

Builders' Liability for Latent Defects: Recent Developments in the Torts-Contract Demarcation Dispute

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Introduction

In *Bryan v Maloney*,¹ a majority of the High Court² held that the liability of builders to the owner of a house for latent defects which result in diminution of the value of the property is no longer to be regulated exclusively by the law of contract but is also properly a concern of the law of torts. In the case the majority allowed the third owner of a residential home to recover from the original builder the economic loss representing the diminution in the value of the house as a result of it being constructed with inadequate footings. Prior to this decision, a subsequent purchaser had no right to sue a builder for loss caused by the manifestation of a latent defect.³ No remedy was available in negligence, as the loss suffered by the purchaser, being purely economic loss, was thought to be recoverable only upon a contractual action for a breach of a warranty as to quality - an action obviously unavailable to a subsequent purchaser.

The decision of the majority in *Bryan v Maloney* represents an important expansion of the circumstances where a plaintiff will be able to recover pure economic loss resulting from the defendant's negligent provision of work or services under a contract to which the plaintiff was not a party, and as such marks a further expansion of tortious liability into what was previously considered the exclusive domain of contract. This case deserves close analysis, as the judgments contain many important and interesting pronouncements on the principles which should govern the recovery of pure economic loss where the relevant services were provided by the defendant under a contractual obligation to either the plaintiff or to another person. The case repre-

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1 (1995) 128 ALR 163.

2 Mason CJ, Deane, Toohey and Gaudron JJ; Brennan J dissenting.

3 Absent a negligent misrepresentation by the builder to the purchaser as to the quality of the building.

sents another attempt by the High Court to deal with the complex question of the proper ambit of the law of torts vis-a-vis the law of contract, and is the most significant case in Australian law to examine the relationship between these two areas of civil obligation since *Hawkins v Clayton*.⁴ Before I turn to consider the judgments in *Bryan v Maloney* in some detail I will first briefly consider the reasons which are most commonly advanced for the view that contractual principles alone should regulate the liability of a builder to a subsequent home purchaser for a defect in the quality of the house.

Arguments in Favour of the Exclusivity of Contractual Principles

Some commentators and members of the judiciary have questioned the legitimacy of regulating the liability of builders to subsequent purchasers for latent defects by the use of tort law. They take the view that the difficulty with the imposition of liability in this context stems from deficiencies in contract law which can be remedied more efficaciously by modifying contractual principles - such as the privity doctrine - than by an expansion of tortious principles. Three main reasons are usually advanced against imposing liability in tort.⁵

First, it is argued that quality of construction work is a matter of contractual warranty, and that such warranties cannot be easily defined or regulated by tort law. It is argued that a builder does not warrant, except in contract to the first owner with whom there is a building agreement,⁶ that the house is of reasonable quality. To hold a builder liable except in contract 'would be to open up a new field of liability the extent of which could not ... be logically controlled'.⁷ This is a major reason advanced by the House of Lords for denying that a person engaged in any role in the production and construction of new buildings owes a duty of care to later owners or occupiers to avoid economic loss consisting of the diminution in value of the building upon the manifestation of a hidden defect: *D&F Estates Ltd v Church Commissioners for England*⁸ and *Murphy v Brentwood District*

4 (1988) 164 CLR 539.

5 These three reasons were relied upon by Brennan J in *Bryan v Maloney*, in order to deny liability: see below. These concerns were also identified by La Forest J in *Winnipeg Condominium Corp No 36 v Bird Construction Co* (1995) 121 DLR(4th) 193 who saw them as ultimately being founded on the policy concern that builders should not be exposed to indeterminate liability.

6 In the absence of an exclusion or limitation of liability clause.

7 *Dutton v Bognor Regis UDC* [1972] 1 QB 373 at 414 per Staples J.

8 [1989] AC 177 at 206, 216-217.

Council.⁹ The concern consistently expressed by the House of Lords is that to allow recovery for the cost of repairing defects in buildings would have the effect of creating a non-contractual - and indefinite - warranty of quality. The imposition of a warranty of this kind on a builder in favour of an owner of the house would be contrary to any sound policy requirement where there is no contractual relationship between the parties,¹⁰ and is a matter which should be left to the legislature. A similar concern has also been expressed by the Supreme Court of Canada.¹¹

A second, and closely interrelated, reason commonly advanced for refusing to recognise an entitlement in the subsequent purchaser to sue in negligence is a concern that tort law does not have the appropriate mechanisms to recognise and respect a clause in the original building agreement which qualifies the scope of the duty of care owed by the builder or which alternatively limits or excludes the liability of the builder. Where the obligations of the builder or the consequences of a breach of those obligations are dealt with by a contract which forms part of the matrix to the tort claim, the financial interests of the builder may be unfairly prejudiced should the court ignore the protection negotiated for by the builder in the contract. For this reason, Fleming considers that it is problematic for the law of torts to regulate the relationship between two parties where the relevant obligations of one of the parties is regulated by a contract to which the other party is not privy.¹² He would prefer the development of a contractual solution, such as a doctrine of contractual assignment as is commonly used in the United States, acknowledging however that such an approach is currently stymied by the inflexibility of the privity doctrine in Anglo-Australian law.¹³

Both of the concerns mentioned are merely specific instances of the broader issue which arises in this context: to what extent should the law of torts be permitted to interfere with the contractual rights and responsibilities allocated in the original building agreement? The problem is well stated by Barrett:¹⁴

9 [1991] 1 AC 398 at 468-469, 480-481, 488-489, 497-498.

10 *Junior Books Ltd v Veitchi Ltd* [1983] 1 AC 520 per Lord Brandon.

11 See also *La Forest J in Winnipeg* (1995) 121 DLR(4th) 193 at 215-216.

12 JG Fleming, 'Tort in a Contractual Matrix' (1995) 3 *Tort Law Review* 12.

13 See also Markensinis, 'External and Troublesome Triangles' (1990) 106 *LQR* 556; Beyleveld and Brownsword, 'Privity, Transitivity and Rationality' (1991) 54 *MLR* 48.

14 Barrett, 'Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis' (1989) 40 *SCL Rev* 891 at 941.

Perhaps more so than any other industry, the construction industry is 'vitaly 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.

This issue will be discussed at length below in the section headed 'Tort Liability and Contractual Allocation of Risk'.

A further, and again interrelated, concern raised by the recognition of a duty of care owed by builders to subsequent purchasers for latent defects is that it is contrary to the principle of *caveat emptor*. This principle embodies two major interlinking propositions: a purchaser of a house must rely upon the purchaser's own investigations and inquiries, and a builder gives no implied warranty of quality or of fitness for human habitation in favour of a purchaser of a previously constructed house. Accordingly, if the purchaser seeks greater protection than the purchaser's own investigations and inquiries provide, appropriate warranties should be sought from the vendor.¹⁵ Both the High Court and the Supreme Court of Canada have denied that the doctrine should operate in cases of latent defects, concluding that it is the builder who is best placed to guard against loss caused by latent defects.¹⁶ This will be discussed further in the next section of this article.

