The impact of contract upon tortious liability of construction professionals

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Introduction

The recovery of economic loss in tort as a result of defective workmanship of a builder or design professional has long been a contentious issue in the Australian, English and Canadian courts.

In England, for example, it was thought that as a result of the decision in *Anns v. Merton London Borough Council*,[1] the courts would allow the recovery of what would now be classified as pure economic loss in certain circumstances based solely on considerations of reasonable foreseeability and policy (Lord Wilberforce's two-tier test).

Since 1990 however, the establishment of the *Hedley Byrne*[2] criteria of an assumption of responsibility and reasonable reliance are a prerequisite to recovery in England, the House of Lords having made it clear that the principles of *Donoghue v. Stevenson*[3] have no place in the sphere of the recovery of economic loss in tort.[4]

By contrast, the High Court in this country – which initially approached the *Anns* test with caution before rejecting it altogether in *Sutherland Shire Council v. Heyman*,[5] has seen fit to enlarge the circumstances in which it will permit recovery

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[1] [1978] AC 728.

[2] *Hedley Byrne & Co. v. Heller & Partners Ltd* [1964] AC 465.

[3] [1932] AC 562.

[4] See *D&F Estates Ltd v. Church Commissioners for England* [1989] AC 177; *Murphy v. Brentwood District Council* [1991] 1 AC 398 and *Department of the Environment v. Thomas Bates & Son Ltd* [1991] 1 AC 499.

[5] (1985) 157 CLR 424.

of economic loss. It has done this, not by the express application of the *Hedley Byrne* principle, but based on Lord Atkins' test of foreseeability in *Donoghue v. Stevenson*[6] and the antecedent requirement of 'proximity' – the constituent elements of which often seem to mirror the *Hedley Byrne* criteria, even if only as policy driven fictional notions.[7]

The Canadian courts appear to have arrived at something of a middle ground. Having rejected the English approach – (but being reluctant to open the flood gates to the same extent as has now arguably occurred in Australia and New Zealand) the Canadian courts will allow recovery of pure economic loss in the construction sphere where there is a 'dangerous defect'.[8] Recently, the Canadian Supreme Court has also seen fit to allow recovery based on *Hedley Byrne* criteria to create an affirmative duty of care in a professional contractual relationship.[9]

It is clear that the law in this area has been (and continues to be) in a state of flux and uncertainty. One of the principal areas in which the issue of recovery of pure economic loss has arisen is in the construction sphere where as an additional complicating factor there often exists complicated contractual structures and interwoven professional relationships.

It is this aspect upon which this article will focus. Such a focus is particularly apposite in view of recent pronouncements by the House of Lords[10], High Court[11] and Supreme Court of Canada[12] confirming the existence of concurrent liability – although in different contexts and arguably with differing consequences.

The article will be divided into three parts:

Part 1 will firstly consider why it matters that there can be concurrent duties in contract and tort. It will then examine the scope for the imposition of concurrent duties between client and consultant. In doing so, it will examine the new found status of the contractor as a 'professional' and will draw a distinction between the so-called 'simple contract' situations and contracts which expressly detail the parties' obligations.

Part 2 will consider the scope for the imposition of a tortious duty owed to a third party in the 'contract setting' or 'matrix', i.e. where the parties, although not in a contractual relationship themselves, are both parties to a contract structure or chain. Specific instances of principal-subcontractor and architect-contractor will be examined.

[6] [1932] AC 562.

[7] The writer has already expressed his views in this area; See Mead P. 'The Recovery of Economic Loss Arising from Defective Structures – Policy, Principle and the Amorphous Notion of Proximity as a General Concept' (1996) 12 BCL 9. See also *Wallace I. D. QC Bryan v. Maloney*; 'More unresolved problems' (1995) 1 ACLR 4.

[8] See, for example, *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1995) 121 DLR (4th) 193.

[9] *Edgeworth Construction Ltd v. N. D. Lea & Associates Ltd* (1993) 66 BLR 56.

[10] *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506.

[11] *Bryan v. Maloney* (1995) 182 CLR 609.

[12] See, for example, *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1995) 121 DLR (4th) 193; *Edgeworth Construction Ltd v. N. D. Lea & Associates Ltd* (1993) 66 BLR 56.

Part 3 will consider the tortious duty which may be owed to a third party in a simple contract setting (in particular to a subsequent purchaser of a house or other permanent structure) and will examine the likely regard the court will have to the contract between the builder and original owner, in determining the existence or extent of the duty which may be owed. The liability of a consultant with respect to a report relied upon by a third party will also be briefly considered.

It will be concluded that while there are many circumstances which remain unclear, there appears to be little prospect of a retreat from the imposition on professionals of ever expanding legally imposed duties to avoid harm, be it of a physical or economical nature, and that it would be increasingly unwise for such parties to assume that the contractual setting will always be sufficient to delimit the extent of such duties.

Part 1: Concurrent liability

Relevance of concurrent liability

The issue of whether there can be a tortious duty owed concurrently with a contractual obligation in a particular circumstance has seemed to trouble the courts until very recent times and is still far from settled.[13]

The issue of concurrent liability is relevant to the construction sphere for a number of reasons.

Firstly, the damages which may be awarded for breach of a tortious duty may be different to those available for breach of contract. Generally speaking, in contract, the plaintiff is entitled to receive expectation losses, whereas in tort, the plaintiff is only entitled to be put back in the position it would have been had the tort not been committed.[14] Moreover, the test of remoteness in tort is less demanding than in contract as it allows recovery in respect of loss or damage which is foreseeable in a general way as a possible consequence of the defendant's breach of duty.[15]

Secondly, a plaintiff which may otherwise be statute barred in respect of a claim for breach of contract may nonetheless be able to recover in respect of a breach of a co-extensive tortious duty.[16] This is because in an action for negligence the cause of action will be said to accrue when the aggrieved party has suffered loss and

[13] See, for example, *R.W. Miller & Co. v. Krupp* (1995) 11 BCL 74.

[14] See *Gates v. City Mutual Life Assurance Life Society Limited* (1986) 160 CLR 1. For recent developments in this area, in relation to recovery of 'expectation losses', see *Capro Group Pty Ltd v. Janbrett Consultants Pty Ltd* (1994) ATPR 41-298. See also Swanton J. and McDonald B. 'Measuring Contractual Damages for Defective Building Work' (1996) 70 ALJ 444 and most recently *MGICA* (1992) *Ltd v. Kenny & Good Pty Ltd* (No. 2) (1996) 135 ALR 7.

[15] *Mount Isa Mines Ltd v. Pusey* (1970) 125 CLR 383. In the context of damages recoverable in a construction claim, see *Brickhill v. Cooke* [1984] 3 NSWLR 396 at 401.

[16] See, for example, *Lancashire & Cheshire Association of Baptist Churches Inc. v. Howard & Seddon Partnership* (a firm) [1993] 3 All ER 567; *NRMA Insurance Limited v. A.W. Edwards Pty Limited* (unreported, NSW Court of Appeal Kirby P. Mahoney and Powell J.J.A. 11 November 1994); *Pullen v. Gutteridge Haskins & Davey* Pty Ltd [1993] 1 VR 27.

damage. It is now clear that in Australia,[17] New Zealand[18] and Canada,[19] economic loss (and hence damage) will only be sustained at the time when the defect or inadequacy responsible for the loss is first known or manifest (or should have become so on reasonable inspection).[20]

Thirdly, there is the possibility of a plaintiff circumventing the effect of contractual exclusions.[21] The imposition of a tortious duty may also be used to potentially overcome the restrictive effect of the contractual doctrines of consideration and privity of contract which, if strictly applied, may otherwise preclude the possibility of the third party bringing an action for breach of a contractual term (express or implied) requiring the exercise of reasonable care and skill in the performance of the task or undertaking.[22]

Finally, it may be necessary for a defendant to establish co-extensive tortious duties in order to invoke the protection of the relevant joint tort-feasor legislation. Such legislation is usually only enlivened if 'fault' (relevantly, an act or omission which gives rise to a liability in tort) is established.[23]

