the relevant proximity would have existed had Mrs Maloney suffered physical injury or property damage because of a partial collapse of the house: that being so, the distinction between that sort of damage and pure

economic loss was "an essentially technical one" (p.626) which should therefore not carry great weight.

These judges drew support from the recent Canadian (Winnipeg) and New Zealand cases, and rejected the contrary approach of the House of Lords in *Murphy* and *D & F Estates* as resting "upon a narrower view of the scope of the modern law of negligence and a more rigid compartmentalization of contract and tort than is acceptable under the law of this country" (p.629).

They concluded by emphasizing that the decision turned "to no small extent, on the particular kind of economic loss involved, namely, the diminution in value of a house where the inadequacy of its footings first becomes manifest by reason of consequent damage to the fabric of the house" (p.630). It was not to be taken as determinative of "other categories of case or ... other kinds of damage", and their Honours specifically reserved the position between the manufacturer and the subsequent purchaser or owner of a defective chattel (p.630).

Toohey J delivered a separate judgment to similar effect.

Brennan J

In a lone dissent described by commentators as powerful, Brennan J suggested that claims between builder and original owner should be regulated by contract, not tort: to avoid anomaly, so should claims by subsequent owners. The answer for subsequent purchasers, he suggested, lay in securing appropriate contractual warranties, not the judicial establishment of a duty of care. Establishing a duty of care in such cases could lead to the inflation of building costs to cover risks. Providing an avenue for recourse in those circumstances would be better undertaken, he suggested, by the Parliament (p.644).

He also suggested that reliance in this case on the notion of proximity was generally unhelpful. Accepting that the word "persistently defie(d) expression", he said it therefore could "not provide a working criterion of liability" (p.653). His Honour therefore addressed the issue simply by characterizing Mrs Maloney's damage as physical defects in the house which posed no "substantial risk of damage to personal property", so that "she suffered no damage in respect of which an action lies in negligence" (p.655). In other words, he excluded the case from those categories for recovery hitherto established.

That brief review of course does not do complete justice to the comprehensive reasoning of the members of the Court. It does however provide a background for what follows. I will now indicate some fundamental issues thrown up by the case, some of which have been judicially considered since. I will then finally mention some unresolved subsidiary issues.

Fundamental issues

The uncertainty of "proximity"

Brennan J unflatteringly described this concept, as relevant to this area, as "a juristic black hole into which particular criteria and rules would collapse and from which no illumination of principle would emerge" (p.655). McHugh J has spoken extrajudicially (Finn: "Essays on Torts" (1980) p. 36) of the difficulty created by its being "a legal rule without specific content". Its policy base is a real problem, for that is itself a concept "inherently so abstract, indeterminate or malleable as to defy a stand alone definition" (Millar: "Damages for Defective Works", Building and Construction Law, Vol. 11, p.383).

Because appreciation of the significance of competing policy considerations necessarily varies from judge to judge and from time to time, one wonders indeed whether a differently constituted House of Lords would today decide *Murphy* in the same way.

But for all that, proximity seems to be here to stay, as most recently illustrated in the High Court by *Esanda Finance Corporation Ltd v. Peat Marwick Hungerfords* (1997) 71 ALJR 448. In a pleadings contest, with relation to a financier's claim against auditors for pure economic loss suffered through entering into transactions in reliance on audited accounts of another corporation, the High Court affirmed that foreseeability was not enough. Citing *Bryan v. Maloney*, Toohey and Gaudron JJ said, for example (p.457) that:

> "In this country, the question whether there is a duty of care to take reasonable steps to avoid another's economic loss depends on whether there is a relationship of proximity, it being said that 'the categories of case in which the requisite relationship of proximity with respect to mere economic loss is to be found are properly to be seen as special'."

2. The manner of defining or fashioning this field of liability

Although the majority of the court has been generally content to proceed consistently with Stephen J's sanction of the so-called "incremental" approach to the definition of this field of liability, it was the resultant uncertainty which prompted Brennan J's dissenting reference to the impracticability of having liability determined for the first time with any certainty in the courtroom. The majority has naturally been careful to dispel, where possible, suggestions of intolerable uncertainty.

The most recent illustration of this carefulness is *Hill v. Van Erp* (1997) 71 ALJR 487. Following *Ross v. Caunters* [1980] Ch 297, the High Court allowed damages, against a negligent solicitor, in favour of an intended beneficiary under a will. The named beneficiary had lost her benefit, by force of statute, because - at the instance of the solicitor -

her husband witnessed the execution of the will by the testatrix. It suffices to refer to what Dawson J said (pp.498-9):

> "Whilst the loss Mrs Van Erp has suffered is pure economic loss, the considerations which ordinarily prompt concern about imposing liability for such loss are absent. In the first place, to impose liability upon the solicitor in such a situation is not to raise the prospect of indeterminate liability. An intended beneficiary under a will is a specific, identifiable individual rather than a member of an unascertained class. Nor is the liability to such a person at large. The maximum amount of the damages which might be awarded is fixed by the size of the intended bequest. ...
>
> Secondly, no question of competitive advantage arises. In appropriate cases that is a consideration which is relevant to the scope of the tort of negligence. (His Honour then refers to *Bryan v. Maloney*.) ... In this case, the solicitor's negligence had nothing to do with her obtaining a commercial or competitive advantage and the recognition of a duty of care would not impede the legitimate pursuit of financial gain.
>
> Thirdly, the recognition of a duty of care would not supplant or supplement remedies available in other areas and would not disturb any general body of rules constituting a coherent body of law. The only areas of law which require particular attention are the law of succession and the law of contract."

