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Author

Hocking, Barbara Ann, Orr, Graeme

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BUILDING AN EXTENSION ONTO THE HOUSE OF NEGLIGENCE: THE HIGH COURT ON BUILDER'S LIABILITY FOR STRUCTURAL DAMAGE IN *BRYAN V MALONEY*

Barbara Ann Hocking and Graeme Orr*

A perennially litigious area of the law of negligence is that dealing with builders' liability. The recent High Court decision in *Bryan v Maloney*[1], in recognising builder's liability to future owners of dwellings, for economic loss caused by structural flaws, illustrates the extent to which this is potentially one of the most expansive areas of the law. This commentary focuses on the joint judgment of Mason CJ, Deane and Gaudron JJ: Toohey J delivered a separate, essentially concurring opinion, whilst Brennan J dissented strongly. After considering the judgments in some detail, we argue that this case can be seen as a continuation of a trend in appellate court treatment of negligence: the 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.

In *Bryan v Maloney* the defendant-appellant Bryan, was a professional builder. He had built a house in Launceston which had been occupied by several owners prior to its purchase by the plaintiff-respondent, Maloney. Maloney had who inspected the house three times before purchasing it. Maloney noticed no cracks in the walls or other defects and considered the house to be a 'good solid house' which she thought had been built properly. However, about six months after the purchase, cracks began to appear in the walls of the house.

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* Lecturer in Law, QUT Justice Studies, and Associate Lecturer, Griffith Law Faculty respectively.

1 (1995) 128 ALR 163; (1995) 69 ALJR 375. References are to the ALR.

Proceedings were instituted in negligence against Bryan in the Supreme Court of Tasmania, and Wright J found in Maloney's favour, awarding damages of $34,464.68, to remedy the inadequate footings and consequential damage to the fabric of the house. Bryan's appeal to the Full Court of the Supreme Court of Tasmania was unanimously dismissed, and his appeal to the High Court was rejected 4-1. On appeal, a number of matters were common ground: (a) Bryan was negligent in building the house with inadequate footings; (b) Maloney's damage was the economic loss involved in the decrease in the value of the house resulting from the inadequacy of the footings and the consequent structural damage; (c) Maloney sustained that damage when the inadequacy of the footings first became manifest (i.e. when cracks appeared in the walls of the house after she had purchased it); and (d) the damage was a foreseeable consequence of Bryan's negligence.

The fact situation epitomises the competing tensions between economic loss and economic reality. Mason CJ, Deane and Gaudron JJ begin their consideration ('the joint judgment') with the reminder of what they see as "two distinct policy considerations"[2] that may militate against recognition of a relationship of proximity in cases involving mere economic loss. The first is the law's classic concern to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class."[3] Second is the economic system as an ideal whole, given that:

> [I]n a competitive world where one person's economic gain is commonly another's loss, a duty to take reasonable care to avoid causing mere economic loss to another, as distinct from physical injury to another's person or property, may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage.[4]

The combined effect of these two distinct policy considerations is that where mere economic loss is sought, the categories of case in which the

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2 *Id* at 166.

3 *Id* at 166 referring to *Ultramares Corporation* v *Touche* (1931) 174 NE 441 at 444 per Cardozo CJ.

4 *Id* at 166, referring to *Jaensch* v *Coffey* (1984) 155 CLR at 578; *Sutherland Shire Council* v *Heyman* (1985) 157 CLR at 503.

requisite relationship of proximity is to be found are "properly to be seen as special."[5]

The joint judgment emphasises the pivotal part played by proximity in determining whether a duty of care exists in such situations, given that there was no High Court precedent determining the liability of a builder to a subsequent owner. The path to resolution of that issue is expressed in terms of the factual components of the relevant category of relationship and the identification of any applicable policy considerations - a question of law to be resolved by the ordinary processes of legal reasoning, in the context of the existence or absence of proximity in comparable situations.