Recent approaches to concurrent liability

Prior to the decision of the High Court in *Bryan v. Maloney*,[24] the courts in this country had often taken the Privy Council in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd*[25] as cautioning against over-readily ascribing a liability in tort when the rights and obligations of the parties were governed by a contract. That decision influenced Giles J. in *R.W. Miller v. Krupp*[26] where His Honour stated:

> "the law of contract has not been assimilated to the law of tort by routine imposition of a duty of care co-extensive with a contractual obligation."[27]

A short time after this, however, in the House of Lords decision in *Henderson v. Merrett Syndicates Ltd*,[28] Lord Goff of Chievely expressed his belief that:

> "... in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either tortious or a contractual remedy. The result may be untidy; but given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of

[17] *Bryan v. Maloney* (1995) 182 CLR 609.
[18] *Invercargill City Council v. Hamlin* [1994] 3 NZLR 513, and on appeal to the Privy Council [1996] 1 All ER 756.
[19] *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* 121 DLR (4th) 193.
[20] See, for example, *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424 at 505; *Bryan v. Maloney* (1995) 182 CLR 609.
[21] *Bryan v. Maloney* (1995) 182 CLR 609; *Roberts & Anor. v. J. Hampson & Co.* (a firm) [1989] 2 All ER 504.
[22] See the article by Tapsell K. 'Bryan v. Maloney: Multiple Liability to an Interminate Number of the Same Class' (1996) BCL 165.
[23] See *R.W. Miller & Co. Pty Ltd v. Krupp (Australia) Pty Ltd* (1995) 11 BCL 74.
[24] (1995) 182 CLR 609.
[25] [1985] 2 All ER 947.
[26] (1995) 11 BCL 74.
[27] ibid at 150.
[28] [1994] 3 All ER 506 at 532.

the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."

Bryan v. Maloney

In *Bryan v. Maloney*,[29] the majority of the High Court made clear that whatever may have been the position in earlier times, the existence of a contractual relationship between builder and client did not preclude the existence either of a relationship of proximity between them in relation to that work or of a consequent duty of care under the ordinary law of negligence.

At page 620, the Court stated:

"The fact that the law recognises the existence of concurrent duties in contract and tort does not mean that the existence of a contractual relationship is irrelevant to either the existence of a relationship of proximity or the content of a duty of care under the ordinary law of negligence. In some circumstances, the existence of a contract will provide the occasion for, and constitute a factor favouring the recognition of, a relationship of proximity... In other circumstances, the contents of a contract may militate against recognition of a relationship of proximity under the ordinary law of negligence or confine, or even exclude the existence of, a relevant duty of care."

The majority of the Court approved the statement of the contract/tort position by Le Dain J. in the unanimous judgment of the Supreme Court of Canada in *Central Trust Co. v. Rafuse*[30] as follows:

"1. The common law duty of care that is created by a relationship of sufficient proximity... is not confined to relationships that arise apart from contract...

2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract...

3. A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort..."

In *Bryan v. Maloney*,[31] the majority of the Court held that where a contract (as in that case) is non-detailed and contains no exclusion or limitation of liability, neither the existence nor the content of the contract precludes the existence of liability under the ordinary law of negligence. Rather they classed the case as one where the relationship of proximity arose by virtue of the contract and the work to be performed under it.[32]

[29] (1995) 182 CLR 609.
[30] 31 DLR (4th) at 521-522.
[31] (1995) 182 CLR 609.
[32] ibid. at 622.

To the extent that the majority were referring to a concurrent tortious liability owed by professionals to parties with which they had an existing contractual relationship (in a simple non-detailed contract situation), the dicta is largely unexceptional, and is reflected in a number of decisions at state and appellate level.

For instance, in *Brickhill v. Cooke*,[33] the New South Wales Court of Appeal held that an engineer may be sued in tort as well as in contract and allowed the recovery of loss of value in the house and consequential financial damage.

Similarly, in *Pullen v. Gutteridge Haskins & Davey Pty Ltd*[34] the Appeal Division of the Supreme Court of Victoria noted that since the decision in *Voli v. Inglewood Shire Council*,[35] it had been clear that an architect or engineer could be held liable to his client in tort as well as in contract.

The Court then referred with approval to the Victorian decision in *MacPherson & Kelly v. Kevin J. Prunty & Association*[36] where it was said that the view was no longer tenable that concurrent liability in tort exists only where some physical injury or damage is likely to result.

Is a builder a 'professional'?

In *Bryan v. Maloney*,[37] however, the High Court was prepared to extend these principles beyond a strictly 'professional' relationship to that of a builder, albeit a 'professional builder' as the High Court was at pains to point out.[38]

The High Court readily equated the position of the builder to that of the architect in *Voli v. Inglewood Shire Council*,[39] seizing upon Windeyer J.'s dicta that the principles of the law of negligence as stated in *Donoghue v. Stevenson* were applicable to define "*the ordinary liabilities of any man who follows a skilled calling*".[40]

There had been indications in *Esso Petroleum Co. Ltd v. Mardon*[41] and *Batty v. Metropolitan Realisations Ltd*[42] that the principle that a duty could be owed both in contract and tort was not confined to cases where the person conducted a common calling (and therefore was under a special type of legal liability) or where a professional man owed a duty in relation to his professional skills.

Notwithstanding this, it had seemed clear prior to *Bryan v. Maloney*[43] that the courts in this country would more readily infer a duty of care with respect to

[33] [1984] 3 NSWLR 396.
[34] [1993] 1VR 27.
[35] (1963) 110 CLR 74.
[36] [1983] 1 VR 573 at 580.
[37] (1995) 182 CLR 609.
[38] ibid. at 625.
[39] (1963) 110 CLR 74.
[40] ibid. at 84.
[41] [1976] QB 801.
[42] *Batty v. Metropolitan Property Realisations Ltd* [1978] QB 554.
[43] (1995) 182 CLR 609.

professionals.[44] The English courts, with their preoccupation with liability founded upon the principles in *Hedley Byrne v. Heller*,[45] had seemed similarly disposed, prompting one commentator to conclude that architects and consulting engineers who give bad advice leading to the construction of shoddy buildings may be liable to the owners, but that the builder whose negligence produced the same result would not.[46]

This had also been thought to be the position in Canada, where in *Dominion Chain Co. Ltd v. Eastern Construction Co. Pty Ltd*[47] it was said:

> "...neither a contractor nor a builder... professes skills in a calling within the meaning of the principle I have applied in the case of the engineers and architects. As a result, under that principle, there is no duty on them to take care, either arising from an implied contractual duty depending solely on the relationship brought about by the contract of employment, or arising concurrently in tort from that relationship."[48]

Shortly prior to the decision in *Bryan v. Maloney*,[49] it was argued before the Court of Appeal in the Supreme Court of New South Wales in *NRMA Insurance Limited v. A.W. Edwards Pty Limited*,[50] that the wider duty in tort had extended only to a case of a professional or *quasi*-professional relationship in to which there is an implied duty to use reasonable care, skill and competence. It was suggested that the present case (involving contractual obligations between builder and proprietor) could be distinguished from that line of 'professional' authority and that as a matter of principle, the parties should be confined to their contractual rights and duties.

It was left to Kirby P. who delivered the principal judgment to deal with this contention by stating:

> "Even if the opponent is correct and a duty of care expressed in the cases is confined to a professional or quasi-professional relationship, it is far from plain that the detailed facts of the instant case might not bring the parties into such a relationship, properly understood in the modern context. It is true that theirs was not a relationship which was professional in the traditional sense of that term. Assuming such a distinction to be viable, it is, nonetheless, arguable that, with modern complex building contracts, involving hydraulic engineers, architects and highly skilled builders, the principles earlier developed for the traditional professions, may also apply, giving rise to a tortious liability under the general law." [51]

[44] See, for example, Solicitors: *Hawkins v. Clayton* (1988) 164 CLR 539; *Van Erp v. Hill* [1995] Aust. Torts Reports 81-317; *Waimond Pty Ltd v. Byrne* [1989] 18 NSWLR 642. Engineers: *Brickhill v. Cooke* [1994] 3 NSWLR 396. Insurance Brokers: *Forsikringsaktieselskapet Vesta v. Butcher* [1989] AC852. Architects: *Voli v. Inglewood Shire Council* (1963) 110 CLR 74. See also *Johnson v. Perez* (1988) 166 CLR 351 at 363 per Wilson, Toohey and Gaudron J.J.