Also of interest is an apparently increasing preparedness to acknowledge the limits on the usefulness of the criterion of proximity in this area. Dawson J spoke (p.498) of its being "at least a useful" guide. but excluded its describing "a common element underlying all (the relevant) categories of case". Toohey J referred (p.504) to the imprecision of the concept. McHugh J repeated (p.515) his "scepticism about the usefulness of proximity as a principle or a guide for determining the existence of a duty of care". Gummow J acknowledged (p.527) "stringent criticism by judges and in academic writing" of "the use of the imprecise and beguiling but deceptively simple terms 'known reliance' and 'assumption of responsibility' in a number of recent decisions in this field".

Only time will tell whether these reservations lead to a real reluctance to extend further the category of cases for which recovery of pure economic loss will be allowed. In an interesting recent decision of the New South Wales Court of Appeal, *National Australia*

Bank Ltd v. Hokit Pty Ltd (1996) 39 NSWLR 377, the Court was asked, in effect, to depart from the well established principle that in general, a bank pays the amount of a forged cheque at its own risk. The bank unsuccessfully contended that a *Bryan v. Maloney* type "proximity" between customer and bank imposed a duty on the customer "to take reasonable care to prevent the presentation ... of forged cheques" (p.387). Clarke JA referred comprehensively to the recent law. He pointed to absence of the elements of reliance and assumption of responsibility, and a consequent need to consider issues of "policy fairness and reasonableness" (p.404). It was, he held, better to maintain "the clear rule in preference to the imposition of a duty of care which may conceivably lead to much uncertainty in application" (p.405).

3. Concurrent duties, tort and contract

These uncertainties lend considerable attraction to the dissenting approach of Brennan J.

Allowing concurrent duties in contract and tort between builder and first owner, and then extending the duty in tort to subsequent purchasers, raises obviously serious questions as to the precise content of the tortious duty to the subsequent purchaser. To what extent is it affected by the terms of the initial contract, for example? In the absence of appropriate limitation, there is the spectre of a builder's owing a more expansive duty to the subsequent purchaser than to the original.

In confining the subsequent purchaser to the caveat emptor limitation, Brennan J may have had in mind the sorts of points made by one commentator (Barrett, "Recovery of Economic Loss in Tort for Construction Defects" (1989) 40 SCL Rev 891, 941):

> "Perhaps more so than any other industry, the construction industry is 'vitally enmeshed in our economy and dependent on settled expectations'. The parties involved in a construction project rely on intricate, highly sophisticated contracts to define the relative rights and responsibilities of the many persons

> whose efforts are required - owner, architect, engineer, general contractor, subcontractor, materials supplier - and to allocate among them the risk of problems, delays, extra costs, unforeseen site conditions, and defects. Imposition of tort duties that cut across those contractual lines disrupts and frustrates the parties' contractual allocation of risk and permits the circumvention of a carefully negotiated contractual balance among owner, builder, and design professional."

It must however be acknowledged that their Honours would have been alive to these points. The argument attributed in the report (pp.610-613) to counsel for the appellant, led by S. P. Charles QC (as his Honour then was) displays his customary clarity: that so enlightened, their Honours of the majority went on to decide the case as they did, shows continuation of a trend towards "protection of the consumer interests of those private or civilian plaintiffs who could be said to be vulnerable by reason of a practical absence of adequate means of self protection in their dealings with expert or specialist suppliers of goods or services" (Hocking and Orr: "Building an Extension on to the House of Negligence" (1995) Griffith Law Review, Vol 4, No. 1, p.112).

Unresolved subsidiary issues

I turn now to a number of issues spawned by *Bryan v. Maloney* but left unresolved.

(a) Will the principle be extended to benefit subsequent owners of defective chattels?

The majority was at some pains to stress that such an extension should not be assumed (p.630). One wonders why. It is not made clear in the judgment. Emphasis on the enduring nature of a dwelling house, and its significance to the owner as a major asset, would provide a point for distinguishing many chattels. In *Murphy*, however, their Lordships thought extension to the manufacturers of defective chattels logical (p.469). The extent of liability of manufacturers of products set up by Part VA of the *Commonwealth Trade Practices Act* may rob the point of great practical significance anyway.

(b) Will it apply to commercial buildings?

Again, their Honours of the majority emphasized that their decision was limited to "a building which was erected to be used as a permanent dwelling house" (p.630). What of the position of the subsequent purchaser of a commercial building?

Without deciding the point, Cooke P in *Invercargill* observed (p.520), as arguable, that the network of contractual relationships could ordinarily be thought to provide sufficient protection, without the need to superimpose a duty in tort. On the other hand, in *Winnipeg*, the Supreme Court of Canada allowed recourse in respect of an apartment building, at least as to dangerous defects, pointing out (p.213) among other things that denying recourse may discourage proper repair.