Concurrent Duties and the Relevance of Contract

In examining comparable situations, the joint judgment turns first to the issue of concurrent duties in contract and tort. *Hawkins v* Clayton[6] is cited as confirmation that there are no acceptable grounds for limiting the ordinary liabilities in negligence simply because the defendant was contracting to give services as part of a "skilled calling."[7] Buttressing this is the unanimous Supreme Court of Canada opinion delivered by Le Dain J in *Central Trust Co v Rafuse*[8] that the common law duty of care created by a relationship of sufficient proximity is not confined to relationships that arise apart from contract. *Rafuse* provides persuasive authority for the links that exist between the fact or absence of a contract and tortious liability, and recognises that a duty may be created by a relationship of proximity that would not have arisen had there not been a contractual dealing. In *Bryan v Maloney*, whilst there was no contract between the subsequent owner and the builder, the relationship of proximity was primarily founded on the relationship established by virtue of the original building contract (with the first owner) and the work the builder was to perform under that contract.[9]

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5 *Id* at 166.

6 (1988) 164 CLR per Mason CJ and Wilson J at 543 and Deane J at 575.

7 (1995) 128 ALR 163 at 167, referring to *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 84 per Windeyer J.

8 (1986) 31 DLR (4th) at 521-522.

9 (1995) 128 ALR 163 at 169.

Recognising that a builder owes a clear duty for the physical safety of those for whom the house is built, (both in contract and negligence) is not, however, the same as recognising a duty for mere economic loss. Their Honours also resolve this hypothetical issue in favour of original owners, asserting that the policy considerations which underlie the reluctance of the courts to recognise a relationship of proximity and a consequent duty of care in cases of mere economic loss are inapplicable to these relationships. Again, the issue is related back to the original building contract: liability cannot be in an indeterminate amount if damage to a single structure is concerned. As there is a duty to avoid physical injury to the owner's person or property, there is "no real question of inconsistency"[10] between the existence of a relationship of proximity concerning structural damage and the legitimate pursuit by the builder of his or her own financial interests.[11]

In previous cases involving defective structures, many courts have distinguished between "ordinary physical damage to a house by some external cause" and "mere economic loss in the form of diminution in value of a house when the inadequacy of its footings first becomes manifest by consequent damage to its fabric."[12] The joint judgment notes that this distinction "has only recently attained general acceptance"[13] and is "an essentially technical one."[14]

A Duty to Subsequent Owners

The relationship of proximity is however seen to extend beyond that between builder and original owner and to also exist, "[a]t least prima facie" between the builder and persons other than that first owner, including any subsequent owner who might sustain physical injury to person or property as a consequence of collapse of the inadequate

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10 *Id* at 169.

11 *Id* at 170.

12 *Id* at 169.

13 *Id* at 169, noting the contrary view of Lord Wilberforce in *Anns* v *Merton London Borough Council* [1978] AC at 759 to the effect that "the correct classification of the damage in a case such as the present was not economic loss but 'material, physical damage'".

14 *Id* at 169, 171.

footings.[15] The relationship in question here is seen to correspond to that between the architect and the injured plaintiff in *Voli* v *Inglewood Shire Council*.[16] Proximity is found in the connecting link which the house represents, as an enduring object, at the heart of the relationship of builder to home owner, and which was intended to be so enduring (remembering that a house would ordinarily be bought and sold on the block on which it was erected). The fact that often, a residential house is *the* most significant purchase an ordinary citizen makes, is cited to further buttress this conclusion. That the property involved was built as a permanent residential dwelling is said to constitute "an important consideration" supporting a finding of proximity. That being so, the joint judgment emphasises that the decision is "not directly decisive of the question whether a relevant relationship of proximity exists in other categories of case"[17]. Yet it is unclear why this factor should affect proximity (short of a claim that only residential home purchasers reasonably rely on assumptions about the special skill and expertise of the builder of a structure). Why would the relationship of proximity between a builder of a commercial property and a subsequent owner-investor be different? It may be, however, that categorisation of a case as involving a residential, owner occupied dwelling may be of some weight in negativing any policy arguments in favour of the builder (such as the cost of insurance, fairness of the risk allocation and possible impact on the building industry). This may be because an ordinary residential owner-occupier would be less well placed to know about or afford insurance for latent defects, and it may be seen as fairer to allocate such risk to the builder, who has an ongoing professional involvement in the industry, whereas the average resident only occasionally purchases a home, and does so with considerations of suitability of size, location and price (given their family, work and

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15 *Id* at 170. Their Honours add the qualification that this extends to such persons, including Maloney, who might sustain injury while they or their property were lawfully in the house or in its vicinity.