The Decision in *Bryan v Maloney*

Facts

In 1979 the appellant, Mr Bryan, a professional builder, constructed a house for his sister-in-law, Mrs Manion. There was no evidence of the price paid by Mrs Manion for the construction of the house, but it was not suggested that the dealings between Mr Bryan and Mrs Manion took place other than according to a normal commercial transaction, nor that the house was to be built other than in accordance with standard building practice. Further, there was no evidence

¹⁵ See Huband JA in the Manitoba Court of Appeal in *Winnipeg Condominium Corp No 36 v Bird Construction Co* (1993) 101 DLR(4th) 699.

¹⁶ *Bryan v Maloney*, *Winnipeg* (1995) 121 DLR(4th) 193.

that the contract between Mr Bryan and Mrs Manion attempted to modify Mr Bryan's liability for defective construction of the house. Mrs Manion later sold the house, and in 1986 the new owners sold it to the respondent, Mrs Maloney, for an unknown purchase price.

According to the evidence, Mrs Maloney inspected the house three times before purchasing it and despite the fact that she looked specifically for cracks on the outside wall, she found none, nor did she notice any other defects. Mrs Maloney was not aware of, and neither did she make inquiries about, the identity of the builder. Her evidence was that she thought the house 'would be built properly'.¹⁷ Cracks began to appear in the walls of the house six months after Mrs Maloney purchased it, and subsequently the damage to the fabric of the house became quite extensive. The reason for the damage was that the house had been constructed by Mr Bryan with footings which were inadequate to withstand the seasonal changes in the reactive clays in that area.

In the proceedings in the Full Court of the Supreme Court of Tasmania and in the High Court the case was conducted on the basis that Mr Bryan had been negligent in constructing the house with inadequate footings and that the damage suffered by Mrs Maloney was purely economic loss resulting from the diminution in the value of the house due to the inadequacy of the footings. The only major - this being the most fundamental - question to be decided by the High Court was whether a professional builder who constructs a house for the owner of land owes a duty to a subsequent purchaser to take reasonable care to construct the house so as to avoid a reduction in the value of the house when a non-dangerous latent defect becomes manifest.

Majority Judgments

Mason CJ, Deane, Toohey and Gaudron JJ (Toohey J delivering a separate judgment) answered this question in the affirmative. Although the majority judges expressly stated that the decision was confined to cases involving a building erected as a permanent dwell-

¹⁷ *Bryan v Maloney* at 164.

ing house¹⁸ the reasons given for allowing recovery appear to be applicable equally to commercial buildings as to residential homes.¹⁹

Because this was a novel category of case, the question whether there was requisite proximity had to be approached by drawing analogies with related situations and by an examination of applicable policy considerations.

As the closest comparable relationship is the relationship between a builder and the *first* owner²⁰ it was appropriate to examine the factors which would establish proximity in that relationship. Their Honours pointed out that it has been established for some time that the existence of a contractual relationship between the builder and the first owner does not preclude the concurrent existence of a relationship of proximity between them and a resultant duty of care.²¹ Conversely, the existence of a contractual relationship is a significant factor which might point to the presence of the necessary proximity between the contracting parties - or possibly between a contracting party and a third person.²² Their Honours considered that in the case before them Mr Bryan and Mrs Manion were sufficiently proximate by virtue of their contractual relationship.²³ Given that a clear relationship of proximity would exist with respect to physical damage, the Court clearly saw it as a small step to also find a proximate relationship in relation to any economic loss suffered by a first owner which is caused by the manifestation of a latent defect.

18 Id at 174 and at 199 per Toohey J. Their Honours made plain that the principles laid down were not determinative of the question whether a manufacturer of a chattel with a latent defect is liable for the economic loss suffered by a subsequent purchaser of the chattel when the defect becomes manifest.

19 *Bryan v Maloney* at 174. Some support for this may be derived from *Winnipeg* (1995) 121 DLR(4th) 193, a case involving commercial premises. However, it seems that where the premises are used for commercial purposes it may be that the element of reasonable reliance will be more difficult to establish. Specifically, it might be expected that a purchaser of commercial premises would commission an engineer to provide a building report.

20 The term 'first owner' is used in this article to refer to the owner of the land who contracted with the builder to construct the house in question.

21 *Bryan v Maloney* at 167, citing *Voli v Inglewood Shire Council* (1963) 110 CLR 74 per Windeyer J. See also *Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761 in relation to the professional liability.

22 *Bryan v Maloney* at 169. The statements in the joint judgment about the relevance of the contractual terms to the duty imposed in negligence is discussed below under 'Tort Liability and Contractual Allocation of Risk'.

23 The absence of an exclusion or limitation of liability clause in the contract was relevant to this decision.

Having established that Mr Bryan owed a duty of care to Mrs Manion to prevent the type of loss suffered by Mrs Maloney, the majority then turned to the question whether a builder could owe a duty of care to Mrs Maloney as a subsequent purchaser. Mason CJ, Deane and Gaudron JJ confirmed that the loss suffered by Mrs Maloney was merely economic loss 'in the sense that it was distinct from, and not consequent upon, ordinary physical injury to person or property'.²⁴ They recognised however that the distinction between this type of economic loss and physical damage to property 'is an essentially technical one'.²⁵ Given that it appears the defect in the house was not dangerous²⁶ the classification of the loss as economic loss appears to be supported by the weight of English and Australian authorities.²⁷

Although the majority recognised that traditionally, *sans* a contractual relationship, a builder would be liable for a latent defect only where it caused damage to persons or other property,²⁸ the judges thought that the type of loss here claimed was arguably less remote, and more readily foreseeable, than ordinary physical damage to the owner or to other property of the owner caused by the collapse or partial collapse of the house. As long as the requirement of proximity was satisfied, a duty would be owed. In this regard, the absence of direct dealing between the builder and the subsequent purchaser would not preclude a finding of proximity. Further, the very existence of the house was an important factor establishing proximity, as it was a structure which was intended to last indefinitely and which represented a significant investment by the purchaser.

In determining the question of proximity, the majority emphasised that the Court should look to determine whether the indicia of a 'special relationship' for the purposes of the law of negligent misrepresentation, namely assumption of responsibility and/or reliance,

24 *Bryan v Maloney* at 165. Their Honours rejected the application of the 'complex structure' theory (which was advocated by Lord Bridge of Harwich in *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 at 207) in a case, such as the present case, where the entire building was erected by one builder. Accordingly, this theory could not be relied upon to characterise the damage in this case as ordinary physical injury.