While this point remains unresolved, purchasers of commercial buildings may well be advised to seek appropriate contractual warranties from their vendors, and as well, to investigate the possibility of taking an assignment of the vendor's contractual rights against the builder. If the building contract contains a prohibition on assignment of the benefit of the contract, the vendor could nevertheless arguably recover substantial damages from the builder, in effect to protect himself against liability to the subsequent purchaser (cf. *St Martin's Property Corporation Ltd v. Sir Robert McAlpine Ltd* (1994) 1 AC 85, 114-5 per Lord Browne-Wilkinson).

(c) *How many* subsequent purchasers might claim?

Take the case of a subsequent purchaser who, becoming aware of a latent defect, recovers damages from the builder but fails to carry out the necessary rectification. In theory, it might be argued, an even later purchaser, upon becoming aware of the newly apparent damage, might recover further damages, rendering the builder liable more than once.

contract prohibiting assignment of purchaser's rights of latent defects to subsequent purchasers. cf DBCT Act - binding subsequent owners

The answer would probably be said to lie in the reference by the majority, with relation to the time span of liability, to the "element of reasonableness both in the requirement the damage be foreseeable and in the content of the duty of care" (p.626). And as Toohey J said, "as time goes on it may be more difficult to show that the defect was the result of negligence and not of wear and tear or factors not associated with the standard of construction" (p.665).

But for all this, the position of the builder is left in an extremely uncertain state.

(d) What is the relevance if any of limiting provisions in the original building contract?

Their Honours indicated they may be relevant, though not necessarily decisive as to the extent of any duty owed to the subsequent owners (p.621). What, for example, if the original owner agreed, in order to save costs, that the builder not adhere to normal building standards: should that bear upon the extent of the builder's liability to a subsequent purchaser? Toohey J referred to Windeyer J's words in *Voli v. Inglewood Shire Council* (1963) 110 CLR 74, 85 to the effect that that would be "not an irrelevant circumstance".

In *Henderson v. Amadio Pty Ltd* (1995) 65 FCR 1, Heerey J held that any duty in tort, owed by a firm of accountants engaged by X to produce financial projections, to third parties who might use the data, effectively was limited by the terms of their original engagement. Referring to *Bryan v. Maloney* and *Voli*, he said that:

> "the original retainer is important in establishing the nature of the duty of care owed not only to clients but also to third persons ... a contract between the original parties is not a bar to tortious liability towards third parties but it influences the nature and scope of the duty which arises ... such duty did not extend to advising potential investors on the validity of the assumptions used in the cash flows." (p.143)

(e) To whose benefit could analogous duties enure?

Could such a duty for argument's sake, extend to a financier? What if a mortgagee, taking possession of the property of a financially collapsing developer, finds that the property

is defective: might that financier sue the negligent builder? The dwelling house limitation aside, one writer suggests that the financier may have an arguable case (Mead: "Defective Structures and the Construction Financier's Remedy in Tort" (1996) 46 Australian Construction Law Newsletter 20).

On the other hand, could the right of action bypass a financially defunct builder and fasten upon his immediately negligent subcontractor? Another commentator suggests the answer is yes: Tapsell: "Bryan v. Maloney, the Unresolved Problems" (1994) 13 Australian Construction Law Reporter 87.

These uncertainties confirm the need for appropriate protection for builders, either through insurance or legislation. Some States have legislated specifying early and readily ascertainable dates from which fixed periods run limiting recovery: *Building Act* 1993 (Vic), *Development Act* 1993 (SA) and *Building Act* 1993 (NT). The commencement dates vary, from the date of the final compliance certificate issued by the building authority in Victoria, to the completion of the work in South Australia, and the date of first occupancy in the Northern Territory.

10 years from certificate of occupancy

In any event, builders and architects should be alive to the need to secure appropriate indemnity insurance covering the possibility of such claims.

The future?

These unresolved issues raise what many would consider the "spectre" of further extension of the principle established in *Bryan v. Maloney*. Although the High Court has

already extended it, effectively, through *Van Erp*, albeit in precise and confined circumstances, intermediate courts have shown reluctance.

In *Council of the Municipality of Woollahra v. Sved* (1996) Aust Torts Reports 63,545, a majority in the New South Wales Court of Appeal adopted a conservative approach to any suggested liberal application of *Bryan v. Maloney*. Mr and Mrs Sved had purchased a house from Mr and Mrs Goddard. Their contract of purchase entitled them to rescind if, at settlement, no s.317A certificate (from the local authority as to compliance with ordinances etc.) was produced. None was, although promised by the local authority. Having completed, and having discovered defects, the Sveds were held to have a right to damages against the Council. The issue now relevant was whether they had a cause of action against the builders.

The majority (Clarke JA and Cole JA) held that they did not. Cole JA held that reliance or assumption of liability was necessary, and absent. That was because in accordance with the trial judge's findings, the purchasers' reliance on the promised s.317A certificate negated any general or special reliance on the builder (p.63,583). Clarke JA reached a similar view, but his judgment is particularly significant for the suggestion that *Bryan v. Maloney* is effectively, as we would say, to be "confined to its own facts".