16 (1963) 110 CLR 74 at 85, per Windeyer J concluding that there was no reason why a contractual exclusion of liability should necessarily protect a professional (architect) from negligence liability to a person who was a stranger to that contract.

17 (1995) 128 ALR 163 at 174.

budgetary needs) rather than an eye to eye to any engineering or construction factors.

The lapse of time between construction and the subsequent purchase and manifestation of damage (which may be many years or decades) does not, of itself, deny proximity: the duty survives, and extends to all reasonably foreseeable future owners. After all, the negligent construction is most likely to only manifest itself after several years, and given a society or relative mobility, changes in ownership are to be expected in that time. When the economic loss is eventually sustained, given that there is no intervening negligence or other causative event, the causal proximity the builder's lack of reasonable care and the loss is unextinguished by either lapse of time or change of ownership.

The joint judgment deals quite succinctly with the contrary view that prevailed in the House of Lords in *D & F Estates Ltd* v *Church Commissioners*[18] and *Murphy* v *Brentwood District Council.*[19] In those cases, the House of Lords considered that a builder's liability under the law of negligence did not extend to compensating either the first or any subsequent owner for economic loss sustained when inadequate footings of a building later manifested itself in the form of damage to the fabric of the building. These cases are seen to rest upon:

> [A] narrower view of the scope of the modern law of negligence and a more rigid compartmentalisation of contract and tort than is acceptable under the law of this country.[20]

Rather, the conclusion that a duty of care is owed for mere economic loss to subsequent owners is supported by persuasive Canadian[21] and

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18 [1989] AC 177.

19 [1991] 1 AC 398.

20 (1995) 128 ALR 163 at 173.

21 *Id* at 174, referring to *Winnipeg Condominium Corp. No. 36* v *Bird Construction Co. Ltd*, unreported, 26/1/95, a decision of the Supreme Court of Canada delivered by La Forest J, not accepting the approach to the relationship between contract and tort adopted by the House of Lords in *D & F Estates* and *Murphy* but adopting a similar approach to that accepted in *Bryan v Maloney*. The decision of the Full Court of the Supreme Court of Tasmania in the instant case was referred to with approval by La Forest J in *Winnipeg Condominium*.

New Zealand authority[22] and by 'the weight of' recent decisions in the Supreme Courts in Australia'.[23] It is also supported by some United States cases although it is acknowledged that the United States courts have not "spoken with concordant voices"; rather, the trend in that country is "to recognise liability to a subsequent purchaser but to base it upon a transferable warranty of habitability (not requiring privity)" rather than upon the principles of ordinary negligence.[24]

Nor does the joint judgment consider it legitimate to claim, as matter of policy, that the sanctity of contract or the compartmentalisation of the law requires that liability under ordinary negligence principles should be excluded as between parties in a contractual relationship, (given that the contract does not explicitly limit or exclude negligence liability), or indeed that liability to third parties such as a subsequent owner should be excluded or modified simply because the acts complained of (e.g. the shoddy building work) were done, at the time, under a contract for services. The "law of this country [knows] no such policy."[25] Rather, since assumed responsibility and reasonable reliance are together common indicia of the sort of proximity which gives rise to a duty of care to avoid mere economic loss, the joint judgment sees "strong reasons" for finding a relevant relationship of proximity between a builder such as Bryan and a first owner, since the relationship is characterised by an assumption of responsibility (by the builder) and concomitant, known and reasonable reliance (by the owner). The same reasoning is said to apply to the builder's relationship with subsequent owners, albeit that they are not personally knowable at the time of construction.

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22 *Id* at 174, referring in particular to *Bowen* v *Paramount Builders* [1977] 1 NZLR 394; *Mt Albert Borough Council* v *Johnson* [1979] 2 NZLR 234; *Askin* v *Knox* [1989] 1 NZLR 248.

