

Builder's Duty Of Care

Bryan v Maloney revisited

In *Bryan v Maloney* [see (1995) ACLN #41 p43], the High Court held that the builder of a house owed a duty of care to a subsequent purchaser if a relationship of proximity existed. For such a relationship to exist, the Court said that an element of known reliance or assumption of responsibility is commonly required. The High Court treated the duty to a subsequent purchaser as an "*extension of the duty of care to which the builder was already subjected in consequence of his relationship with the building owner*".

The scope of that landmark decision and its effect on the construction industry has been discussed widely. Some believe the High Court's decision will be interpreted broadly, therefore, increasing the scope of liability for builders in tort. Has Pandora's Box been opened as claimed, or will the application of the Court's decision be limited to its own or similar facts?

Zumpano

The scope of *Bryan v Maloney* was examined by Justice Brooking in *Zumpano v Montagnese*, an October 1996 decision of the Victorian Court of Appeal.

Facts

Mr and Mrs Zumpano were professional builders. In 1985 they constructed a house as their family home. During construction, the Zumpanos engaged a licensed plumber to carry out plumbing works including the supply and installation of a boundary trap. The Zumpanos left it to the plumber to carry out those works.

In 1985, the Melbourne and Metropolitan Board of Works ("MMBW") issued a notice to the plumber which stated that the plumbing works had been accepted as completed. Annexed to the notice was a copy of the property sewerage plan which showed the boundary trap.

In 1986, the Zumpanos sold the house to Mr and Mrs Montagnese. In 1991, the Montagneses discovered that the boundary trap had not been installed by the Zumpanos' plumber when the house was built.

The Montagneses brought an action in negligence for the cost of installing the boundary trap, associated plumbing works and the cost of reinstating landscaping.

Initial proceedings

The case initially came before a magistrate who found that the Zumpanos had breached the duty of care

they owed to the Montagneses. The Zumpanos' appeal was dismissed by Justice Mandie of the Victorian Supreme Court who followed *Bryan v Maloney* in deciding that an owner-builder owed a duty of care to subsequent purchasers of a house which was sold as a builder's own home.

Court of Appeal

The Zumpanos successfully appealed to the Victorian Court of Appeal. In his leading judgment, Justice Brooking considered the parameters of *Bryan v Maloney* in detail. The two other judges, Justices Tadgell and Phillips, did not discuss *Bryan v Maloney* and concluded that it was not open to the magistrate to find any negligence on the part of the Zumpanos because there was no evidence to conclude that the Zumpanos - as builder - ought to have personally ensured that the boundary trap was installed by the plumber. These two judges said that it was far from obvious that it was not reasonable to rely on the licensed plumber and the MMBW. They decided that the liability of the Zumpanos had been "*determined upon an excessively high standard of care*".

Justice Brooking recognised that *Bryan v Maloney* "*must have bounds unless it was to have an unacceptable wide operation*" and found that the High Court had imposed several limitations to the extension of the duty of care found in that case. These included:

- the duty of care is confined to structural defects;
- the duty of care is confined to defects which affect the value of the house;
- the defect must be latent and previously unknown;
- the decision applies to the construction of dwelling houses and does not, for example, extend to the construction of commercial buildings;
- the duty of care arises only in cases where the builder erected the house under contract (i.e. the ordinary relationship between a builder of a house and its owner).

In the circumstances of the case before him, Justice Brooking found that no duty of care existed because the house was not built under contract (the Zumpanos built as owner-builders). As such, the requisite relationship of proximity was not established. Additionally, in his

Honour's opinion, the defect in this case (i.e. the non-installation of a boundary trap) was not structural and it was doubtful that it affected the value of the house.

Justice Brooking concluded that even if such a duty of care had existed, it was not breached. To say that the Zumpanos should have inspected the property to see whether the trap was installed or not was to impose too high a standard. The Zumpanos were entitled to rely on the letting of a contract to the plumber and the inspection certificate issued by the MMBW.

Sved

In the July 1996 decision of *Woollahra Municipal Council v Sved*, the majority of the New South Wales Court of Appeal was also reluctant to interpret *Bryan v Maloney* widely and found, on the facts before them, that there was no relationship of proximity between the builder and the subsequent purchaser. Justice Clarke was of the view that the answer given by the High Court in *Bryan v Maloney* that such a duty of care existed was highly qualified and that "*the narrow ambit of the proximity relationship in that decision was more reflective of a determination based upon particular facts than one applicable to a broad category of cases*".

Conclusion

The cases of *Zumpano* and *Sved* show that construction industry concern over a wide application of the builder's duty of care to subsequent purchasers is not warranted - at least for the moment. Since the High Court decision, the lower courts have recognised only limited circumstances in which such a duty will arise. As to whether the courts' limitations on the application of the *Bryan v Maloney* principles will be eroded as more cases come to trial, only time will tell. On the other hand, various Australian states already impose statutory warranties upon builders and there are new statutory warranties being cast upon builders and developers in New South Wales.

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