Clarke JA said (p.63,569):

> "... the category of case directly falling within the scope of the decision is limited to the liability for economic loss of a builder, who built a permanent residence pursuant to a construction contract which contained no terms limiting or excluding its liability, to a subsequent owner arising from the existence of latent defects discovered after that owner purchased the residence in circumstances where there was no intervening negligence or other causative event.
>
> So understood the authority of the decision does not extend to, for instance, the construction of a commercial building, nor, presumably, a case in which other acts of negligence have intervened between the builders' negligence and the discovery of damage, such as occurs when a local council has been negligent, whether in the issue of a certificate or otherwise. Nor does it extend

> to the case of damage which, although discoverable on a reasonable inspection, was not in fact discovered until after the plaintiff had purchased the property."
>
> I note these further observations (pp.63,570-63,571):
>
> "... the narrow ambit of the proximity relationship found in *Bryan* seems ... to be more reflective of a determination based on the particular facts rather than one applicable to a broad category of cases. ... Where the identified category is significantly fenced in with limitations and exceptions ... the criticisms of the doctrine expressed by Brennan CJ in a series of cases ... derive particular force. ... The problem ... lies in ascertaining what factors, apart from known reliance or the assumption of the responsibility, will govern the existence of the requisite relationship ... A principle which bases liability on the elements of known reliance and the assumption of responsibility is ... one which I apprehend courts could readily apply. ... Where, however, the search is for some overall unifying principle designed to cover all claims in negligence for economic loss flowing from acts or omissions, the very breadth of the principle to cover all subcategories is likely to lead to an uncertain rule pursuant to which judges are required to determine novel cases without any more specific guidance than that there must be proximity."

Conclusion

I began this paper by going back 20 years. It would be fascinating (if rather self-indulgent) to be able now to jump forward two decades to see:

(a) whether the High Court is, through some ingenious refinement, able to inject any degree of concrete precision into the notion of proximity; or whether, on the other hand, it candidly disavows the concept as being no more than a virtually transparent mask for policy: this is indeed an area of "judicial legislation";

(b) whether a consumer oriented High Court will resist the temptation of tying up loose ends left by *Bryan v. Maloney* in an expansionist way - perhaps creating further uncertainty; or whether, on the other hand, it will indeed respect the limitations it appears to have prescribed with some degree of stringency.

Changing composition of the Court will undoubtedly have a major effect on the resolution of these issues.

> to the case of damage which, although discoverable on a reasonable inspection, was not in fact discovered until after the plaintiff had purchased the property."

I note these further observations (pp.63,570-63,571):

> "... the narrow ambit of the proximity relationship found in *Bryan* seems ... to be more reflective of a determination based on the particular facts rather than one applicable to a broad category of cases. ... Where the identified category is significantly fenced in with limitations and exceptions ... the criticisms of the doctrine expressed by Brennan CJ in a series of cases ... derive particular force. ... The problem ... lies in ascertaining what factors, apart from known reliance or the assumption of the responsibility, will govern the existence of the requisite relationship ... A principle which bases liability on the elements of known reliance and the assumption of responsibility is ... one which I apprehend courts could readily apply. ... Where, however, the search is for some overall unifying principle designed to cover all claims in negligence for economic loss flowing from acts or omissions, the very breadth of the principle to cover all subcategories is likely to lead to an uncertain rule pursuant to which judges are required to determine novel cases without any more specific guidance than that there must be proximity."

Conclusion

I began this paper by going back 20 years. It would be fascinating (if rather self-indulgent) to be able now to jump forward two decades to see:

(a) whether the High Court is, through some ingenious refinement, able to inject any degree of concrete precision into the notion of proximity; or whether, on the other hand, it candidly disavows the concept as being no more than a virtually transparent mask for policy: this is indeed an area of "judicial legislation";

(b) whether a consumer oriented High Court will resist the temptation of tying up loose ends left by *Bryan v. Maloney* in an expansionist way - perhaps creating further uncertainty; or whether, on the other hand, it will indeed respect the limitations it appears to have prescribed with some degree of stringency.

Changing composition of the Court will undoubtedly have a major effect on the resolution of these issues.

BRYAN v MALONEY - A HIGH POINT

IN THE LIFE OF PROXIMITY

There are three speakers at this seminar each of whom will be discussing aspects of *Bryan*[1]. It has seemed to me important that the views expressed by the first speaker are not iterated, except where iteration is, as a practical matter, unavoidable, by the later speakers. Having had the benefit of reading what Justice Charles has previously had to say on the subject I have determined to focus on the importance of the concept of proximity in the law of negligence in this country as exemplified in *Bryan*. This may seem an unduly academic approach but my primary purpose is not to engage in a discussion of legal history but rather to examine competing judicial approaches in an endeavour to demonstrate that the proximity doctrine has reached its high (or low depending on the point of view) point in *Bryan* and there is now a real question whether it is conducive to the ordered development of the law.

Donoghue v Stevenson[2] is unarguably the most important decision on the tort of negligence in this century. It has led to an increasing expansion in the tort and courts continue to rely on it when faced with

---

1 *Bryan v Maloney* (1994-5) 182 CLR 1.

2 (1932) AC 564.

novel situations. It is best known for the famous passage in the speech of Lord Atkin[3] but the principle which the authority actually expounds is itself of great importance although less frequently mentioned. That principle could be expressed as follows - a manufacture of a product, which is sold in a form that shows the manufacturer intended it to reach an ultimate consumer in the form in which it left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the product will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care[4].