23 *Id* at 174, referring to *National Mutual Life Association of Australasia Ltd.* v *Coffey & Partners Pty. Ltd.* [1991] 2 Qd R 401; *Opat* v *National Mutual Life* [1992] 1 VR 283; *Lowden* v *Lewis* [1989] Tas R 254; *Brumby* v *Pearton* (1991) 10 BCL 291; *Miell* v *Hatjopoulos* (1987) 4 BCL 226.

24 *Id* at 174, referring to *Barnes* v *Mac Brown and Company Inc.* (1976) 342 NE (2d) 619; *Moxley* v *Laramie Builders Inc.* (1979) 600 P 2d 733; *Terlinde* v *Neely* (1980) 271 SE 2d at 768-769; *Blagg* v *Fred Hunt Co. Inc.* (1981) 612 SW 2d 321; *Redarowicz* v *Ohlendorf* (1982) 441 NE 2d 324; *Gupta* v *Ritter Homes Inc.* (1983) 646 SW 2d 168; *Lempke* v *Dagenais* (1988) 547 A 2d 290.

25 *Id* at 170.

The joint judgment however ends on a cautionary note, emphasising that the decision turned upon the particular kind of economic loss involved. This is characterised as "the 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."[26] *Bryan v Maloney* does not necessarily determine the question whether a relationship of proximity exists between the manufacturer and the purchaser or subsequent owner of, say, a chattel in respect of the diminution in the value of the chattel sustained when a latent defect in it first becomes manifest[27].

In a separate judgment, Justice Toohey also found against the builder, placing considerable emphasis upon the relationship of proximity as the cornerstone of negligence, citing the recent High Court decision in *Burnie Port Authority* v *General Jones Pty Ltd*,[28] which emphasised that the practical utility of proximity lies in understanding and identifying the categories of case in which a duty of care will arise.

Toohey J considers in some detail the "difficult" traditional distinction between pure economic loss and economic loss consequent on physical damage negligently caused to property, a difficult distinction which has plagued the building cases. Rather than seeking to establish watertight *a priori* distinctions, Toohey J says that ultimately the question is one of "recoverability in particular circumstances, rather than the allocation of the circumstances to a particular classification."[29]

For Toohey J, the key question is whether proximity can be found in any special relationship between the plaintiff and defendant, and any reliance by the former on the latter. However, again, rather than deduce this from first principles, Toohey J suggests the procedurally more cautious incremental approach[30], associated in the past with Brennan J's interpretation of the common law method. However, incrementalism on its own, in novel cases, will not determine the issue (aside from

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26 *Id* at 174.

27 *Id* at 174.

28 (1994) 179 CLR 520 at 543 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

29 (1995) 128 ALR 163 at 195.

30 *Id* at 197.

counselling caution). Rather, close attention must be paid to the circumstances of the case and the application of principles in similar, previous decisions. Thus, Toohey J, like the majority, turns to *Voli*, in which an architect's duty to subsequent purchasers, at least as regards physical injury or damage, was upheld. Toohey J also notes that the terms of the builder's contract may "serve to identify the principles to be applied in determining the liability of the builder"[31], and that a duty of care may arise in both contract and tort, and to subsequent owners in tort.

The relevant contractual circumstances in this case are the commercial nature of the original contract and the acceptance by the builder of the need to conform to the standard of a reasonably competent builder. Further, the very fact that the appellant was contractually responsible for "a structure, the defects of which might not readily be ascertained by a subsequent purchaser of the house"[32], lends weight to a finding in favour of a duty extending to such later owners. As regards policy considerations, Toohey J cites with approval those identified by the Supreme Court of New Hampshire in *Lempke v Dagenais*[33]. He places some emphasis on the importance of buying and owning a house to the average citizen, both in terms of the relative value of the asset, and its status as accommodative home to the family. Toohey J also draws on the policy discussion of the health and safety issues relating to builder's liability, in the recent Canadian decision in *Winnipeg Condominium* Corporation, whilst noting that the defects in *Bryan v Maloney* were not such as to endanger safety. It may, however, be arguable that at the time of the inadequate construction work, few if any experts, let alone builders, could know whether the defects would manifest themselves in safe, rather than unsafe, structural damage. Toohey J also comments that in cases of non-dangerous defects, especially where the house is old, the plaintiff may

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31 (1995) 128 ALR 163 at 198.