25 *Bryan v Maloney* at 169.

26 *Id* at 199 per Toohey J.

27 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 503-505, 512 cf 446-447; *D & F Estates* [1989] AC 177 at 206, 213, 216 per Lord Oliver; *Murphy v Brentwood* [1991] 1 AC 398 at 466-468, 475, 484-485, 492-493; *Department of the Environment v Bates* [1991] 1 AC 499 at 519.

28 Or possibly in the view of Toohey J, a builder would be liable for a latent defect where it posed a *danger* to persons or other property.

were present in the relationship between the builder and the subsequent purchaser. It was held that on the facts before the Court the requisite elements of reliance and responsibility were met: Mr Bryan undertook the responsibility of erecting the house on the basis that its footings would be adequate to support it for a period of time which included the time at which Mrs Maloney suffered the damage, and Mr Bryan must have been aware that a subsequent purchaser in the position of Mrs Maloney would assume the footings were adequate. It would appear then from this case that these requirements will be easily fulfilled where the claim is against a builder for a latent defect. The requirement of assumption of responsibility will apparently be met even though there is no express representation by the builder as to the quality of the work, provided the builder has not disclaimed liability. The practical effect of this approach is the creation of an implied representation by the builder that the house was built with reasonable care and skill.²⁹

The second requirement, the reliance element, appears to be a matter of presumption. According to the evidence in this case Mrs Maloney did not inquire about, and was otherwise unaware of, the identity of the builder of the house and so could not establish specific reliance on the house having been adequately built by Mr Bryan. Apparently then it is to be presumed that the purchaser relied upon the builder having constructed the house safely: the purchaser is not required to prove that she *in fact* relied on the particular builder in any respect. This approach might be questioned. While there may be good reasons for adopting a presumption of reliance where the parties are in a close professional relationship commonly characterised as one of trust and confidence, eg solicitor and client,³⁰ absent a professional, or even a personal, relationship between the parties, the rationale for such a presumption is obscure. Further, the majority's approach to reliance in this case expands the concept of reliance beyond that of 'known reliance' which previously had been adopted in *Caltex Oil v The Dredge 'Willemstad'*.³¹ Likely reliance will suffice.

Turning to the question whether there were any policy reasons which should preclude the recognition of a duty of care, Mason CJ, Deane

29 This was rejected by Brennan J: *Bryan v Maloney* at 186. Brennan J discusses the matter in his judgment and concludes that there is no evidence of either a representation or reliance in this case.

30 *Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761 at 776 per Lord Goff.

31 (1976) 136 CLR 529, in particular Gibbs and Mason JJ. See also McDonald & Swanton, 'Builders' Liability for Negligence Towards Subsequent Owners of the Property' (1995) 69 *ALJ* 687 at 689.

and Gaudron JJ effectively rejected the argument that the *caveat emptor* principle applied to militate against liability. Instead, they took the view that:³²

by virtue of superior knowledge, skill and experience in the construction of houses, it is likely that a builder will be better qualified and positioned to avoid, evaluate and guard against the financial risk posed by latent defect in the structure of a house [as against a subsequent purchaser].

The recognition of the fact that it is the builder, not a subsequent purchaser, who is the best placed to detect and bear the risk of hidden defects does seem to more accurately reflect the realities of the modern house-buying market,³³ and constitutes a compelling policy reason for imposing liability.³⁴ The reality is that it is not usual practice for house purchasers to commission an engineer's report to investigate the structural soundness of the house. As such, there is usually no practical opportunity on the part of subsequent purchasers to guard against the risk of loss caused by a latent defect. The absence of an opportunity to guard against the risk by self-protective measures has recently been viewed as an important factor favouring the recognition of a duty of care in tort.³⁵

The traditional policy justifications for denying recovery of economic loss - namely the potential for imposing indeterminate liability on the builder, and the shifting of a financial loss from the purchaser to the builder with insufficient justification - were thought by the majority to have little application in this context. Unlike other categories of case where economic loss is recoverable, there is no real danger that builders will become liable potentially in an indeterminate amount, to an indeterminate number of successive owners or over an indeterminate time period. The loss recoverable will be limited to the cost of rectifying the house³⁶ and there will be only a limited number of subsequent owners. Presumably also the number of potential claimants is limited by the requirement of reasonable reliance: a purchaser subsequent to the purchaser who owned the house when the defect

32 *Bryan v Maloney* at 172-173. Similar comments were made by Osborne, 'A Review of Tort Decisions in Manitoba 1990-1993' [1993] *Man L J* 191 at 196.

33 See also *La Forest J* in *Winnipeg* (1995) 121 DLR(4th) 193 at 220-221.

34 Toohey J also recognised the additional policy consideration that confining recovery to the first purchaser might encourage sham first sales as a means of insulating builders from liability.

35 JG Fleming, note 12 above, at 18ff. This view has its genesis in the judgment of Lord Brandon in *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 819 and has found a strong advocate in J Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 *LQR* 249 at 271-277.

36 *Bryan v Maloney* at 171-172.

became evident would be disentitled from bringing an action on the basis that a reasonable examination at the time of purchase would disclose the defect in the footings.³⁷

Further, the time span for potential liability is limited to that which is reasonable. The majority recognised that the duty to subsequent purchasers will not continue indefinitely, and may be shorter than the actual habitable life of the building. There will come a time when the damage is no longer reasonably foreseeable, and is no longer attributable to a breach of a reasonable standard of care in the construction of the building, but rather to normal wear and tear factors.³⁸ Toohey J in particular recognised that as time passes it may be more difficult to show that the defect was the result of negligence and not of normal wear and tear not associated with the standard of construction.

It is interesting to note that the majority did not discuss whether this case could be analysed as a 'transferred loss' case. The 'transferred loss' doctrine has been accepted into both English³⁹ and Canadian⁴⁰ law, although there is some controversy whether the doctrine applies where the loss consists of pure economic loss.⁴¹ The nature of a 'transferred loss' is succinctly explained by Lord Mustill in *White v Jones*:⁴²

In situations where party A has a cause of action for a breach of duty by the defendant, but the loss resulting from the breach is suffered not by A himself but by B, the loss is 'transferred', or attributed, to A so as to enable him to recover damages for the breach.

The loss must be one which could be suffered indifferently by the claimant or by another person but has fallen on the claimant due to events which have occurred subsequently to the breach of duty.⁴³ It

37 This was the view taken by the trial judge. Toohey J, the only member of the High Court to refer to this matter, apparently endorsed this approach. He, however, declined to reach a concluded view.

38 *Bryan v Maloney* at 171-172.

39 *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785; *White v Jones* [1995] 1 All ER 691 at 707-708, 723-724.