[45] [1964] AC 465.

[46] Makesinis & Deakin, 'The Random Element of Their Lordships Infallible Judgment; an Economic and Comparative Analysis of the Tort of Negligence from Anns to Murphy' (1992) 55(5) MODLR 619.

[47] (1976) 68 DLR (3d) 385.

[48] ibid. at 394.

[49] (1995) 182 CLR 609.

[50] (Unreported NSW Court of Appeal, Kirby P. Mahoney and Powell J.J.A. 11 November 1994).

[51] ibid. at 240.

The High Court in *Bryan v. Maloney*[52] seems to have gone even further than this. Although referred to as a "*professional builder*",[53] the contract in question was a simple contract, not a modern complex building contract. The High Court showed little reluctance however in extending a duty in these circumstances.

Simple contact

As a result of the decision in *Bryan v. Maloney*[54] a plaintiff in this country (at least in respect of a dwelling house) may claim against a builder or professional with whom it has a contract. However, the terms of that contract (either express or implied) can modify or even exclude liability in certain circumstances[55]. This is because the "*tort duty... must yield to the parties' superior right to arrange their rights and duties in a different way*".[56] Similarly, a defendant's disclaimers may potentially have a powerful effect in negativing the Hedley Byrne liability or even a proximity based test founded on assumption of risk and reasonable reliance.

Recently, in *John Holland Construction & Engineering Pty Ltd v. Kvaerner R.J. Brown Pty Ltd*,[57] it was held that the concurrent duty arises from the readiness of the court to import into certain contracts a term requiring the contractor (or other construction professional) to perform its contractual tasks with due skill and care. What the law of negligence in this context imposes is not that the relevant party owes a duty of care to perform the contract, but that it owes a duty to perform the contract with due care.

Absent a contractual modification, the duty which will be owed is that laid down by Windeyer J. in *Voli v. Inglewood Shire Council*,[58] where it was said of the architect:

> "He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments – but he must bring to the task that he undertakes the competence and skill that is usual among architects practicing their profession."[59]

Recently in *Collins v. ACT Building Consultants & Managers Pty Ltd*[60] it was confirmed by the court that the appropriate standard of care was not to be determined solely by reference to practices followed or supported by a responsible body of opinion in the relevant profession or trade. The court relied on the decision of the High Court in *Rogers v. Whitaker*[61] where it was held that the duty

[52] (1995) 182 CLR 609.
[53] ibid. at 625.
[54] (1995) 182 CLR 609.
[55] For example, *Lancashire & Cheshire Association of Baptist Churches Inc. v. Howard & Seddon Partnership* (a firm) [1993] 3 All ER 567; *Pullen v. Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27.
[56] *Edgeworth Construction Ltd v. N.D. Lea & Associates Ltd* 107 (1993) 66 BLR 56.
[57] (1997) 13 BCL 262.
[58] (1963) 110 CLR 74.
[59] ibid. at 84.
[60] (Unreported ACT Supreme Court, Gallop J., 4 August 1995.)
[61] (1992) 175 CLR 479.

to provide information and advice takes its precise content from the nature and detail of the information to be provided from the needs, concerns and circumstances of the recipient of the advice.

Although the same considerations apply to an engineer,[62] it should be noted that an engineer and architect's obligation can be absolute. This was acknowledged by Giles J. in *R.W. Miller v. Krupp*[63] where it was held that the engineer's obligation was to fulfil the contract whether or not what the contract required reflected proper engineering practice, in circumstances where the defendant's liability arose from a contractual provision which did not depend on negligence on the part of the defendant.[64]

Limited retainer

A question arises as to the effect of an expressly limited retainer upon the duty which would otherwise be owed. As Kirby J. pointed out in *Waimon Pty Ltd v. Byrne*:[65]

> "Although the contractual retainer will be an important indicium of the nature of the relationship which gives rise to the common law duty of care... it will not chart exclusively the parameters of that duty."[66]

In *Brickhill v. Cooke*,[67] for example, the defendant engineer laid great stress on the fact that the cost of an inspection and report undertaken by it was only $65.00. It was argued that although the defendant was a qualified engineer, the price charged did not require it to perform the duty of care to be expected of a structural engineer carrying out a detailed and more costly structural report.

The court said that it was not in accordance with the settled negligence doctrine to delimit the duty by introducing into its formulation, circumstances which properly relate to the issue of breach.[68] The court held that the defendant's duty was to exercise such care as would be shown by a reasonably competent qualified engineer retained for the purpose in hand.[69]

A similar approach was adopted in the English decision of *Roberts v. J. Hampson & Co.* (a firm)[70] where it was said of a surveyor engaged on a limited retainer:

> "...It is inherent in any standard fee work that some cases will colloquially be 'winners' and others 'losers' from a professional man's point of view... Its duty to take reasonable care in providing a valuation remains the root of his obligation."[71]

[62] See *Chas Drew Pty Ltd v. J.E. & P. Consultancy Engineers Pty Ltd* (1989) 10 BCL 48 at 50.
[63] (1995) 11 BCL 74.
[64] ibid. at 141 – referring with approval to the categories identified by the Court of Appeal in *Forsikringsaktieselskapet Vesta v. Butcher* [1989] AC 852.
[65] [1989] 18 NSWLR 642.
[66] ibid. at 652.
[67] [1984] 3 NSWLR 396.
[68] Contrast the different emphasis on the extent or existence of duty in *Bryan v. Maloney* (1995) 182 CLR 609.
[69] ibid. at p.399.
[70] [1989] 2 All ER 504.
[71] ibid. at 510.

More recently, Cole J. had cause to consider the impact of an architect's limited retainer (as to scope rather than money) on the duty of care in tort in *Jiawan Holdings Pty Ltd v. Design Collaborative Pty Ltd.*[72] In that case, His Honour accepted as correct the proposition that one had to look at the circumstances to see if the relationship between the architect and the plaintiff (arising from a limited contract of engagement), imposed an obligation to take steps "*beyond the specifically agreed professional task or function*" to avoid real and foreseeable risk of loss by the plaintiff.[73] On the facts of that case (involving as it did a limited commission to the architect to issue certificates to permit the recovery of sums from the financier) it was held it did not.

An opposite result was reached both at first instance and on appeal in the Supreme Court of New South Wales in *McBeath v. Sheldon.*[74] In issue was a claim by the architect that the extent of its duties of supervision were limited by correspondence passing between itself and the client. While the court seemed to accept that it was open to the architect to have contracted on a more limited basis, on the facts of the case, the contention failed and economic loss was held to be recoverable in tort.

Somewhat more alarmingly, in the recent decisions *Skinner & Edwards (Builders) Pty Ltd v. Australian Telecommunication Corporation*[75] and *Yanchep Sun City Pty Ltd v. Enryb Pty Ltd*,[76] it was held that a professional consultant had an obligation to check the work of other professional consultants engaged on the same project, notwithstanding express expertise by a particular party on which one might reasonably have thought the other non-specialist professional would have been entitled to rely. As such, these cases provide an illustration of where the relationship between the engineer and plaintiff (arising from a limited contract of engagement) required the taking of positive steps "*beyond the specifically agreed professional task or function... to avoid a real and foreseeable risk of economic loss being sustained by the client*".[77]

Detailed contracts

The change in approach to the question of concurrent liability by the House of Lords and High Court, makes it necessary to treat with caution a number of decisions of lower courts handed down prior in time. Many of these cases related to so called 'detailed contracts'.

As an example, in the English decision of *William Hill Organisation Ltd v. Bernard Sunley & Sons Ltd*,[78] the court had held that it was only by reference to the

[72] (1990) 10 BCL at 214.
[73] ibid. at 230.
[74] [1993] Aust. Torts R 81-208.
[75] [1992] 27 NSWLR 567.
[76] (Unreported; Supreme Court NSW, Murray J., 7 November 1994.)
[77] Per Deane J. in *Hawkins v. Clayton* (1988) 164 CLR 539 at 652.
[78] (1983) 22 BLR 1.

alleged obligations of the defendants under the contract between the parties that the case could be pleaded at all, and that to claim a remedy for breaches which were only capable of ascertainment by reference to the contract itself (which, for example, provided for the conclusive effect of the final certificate) was not open to the plaintiff.