32 *Id* at 198.

33 These are: that latent defects will not manifest themselves for a considerable time, often after the property has been sold to an unsuspecting purchaser; that in a mobile society a builder must expect that the house will be sold within a relatively short time; that a subsequent purchaser has little opportunity to inspect and little experience and knowledge about construction; that the builder already owes a duty to the building owner to build in a workmanlike manner; and that confining recovery to the first purchaser might encourage sham first sales as a means of insulating builders from liability.

find it harder to prove, on the facts, that the defects were caused by inadequate building work, rather than lapse of time or geological factors.[34]

As with the majority, however, Toohey J's judgment concludes on a cautionary note: the plaintiff oriented decision in this case is facilitated by several uncomplicating factors. First, house was built as a non-commercial, residential building. Secondly, nothing impinging on liability (such as an exclusion clause) appeared in the contract between the builder and the original owner. Thirdly, there was no question of when the cause of action vested in the respondent or any issue of limitation of action arising therefrom. Nor did Toohey J consider it necessary to comment on the trial judge's view that no further cause of action could vest in owners following Maloney, because, at the time of any future purchase, a reasonable examination would disclose the defect in the footings.[35] Finally, it should be noted that Toohey J's judgment does not purport to deal with liability for defective products.

The Cautious Dissent: Pure Economic Loss, and the Role of Contract

Brennan J utters the lone dissent in the case. In his view, the type of damage in issue is pivotal to the legal determination. The first category involves physical damage to person or property, for which a defendant "is and always has been" liable under the "paradigm application"[36] of *Donoghue* v *Stevenson*[37]. The second category consists of pure economic loss for which a defendant may be liable in negligence under principles developed from *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd.*[38] To Brennan J, there is a particular reason for this distinction: it is not the pecuniary character of damages or even the manner of their calculation, but rather the kind of loss or damage suffered for which the plaintiff claims compensation that is relevant. The distinction serves a specific purpose in that it distinguishes cases where, in the absence of any contrary factor reasonable foreseeability of the kind of damage actually suffered is sufficient to give rise to the defendant's duty of care from

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34 (1995) 128 ALR 163 at 200.
35 *Id* at 200.
36 *Id* at 176.
37 [1932] AC 562.
38 [1964] AC 465.

cases where reasonable foreseeability alone does not give rise to such a duty. In particular, where the latent defect merely affects the quality of a building/chattel, a 'remote' purchaser should not ordinarily have a negligence claim against the producer;[39] rather, the proper plaintiff, if any, is the original owner, as the damage is really done at the time of construction/manufacture. In asserting this conservative opinion, he reiterates his by now traditional, but almost lone (barring McHugh J) stance against proximity, which he considers an ill-defined judicial tool that invites overly broad discretion and hence uncertainty into the law of negligence[40]

The second plank to Brennan J's dissent is a contractarian approach. For Brennan J a negligence duty does not simply arise independently from the factual matrix that makes up the original contract. Rather, there is a need to ensure that the assumed, and knowable risks and obligations that a builder may contractually enter into with the original owner can be harmonised with any negligence liability to the original or future owners. Clearly, negligence law must respect contract *vis-a-vis* any claim by the original owner and the builder. To Brennan J, it follows that any subsequent purchasers should also have their rights delimited by contract (presumably the contract of purchase by which they acquired title from the previous owner). To do otherwise would raise the possibility of anomalies, if builders can contractually limit their liability to the original owner, yet must insure for liability to all future owners. The majority's position, he says is "tantamount to the imposition ... of a transmissible warranty of quality", a matter better left to Parliament[41]. Ultimately, to Brennan J, the distinction between 'pure' economic loss, and economic loss consequent on damage to person or property, marks a sensible distinction between the interests to be protected by contract and negligence.

How Influential will *Bryan* v *Maloney* be?