40 *Canadian National Railway Co v Norsk Pacific Steamship Co* (1992) 91 DLR(4th) 289; *British Columbia Hydro and Power Authority v ND Lea & Associates* (1992) 92 DLR(4th) 403.

41 In *Canadian National Railway Co v Norsk Pacific Steamship Co* (1992) 91 DLR(4th) 289 La Forest J held that the doctrine only applies where the claim is one for property damage, not for economic loss. No such limitation, however, appears to have been placed on the application of the doctrine by either Lords Goff or Mustill in *White v Jones* [1995] 1 All ER 691.

42 *White v Jones* [1995] 1 All ER 691 at 723-724.

43 *Ibid.* See also Lord Goff at 707-708.

appears this doctrine may have provided an alternative means of analysis open to the Court in *Bryan v Maloney*. Presumably, however, their Honours saw it preferable to proceed to recognise liability on an 'incremental' approach⁴⁴ rather than to achieve that result by the introduction of a radical new notion into the law of Australia.

The majority decision represents a further example of the Mason Court feeling compelled to act to remedy a manifest social injustice which some legislatures have steadfastly refused to face. Further, such an approach is consistent with the increasing move by the courts and legislature to a 'neighbourhood' view of the law of obligations which seeks to protect the party who is the least informed, or the least placed to avoid harm, in a social or business relationship or dealing.⁴⁵ Although problematic from a doctrinal perspective, it will be welcomed by many as a long-overdue development securing practical justice for home purchasers. The onus is now placed on the legislatures to place practical limits on the liability of builders if considered desirable, by means of fixed limitation periods for example.⁴⁶

Dissenting Judgment

Brennan J⁴⁷ wrote a lengthy and persuasive dissent holding that liability should not lie, expressing a clear preference for the liability of builders to be regulated exclusively by contract law. His Honour first discussed at some length the correct categorisation of the relevant loss. He considered that it is artificial to classify defects in a building as pure economic loss, as the defects are physical defects with physical consequences which require rectification. So although not physical damage within *Donoghue v Stevenson*, neither are these defects to be classified as pure economic loss.⁴⁸ On the approach of Brennan J, it is the defective nature of the building, not the external manifestations of the defect, that is the relevant damage. If the defects are the relevant damage, the only cause of action vests in the first owner, as they were the owner when the damage occurred⁴⁹ and that owner's rights

44 This approach has strongly been advocated by Brennan CJ in a number of decisions.

45 Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37.

46 Legislatures in Victoria, South Australia and the Northern Territory have introduced fixed limitation periods, in each case commencing from early dates: *Building Act 1993* (Vic), *Development Act 1993* (SA) and *Building Act 1993* (NT).

47 Now Chief Justice Brennan.

48 *Bryan v Maloney* at 184.

49 *Id* at 187, citing his judgment in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 490-493.

against the builder will be governed by the building contract. Whatever the classification of the loss, the defects did not fall within *any* category of damage for which damages in negligence might be awarded at the suit of Mrs Maloney.⁵⁰ Brennan J was however careful to emphasise that there was no evidence that the defects in the case at hand posed a risk of danger to persons or other property. If the defects had been dangerous, Brennan J would have been disposed to recognising liability in negligence to reimburse the subsequent purchaser for the costs incurred in restoring the house to a non-dangerous condition. This aspect of his Honour's judgment will be considered in more detail in the following section.

Brennan J saw no reason for imposing liability in negligence in favour of a subsequent purchaser where the loss is purely economic resulting from a reduction in the value of the house due to a non-dangerous defect. He argued that it is one thing to impose a duty to avoid or prevent physical injury, and another to impose liability on a builder to a subsequent purchaser for a building or chattel where it will be sold in an open market in which the price will reflect the quality of the thing to be sold. In the absence of any risk of damage, there is no reason why the law of negligence should impose a duty to protect the purchaser's financial interests: where the loss relates solely to the quality of the building or chattel it is the law of contract which should appropriately protect the purchaser's interests, not the law of torts. And the financial interests of a house purchaser are protected by the law of contract only in so far as the purchaser has a remedy against the vendor according to the terms of the contract of sale.⁵¹

In relation to the financial interests of builders, Brennan J recognised that it would be anomalous if the builder's liability to the first owner was governed by the original building agreement, under which liability could be extinguished or modified, whereas liability in relation to the subsequent owner was to be governed by tort law which was not able to bind the purchaser to the contractual terms. His Honour pointed out that:⁵²

Such a situation would expose the builder to a liability for pure economic loss different from that which he undertook in constructing the building

50 *Bryan v Maloney* at 185.

51 *Id* at 181. His Honour draws support from the principle of *caveat emptor*. This principle, however, is now so besieged by legislation and judicial decisions, that it can probably be stated that it has come to be applied in the exception rather than the rule, and as discussed previously does not reflect the realities of the house buying market.

52 *Id* at 184.

and would confer a corresponding right on the remote purchaser which the purchaser had not sought to acquire from the vendor.

Accordingly, in order to protect the interests of the builder, the builder's duty of care imposed at common law would have to be modified by a consideration of the work which the builder had agreed with the first owner would be performed.⁵³ However, this would have the unsatisfactory effect that the interests of the subsequent purchaser would be governed by a contract to which that purchaser was not a party and who knew nothing of its terms. Accordingly, his Honour agreed with the House of Lords⁵⁴ that to impose liability on the builder in negligence would be inappropriate as it would be tantamount to imposing a 'transmissible warranty of quality' in tort. Not only was this result unsatisfactory from a doctrinal point of view, it would have the effect of inflating building costs. Accordingly, it was not appropriate for the courts to undertake an expansion of remedies in this area: this was a matter which should be left to the legislature.⁵⁵

The Intermediate View: The Cost of Remedying Dangerous Defects

Given that two of the four members of the majority in *Bryan v Maloney* have since departed from the High Court,⁵⁶ it is worthwhile considering the area of common ground between the majority and Brennan J: that is, the issue of dangerous defects. Brennan J accepted what is often referred to as the 'intermediate view'⁵⁷ that a builder is liable to a subsequent purchaser in negligence for the costs incurred in remedying a dangerous defect so as to restore the house to a safe condition. Damages are to be measured, not by the cost of repairing the damage which has resulted from the manifestation of the defect, but by the (possibly lesser) cost of putting the building into a state in which it no longer poses a danger to the occupants of the building or

53 In this case, Brennan J thought it would have been critical to determine whether Mrs Maloney had requested, and was willing to pay for, soil tests which would have revealed the reactive clays and would have allowed for 'special precautions' to be taken: *id* at 182. There was no evidence as to these matters.

