OPINION

Taking 51 steps to negligence

by DOUG JONES

IN SUNNY Manchester the rains came down, the gutters overflowed and the warehouse contents were flooded. Who was to blame? Was it the seagulls, or was it the 51st step by the snail in the drink bottle?

And in beachside Darwin the grounds and girders shifted and the waters penetrated, causing economic loss to the owners of the mixed residential and commercial complex above.

Who was to blame? Was it the builder and its engineers, or would the fact that the building was partly commercial be enough to get them off? In Queensland, they might well have walked ... but this was the Northern Territory.

In the sometimes surreal world of the development of negligence law, it is often questions such as these, in two recent court cases, which determine whether the legal exposure of builders and professionals in the construction industry will continue to increase.

And in both instances the liability did increase ... yet again.

First, the seagulls case, more formally known as Baxall Securities v Sheard Walshaw, decided by the UK Technology and Construction Court last October.

Consider, on the one hand, the advice of the environmental engineers: "Seagulls. Yes, seagulls. They have adopted the roof of your premises and roost in the gutter. Their feathers, food and droppings accumulate quickly and block the drain outlets. If the problem was one of herons or pigeons I could suggest mounting a replica of another bird on the roof. Seagulls, however, seem to fear nothing, other than killer whales, which might prove difficult to fit and would require planning permission."

If the seagulls were to blame, the architects who had under-designed the gutter would get off. (The unqualified individual responsible was "last heard of running a public house in Cumbria".)

Then consider, on the other hand, the outrage of one of the dissenting judges almost 70 years ago in the landmark negligence case Donoghue v Stevenson, the snail-in-the-drink-bottle court case which set the basis for most of today's "modern" negligence law.

Arguing against the idea of applying negligence law to the sale and purchase of consumer products, Lord Buckmaster thundered: "If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty? Yet if a house be negligently built and the ceiling falls and injures the occupier, no action against the builder exists according to English law, although I believe such a right did exist according to the laws of Babylon."

(Another of the dissenters spoke of another "alarming consequence" if consumers could sue: people injured in a railway accident caused by a defective axle might even be able to sue the manufacturer!)

Today, of course, the laws of Babylon apply, even though the penalties are much reduced. In many circumstances even a subsequent owner of a defectively built house can bring a successful negligence claim against the builder, even if only "economic" loss, without any physical damage or injury, has been suffered.

The 1995 High Court case that established this in Australia will be well known to most readers: Bryan v Maloney.

In the Manchester seagulls case the judge eventually found that one flooding episode had been caused by seagull-induced blockages, along with other factors the claimants could reasonably have discovered before they leased the premises, but a second flooding episode, just after the gutter had been cleared, had been caused by the gutter's underdesign.

Architects liable

So were the architects liable? The answer was "yes".

The judge ruled: "One must now accept that a builder owes a duty to a subsequent occupier in appropriate circumstances. I think it must follow that I must take the 51st step and hold that an architect may also owe a duty and be liable in appropriate circumstances."

The tests he applied to decide if the circumstances were "appropriate" were those developed in the UK. In Australia, the tests to be applied for "pure economic loss" cases are still highly uncertain: as the 1999 "potato wilt" case Perre v Apand demonstrated, ask any seven High Court judges and you'll get seven quite different tests, even if in that case all of them produced the same answer!

The significance of the case is that for the first time in the UK the 51st step has been taken - and once again the potential scope of architects' liabilities has expanded.

An equally salutary lesson can be drawn from the October 2000 Northern Territory Supreme Court case Proprietors Units Plan and others v Jiniess Pty Ltd and others.

In this case the engineers and builder of a negligently designed and built commercial and residential complex were being sued by the body corporate and several subsequent owners for economic losses, including the reduction in the value of their units.

The engineers and the builder argued that the court should follow a series of Victorian, NSW and Queensland court decisions, since Bryan v Maloney, which they said confined the operation of Bryan v Maloney-style liability to a "narrow category of cases" - which naturally did not extend as far as the current situation!

For example, in its 1999 decision in Fangrove v Tod Group Holdings the Queensland Supreme Court of Appeal had refused to apply Bryan v Maloney to commercial (as distinct from residential) buildings, saying that only the High Court should make such an "extension". And the Darwin complex was partly commercial in nature ...

These arguments received short shrift from the court, as did an argument that the High Court judges' analyses in the potato case, Perre v Apand, indicated Bryan v Maloney would be decided differently today.

Instead, the judge said that while the law on economic loss was "unsettled", none of the judgments in Perre v Apand had doubted Bryan v Maloney, and it was difficult to see why the plaintiffs should be treated differently from the plaintiff in Bryan v Maloney.

As in Bryan v Maloney, the relationship between the engineers and the plaintiffs had involved both an assumption of responsibility by the engineers for professional design and supervision and reliance on this by the owners.

It made no difference that the complex included commercial units. The commercial units were in the same building and were affected by the same failures of design, supervision and construction. Further, the characteristics of the commercial unit owners were no different from those of the owners of the residential units; the only real difference had been that the units were to be used as commercial outlets.

The judge extended Bryan v Maloney to the "mixed use" situation and concluded that a duty of care was owed by the engineers to all but one of the plaintiffs.

The exception was a subsequent residential owner who had commissioned an independent expert examination of cracking in her unit before she bought it, quite beyond the level of enquiries usually made by unit purchasers, and had not relied on the original engineers' conduct.

The engineers were held liable in negligence in relation to both the original structure design and the original certification of the building. Similar orders were made against the builder. Both were also found to have engaged in misleading and deceptive conduct under the Trade Practices Act. ■

Ed.: Doug Jones is a construction partner with the national law firm Clayton Utz.

PEOPLE

❑ The Australian Institute of Steel Construction has elected as its president **Avri Alfasi**, the md of Alfasi Constructions. **Greg Hancock** and **Nando Galluzzi** have been elected vice presidents of the council. Avri takes over from **Ken Wilson**, who has been interim president for a year.

Kevin Gill... high-force tools.

firm. Chalabian has expertise in commercial property transactions, hotels and gaming, Hawley advises on planning and environmental issues, and Hider specialises in construction law.

❑ **Power tools supplier Enerpac has appointed Kevin Gill as its manager for southern Queensland. Gill, a former fitter and turner, has worked for seven years in technical sales for Enerpac distributor AD Automation in South Australia. Now based in Brisbane, his territory extends from Tweed**

successful sales drive in that state. He replaces **Ron Jowett** who is retiring.

❑ *Glynwed Pipe Systems Australia has appointed* ***Steve Maheridis*** *to the position of regional sales manager for Victoria, based in Melbourne. Maheridis is a scientist with a background in chemical engineering and sales. He has worked for three years with Ionics Watertec where he has been a sales engineer and regional sales coordinator.*

equipment technician award. These two winners and six other final winners in the contest have won the prize of a study tour in Japan.

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PAGE 27