In the area of builders' liability, the courts have prevaricated about allocating losses caused by negligent building work and the closely related

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39 (1995) 128 ALR 169 at 187.

40 *Id* at 191.

41 *Id* at 184-185.

issue of inspections. Stapleton observes that this area provided a "particular focus" for litigation in the United Kingdom in the 1970's and 1980's, and characterises these claims as "quality" claims, that is, "claims for pure economic loss associated with the acquisition of property below the quality expected given the circumstances, such as price."[42] It was agreed in *Bryan v Maloney* that the essential damage to the plaintiff was the loss involved in the decrease in value of the house, which was properly measurable by the cost of rectification; moreover, the claim did not involve any allegation that the structure was unsafe. The loss could thus be seen in as a Stapletonian "quality" claim (indeed, Brennan J, in dissent, seemed adamant that pure economic loss not consequent on any physical damage - analogous to buying a defective product - is the only way the loss could be categorised).

In overruling the infamous decision in *Anns*, the House of Lords decided in *Murphy* v *Brentwood District Council* that the cost of remedying defects in a building should not be recoverable notwithstanding the fact that the defect posed a threat to the health and safety of the occupants. By contrast, in the earlier decision in *Dutton* v *Bognor Regis UDC*[43] the plaintiff, a subsequent purchaser, had been considered within the circle of persons to whom a building inspector owed to a duty of care and someone who should have been within the reasonable control of the building inspector when he examined the foundations of the dwelling the plaintiff bought sometime in the future. The duty to inspect was consequent upon the "control" factor and hence a "responsibility" was attributed to the defendant inspector. Duncan has commented that this "now discredited" decision involved the creation by Lord Denning of terms designed to serve a successful outcome for the plaintiff.[44] It is Duncan's view that this case did not deal with the same area as negligent misstatement. For Duncan, the issue in Dutton was the statutory function of inspection for the purpose of checking compliance with the by-laws, rather than the question of negligent issue of a certificate of compliance

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42 J.Stapleton, *Product Liability*, Butterworths, London, 1994, 142.

43 [1972] 1 QB 373.

44 W.Duncan, "Liability for Defective Premises in Queensland" (1990) 11 *The Queensland Lawyer* 81 at 137.

which "s really another question." For Duncan, the difference between the two types of harm is quite clear: the latter is a question of negligent misstatement under the principles in *San Sebastian* which is better "viewed as a particular instance of negligence."[45]

Bryan v Maloney's obvious and immediate repercussions are in the building industry, it now being quite clear that the duty of care extends to cover future, foreseeable owners of houses for structural defects even those that pose no clear danger to the safety or structural integrity of the dwelling. Less certain is whether such duties extend to non-residential, commercial and/or investment constructions. Also for debate is the extent to which *Bryan v Maloney*'s plaintiff friendly approach will be analogised to similar categories outside the strict building decisions (eg the construction of a mobile home, or the excavation of tunnels) - although arguments about liability for the manufacture of chattels in negligence law is rendered fairly academic by the broad reach of the manufacturer of products' liability provisions of Part VA of the *Trade Practices Act* 1974 (Cth)[46]

Consumer Protection

Bryan v Maloney, however, suggests that Australian courts are prepared to recognise the need for consumer redress to purchasers of buildings in suitable situations. This might be viewed as a logical progression for the negligence law, given its modern genesis in *Donoghue v Stevenson*, which was essentially concerned with product liability. The implicit view that a defective structure is a product that has failed a quality test lies at the heart of the decision in *Bryan v Maloney* (notwithstanding the majority's caveat that the judgment does not purport to deal with manufacturing or chattel liability issues). Yet product liability reasoning is implicit in the judgment, and the broad brush references to the "value" of the house. In other words, Mrs Maloney, in good faith, purchased a house - a product - that was simply not made with the required care, skill and diligence: its construction or

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45 *Id*, referring to *San Sebastian Pty Ltd v The Minister Administering the Environmental Planning and Assessment Act* (1986) 162 CLR 340 at 354-5.

46 *TPA* s. 4 defines 'goods' broadly to include, for example, ships, aircraft, minerals and trees.

manufacture did not prove workmanlike, it was not built according to reasonable standards; it was not warrantable.