54 See 'Arguments in Favour of the Exclusivity of Contractual Principles' above.

55 However, Brennan J did not completely rule out the possibility of liability in tort of a builder to a subsequent owner of a defective house who has suffered economic loss resulting from a non-dangerous defect: the purchaser will have a good cause of action if the requirements of the law of negligent misstatement are met. In this case there was no allegation of a negligent misstatement by the builder.

56 Mason CJ and Deane J.

57 Laskin J (dissenting) in *Rivtow Marine v Washington Iron Works* [1974] SCR 1189 at 1221-1222.

to other property. As will be discussed shortly, this intermediate view is the view which currently represents the law in Canada.

Although the majority judges in *Bryan v Maloney* did not discuss this issue at any length, it is clear that their Honours would find a builder liable to a subsequent purchaser for the costs of rectifying a defect so as to avert danger.⁵⁸ Accordingly, all five of the judges would have agreed that tort should regulate liability for dangerous defects. Brennan J acknowledged that the rectification costs of dangerous defects should be classified as pure economic loss: the relevant loss consists of the sum which the occupier has to expend to rectify the defects before actual physical damage occurs, rather than the consequence of the physical defects.⁵⁹ However, he considered that recovery should be permitted for this type of economic loss because *at base* the duty is of the *Donoghue v Stevenson* kind - to avoid physical damage - and thus represents a legitimate development of the *Donoghue v Stevenson* principles. Further, there are patently sound policy considerations underlying this development: the owner of premises is to be encouraged to remedy defects before they cause physical injury to persons or property.⁶⁰ On this view an owner who *actually incurs*⁶¹ expense to remedy a defect in order to avoid a substantial risk of damage to persons or other property, will have a remedy to recover this economic loss in tort.

This intermediate view of liability was adopted by the Supreme Court of Canada in *Winnipeg Condominium Corp No 36 v Bird Construction Co*⁶² which dealt with the question of the liability of a builder to a subsequent purchaser for a dangerous defect in a commercial building. In that case the exterior cladding on an apartment building was

58 *Bryan v Maloney* at 173 and in particular, at 199, per Toohey J, who indicated that he would have been open to an argument that the loss caused by a latent defect is not invariably to be classified as pure economic loss where the defects pose a danger to persons or to other property. His Honour did not express a concluded view on this issue as he was prepared to act on the basis that the loss suffered by Mrs Maloney was purely economic loss. In any event, it seemed that there had been no direct finding by the trial judge that the defects in this case were potentially dangerous.

59 *Id* at 188-189.

60 *Id* at 189. His Honour saw this ground of liability as being analogous to the remedy available to a rescuer who protects a potential victim from damage threatened by the defendant's negligence.

61 It is important to note that Brennan J would not allow compensation unless the costs of remedying the defect had actually been expended: the costs of rectification can not be recovered in advance.

62 (1995) 121 DLR(4th) 193.

built defectively and posed a threat to persons or property.⁶³ The Court, endorsing the view earlier expressed by Laskin J in his partially dissenting judgment in *Rivtow Marine Ltd v Washington Iron Works*,⁶⁴ held that a subsequent purchaser of the building was entitled to be compensated for the costs incurred in rectifying the defect and making the building safe. This was the position even though no actual physical damage to persons or to other property had resulted from the defective cladding. La Forest J, who delivered the judgment for the Court, stated the relevant principle as follows:⁶⁵

where a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain defects resulting from that negligence which pose a real and substantial danger to the occupants of the building, the reasonable cost of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort by the occupants. The underlying rationale for this conclusion is that a person who participates in the construction of a large and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons or property in the community, should be held to a reasonable standard of care.

La Forest J pointed out that there are strong policy reasons for refusing to draw a distinction between actual and threatened danger.⁶⁶

Under the law as developed in *D & F Estates* and *Murphy*, 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, either intentionally or through neglect, allows a defect to develop into an accident may benefit at law from the costly and potentially tragic consequences. In my view, this legal doctrine is difficult to justify because it serves to encourage, rather than discourage, reckless and hazardous behaviour. Maintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive

63 La Forest did not therefore feel it necessary to decide the question whether a non-dangerous defect would be compensable.

64 [1974] SCR 1189.

65 (1995) 121 DLR(4th) 193 at 203.

66 *Id* at 213. See also Cooke, 'An Impossible Distinction' (1991) 107 *LQR* 46 at 70 who expressed the rationale as follows:

'The point is simply that, prima facie, he who puts into the community an apparently sound and durable structure, intended for use in all probability by a succession of persons, should be expected to take reasonable care that it is reasonably fit for that use and does not mislead. He is not merely exercising his freedom as a citizen to pursue his own ends. He is constructing, exploiting or sanctioning something for the use of others. Unless compelling grounds to the contrary can be made out, and subject to reasonable limitations as to time or otherwise, the natural consequences of failure to take due care should be accepted.'

for plaintiffs to mitigate potential losses and tends to encourage economically inefficient behaviour.

Further, the absence of a contract between the parties was not problematic as the duty to construct houses to a reasonable standard of safety was not dependent on a contractual obligation to do so; rather it was an independent obligation arising in tort to construct the building safely. Furthermore, the builder would not be permitted to say that it owed no duty to construct the building without dangerous defects as the builder had complied with the contractual specifications: the builder may be required to go further than the contractual specifications in order to ensure the building is safe.⁶⁷ This latter proposition places an important qualification on the general principle that the duty of care imposed in negligence may be circumscribed by more limited obligations stipulated in the contractual arrangements, and will be considered in more detail in the next section.

In *Winnipeg* the purchaser was thus entitled to recover the cost of removing the danger posed by the faulty cladding, but not the cost of any repairs that would serve merely to improve the quality, and not the safety, of the building.⁶⁸

In England, despite occasional dissentients,⁶⁹ there is still strong judicial support for the traditional view that costs incurred by a plaintiff in repairing a defective building are characterised as economic loss where the cost of repairs is not consequential upon personal injury or damage to other property. In *D & F Estates* Lord Bridge stated the English position as follows:⁷⁰

liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic.

67 (1995) 121 DLR(4th) 193 at 217-8. La Forest J recognised that there are more compelling policy reasons for imposing liability where the defect is dangerous rather than where the work is merely shoddy or substandard but not dangerously defective. In the latter class of cases the courts are not concerned with safety matters, but are merely concerned with 'the questions of quality of workmanship and fitness for purpose': at 215-6.

68 (1995) 121 DLR(4th) 193 at 215-6.

69 Most notably Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728 and Lord Brandon in *Junior Books v Veitchi* [1983] 1 AC 520.

70 [1989] AC 177 at 206. See also *Murphy v Brentwood* [1991] AC 398 at 470-1, 475, 480-1, 488-9, 497-8.