Similarly in this country in *NRMA Insurance Limited v. Coyle Pty Limited*,[79] Cole J., having referred to the decision of Giles J. in *R.W. Miller & Co. Pty Ltd v. Krupp (Australia) Pty Ltd*[80] and Kelly J. in *Frederick W. Nielsen (Canberra) Pty Limited v. PDC Constructions (ACT) Pty Ltd*[81] agreed with the Tai Hing approach. He said:

> "Where, as here, the only aspect pleaded as giving rise to the relationship said to ground a tortious duty is the contract, and where the alleged breaches of any tortious duty are entirely concurrent with the contractual obligations between NRMA and the builder, in my view, there can be no basis for holding that there exists concurrently with the contractual obligation, a tortious duty in coincident terms. Where the contract is a detailed recitation of the agreed rights, obligations and responsibilities of the builder to the proprietor, as it is here, there is no basis in my view for erecting a tortious duty different to the agreed contractual responsibility."[82]

This decision went on appeal,[83] where Kirby P. thought that in view of the decision in *Henderson v. Merrett Syndicates Ltd*[84] (handed down between the original hearing and appeal) it was inappropriate to dismiss the concurrent claim in tort summarily.

Of further relevance in the context of 'detailed contracts' was the endorsement of the majority in *Bryan v. Maloney*[85] of the comments of Le Dain J. that:

> "... A claim cannot be said to be made in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract."[86]

This approach is consistent with the decision in *R.W. Miller & Co. v. Krupp*[87] (decided prior to both *Henderson and Bryan*). Although Giles J. in that case (with respect, with the wisdom of hindsight erroneously), thought that their Lordships in *Tai Hing* rejected concurrent liability in contract and tort, His Honour found that the particular provisions of the specification were part of a detailed contract which sought to spell out with precision what was required of the contractor. It contained exclusion clauses by which the contractor could be relieved of

[79] (Unreported, NSW Sup. Ct, Cole J., 10 May 1994).
[80] (1995) 11 BCL 74.
[81] (1987) 3 BCL 387.
[82] ibid. at 390.
[83] See *NRMA Insurance Limited v. A.W. Edwards Pty Limited* (unreported NSW Court of Appeal Kirby P., Mahoney and Powell J.J.A. 11 November 1994).
[84] [1994] 3 All ER 506.
[85] (1995) 182 CLR 609.
[86] ibid. at 621-622.
[87] (1995) 11 BCL 74.

responsibility for failing to do what was required of it, and the bargain between contractor and principal was a carefully structured one.[88] As such, His Honour was not prepared to superimpose a tortious liability.

Conversely, where the alleged breach of duty is said to arise co-extensively with an implied term, there will be nothing flowing from contractual intention which should preclude reliance on a concurrent liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.[89]

An example of the former situation is to be found in the Queensland decision of *Doug Rea Enterprises Pty Ltd v. Hymix Australia Pty Ltd*,[90] where the contractor under a detailed construction contract was held to be under a duty of care co-extensive with its contractual obligation, it being necessary to imply a contractual term that the contractor would use reasonable care and skill.

Somewhat less certain is the approach the Australian courts would take to a factual scenario such as that which arose for consideration before the English courts in *Greater Nottingham Co-operative Society Ltd v. Cementation Piling & Foundations Ltd*,[91] where there was a 'direct collateral agreement' between the proprietor and subcontractor. The subcontractor's negligent operation of its equipment caused economic loss to the proprietor.

It was held that the direct contract with express obligations to take care in design and selection of materials, but no express obligation to take care in the operation of equipment, prevented a wider obligation in tort (i.e. an express but limited contractual obligation negatived the imposition of a tortious duty).[92] While this result may hold true in a 'contractual matrix' situation where another party has expressly assumed the 'omitted' duty by related contract, the way does appear open for the courts in this country to nonetheless impose a tortious duty in these circumstances.[93]

PART II: The contractual matrix and duties to third parties

Is it appropriate in circumstances where multiple parties have entered into a contractual scheme or arrangement for the delivery of a project to allow parties (who may, for instance, have expressly excluded collateral warranties), the right to step outside the contractual matrix and seek to recover damages in tort? The situation most often arises where the party against which recovery would otherwise be sought has become insolvent.

[88] ibid. at 147.
[89] Le Dane J., in *Central Trust Co. v. Rafuse* 31 DLR (4th), @ p.521-522.
[90] (1988) 4 BCL 67.
[91] [1989] 1 QB 71. In England the question is now academic given the prohibition on the recovery of pure economic loss in these circumstances.
[92] ibid. at 99.
[93] See, for example, *Australian Mutual Provident Society v. Dowell Australia Limited* (unreported, Supreme Court of NSW, Rogers C.J., 8 November 1988).

As Sidney R. Barrett has stated:

> "Perhaps more than any other industry, the construction industry is virtually 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, material supplier – and to allocate among them the risk of problems, delays, extra costs, unforseen 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 the carefully negotiated contractual balance among owner, builder and design professional."[94]

The factors influencing a court's decision to allow recovery in these circumstances are likely to be similar in Australia and the UK (and to a lesser extent Canada). This is because nowadays in England recovery of pure economic loss will not be permitted unless the plaintiff can bring itself within the *Hedley Byrne* criteria (i.e. assumption of responsibility by the defendant, (reasonable) reliance by the plaintiff).[95] While this liability was originally based on express representations or interventions acted on by the plaintiff to its detriment, it has more recently been extended to an affirmative duty of care in tort owed by the defendant (so extending to negligent omissions).[96]

In Australia, it is now well established that where the plaintiff's claim is for pure economic loss, the categories of case in which the requisite relationship of proximity is to be found are properly to be seen as special in that they will be characterised by some additional element or elements which will commonly (but not necessarily) consist of known reliance (or dependence) or the assumption of responsibility or a combination of the two.[97]

Although it has been said that reliance is implicit in the relationship between a professional and its client,[98] it seems unlikely that in the pure construction sphere the High Court would be prepared to infer reliance and assumption of responsibility as it did in the case of a simple contract situation and a subsequent purchaser of a dwelling house in *Bryan v. Maloney*.[99] For example in *R.W. Miller v.*

[94] Barrett S.R. 'Recovery of Economic Loss in Tort for Construction Defects: a Critical Analysis' (1989), 40 SCL Rev. 891 at 941.

[95] *Murphy v. Brentwood District Council* [1991] 1 AC 398.

[96] See *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506.

[97] See generally, *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424 at 443-449, 466-468, 501-502; *Hawkins v. Clayton* (1988) 164 CLR 539 at 576. See also *San Sebastian Pty Ltd v. Minister Administering the Environmental Planning Act* (1986) 162 CLR 340, where the High Court identified the difficulty in deciding whether a sufficient relationship of proximity exists to enable a plaintiff to recover economic loss in situations outside the realm of negligent misstatement where the element of reliance may not be present.

[98] *Pullen v. Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27.

[99] (1995) 182 CLR 609: See also the Queensland Court of Appeals' treatment of this issue in the context of a professional relationship of solicitor and beneficiary under a will in *Van Erp v. Hill* (1995) Aust. Torts Reports 81-317.

Krupp (Aust) Pty Ltd[100] Giles J. refused to find negligence as against the supervising engineer, in part because the contractor had not in fact relied upon the engineer, but rather had held itself out as an expert in the particular field.

Accordingly, not only express disclaimers and exclusions but also the contract structure or setting may militate against a finding of proximity in this country or negative the *Hedley Byrne* prerequisites in the UK.

Owner v. subcontractor

Although now regarded as something of an aberration, one of the earliest examples of successful recovery of economic loss in tort outside of the contractual chain was the 1983 decision in *Junior Books Ltd v. Vietchi Co. Ltd.*[101] In that case the House of Lords was called upon to make a determination in respect of liability of a nominated specialist flooring subcontractor to a principal for whom the relevant building was constructed in respect of economic loss caused by negligently carrying out the installation work of the flooring for the building. Unlike the scenarios in *Anns* and *Batty*, there was no allegation that the defective flooring was likely to lead to any danger of physical injury to person or property.