That principle has never been questioned but it will be seen that it is limited to injury to life or property. It does not apply to a claim for economic loss and of course it does not posit a duty in respect of the quality, as opposed to the dangerous nature, of the product. Claims in negligence for economic loss were not admitted in England prior to the decision in *Hedley Byrne*[5]. In that case it was held that, in cases of a special relationship involving reliance or assumption of responsibility or both, a duty of care could arise.

---

3 Ibid at 580.
4 Ibid at 499.
5 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* 1964 AC 465.

Then in 1972 Lord Denning entered the picture. In *Dutton*[6] he held that the *Donoghue* principle applied in respect of houses as well as chattels. This was an important determination which has never since been doubted but Lord Denning went further. He held that a builder would be liable not only for defects causing injury or damage to property other than the building which it had constructed in accordance with the *Donoghue* principle but also for defects which did not create a danger but which rendered the building built by the builder less valuable. Lord Denning also refused to accept that the law should distinguish between a latent defect which actually causes injury and one which is discovered before injury is caused. As his Lordship said (speaking of a chattel):

> "If he makes it negligently, with a latent defect (so that it ... injures someone) he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of the repair."

The next important case was *Anns*[7]. In it the House of Lords generally agreed with Lord Denning's conclusions and Lord Wilberforce laid down his two stage approach for deciding whether a duty of care should be found to arise in novel cases.[8] That approach required courts to inquire whether there was proximity (as expressed by his Lordship on one

---

6 *Dutton v Bognor Regis UDC* 1972 1 QB 373 at 393.
7 *Anns v Merton London Borough Council* 1978 AC 728 at 758.
8 Ibid at 751-2.

view this was akin to a test of foreseeability) and if so, were there considerations which ought to negative or limit a duty of care? At this stage English law would appear to have permitted recovery by a subsequent purchaser of premises from the builder of those premises in respect of latent defects which caused injury or damage to a third person or his or her property, for repairs designed to prevent that injury or damage and for damage to the structure itself, which Lord Wilberforce classified as property damage.

There the law remained for some time although Lord Brandon, in a dissenting speech in *Junior Books*[9] which has since been accepted in England as correctly expressing the law, said that the injury to property of which *Donoghue* speaks is property other than the very property which gave rise to the risk of physical damage.

In 1989 and 1991 the House of Lords revisited this area of the law in *D & F Estates Ltd v Church Commissions for England*[10] and *Murphy v Brentwood District Council*[11]. *Anns* was held to be unsound. The liability of a builder to a person who sustained injury or damage to property (other than the property built by the builder) as a result of a latent defect to the building built by the builder as a result of the latter's negligence was once

9 *Junior Books v Beitchi* 1983 1 AC 520 at 549.
10 1989 1 AC 177.
11 1991 1 AC 398.

again accepted as flowing from the principle in *Donoghue*. The House however came down firmly against a claim by a subsequent purchaser for:-

(1) The cost of the repair of a dangerous defect which, although originally latent, had been recognised in order to prevent it causing damage (the argument was that once discovered the defect is no longer latent and the owner is free to discontinue using the building or alternatively to repair the building at its own cost to remove the danger);

(2) The cost of repairing defects in quality in the building built by the builder which are not dangerous.

In some quarters these decisions have been regarded as somewhat regressive and as depicting an unwillingness to mould the law to modern needs. It is, however, important to recognise that they both involved the application of the *Donoghue* principle to real property and they rejected extensions of that principle which the House regarded as contrary to well accepted canons of English law. The result followed careful analyses of established principles in the light of the evolutionary nature of the common law. In *D & F*, which concerned defective plaster work, Lord Bridge said that the recovery of the cost of remedying defects of quality was not justified under any legitimate development of *Donoghue* and as a

matter of policy was not supportable insofar as it elevated the plaintiff to the position of someone who had the benefit of a warranty. In *Murphy* the House of Lords agreed with their earlier decision in *D & F*.

It is helpful, I believe, to cite from Lord Bridge's speech in *Murphy* because it sums up the present English situation. His Lordship said:

> "If a manufacturer negligently puts into circulation a chattel containing a latent defect which renders it dangerous to persons or property, the manufacturer, on the well known principles established by *Donoghue v Stevenson* [1932] AC 562, will be liable in tort for injury to persons or damage to property which the chattel causes. But if a manufacturer produces and sells a chattel which is merely defective in quality, even to the extent that it is valueless for the purpose for which it is intended, the manufacturer's liability at common law arises only under and by reference to the terms of any contract to which he is a party in relation to the chattel; the common law does not impose on him any liability in tort to persons to whom he owes no duty in contract but who, having acquired the chattel, suffer economic loss because the chattel is defective in quality. If a dangerous defect in a chattel is discovered before it causes any personal injury or damage to property, because the danger is now known and the chattel cannot safely be used unless the defect is repaired, the defect becomes merely a defect in quality. The chattel is either capable of repair at economic cost or it is worthless and must be scrapped. In either case the loss sustained by the owner or hirer of the chattel is purely economic. It is recoverable against any party who owes the loser a relevant contractual duty. But it is not recoverable in tort in the absence of a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss. There is no such special relationship between the manufacturer of a chattel and a remote owner or hirer.
>
> I believe that these principles are equally applicable to buildings. If a builder erects a structure containing a latent

> defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect. But if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. If the defect can be repaired at economic cost, that is the measure of the loss. If the building cannot be repaired, it may have to be abandoned as unfit for occupation and therefore valueless. These economic losses are recoverable if they flow from breach of a relevant contractual duty, but, here again, in the absence of a special relationship of proximity they are not recoverable in tort. The only qualification I would make to this is that, if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repair or by demolition, so far as that cost is necessarily incurred in order to protect himself from potential liability to third parties."[12]

Pausing there, English law has accepted the extension of the *Donoghue* principle to real property but has rejected -

i) the notion that a builder could be liable to a subsequent purchaser for defects in a building not creating a danger (that is qualitative defects);

ii) a builder's liability in respect of latent defects which, while giving rise to a risk of injury to persons or damage to property (other than to the building itself) are discovered before injury or damage ensues. In this instance the cost of

---

12 Ibid at 475.

removing the risk is to be borne by the purchaser if it decides to take that step. This proposition is, perhaps, subject to the qualification mentioned by Lord Bridge.

I have spent some time on the developments in England because although they demonstrate an early inclination to elevate the importance of policy in the development of the law further reflection guided the courts back in favour of continuing to apply the conventional evolutionary process by which principles are expanded to cover novel situations. That is not to say that policy became irrelevant but it ceased to have the significance which Lord Wilberforce expressly accorded it in *Anns*.

While everyone will not necessarily agree entirely with the decisions in *D & F* and *Murphy* there can be no doubt that following those decisions the law is substantially clearer than it was following *Anns*. Trial courts thenceforth would have little difficulty in finding the principles by which they are to decide cases in the particular area. Of equal importance is the fact that lawyers are able to advise clients on their legal positions according to well established principles. This is not insignificant because clients are thereby able confidently to plan for the future and as well to approach discussions about the settlement of litigation with a clear understanding of the principles applicable. In my view the importance of the development of principles by evolutionary

means and the corresponding certainty of the law should not be underestimated. As I have indicated, prior to these two cases English courts had been required to follow the two stage approach expressed by Lord Wilberforce in *Anns*[13]. This test, obviously enough, gave the decision maker enormous latitude and it cannot be doubted that the House of Lords has, in rejecting it, come down firmly on the side of a principled rather than a discretionary enlargement of the tort of negligence.

In Australia the High Court has not applied the *Anns* test. Indeed it could well be said that in *Heyman v Sutherland Shire Council*[14] it rejected it. Instead the test of proximity first articulated by Deane J has been the guiding force in determining whether a duty of care should be found to exist in novel categories of cases. So much is clear from *Gala v Preston*[15]. It must however be emphasised that proximity as explained in the series of cases leading to the statement in *Gala* does not prescribe a test for deciding whether a duty of care arises on the facts of a particular case. Its importance is

> "As a general conception deduced from decided cases, its practical utility lies essentially in understanding and identifying the categories of case in which a duty of care arises under the common law of negligence rather than as a test for determining whether the circumstances of a particular

---

13 Ibid at 751/2.
14 (1985) 157 CLR 424.
15 (1991) 172 CLR 243 at 252-253.

> test for determining whether the circumstances of a particular case bring it within such a category, either established or developing."[16]

Indeed in *Bryan* the majority formulated a general question which could properly be regarded as covering a defined category of cases. However, in answering the question the majority so hedged in its conclusion that a duty of care arose that the category became a narrow and somewhat indefinite one and the expression of the reasoning has left me, if I may respectfully say so, with the feeling that the Court was focussing essentially on the facts of the case rather than defining a category within which the facts in *Bryan* fell.

I have had something to say about this in my judgment in *Woollahra Municipal Council v Sved & Ors* (1996) 40 NSWLR 101 and I do not wish to rehearse the observations I there made. It is sufficient to say that the judgment in *Bryan* should not, in my opinion, be seen as authoritative in a claim by a subsequent purchaser against a builder unless the case meets the following requirements expressed by the Court -

1. It deals with the particular kind of economic loss (ie diminution in value of a house when the inadequacy of its footings first becomes manifest by reason of consequent damage to the fabric of the house).

---

16 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 543.

2. It concerns a building erected for use as a permanent dwelling house.

As the majority said the case is not to be regarded as directly decisive in other categories of case or as regards other kinds of damage. The category is narrow indeed. That is troubling enough but it is not the matter that has caused me the greatest concern about the decision in *Bryan*. As I have endeavoured to point out the development of this area of the law in England founded heavily upon *Donoghue* and the liability imposed on a builder in *Dutton* proceeded on the basis that there could be no logical distinction between the case of a defective chattel and a defective building[17].

Nonetheless the majority in *Bryan* was at pains to point out that the decision should not be seen as governing defective chattels. Although the statement is explicable insofar as it would, in my view, be exceedingly difficult to extend the decision to cover chattels generally, the statement raises the possibility that the liability in respect of chattels under *Donoghue* is now arguably more restricted than the liability in respect of buildings under *Bryan* but derived from *Donoghue*. This would be an odd situation unless there was a distinction of substance between the two. The

[17] See also Lord Keith in *Murphy*, ibid at 469.