Lord Oliver reached a similar conclusion in that case.⁷¹ It is submitted that the English position is unsatisfactory as it fails to provide adequate incentives for occupiers to repair dangerous defects. It is based on the completely unrealistic view that a home owner who discovers a dangerous defect has a choice to discard the home rather than remedy the defect.⁷² It is submitted that even if a differently constituted bench of the High Court was resistant to the proposition that the law of torts should impose liability for non-dangerous defects, the Court would be persuaded to allow a remedy in tort for dangerous defects due to the distinctive policy factors supporting liability in that situation.

Tort Liability and Contractual Allocation of Risk

As discussed above, the joint judgment in *Bryan v Maloney* confirmed that the existence of a contract to do the relevant building work did not automatically preclude the imposition of liability in tort. Nevertheless their Honours recognised that the existence of a contractual relationship is not completely irrelevant to the application of tort rules. The existence of a contract - either between the parties or as part of the contractual context within which the parties operate - may be relevant to establishing proximity. Alternatively - and this is the point I wish to pursue further - the contract might by its terms militate against recognition of a relationship of proximity or modify or exclude the liability which would otherwise be imposed in tort.⁷³ That liability in tort will be modified or excluded by contractual terms is most clear where the conduct which is said to form the basis of the liability in tort is also regulated by a contractual relationship between the same parties to the tort action (that is, in a potential concurrence-of-liability situation). More controversially however, there is some indication in Australia and in Canada that the rights of a subsequent purchaser in negligence against the builder are likewise affected by a contrary allocation of rights and responsibilities in the original building agreement. It is therefore necessary to discuss the effect of the provisions of the original building agreement on the tortious liability of the builder to both the first owner and to subsequent purchasers.

71 [1989] AC 177 at 213-4.

72 See *La Forest J in Winnipeg* (1995) 121 DLR(4th) 193 at 214-5.

73 (1995) 128 ALR 163 at 167-8.

Liability to First Owner

As the contract in *Bryan v Maloney* did not contain a clause purporting to modify the duty or liability of Mr Bryan for defects, the Court did not need to examine thoroughly the question of the extent to which contractual terms will alter the tortious duty in a concurrency of duties situation. The joint judgment did, however, endorse⁷⁴ the now-classic principles of concurrency of liability expounded by Le Dain J in *Central Trust Co v Rafuse*.⁷⁵

By its endorsement of the Le Dain J principles - also recently approved by the House of Lords in *Henderson v Merrett Syndicates Ltd*⁷⁶ - the majority in *Bryan v Maloney* is endorsing the principle of the primacy of private ordering. This principle recognises that although the tort duty is 'a general duty imputed by the law in all the relevant circumstances, [it] must yield to the parties' superior right to arrange their rights and duties in a different way'.⁷⁷ There are two ways in which the contractual terms might potentially limit a tort action.⁷⁸ First, the contract might contain an exclusion or limitation of liability clause, in which case the *liability* in tort for breach of the duty of care will be correspondingly modified. The plaintiff will not be permitted to use an action in tort to impose a wider liability on the first party than would be available under the contract. Secondly, the contract might, by its express or implied terms, specify obligations which are different in scope to the duty of care which would be imposed in tort, in which case the *duty* in tort will be correspondingly modified.⁷⁹ Although the duty of care in negligence is one which is imposed by law where there is a sufficient relationship of proximity existing between the parties, and as such arises independently of any contractual relationship, it must yield to the parties right to arrange their affairs and assume risks in a different manner than would be done under the law of tort.

Accordingly, if the obligation which is the basis of the imposition of liability in negligence is specified in the contract, the duty of care in negligence will continue to arise⁸⁰ but it will be circumscribed by the

74 Id at 168. Toohey J placed similar reliance on these comments.

75 (1986) 31 DLR(4th) 481 at 521-2. Le Dain J spoke for a unanimous court.

76 [1994] 3 WLR 761 at 779-789.

77 *BG Checo International v BC Hydro* (1993) 99 DLR(4th) 577 at 584.

78 Id at 604 per Iacobucci J.

79 See also Deane J in *Hawkins v Clayton* (1988) 164 CLR 539 at 582.

80 Unless the relevant contractual provision clearly expresses an intention to oust the duty in tort: *BG Checo* (1993) 99 DLR(4th) 577 at 587. It may be that the courts will be more willing to find that the tort remedies have been ousted by the con-

contractual duty. It is only if the contractual duty contradicts the tort duty that the tort duty will be diminished; if the contractual duty is co-extensive with the tort duty, the tort duty remains unaffected.⁸¹ In either case, the plaintiff can elect whether to sue in contract or in tort so as to take advantage of the most favourable procedural or remedial rules.⁸²

One question which remains at large in this context, at least for Australian law, is whether a tortious duty of care can be *enlarged* by the contract between the parties. It appears from the Le Dain J principles that although the contract can *limit* the tortious duty below that which would be required at law, it can not expand it *above* that which would be so required. This proposition is to be derived from a statement by Le Dain J that the 'nature and scope' of the asserted duty in tort 'must not depend ... on the manner in which an obligation or duty has been expressly and specifically defined by a contract'.⁸³ It is my submission that, read in the context of the propositions following it, the relevant principle is that the tort duty, based as it is on a duty imposed by law to ensure that the work done meets a reasonable standard of construction, cannot be enlarged by contract to impose a duty to do what is more than reasonable. If the terms of the contract expressly require more than a reasonable standard of construction, that higher duty can not be enforced in negligence. The principle

tract where the parties are contracting in a commercial context: see the minority view in *BG Checo* at 613.

- 81 *BG Checo*. It is submitted that it is irrelevant whether the contractual obligation arises by way of an express term of the contract. It is submitted that the better view is that of the majority in *BG Checo*, that liability in negligence will not be precluded merely because the relevant obligation has been expressly stipulated in the contract. Admittedly, in *Hawkins v Clayton* (1988) 164 CLR 539 at 586, Deane J did suggest that if the contract expressly imposed a general contractual duty of care this clause would oust the tort duty unless the contractual terms make plain that the contractual duty was concurrent with the tort duty and was not in substitution for it. However, his Honour did not discuss the matter in any detail.
- 82 See Le Dain J's third principle. It appears that Deane J would require a qualification to this proposition where the relevant contractual duty is argued to arise as a matter of contractual implication. In *Hawkins v Clayton* he expressed the view that the courts should be hesitant to *imply* a contractual term imposing a duty of care which the common law imposes in any event: (1988) 164 CLR 539 at 583-6. Accordingly, the presence of a duty of care in torts might impede the implication of the contractual duty in the first place and the plaintiff would be restricted to suing in tort. Lord Goff declined to follow Deane J's approach in *Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761 at 788. Accordingly, the presence of a duty of care in torts might impede the implication of the contractual duty in the first place and the plaintiff would be restricted to suing in tort.
- 83 *Central Trust Co v Rafuse* (1986) 31 DLR(4th) 481 at 521-2.

that the law of torts cannot enforce a supernumerary contractual duty of care was confirmed by La Forest J in *Winnipeg*:⁸⁴

a contractor's duty to take reasonable care arises independently of any duty in contract between the contractor and the original property owner. The duty in contract with respect to materials and workmanship flows from the terms of the contract between the contractor and home-owner. By contrast, the duty in tort with respect to materials and workmanship flows from the contractor's duty to ensure that the building meets a reasonable and safe standard of construction. For my part, I have little difficulty in accepting a distinction between these duties. The duty in tort extends only to reasonable standards of safe construction and the bounds of that duty are not defined by reference to the original contract. Certainly, for example, a contractor who enters into a contract with the original home-owner for the use of high-grade materials or special ornamental features in the construction of the building will not be held liable to subsequent purchasers if the building does not meet these special contractual standards. However, such a contract cannot absolve the contractor from the duty in tort to subsequent owners to construct the building according to reasonable standards.