Adopting the two-tier test of Lord Wilberforce in *Anns*, Lord Roskill, (unwilling to draw the 'somewhat artificial distinction between physical and economical financial loss'),[102] examined a number of elements which led him to conclude that there was a very high degree of proximity between the plaintiff and defendant – one which fell only just short of that which would exist if the parties were bound by contract.

The English courts have subsequently distinguished that decision. In *Muirhead v. Industrial Tank Specialties Ltd*[103] and in *Simaan General Contracting Co v. Pilkington Glass Ltd (No. 2)*,[104] the court saw no need to superimpose onto the contractual structure a tortious duty. In *Muirhead*, the parties were "*contractually... several stages removed from each other*"[105] and in Simaan, an assumption of responsibility was "*inconsistent with the structure of the contract the parties have chosen to make*".[106]

Although *Anns* is no longer the law in England, policy reasons can clearly be seen to be behind the reluctance of the courts in these cases to superimpose a tortious duty on parties which through the contract setting will have sought to expressly address issues of risk allocation, sometimes even by way of express

[100] (1995) 11 BCL 74.
[101] [1983] 1 AC 520.
[102] ibid. at 533.
[103] [1986] 1 QB 507.
[104] [1988] QB 758.
[105] [1986] 1 QB 507 at 534.
[106] [1988] QB 758 at 781.

exclusions or limitations contained in the contract between the building owner and the head contractor or between the head contractor and subcontractor.

This factor was clearly influential in *Norwich City Council v. Harvey*[107] (a physical damage case), where the Court of Appeal held that the general duty of care owed by the defendants to the plaintiff was qualified by the contractual scheme propounded by the plaintiff whereby it had accepted the risk of damage by fire and that the duty therefore did not extend to damage by fire to the plaintiff's property.

Suffice it to say that to have held otherwise would have been to render nugatory the express terms of the parties' contractual bargain which itself contained an obligation to insure. Significantly the Court also considered that a stranger to a contract could take advantage of a provision of the contract to limit or exclude a duty of care in tort.[108] The same result in this country may be achieved by an extension of the principles in *Trident General Insurance Co. Ltd v. McNiece Bros Pty Ltd.*[109]

In Australia there has also been considerable emphasis given to the 'contract setting'.

In *Frederick W. Nielsen v. PDC Constructions*,[110] Kelly J., noted:

> "Where... parties to a building contract enter into a detailed written agreement intended to regulate the performance of the contract, the relationship between the parties is governed by that written agreement, subject only to the implication of such terms as are necessary to be implied in the absence of express terms dealing with the subject matter of the implications."[111]

In that case, His Honour, in dismissing a claim for pure economic loss brought in tort by a subcontractor against a head contractor, concluded that the parties must have taken to have distanced themselves from each other quite deliberately as was evidenced by the contractual matrix into which they had entered and that there was no other special relationship of reliance as contemplated by cases like *Sutherland Shire Council v. Heyman.*[112]

Similarly in *John Goss Projects Pty Ltd v. Thiess Watkins White Constructions Limited (In Liquidation)*,[113] de Jersey J. said:

> "It is not right, in my opinion, to equate this builder with the architect referred to in *Voli v. Inglewood Shire Council*, or the solicitor referred to in *Hawkins v. Clayton*. The reality is that the three parties regulated their overall relationship in a particular way by

[107] [1989] 1 WLR 828.
[108] ibid. at 838. A similar conclusion was also reached in *Pacific Associates Inc. & Anor. v. Baxter & Anor.* [1990] 1 QB 993.
[109] (1988) 165 CLR 107.
[110] (1987) 3 BCL 387.
[111] ibid. at 390.
[112] (1985) 157 CLR 424.
[113] (Unreported, Qld Sup. Ct, de Jersey J., 2 October 1992).

contracts which made clear the extent of the reliance by the one against the other. That apart, there is no special feature warranting the conclusion that, notwithstanding that the second defendant knew it had rights in relation to these matters against the first defendant, it nevertheless relied in the relevant sense upon the plaintiff, expecting that if the plaintiff did not do its job properly, an action in negligence would be available."

It can be seen from these cases that the courts now regard the making of arrangements for work to be subcontracted as clear evidence by the owner to distance itself in law from the subcontractor – making it very different to see how the *Hedley Byrne* criteria could be satisfied in these circumstances. In the absence of this reliance, or any other indicia of a close special relationship, it is also unlikely that these circumstances would be sufficient to give rise to a proximate relationship necessary to found a duty of care to avoid economic loss.[114]

Contractor v. architect/engineer

A contractor will not in ordinary circumstances have any contractual relationship with either the architect or engineer (hereafter collectively referred to as 'the architect') who are engaged by the principal.

Accordingly, claims by contractors against architects for costs occasioned by flaws in the architect's design, failure to adequately supervise, or failure to appropriately certify can only be made as a claim outside of contract, usually in tort, on the basis of alleged negligence in the discharge of the architect's or engineer's duties to the owner.[115]

Depending on the architect's function, different considerations will be called into focus.

(i) Architect as designer

In the case of an architect's design, there would at first blush seem to be a plausible resemblance to the *Hedley Byrne* requirements, since the architect's design can be represented as a positive action or intervention on its part, and due care in design preparation can be said to be a matter upon which the contractor is entitled to rely when pricing the work.[116]

However, in *Lancashire & Cheshire Association of Baptist Churches Inc. v. Howard & Seddon Partnership*[117] the court considered the liability of an architect for economic loss and specifically whether submissions by architects of design constituted a statement as to the adequacy of the design.

[114] This situation should not be confused with one where there is a "direct collateral agreement" as in *Simaan General Contracting Co. v. Pilkington Glass Ltd* (No. 2) [1988] 2 WLR 758. See also *Australian Mutual Provident Society v. Dowell Australia Limited*, (unreported Supreme Court of NSW, Rogers C.J., 8 November 1988).

[115] This situation is to be contrasted with where there is express reliance on a specific representation or intervention by an architect which would in usual circumstances satisfy the *Hedley Byrne* test.

[116] See Wallace I.D., QC 'Hudson's Building & Engineering Contracts' Eleventh Edition (1995) Sweet & Maxwell London 165.

[117] [1993] 3 All ER 567 – a principal/architect case.

In holding that the plaintiff's action was not sustainable under the principles of *Hedley Byrne v. Heller*, Judge Kershaw, QC said at page 38:

> "Upon the evidence put before me I find as a fact that when submitting designs the defendants did not make any express statement about the technical qualities of the proposed building... and it would, in my judgment, be artificial to treat the submission of drawings and designs by an architect to his client as some form of implied statement as to the technical adequacy of the proposed building."[118]

This is consistent with the long-standing practice of contractors to price construction contracts on the basis that the owner neither expressly nor impliedly warrants its architect's design so that the contractor has to make up any design deficiencies at its own cost, the contractor having warranted its ability to carry out and complete it.[119]

Notwithstanding this, the Supreme Court of Canada in the decision of *Edgeworth Construction Ltd v. N. D. Lea & Associates*[120] held that the consulting engineers in question owed a duty of care (based on negligent misstatement) to a tendering contractor for economic loss caused by the contractor's reliance upon drawings.

The decision was explained by McLachlin J. at page 65:

> "Liability for negligent misrepresentation arises where a person makes a representation knowing that another may rely on it, and the plaintiff in fact relies on the representation to its detriment [citing *Hedley Byrne & Co. v. Heller & Partners Ltd*]... The facts alleged in this case meet this test... The engineers undertook to provide information (the tender package) for use by a definable group of persons with whom it did not have any contractual relationship. The purpose of supplying the information was to allow the tenderers to prepare a price to be submitted. The engineers knew this. The plaintiff contractor was one of the tenderers. It relied on the information prepared by the engineers in preparing its bid. Its reliance upon the engineers' work was reasonable. It alleges it suffered loss as a consequence. These facts establish a prima facie cause of action against the engineering firm."