Furthermore, these were latent defects. The builder was responsible for a structure whose inadequate footings "might not readily be ascertained"[47] by a subsequent purchaser, particularly one who was a residential owner-occupier: the ordinary or civilian "consumer" of houses. The majority's emphasis upon the importance of a house to such buyer's suggests that what might be called a "civilian consumer solution" influenced the Court's assessment of the policy considerations that might limit recovery. This consumer based reasoning is articulated particularly clearly by Toohey J, and is reinforced by the adoption of the policy considerations identified by Thayer J in *Lempke*[48]. Of additional significance is the policy reference to the possibility of bogus first sales as a means of insulating builders from liability should recovery be confined to the first purchaser.

The development of a distinction between the obligations of private defendants such as builders, contractors and architects on the one hand, and those of local public authorities on the other, now looks distinctly likely. The emergence of such a distinction has recently been observed in relation to New Zealand.[49] The purpose served by such a distinction could, of course, be to advance the interests of consumers vis a vis parties such as builders and architects while reining in the liability of local authorities which has caused the courts so much disquiet. While this distinction has been largely eroded in England due to the effect of the House of Lords decisions in *D & F Estates Ltd* (concerning the liability of private defendants) and *Murphy* (concerning local authorities), it remains extremely significant in New Zealand, Canada and Australia.

It might also be suggested that there is a movement in England too, that may lead to a modification of the English approach, given the decisions of the

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47 (1995) 128 ALR 163 at 198 per Toohey J.

48 Which include the finding that the qualifications and position of builders generally, who have superior knowledge, skill and experience, make them better placed to avoid, evaluate and guard against the financial and other risks of defects.

49 I.N.Duncan Wallace, "No Somersault After Murphy: New Zealand Follows Canada" (1995) 111 *LQR* 285.

House of Lords in *White v Jones*,[50] *Henderson v Merrett Syndicates*[51] and *Spring v Guardian Assurance*,[52] all of which advanced the interests of individual consumer, investment or working plaintiffs at the expense of private defendants. However, in the recent decision in *X (Minors) v Bedfordshire County Council*[53] the House of Lords did not countenance a duty of care on the part of the local authority in relation to the protection and education of children, although it did recognise a duty to exercise reasonable skill and care on the part of the educational psychologists and the staff of the local authority (for whom it would of course be liable under the principles of vicarious liability). The House emphasised the policy reasons for denying a duty of care on the part of the local authority in relation to such social welfare obligations, which indicates that if there is to be a change under English law, it will be a slow process involving occasional liability owed by private defendants.

Another interesting aspect to the decision in *Bryan v Maloney* concerns the occasional use by the courts of the law as a means of developing, in the words of Duncan Wallace, "doctrinal and legislative systems of housing control"[54]. Duncan Wallace points to the genesis of this approach in the 1970's following the 1972 decision in *Dutton* in which Lord Denning presided over the Court of Appeal.

Protection of Vulnerable Private Citizens?

Again, Stapleton provides an interesting perspective on the recent developments in this area of law by drawing attention to the increasing significance of questions of 'who had the best opportunity to foresee and avoid the loss?' to the court's ultimate decision. Stapleton phrases this in terms of "deterrence", and sees the issue as particularly important to the liability of "peripheral parties"[55]. She notes that the recent case law dealing with economic loss in the tort of negligence might be interpreted as leading in the direction of "a refocussing of entitlements in this tort in favour of private

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50 [1995] 1 All ER 691.

51 (1994) 3 WLR 761.

52 [1994] 3 All ER 129.

53 [1995] 3 All ER 353.