Although admittedly his Honour is here speaking of the duty owed to subsequent owners, he has previously expressed the view that the same principle would apply to the first owner.⁸⁵ Accordingly, it is suggested that the position in Australia is that usually a contractual provision which stipulates the content of the duty does not preclude the imposition of a duty of care in negligence: the content of the duty of care in negligence will be held to be co-extensive with the content of the contractual duty. However, where the contractual duty seeks to stipulate obligations which are more stringent than those which would be imposed in tort on the 'reasonable' benchmark, the only basis for enforcing those more onerous obligations is in contract

The recognition by the High Court of the principle of primacy of private ordering means that negligence law will not be permitted to operate unfettered in the contractual context: although liability in negligence for economic loss can arise in circumstances where previously the only liability was in contract, the law of negligence cannot disregard the rights and responsibilities allocated by the parties in their contract. This approach marks a much needed step by the Court

84 (1995) 121 DLR(4th) 193 at 205.

85 *BG Becco* (1993) 99 DLR(4th) 577 at 585.

towards the rationalisation of the Australian law of obligations, a process urged by Deane J in *Hawkins v Clayton*.⁸⁶

The law of contract and the law of tort are, in a modern context, properly to be seen as but two of a number of imprecise divisions, for the purpose of classification, of a general body of rules constituting one coherent system of law. Where rules classified in different divisions would otherwise conflict or compete, an essential function of the whole system is to avoid, resolve or rationalise such conflict or competition, not to induce or preserve it.

Liability to Subsequent Purchasers

The Court in *Bryan v Maloney* was not required to deal with the difficult issue of whether the terms of the contract between the builder and the first owner could affect the common law duty of care owed by the builder to the subsequent purchaser as the contract in that case was non-detailed and did not attempt to modify or exclude the duty or liability of the builder in negligence. The majority did not therefore find it necessary to discuss this issue in any detail. Mason CJ, Deane and Gaudron JJ⁸⁷ did however approve of the following comment by Windeyer J in *Voli v Inglewood Shire Council*.⁸⁸

neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance.

This extract was also endorsed by Lord Nolan in *White v Jones*,⁸⁹ who stated that the content of the terms of the contract 'may be relevant in determining what the law of tort may reasonably require of the defendant *in all the circumstances*'.⁹⁰ Further principles need to be developed to regulate the manner in which contractual terms are to affect tortious liability to third parties: the matter should not be left to the general discretion of the courts as seems to be advocated by Lord Nolan. In particular, it will be necessary to ensure that the interests of

86 (1988) 164 CLR 539 at 584. Similar sentiments were expressed by La Forest J in *BG Checo* (1993) 99 DLR(4th) 577 at 580.

87 (1995) 128 ALR 163 at 169, 171. See also *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 at 407.

88 (1963) 110 CLR 74 at 85.

89 [1995] 1 All ER 691 at 736.

90 *Ibid*; emphasis added.

the subsequent purchaser, who will most likely be unaware of the attempt by the builder to shield itself from the consequences of its negligent acts, are adequately protected. If the builder's interests are to be preferred over the purchaser's interests, the policy reasons for so doing should be carefully explicated.

Post-*Bryan v Maloney* then it is uncertain about the extent to which the law of negligence should, as a matter of principle and of policy, take into account the fact that a builder has negotiated for reduced responsibilities or liability in the original building agreement. Nor is it clear as to the manner in which the traditional principles of negligence law can be applied or adapted to recognise such matters. As recognised by Toohey J, this is a problem with which the Australian courts will need to grapple in the future.

An answer to this solution is not readily to be found by examining cases from other jurisdictions. The Supreme Court of Canada has not yet directly faced this question. McLachlin J in *London Drugs v Kuehne & Nagel International*⁹¹ took the view that a duty of care can be waived or qualified by contractual terms which form part of the matrix in which the activities were undertaken. The question of the scope of a duty of care is to be considered in the context of 'the contractual structure against which such duty is said to arise'.⁹² However, her Honour was there addressing the question whether a defendant to a negligence action could take advantage of an exclusion or limitation clause which has been agreed to by the plaintiff in a contract to which the defendant was not a party. Her Honour was not concerned with the converse question: whether the defendant should be entitled to take advantage of an exclusion or limitation clause in a contract to which the defendant, but not the plaintiff, is a party. In this converse situation quite different policy considerations would arise as the plaintiff is not aware of the relevant contractual term. McLachlin J draws support for her approach by drawing upon the orthodox tort defence of voluntary assumption of risk. In that case, it could be said that the plaintiff must have assumed the risk of loss by agreeing to the limitation clause with the employer. Similar reasoning cannot be applied in the *Bryan v Maloney* class of case, where the plaintiff purchaser will usually be unaware of the terms of the original building agreement, and thus cannot be said to have assumed the risk.

91 [1992] 3 SCR 299.

92 Purchas LJ in *Pacific Associates Inc v Baxter* [1990] 1 QB 1993. McEachern CJBC in the Court of Appeal in *London Drugs* [1992] 3 SCR 299 took a similar view to McLachlin J, holding that a contract between two parties may be relevant in determining tort rights and duties arising within the contractual matrix.

In the builder-subsequent purchaser case then, should the focus be not on whether the purchaser has assumed the risk of loss, but rather on whether the builder has assumed responsibility for the avoidance of a latent defect? This was the approach taken by the House of Lords in *White v Jones*⁹³ when faced with the problems posed by inconsistent contractual terms in the context of professional liability. Lord Goff, with whom the other members agreed, focussed on the 'assumption of responsibility' element - seen to be the crucial element⁹⁴ - in the duty of care analysis, to justify binding third parties to the terms of the contract pursuant to which the professional services were provided. Where the contract limits the responsibility or liability of the professional, the professional will not be said to have assumed responsibility or liability in excess of the contractual limit.⁹⁵ Applying this to the building context, where the original building agreement limits the duties or liability of the builder, the builder should not, for the purpose of establishing the proximity requirement, be taken to have assumed responsibility for tasks or for liability above that contained in the contract. The important question in determining whether a duty of care is owed is to determine whether there has been a 'conscious assumption of responsibility for the task'⁹⁶ on the part of the builder.