The Court had to then consider whether the existence of terms of the contract between the contractor and the employer negated the duty of care. McLachlin J. accepted the argument that when the tender package was incorporated into the contract the representations became the representations of the principal, but she did not accept that thereby they ceased to be the representations of the engineer. Clause 42 which arguably excluded the principal from responsibility for the content of the contract drawings did not expressly or by implication exclude the responsibility of the engineer and so the question of whether the engineer as a

[118] ibid. at 477.

[119] A contractual background or setting seemingly incompatible with any *Hedley Byrne* relationship: see Wallace I.D., QC 'Hudson's Building & Engineering Contracts' Eleventh Edition (1995) Sweet & Maxwell London 165.

[120] (1993) 66 BLR 56.

stranger to that contract could have taken advantage of it did not arise.[121] The Court did, however, indicate that the engineers could have taken measures to protect themselves by placing a disclaimer of responsibility on the design document.[122]

(ii) Architect as superintendent

It will be difficult for a contractor to succeed in an action for economic loss for negligence in supervision by a superintendent unless the superintendent gives the contractor advice outside of the contract. This is because the superintendent is engaged by the principal and is not a party to the contract between the contractor and principal.[123] Rather, to the extent that the superintendent fails to perform in accordance with its duties under the contract, that liability is liable to be sheeted home to the principal, who will then have its own remedies in contract (and arguably in tort) against the superintendent for breach of its terms of engagement.

These factors have not precluded successful attempts in Canada by contractors to seek damages from superintendents,[124] although it has been suggested that some architects in that jurisdiction have unwisely exaggerated the importance of their supervisory role in their standard published conditions of engagement.[125]

It is contended that these cases are of dubious authority and certainly in this country the position seems to have been made clear by the decision in *R.W. Miller & Co. v. Krupp.*[126]

In that case, the court considered a web of claims arising from the collapse of a rail-mounted bucket wheel reclaimer. Of relevance was the claim made by the designer, constructor and commissioner against the supervising engineer for economic loss as a result of failure to take reasonable care to supervise the work under the contract.[127]

Krupp (the contractor) submitted that Minenco (the supervising engineer) owed to it a duty to avoid economic loss through failure to take reasonable care in supervising Krupp's work. The Court rejected this argument and in doing so had regard to the terms of engagement. Minenco was the engineer under the contract. Although it had to decide whether work performed and goods supplied were in accordance with the contract, at least until final certificate, its decision did not relieve Krupp from its responsibilities in the performance of the contract.

[121] This situation was considered in *Pacific Associates Inc. v. Baxter* [1990] 1 QB 993 and answered in the affirmative on the facts of that case.

[122] For a criticism of this decision refer Ian Duncan Wallace, QC at 169-171 of 'Hudson's Building & Engineering Contract' Eleventh Edition (1995) Sweet & Maxwell London 165.

[123] The reader is referred to the article by Phillip Davenport 'Defective Work' ACLN Issue #42 at 19.

[124] *Demers v. Dufrensne* [1979] SCR 149 and *Trident Construction v. Wardings* (1979) 6 WWR 481.

[125] See Wallace I.D., QC in 'Hudson's Building & Engineering Contracts' Eleventh Edition (1995) Sweet & Maxwell, London 165 at 173.

[126] (1995) 11 BCL 74.

[127] ibid. at 147.

Similarly, while it examined and approved or otherwise drawings and calculations submitted to it, its approval did not relieve Krupp from responsibility for mistakes or errors for any departure from the specification.[128]

The Court found that Krupp entered into the contract on the basis that except in relation to the final certificate it had to fully comply with its obligations whether or not Minenco properly carried out its supervisory function. Accordingly, there was no relevant reliance on the part of Krupp, nor any relevant assumption of responsibility on the part of Minenco.[129]

Moreover, the Court noted that the economic loss in question was the loss suffered by Krupp by reason of its breach of the contract. Krupp's submission required that the principal's agent for the purpose of supervising Krupp's performance of the contract owed to Krupp a duty to take care to prevent Krupp from failing to properly perform: a duty to save it from breach of the very contract it had to perform to the supervising engineer's satisfaction.[130]

This issue was one considered in *Pacific Associates Inc. v. Baxter*[131] to which Giles J. referred with approval. His Honour noted that in that case it was clearly enough thought that there should not be superimposed on the contractual structure an additional liability in tort as between the engineer and contractor.[132]

(iii) Architect as certifier

Economic consequences can clearly flow to the parties as a result of the architect's certification of payment claims. Under the standard contracts, there are provisions which expressly provide for a mechanism in the event that the superintendent's certificate is to be disputed (even if such provisions won't affect the liability to pay on the certificate).[133] For example, in *Lubenham Fidelities and Investments Co. Ltd v. South Pembrokeshire District Council*,[134] the Court of Appeal said that whatever the cause of an under-valuation, the proper remedy of the contractor was to request the architect to make an appropriate adjustment in another certificate or to take the dispute to arbitration under clause 35.[135]

These factors similarly influence Cole J. in *P.E. Phontos v. McConnel Smith*[136] where His Honour said:

> "There may well be significant policy considerations affecting a court's decision whether in the usual case and absent any special factual circumstances the law should impose

[128] ibid. at 147.
[129] ibid. at 147.
[130] ibid. at 148.
[131] [1990] 1 QB 993.
[132] (1995) 11 BCL 74 at 148.
[133] See, for example, clause 47 of AS2124; clause 5.02.03 in JCC-C and JCC-D.
[134] (1986) 33 BLR 39.
[135] In a different context see Mead P. 'Liability of the superintendent for damages pursuant to s.82 of Trade Practices Act for wrongfully certifying' (1996) 15 ACLR 6 at 6.
[136] (1993) 9 B.C.L. 259.

> upon a superintendent engaged by a proprietor to act on his behalf in the supervision of the works, and also to perform independent certifying functions with economic consequences both for the proprietor and building contractor, where the decisions of the superintendent are open to review through an agreed arbiter mechanism, a duty of care to the building contractor."[137]

As was recognised by Cole J., the architect is employed, to the knowledge of the contractor, to protect the owner's interests, and not to provide a protection or safeguard to the contractor.

This aspect is highlighted in the English decision of *Pacific Associates Ltd v. Baxter Co.*,[138] in which the defendant (whose contract was with the proprietor) was the supervising engineer under a contract for dredging and reclamation work. The plaintiff claimed that the defendant was negligent in its certification of claim. The Court held that it was not, and that the defendant did not owe a duty of care to the plaintiff. The Court made the determination in the context of the factual matrix, including specifically the contractual structure against which such duty was said to arise. Important was the fact that the plaintiff was not relying on the defendant performing its duty, but was rather relying on its rights against the employer under the contract and its express arbitral mechanisms. There was no reason to believe that the defendant ever assumed a direct responsibility to the plaintiff for economic loss resulting from any breach of its duty to the proprietor.[139]

When called on to make an assessment in a particular case, the Court is also likely to have regard to whether it would be fair, just and reasonable (a test increasingly favoured in England)[140] to impose on the engineer by way of liability in tort, rights in favour of the contractor in excess of those rights which the contractor was content to acquire against the employer under the contract. Relevant to this determination will be whether a remedy is available against the principal under that contract or if an alternative remedy against a third party in contract is available. The courts will only be able to make this determination by reference to the 'contract setting'.[141]

Most recently, Byrne J. emphasised this factor in the recent case of *John Holland Construction & Engineering Pty Ltd v. Majorca Projects Pty Ltd and Bruce Henderson Pty Ltd*[142] where His Honour stated:

> "The solution to the present problem must be found in the answer to the questions whether, in the contractual framework in which the parties to this project operated, it is established that the builder relied on or depended upon the careful and impartial

[137] ibid. at 263.
[138] [1990] 1 QB 993.
[139] ibid. at 1011
[140] See *Greater Nottingham Co-operative Society Ltd v. Cementation Piling & Foundations Ltd* [1989] QB 71 and *Purchas L.J. in Pacific Associates Inc. v. Baxter and Ors.* [1990] 1 QB 993 at 1011. In Australia, see *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424.
[141] *Pacific Associates Ltd v. Baxter Co.* [1990] 1 QB 993.
[142] (1997) 13 BCL 135 at page 246.

performance by the architect of its certifying functions as here alleged and whether the architect, for its part, assumed a legal responsibility to the contractor so to perform them. ... to adopt the expression of Kelly J. in *S.W. Nielsen v. PVC Constructions (ACT) Pty Ltd* (1987) 71 ACTR 1 at 8, have the architect and the builder deliberately distanced themselves from each other so that no relationship of proximity was contemplated. ...In my opinion, it is clear that the question of the rights and remedies of the builder for acts and decisions of the architect were considered by the builder and the proprietor... and... it is... not appropriate for me to seek to engraft upon the contractual background a tortious obligation of the kind contended for by the builder. There is in this case no room for a duty of care owed by the architect to the builder the relevant content of which was a duty to act fairly and impartially in carrying out its functions referred to in Clause 5.02.02."