English Courts have repeatedly said that in logic there is no such distinction and in *Bryan* the majority did not suggest that there was. They simply put each in a separate compartment without any explanation why it was that this should be so.

Having said that I should emphasise that my primary difficulties with the judgment are twofold. First, in the application of the proximity test and, secondly, in that it focuses on the special facts of the case in order to discover whether the proximity necessary to support a duty of care exists and, apart from reference to authority concerning the legal recognition of concurrent duties in contract and tort (which is not now truly controversial but which is explained helpfully by reference to the judgment of Le Dain J in *Central Trust Co v Rafuse*[18]), there is little in the way of discussion of the legal processes of induction or deduction and analogy discussed by Deane J in his development of the place of proximity in the law of negligence.

The consequence is that where factual circumstances are encountered that are similar in some respects to those in *Bryan* but different in others there are no principles by which to guide the court in determining whether a duty of care arises and, if so, the content of that duty. It may be said that one searches for a relationship of proximity. Not,

---

[18] 1986 2 SCR at 204-5.

according to the cases, to determine whether on the particular facts the court should find a relationship of proximity but whether the novel situation encountered constitutes a category in which the requisite proximity should be held to exist. The difficulty with this exercise is that there is little in *Bryan* to guide the court. Where no clear principle is expressed it is no easy matter to reason from the decision by way of analogy or legal deduction or induction. This problem, I hasten to say has been well recognised by a number of judges. In *Sved*, for instance, I added my voice to that of two other judges who had expressed difficulty in identifying the test for ascertaining whether the relevant proximity existed.[19]

In the High Court itself Brennan J has consistently said that

> "to treat proximity as a criterion of liability without an a priori definition of the element it contains is to create a judicial discretion." [20]

Earlier I spoke of the legal processes discussed by Deane J. I had in mind in particular his Honour's discussion of the role of the proximity relationship in *Jaensch v Coffey*[21] and *Stevens v Brodribb Sawmilling Co Pty Ltd*[22]. In the former his Honour said:

---

19 Ibid at 135. (See also Underwood J in *Bryan* in the Full Tasmanian Supreme Court and Southwell J in *Opat v NML* (1992) 1 VR 283 at 294.

20 *Bryan*, ibid 653. (See also Dawson J in *Gala* (ibid) at 276.)

21 (1984) 155 CLR 549 at 585.

22 (1986) 160 CLR 16 at 53-4.

"This does not mean that there is scope for decision in a particular case by reference to what Jacobs J called (*H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 514) 'individual predilections ungoverned by authority' or that it is a proper or sensible approach to the requirement of proximity for it to be treated as a question of fact to be resolved merely by reference to the particular relationship between a plaintiff and defendant in the circumstances of a particular case. The requirement of a "relationship of proximity" is a touchstone and a control of the *categories* of case in which the common law will admit the existence of a duty of care and, given the general circumstances of a case in a new or developing area of the law of negligence, the question whether the relationship between plaintiff and defendant with reference to the allegedly negligent act possessed the requisite degree of proximity is a question of law to be resolved by the processes of legal reasoning by induction and deduction. The identification of the content of the criteria or rules which reflect that requirement in developing areas of the law should not, however, be either ostensibly or actually divorced from the considerations of public policy which underlie and enlighten it. 'What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty ... The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides': per Lord Devlin, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC at 524-525 and see, eg, per Nield J, *Sharpe v E T Sweeting & Son Ltd*, [1963] 1 WLR 665, at 670-676; 2 All ER 455, at 459-464."[23]

In the latter his Honour said

"the notion of proximity can be discerned as a unifying theme explaining why a duty to take reasonable care to avoid a reasonably foreseeable risk of injury has been recognised as arising in particular categories of case and assisting in the determination, by the ordinary legal processes of analogy,

---

[23] 155 CLR 585

induction and deduction, of the question whether the common law should adjudge that such a duty of care is owed in a new category of case."[24]

Accepting that policy may play a part in determining whether a duty of care ought to arise in a given category of case the fact remains that, as Brennan J said in *Bryan* "unless proximity has an ascertainable meaning it cannot provide a working criterion of liability".[25] And, in this respect, the discomfort felt by Australian judges is reflected in Lord Oliver's statement that "proximity is an expression which persistently defies definition". If this be so how does a court apply the test of proximity and what is the utility of the legal processes referred to by Deane J? Of course where novel categories of negligence are developed incrementally and by analogy with established categories (see Brennan J in *Heyman*)[26] then the application of the legal processes identified by Deane J becomes relatively straightforward. But where no established principle or legal rule is used as the foundation for the extension or widening of the law the starting point for the use of those processes is uncertain.

Although the majority in *Bryan* did advert to the extension of the *Donoghue* liability to buildings, the suggested similarity between the position of first and subsequent owners and the question whether a builder

---

24 160 CLR at 52-3.
25 *Bryan*, ibid at 653.
26 157 CLR, ibid at 481.

should not be liable to an owner who discovers a dangerous defect and remedies it the thrust of the reasoning lies in the examination of policy and there is no attempt to deal with the legal reasons which tell strongly against the view that there were genuine analogies supporting a claim made simply for (non dangerous) defects in quality. In the result a decision is found for the particular case but a definition of the rule by which liability in this category of case is to be determined is absent.