In *Henderson v Merrett Syndicates Ltd*, Lord Goff applied these principles to contractual network cases, for example where there is a chain of contracts in the construction industry:⁹⁷

in many cases in which a contractual chain ... is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short-circuiting the contractual structure so put in place by the parties.

His Lordship went on to say that in the typical sub-contracting situation, it would not ordinarily be open to the building owner to sue the sub-contractor direct:⁹⁸

93 [1995] 1 All ER 691.

94 *Hedley Byrne v Heller* [1964] AC 465, in particular Lord Devlin at 531-2; *Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761 at 775-6, *White v Jones* [1995] 1 All ER 691 at 710, 714-5, 735, 730-1.

95 *White* [1995] 1 All ER 691 at 711 per Lord Goff and at 714-5 per Lord Browne-Wilkinson; see also *Henderson* [1994] 3 WLR 761 at 777.

96 *White* [1995] 1 All ER 691 at 716 per Lord Browne-Wilkinson.

97 [1994] 3 WLR 761 at 790.

98 *Ibid.* Lord Goff did not however overrule *Junior Books v Veitchi Co Ltd* [1983] 1 AC 520, finding it unnecessary for the purposes of the case to do so. See also *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758.

For there is generally no assumption of responsibility by the sub-contractor ... direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility.

There may be some merit in applying these principles where the claimant has deliberately become involved in a network of commercial or professional relationships. In such situations it can be said that:⁹⁹

the parties have erected a structure which leaves no room for any obligations other than those which they have expressly chosen to create. On this view, the express and implied terms of the various contracts amount between them to an exhaustive codification of the parties' mutual duties.

However, in the context of a builder's liability to a subsequent purchaser there is 'no consciously created framework of contractual relationships'¹⁰⁰ such that it can be said that liability of the parties is to be governed exclusively by the contractual scheme. Furthermore, the building owner in the contractual network situation has an opportunity to bargain with the sub-contractor to protect itself from the risk of loss caused by the sub-contractors negligence; thus it is easier to conclude there has been no 'assumption of risk' in this situation. A subsequent house purchaser, however, usually has no opportunity to negotiate with a builder to secure protection from loss, and as such it is more problematic to hold in this situation that the builder has not assumed the responsibility of risk *as against the subsequent purchaser* by virtue of contractual terms.

In my view, any approach which indiscriminately favours the builder's financial interests over the purchaser's financial interests - such as the 'assumption of responsibility' approach - is of questionable merit. On the other hand, the view that a subsequent purchaser should be bound by the contractual terms only where that party knows or should have known of the terms of the contract, and so can be treated as having assented to them,¹⁰¹ probably unduly favours the purchaser's financial interests, as this test will rarely be satisfied. It is of course exactly because of this dilemma that Brennan J rejected tortious liability, and preferred to leave the problem to the legislatures to remedy. There is much to be said for that view.

99 *White* [1995] 1 All ER 691 at 721 per Lord Mustill.

100 *Ibid.*

101 Todd, 'Claims in Tort by Owners or Purchasers of Defective Property' (1984) 4 *Legal Studies* 312 at 320-6.

If Australian law does develop to the point where terms in the original building agreement will modify the liability of the builder to a subsequent purchaser, a qualification to such a rule may need to be made where the defect is a dangerous one. There is persuasive authority in both Canada and New Zealand that a builder has an independent obligation in tort to construct a house free of dangerous defects, and that this independent tortious obligation is one which is not able to be varied by the parties to the original building agreement. On this approach, the builder will not be permitted to rely on the fact that it complied with the manner of design stipulated in the original construction contract to protect itself from liability to a subsequent purchaser for harm caused or threatened by a dangerous defect. *La Forest J in Winnipeg* makes the point forcefully as follows:¹⁰²

the duty to construct a building according to reasonable standards and without dangerous defects arises independently of the contractual stipulations between the original owner and the contractor because it arises from a duty to create the building safely and not merely according to contractual standards of quality. It must be remembered that we are speaking here of a duty to construct the building according to reasonable standards of safety in such a manner that it does not contain *dangerous* defects. As this duty arises independently of any contract, there is no logical reason for allowing the contractor to rely upon a contract made with the original owner to shield him or her from liability to subsequent purchasers arising from a dangerously constructed building.

The New Zealand Court of Appeal has also taken the view that the liability of a builder for injury sustained by a subsequent purchaser as a result of the occurrence of a dangerous defect cannot be excluded by agreement with the first owner. In *Bowen v Paramount Builders*¹⁰³ Woodhouse J stated the principle in the following terms:¹⁰⁴

I do not consider the courts need be astute to protect those prepared to undertake jerry-building or shoddy work against the reasonable claims of innocent third parties merely because their bad work was done to a deliberate pattern or arrangement. ...I do not regard a private contractual arrangement for an inefficient design or for an unworkmanlike or inadequate type of construction as any sort of 'justification or valid explanation' for releasing the builder from his duty to those who otherwise could look to him for relief.

Richmond P made a similar point in the same case.¹⁰⁵

¹⁰² (1995) 121 DLR(4th) 193 at 217-8.

¹⁰³ [1977] 1 NZLR 394.

¹⁰⁴ *Id* at 419.

¹⁰⁵ *Id* at 407.

This approach of the Canadian and New Zealand courts is clearly based on compelling policy considerations and it is submitted that it should be followed in Australia. This approach would act as an important qualification on any principle the courts might develop to permit the contractual modification of a claim by a subsequent purchaser.

Conclusion

The decision in *Bryan v Maloney* is significant in a number of respects. It represents a significant move towards the decompartmentalisation of the law of tort and of contract in the field of builders' liability. At the same time it illustrates a move towards the rationalisation of the rules in tort and contract where loss occurs against a contractual structure, although serious questions remain to be answered about the effect of an original building agreement on the rights of a subsequent purchaser. Although some might view the decision as 'an indirect and surreptitious erosion by tort of entrenched contractual principles',¹⁰⁶ the High Court plainly was aware of the dangers of allowing the law of torts to ignore the risks and responsibilities assumed by the builder in the building agreement. Further elucidation by the High Court of the principles which should govern the contractual modification of tortious liability is eagerly awaited - and sorely needed.

¹⁰⁶ To adopt a phrase of McDonald & Swanton, 'Negligence in the performance of contractual services - action in tort by a third party to the contract': note 31 above.