PART III: The relevance of contract to the duty owed to subsequent purchasers

In *Bryan v. Maloney*,[143] the High Court allowed recovery by a subsequent purchaser of property from the original builder who constructed a dwelling house for a landowner under a contract which contained no relevant exclusion or limitation of liability. This enabled the High Court to determine that case in the 'abstract' without having regard to the impact of the terms contained in the building contract:

"...in the circumstances of this case where the contract between Mr Bryan and Mrs Manion was non-detailed and contained no exclusion or limitation of liability, neither the existence nor the content of the contract precluded the existence of liability to Mrs Manion or Mrs Maloney under the ordinary law of negligence. To the contrary, the case was of the kind... where the relationship of proximity arises by virtue of the contract and the work to be performed under it."[144]

Having equated the relationship between Mr Bryan and Mrs Maloney with that of the relationship between the architect and injured plaintiff in *Voli v. Inglewood Shire Council*, the majority of the High Court found it unnecessary to consider whether such a relationship of proximity or any consequent duty of care could be excluded or modified by the terms of the contract between the builder and the first owner.[145]

Of concern, to those in the construction industry, was the obiter of the majority that:

"There is, however, obvious force in the conclusion expressed by Windeyer J. in *Voli v. Inglewood Shire Council* to the effect that, while such a contractual exclusion would be relevant to identifying the task upon which the architect had entered, it could not directly operate to discharge the architect from a duty of care which would otherwise exist 'to persons who are strangers' to the contract."[146]

[143] (1995) 182 CLR 609.
[144] ibid. at 622.
[145] ibid. at 625.
[146] ibid. at 625.

Taken at face value, and in the context of the type of damage (non-dangerous defects) for which the High Court allowed recovery in *Bryan v. Maloney*, this proposition is startling, and with respect, ignores the fact that Windeyer J. was referring to a duty to avoid physical injury to person or property, not economic loss.[147] There is an obvious policy imperative in the former which is simply not present in the later.

In part this confusion is an unfortunate consequence, of the way in which the High Court in *Bryan v. Maloney*[148] categorised the damage suffered by Mrs Maloney. Although awkwardly defined as being the "diminution in value of a house when the inadequacy of its footings first becomes manifest", as Ian Duncan Wallace, QC points out, this definition potentially masked the seriousness of the damage in fact suffered by Mrs Maloney in that case.[149]

This issue of damage seems, with respect, to have confounded the High Court in *Bryan v. Maloney*,[150] the majority's blurring of the distinction between physical damage and the particular kind of economic loss suffered in that case enabling it to more easily transcend the gulf between what has traditionally been held to flow as a result of the breach of duty in each case.

Take, for example, a situation where a builder may be expressly directed pursuant to his contract to substitute materials of inferior grade or to undertake shortcuts in the construction process. None of these matters have the effect of causing a physical risk of danger to an occupant, but will mean that at some period later in time, the structure will not perform as well as it otherwise would have in the absence of these directives by the owner. The builder in such a case might expressly advise against the use of such materials or variation and may (by contract) expressly disclaim liability and responsibility to the owner.

In these circumstances, if regard cannot be had to the contract between the original builder and proprietor, the builder could be exposed to liability 10 or 15 years down the track for what amounts to nothing more than a defect in quality.

As was pointed out by Connolly J. in *R v. His Honour Judge Miller and The Builders' Registration Board of Queensland, Ex parte Graham Evans & Co. (Qld) Pty Ltd.*[151]

> "A builder, no matter how experienced, cannot be asked to do more than perform his contract according to its terms, doing so in a proper and workmanlike manner."[152]

This was the very issue seized upon by Chief Justice Brennan in *Bryan v. Maloney*[153] in his strong dissent. At page 640, he stated:

[147] As was expressly acknowledged by Deane J. in *Hawkins v. Clayton* (1988) 164 CLR 539 at 575.
[148] (1995) 182 CLR 609.
[149] See Wallace I.D., QC 'Bryan v. Maloney; More Unresolved Problems' (1995) 1 ACLR 4.
[150] (1995) 182 CLR 609.
[151] [1987] 2 Qd R 446.
[152] ibid. at 449.
[153] (1995) 182 CLR 609.

> "A duty to take reasonable care in constructing a building to avoid or prevent personal injury is cast upon a builder 'not because he made a contract, but because he entered upon the work'. If the same approach were taken to the definition of a builder's duty to a remote purchaser to prevent the occurrence of defects in the building, the builder would not be liable to the purchaser for defects arising from work which had not been done and which the builder had not been required to do. The purchaser, however, would probably know nothing of the extent of the contract works or the financial constraints which dictated their limits."

Brennan J. considered that if the financial interests of the purchaser were to be protected by the law of negligence, those interests could be affected by the scope of the building contract to which the purchaser was not a party. That contract would not only affect the standard of care in doing work within the scope of that contract, but also determine what defects were outside the scope of the contract and hence outside the postulated tortious duty.[154]

For instance, Brennan J. considered it would have been central to determine whether the original owner gave authority to the builder in that case, to commission and was willing to pay for the soil investigations which would have revealed the presence of reactive clays.[155]

His Honour went on to say it would be anomalous to have claims relating to the condition of the building by an original owner against the builder determined by the law of contract if the relief claim by the remote purchaser against the builder would be determined by the law of tort. Such a situation would expose the builder to a liability for pure economic loss different from that which he undertook in constructing the building and would confer a corresponding right on the remote purchaser which the purchaser had not sought to acquire from the vendor. It would be tantamount to the imposition on the builder of a transmissible warranty of quality.[156]

Both the majority of the High Court and Brennan J. frequently referred to Canadian authorities in the area. While the majority took general support from the cases for its view of concurrent liability, Brennan J. would allow recovery on the basis of the dissenting view of Laskin J. in *Rivtow Marine Ltd v. Washington Iron Works*[157] (the so-called 'dangerous defects' exception), where the courts would now allow recovery only to a plaintiff who actually incurred the expense in removing, paying for the removal or incurring a liability for the cost of removal of a defect which posed substantial risk of damage to personal property.

The Canadian decisions are interesting with regard to the effect of the contractual provisions between the original contracting parties on a duty owed to

[154] ibid. at 640.
[155] ibid. at 641.
[156] ibid. at 644.
[157] [1974] SCR 1189.

a third party. In *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*,[158] La Forest J. stated:

> "As I see it, 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 [in such a manner that it does not contain dangerous defects] ...and not merely according to contractual standards of quality. ...As this duty of care 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."[159]

Accordingly, in Canada, a tort duty to construct a building safely is a circumscribed duty that is not parasitic upon any contractual duties between the contractor and the original owner. This view is predicated upon the duty being one to avoid economic loss arising from dangerous defects or structures and is therefore much more closely assimilate to the dicta of Windeyer J. in *Voli v. Inglewood Shire Council*[160] which concerned a duty to avoid physical harm to person or property. It is not, it is submitted, a sound basis for the courts when considering issues of economic loss arising from defects in quality, to determine the efficacy of exclusions in the original building contract, nor has it been suggested as such in Canada outside of dangerous defect cases.[161]

In the writer's view there is much appeal in the approach of the Canadian courts to this issue.[162] Their treatment of the problem allows the parties to fix their own rights and liabilities on issues of purely economic significance (i.e. the work to be performed, the quality and value of that work and the cost of repairing defects in work). It leads to a situation where the protection of purely economic interests (outside of the 'dangerous defects' exception) is governed solely by the parties' contract. As there is no imposition of a tortious duty to avoid causing pure economic loss, there is no need to look to the underlying transaction, relevant warranties or exclusions to determine what, if any affect these will have upon the tortious duty owed. It addresses relevant policy considerations such as deterrence of shoddy workmanship which is likely to lead to a physical danger to a person or property and is generally more consistent with the development of the law in this area.