I accept the idea that in deciding that on the facts of *Bryan* a relationship of proximity existed the majority has laid down a rule for that category of case. But, as Brooking J has pointed out in *Zumpano v Monthenese*[27], the decision has raised a great many questions and provided little in the way of guidance to resolve them. In his Honour's comprehensive judgment he identified many questions which he grouped under twelve headings. The questions his Honour raised are all serious ones and point to the difficulty facing a lawyer required to advise a client on similar issues: whether that client is a builder or purchaser.

Earlier I referred to the majority's express statement of the ambit of the decision - viz diminution in value of a permanent dwelling house as a consequence of defective footings which are in time reflected in cracks in the fabric. Obviously the latency of the defect was important and it may be

---

[27] (Unreported, Court of Appeal Victoria, 3 October 1996.)

that the court's reasoning can be applied to latent defects in a dwelling house which are of a different nature and which later become evident and reduce the value of the house. But having said that it seems to me to be obvious that there are factors which could operate in a particular case to lead a court to conclude that, even though the claim falls squarely within the words of the majority at 630, there was no relationship of proximity. For instance, one matter which may be of significance is an intervening causal event.[28] In *Sved* the purchaser solely relied on the local council and expressly disowned reliance on the builder and that led the majority to find that a relationship of proximity did not exist between the purchaser and the builder.

What is the position when the purchaser relies on a building inspection which is itself negligently carried out and fails to detect defects which have now become visible? Presumably that would constitute intervening causal negligence. Not so easy is the case in which the purchaser rejects legal advice to have a building inspection which would, or may, have revealed the defects. Again take the case of a purchaser who knew it could have a building inspection but declined to spend the necessary money. And what is the situation of the latent defect ceasing to

---

[28] *Bryan*, ibid at 625.

These problems were all recognised by Brennan J in his dissenting judgment. In his Honour's view liability in a case such as *Bryan* is akin to creating a transmissible warranty quality which has never been recognised by the courts and which is more appropriately a question for Parliament. Unfortunately, although most of the States have passed legislation in this area, the significance of that legislation was not considered by the majority possibly because there was no such legislation at the time in Tasmania. But the question remains, whether that legislation would have any relevance in determining whether a duty of care at common law arises, particularly if it provides comprehensive protection to subsequent purchasers.

I have referred to the rejection by the House of Lords of the notion that if an owner of premises discovers a defect in the premises which is potentially a source of danger to persons or other property that owner has no right to recover the costs of rectifying that defect from the builder responsible for creating it. The reasoning founded heavily on the law concerning chattels and their Lordships said that as the owner of a defective chattel had the option of simply ceasing to use it there was no occasion to allow him to recover the cost of removing the danger so that he could continue to use the goods. Similarly, it was reasoned, the owner could determine to cease to use the building. With the greatest respect I

find this argument not very persuasive. Whether that is an appropriate approach in the case of chattels it must be recognised that a building, relevantly, stands in a very different situation to a chattel. An owner is not free simply to discard the building in the way that it could discard a dangerous chattel. If it walked away from the building it would leave a potential source of danger and may, unless rectification was carried out, find itself liable to someone damaged or injured by the dangerous building.

In Canada the Supreme Court in *Winnipeg Condominium Corporation No 36 v Bird Construction Co*[29] disagreed with the House of Lords. It held that where negligence in planning or constructing a building caused the building to be dangerous, the owner could recover the costs of making the building safe. Brennan J agreed with *Winnipeg* and I am bound to say such a conclusion is perfectly justifiable applying the incremental approach of which Brennan J speaks.

In an article published in volume 12 of "Building and Construction Law"[30] a lawyer, Mr Patrick Mead concluded that by adhering to principle and rejecting both the *Anns* and proximity approaches the English Courts have painted themselves into a corner whereas the High Court will be able flexibly to apply the proximity doctrine to enlarge the law conformably

---

29 1995 121 DLR (4th) 193.

30 Page 9.

with considerations of justice (to be fair to him, Mead is definitely lukewarm on proximity). For my part I am in favour of a return to the development of principles which can be followed by lower courts and which can be supported according to the traditional incremental approach supported by Brennan J. Only if the High Court reflects on the competing approaches and steps back as the House of Lords did will this country develop a law of negligence which is sufficiently certain to enable persons to know where they stand.

BUSINESS LAW SECTION
LAW COUNCIL OF AUSTRALIA
and
THE LAW INSTITUTE OF VICTORIA

CONSTRUCTION LAW SEMINAR
BRYAN v MALONEY JUDICIALLY REVISITED

Tuesday, 29 July 1997

PROGRAM

9.00am-9.50am	Justice Charles
9.50am-10.40am	Justice de Jersey
10.40am-11.10am	Morning Tea
11.10-12.00 noon	The Hon John Clarke QC
12.00pm-12.30pm	Open Forum
12.30pm	Luncheon Snail 'n Bottle Restaurant, Ground Floor
2.30pm	Judges and The Hon John Clarke QC depart

① Contract determines what is to be done — Bld can't be responsible if a less expensive option is chosen and defects arises.

② Is exclusion of liab relevant to a latent defects claim?

(3) liab arises from the doing of the work