54 D.Wallace *above* n.49 at 285.

55 J.Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) 111 *LQR* 301.

citizens"[56], where that term is used to describe individual people not acting in pursuit of profit. Curiously, in this view, even critics of restraint in this area might be persuaded of a morally supportable reason for confining liability, by distinguishing more clearly the 'vulnerable' plaintiff from the plaintiff who 'should have known better'. Recent (appellate level) judicial conservatism in the face of novel tort claims might actually signal more than an indiscriminate attempt to hold back the floodgates, for other more significant symbolism may be at work as part of an attempt to use the law for socially justifiable ends:

> If directed, for example, principally at the denial of tort protection to commercial profit-seekers who are disappointed by their activities in the market-place, it could well be an approach consistent with the focus on injured private citizens which characterised pro-compensation advocates of the 1970s. If so, then even those strongly influenced by that legacy might now also see some point in trying to elucidate coherent restraining principles if these are likely to reorient the focus of tort law on the protection of vulnerable private citizens.[57]

In elaborating upon this perspective, Stapleton draws attention to the increasing hostility of the courts to claims of vulnerability by plaintiffs who have suffered economic loss because they chose to rely upon the negligent advice of defendants where they had adequate (if not necessarily as good) means of checking the information themselves. The decision of the Privy Council in *Yuen Kun-Yeu v Attorney-General of Hong Kong*[58] was explicitly reasoned from this premise. In the construction field, Stapleton contends that this reasoning could have provided the 'missing link' to the decision of the Court of Appeal in *Richardson v West Lindsey District Council*[59] and "bolstered the outcome" in *Murphy*.[60]

While this requirement to balance the responsibility of the builder with the capacity of the purchaser to engage in self-protective measures can be applied to, and accommodate, *Bryan v Maloney*, broader considerations seem to

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56 *Id* at 302.
57 *Id* at 303.
58 [1988] AC 175 at 195.
59 [1990] 1 WLR 522.
60 J.Stapleton *above* n.55 at 308.

underpin the Antipodean approach. Both *Bryan v Maloney* and the recent New Zealand Court of Appeal decision of *Invercargill City Council v Hamlin*[61] assess the fact situation from a related but somewhat different consumer perspective. In *Invercargill* the court emphasised the socio-political context of house-building and home-buying in New Zealand where the "obtaining of surveyors or engineers reports by house purchasers is virtually unknown"[62]

For Stapleton, applying the self protection argument in the construction field readily accommodates English decisions such as *Curran v Northern Ireland Co-Ownership Housing Association Ltd*[63] which held that no duty was owed by a public authority to a successor in title even though the case, like *Richardson* and *Murphy*, involved a private citizen claim and a dwelling at the modest end of the housing market. The decisions in *Scally v Southern Health and Social Services Board*[64] and *Van Oppen v Trustees of the Bedford Charity*[65] are explained as complementary to the principle: in *Scally*, the House of Lords held that an employer was under a duty to take reasonable steps to bring the terms of that employment agreement to the attention of its employees, where they could not reasonably be expected to be aware of those terms unless drawn to their attention. The denial of the duty in *Van Oppen* can be explained from the perspective that risk was or could easily have been appreciated by the plaintiff, "even if only a private citizen."[66] The "harsh application" the principle in *Reid v Rush & Tompkins Group Plc*,[67] where a financial relationship (as in *Scally*) existed between the parties is explicable from both the self protection and the legalistic perspective. According to Stapleton, "In the light of the plaintiffs' opportunities to avoid the risk in such cases, the defendants can be seen as merely peripheral in a causal sense."[68]

The situation is seen differently in situations where the plaintiff has been aware of the risk and bargained and paid for protection against it from the

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61 [1994] 3 NZLR 513.
62 *Id* at 530, per Casey J.
63 [1987] AC 718.
64 [1992] 1 AC 294.
65 [1990] 1 WLR 235.
66 J.Stapleton *above* n.55 at 309.
67 [1990] 1 WLR 212.
68 J.Stapleton *above* n.55 at 309.

defendant. Such cases (eg *Smith v Eric S Bush*[69] are not cases where no duty should be found because the plaintiff has failed to take self-protective measures, "because the payment elevates the adviser from peripheral to a principal causal status"[70].

Whilst a notion such as 'vulnerability' may both seem to elide with the post breach of duty issue of contributory negligence, and offer none of the certainty or constraints on judicial discretion and values that opponents of proximity crave, it may offer a useful and realistic organising theme around which seemingly irreconcilable decisions can be understood.

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69 [1990] 1 AC 831.

70 J.Stapleton n.55 at 308-309.