The same cannot be said of economic loss flowing from a defect in quality, the recovery of which arguably offends against the High Court's very own principle of 'personal advantage'.[163]

[158] (1995) 121 DLR (4th) 193.
[159] ibid. at 217.
[160] (1963) 110 CLR 74.
[161] See *Edgeworth Construction Ltd v. N.D. Lea & Associates Ltd* (1993) 66 BLR 56 per McLaughlin J.
[162] For a contrary view see Palmer J. 'Bird: A Confusion between Property Rules and Liability Rules' (1995) 3 Rot. Law Review at 240.
[163] See *Bryan v. Maloney* (1995) 182 CLR 609 at 618; *Jacnsch v. Coffey* (1984), 155 CLR, at 578; *Sutherland Shire Council v. Heyman* (1985), 157 CLR at 503.

Moreover, if the High Court were to persist in its view that recovery is to be permitted by a subsequent purchaser against a builder in respect of mere quality defects, it potentially opens up an unavoidable examination of contractual specifications and degrees of required quality.[164] To undertake this task one would have to, in addition to considering any contractual restrictions, disclaimer or exemptions with respect to quality, have regard to the delineation of responsibility between the parties involved (e.g. suppliers, subcontractors, etc.).

For example, in *Zumpano v. Montagnese*[165] it was suggested that the liability of the builder could have been avoided if there had been contractual terms excluding or limiting liability (for example, that the builder gave no warranties in relation to the works carried out by its subcontractors). Although this approach has been described as a 'quantum leap' because it would effectively mean saddling a third party with an interference with its normal rights in tort,[166] in the writer's view, this may be considered preferable to saddling a contractor with a tortious liability outside the scope contracted.

Consultants' reports

In addition to the situation considered by the High Court in *Bryan v. Maloney*,[167] a construction professional may be potentially liable for economic loss occasioned by a plaintiff's reliance on a negligently produced report. The existence of such a report may arguably militate against a finding of proximity between the original builder and subsequent purchaser, as it might be thought that the subsequent purchaser relied not on the original builder having performed its work non-negligently but rather on the engineer's/architect's report to protect its economic interests. Alternatively, the existence of such a report may break the chain of causation between the builder's negligence and the purchaser's loss.[168]

Whether or not recovery will be allowed by plaintiffs who have not engaged, have not paid for and who may not even have been considered by the author of the report, will largely be a question of policy. The situation is somewhat different from that of builder and subsequent purchaser. The consultant is not the originator of the defect but has merely been engaged to advise and warn. It accordingly seems that it will at the very least be necessary for the subsequent purchaser to show that it did in fact rely on the report, as the Court is unlikely to see the same imperative to allow recovery, as it did in *Bryan v. Maloney*.[169]

[164] This was Brennan J.'s concern in *Bryan v. Maloney* (1995) 182 CLR 609.
[165] (Unreported; Victorian Supreme Court, Mandie J., 3 May 1995). The decision of the Judge at the first instance was reversed on appeal. See *Zumpano & Another v. Montagnese* (1996) 13 BCL 163.
[166] See Tapsell K. 'Bryan v. Maloney; Unresolved Problems' (1995) 14 ACLR 87.
[167] (1995) 182 CLR 609.
[168] For example, see *Sved v. Council of Municipality of Woollahra* (1995) – Aust Torts R 81-328.
[169] (1995) 182 CLR 609.

In these circumstances a question must be asked whether such reliance is reasonable, particularly when the purchaser is presumably in as good a position as the party who obtained the original report to commission its own? It has been suggested that if it is reasonable, then the author will be treated in law as having assumed responsibility, even if, in fact, it did not do so.[170]

What then of the effect of limitations or exclusions contained in the report?

In the English decision of *Roberts v. J. Hampson & Co.*[171] the courts considered a claim by a third party purchaser against a surveyor which had undertaken a limited retainer to a building society.

Notwithstanding the limited scope of the surveyor's retainer and even though the report came with a myriad of disclaimers, including a recommendation that the purchasers engage their own surveyors for protection, the court allowed recovery by the third party purchasers. The decision was however based on a failure by the surveyor to undertake its duties in the manner of a reasonably competent professional.[172] It appears that the surveyor, for this reason, could also have been liable to the financier.

Although it is, therefore, arguable that the decision is of limited guidance to the question of the extent to which the duty to a third party can be modified by the terms of the original contract or retainer, it was significant that the exclusion was held to be ineffective to preclude liability being owed to the third party, who it was found as a matter of fact relied on the report. This approach supports the contention that while the terms of the contract may be relevant to determine the scope of the task undertaken, they are unlikely to be effective to exclude liability where there has otherwise been a breach of overriding professional duties in circumstances where a duty of care is owed.

Conclusion

The constant theme arising out of the recent developments in this area is that of an ever-expanding tortious liability for those in the construction industry.

It is now clear that the presence of a contractual relationship between a construction professional and client will not necessarily preclude the existence of a tortious duty to avoid economic loss.[173]

It also seems open to assert that a co-extensive tortious duty can be founded on no more than a breach of contractual obligations (either express or implied), thus circumventing the contractual limitation period on the basis of the 'discoverability' test for economic loss.[174]

[170] Trindade & Cane 'The Law of Torts in Australia' 2nd Ed. (1993) Oxford University Press South Melbourne at 368.

[171] [1989] 2 All ER 504.

[172] ibid. at 510.

[173] *Bryan v. Maloney* (1995) 182 CLR 609.

[174] *Lancashire & Cheshire Association of Baptist Churches Inc. v. Howard & Seddon Partnership* (a firm) [1993] 3 All ER 567; *Pullen v. Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27.

Where, however, a contract expressly prescribes the manner in which work is to be undertaken (as opposed to merely delineating responsibilities for certain tasks), or the obligation is absolute, there is unlikely to be superimposed a tortious duty of care.[175]

In circumstances where a contract expressly prescribes certain obligations but is silent as to others, the imposition of a tortious duty is likely to be dependant upon the court's assessment of the totality of arrangements. Relevant to that determination will be the availability of an alternate contractual remedy against another party.[176]

Where the parties are in a contractual setting or 'matrix' the courts seem likely to remain reluctant to impose on the parties a tortious duty which cuts across contractual lines and permits circumvention of a carefully negotiated contractual balance. The possibility cannot however be entirely discounted.[177]

By assimilating the position of the builder to that of the architect in *Voli v. Inglewood Shire Council*,[178] the High Court in *Bryan v. Maloney*[179] has left open the possibility of a duty of care, being owed to remote purchasers to avoid economic loss which will not be negatived by exclusions contained in the original building contract. At this stage the proposition is limited to dwelling houses, but may be extended. While one can understand the logic of such a proposition when concerned with 'dangerous defects', it is somewhat more difficult to fathom in the context of defects in quality, and is an issue which may need to be 'revisited' by the High Court. Given the doubts expressed by Toohey J. as to the classification of damage[180] and the recent addition of Kirby J. and Gummow J. to the High Court bench, this seems a distinct possibility. Further developments are awaited with interest.

[175] For example, as in *R.W. Miller & Co. Pty Ltd v. Krupp Pty Ltd* (1995) 11 BCL 74.
[176] See *Pacific Associates Inc. v. Baxter* [1990] 1 QB 993.
[177] See, for example, *Edgeworth Construction Limited v. N.D. Lea & Associates Limited*, (1993) 66 BLR 56 and *NRMA Insurance Limited v. A.W. Edwards Pty Limited* (unreported, NSW Court of Appeal Kirby P., Mahoney and Powell J.J. 11 November 1990).
[178] (1983) 110 CLR 74.
[179] (1995) 182 CLR 609.
[180] ibid. at 657.