After Mallonland: Testing for a Duty of Care Against Purely Economic Loss

By

The Honourable David Jackson KC

Introduction

1. On one level *Mallonland Pty Ltd & ors v Adventa Seeds Pty Ltd*[1] is not a surprising case. The trial Judge[2], the Court of Appeal[3] and the High Court all reached the conclusion that the defendant did not owe a duty of care in negligence to avoid causing purely economic loss. That loss was suffered by growers who planted contaminated commercially produced sorghum seed. The growers bought the seed from distributors of the defendant's product packaged in bags of its "MR43 Elite" line of sorghum seed. It can also be said, at the highest level of generality, that *Mallonland* is consistent with the trend of recent cases in the High Court[4] that mark a slowing of the "imperial march of modern negligence law"[5] onto ground that liability in negligence did not historically occupy.

2. I will argue that *Mallonland* is a signal of two taxonomical changes in direction. However, as I analyse the case, it does not point clearly in any new direction. I think there are a couple of reasons for that.

3. If you will forgive my telling a personal story, in 2007 the High Court decided *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [6], a case about liability under the principle of *Barnes v Addy*. Not long afterwards, I met my friend Tony Lee, one of the authors of *Ford and Lee on Trusts*. I said to Tony how thrilled I was that *Say-Dee* had righted the ship of authority for *Barnes v Addy* liability. Tony, who has always been a bit of a more progressive than I am, said to me: "David, I don't know" - he often started that way when he was about to gently put someone in their place - "but over the years I've come to the conclusion that novel cases where the plaintiff doesn't win don't decide very much." I think there is something in that. And it is one reason why other recent High Court cases, and now *Mallonland*, don't give as much guidance about the limits of a duty of care to avoid purely economic loss as we might like.

4. Another more specific reason for the lack of direction out of *Mallonland* is that the parties to the appeal did not argue that the "salient features" approach to testing for a duty of care to avoid causing purely economic loss should be abandoned. Understandably enough, the court did not consider it appropriate to do so in *Mallonland*, although there are indications that in future the "salient features" approach may be added to the box of discarded methods of testing for a duty of care.

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1 [2024] HCA 25.

2 (2021) 7 QR 234.

3 (2023) 13 QR 492.

4 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; *Sullivan v Moody* (2001) 207 CLR 562

5 *Astley v Austrust Ltd* (1999) 197 CLR 1, 23 [48].

6 (2007) 230 CLR 89.

5. In the next 45 minutes I will touch on how the current of Australian authority arrived at the "salient features" approach and how, in *Mallonland*, two "salient features" that recur in recent case law operated to knock down the possibility of a duty of care. It is necessary to touch on a few historical features to give context to the discussion. I will have to be overly-brief about some of that history given the short time we have.

Assumption of responsibility

6. We should not forget that the modern tort of negligence in Britain and then this country was established less than 100 years ago. It wasn't until 1932 that the House of Lords decided *Donoghue v Stevenson*, establishing Lord Atkin's famous "neighbour" test for the existence of a duty of care for liability for personal and property injury. To do that it was necessary to overrule earlier cases rejecting that a maker of goods for sale (now called a manufacturer or producer) owed a duty of care in negligence to a user of the goods who was not the buyer. Of course, *Donoghue v Stevenson* was, in terms, confined to personal injury or property damage. It did not encompass purely economic loss.

7. More than 50 years before 1932, in 1875, Blackburn J gave the judgment in *Cattle v The Stockton Waterworks Co*[7], holding that a waterworks company did not owe a duty of care to avoid flooding from a defective pipe laid in a road that caused economic loss by way of increased expenses to a contractor constructing a tunnel under the road to connect the neighbouring land on either side. *Cattle* has since been seen as one of the primary sources of what is described in *Mallonland* (and many earlier cases) as the "general rule" against the existence of a duty of care in negligence to avoid causing purely economic loss, as follows:

> "As a general rule, damages are not recoverable in negligence for pure economic loss, that is, for loss that is not consequential upon injury to person or property. Ordinarily, a person does not owe a duty to take reasonable care to avoid causing reasonably foreseeable pure economic loss to another." [8] (footnotes omitted)

8. It was not until 1964, in *Hedley Byrne & Co v Heller & Partners*[9], that English authority clearly recognised an "exception" to the general rule. The question there was whether a bank owed a duty of care in giving a financial reference about one of its customers to an inquirer (on behalf of a person) who was considering doing further business on credit with the customer.

9. For the purposes of today's discussion *Hedley Byrne* is one of the important cases, because it is the modern source of the concept of "assumption of responsibility" which, as we will see, *Mallonland* elevates to or re-establishes as a separate category of case as a determinant of the existence of a duty of care.

10. So, let me show you just two passages from *Hedley Byrne*, both from Lord Devlin's speech. The first is this:

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7 (1875) 10 QB 453, 457.

8 [2024] HCA 25, [30], [71].

9 [1964] AC 465.

> "I have had the advantage of… studying … the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. **I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken** either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction."[10]

11. This is not the only source of the "assumption of responsibility" concept arising from the speeches in *Hedley Byrne* but it is the clearest and the best starting point. May I point out two important parts of the context of "responsibility … undertaken or assumed" in that passage. The first is that the responsibility considered is to those who "act on information or advice". That is a point I will come back to. It is worth noting that in the following years *Hedley Byrne* became the paradigm example for what is termed "negligent misstatement". The second contextual point is that two classes of "responsibility… accepted or undertaken" are identified: first, the recognised general relationships; second, cases of a specific acceptance or undertaking. But a specific acceptance or undertaking is not required to be express. In the next few sentences Lord Devlin referred to the difficulty in laying down the circumstances where "the law will in a specific case imply a voluntary undertaking".[11]

12. Another important part of the analysis appears in the next paragraph of Lord Devlin's speech, as follows:

> "I shall therefore content myself with the proposition that **wherever there is a relationship equivalent to contract** there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former, *Nocton* v. *Ashburton* has long stood as the authority and for the latter there is the decision of Salmon, J. in *Woods* v. *Martins Bank* which I respectfully approve. There may well be others yet to be established…"[12]

13. *Hedley Byrne* was neither the first common law case nor the first English case to recognise a duty of care in "negligence" against purely economic loss. Brevity confines me to two selected examples. In 1914, the House of Lords, in the equitable case of *Nocton v Lord Ashburton*[13], accepted that a duty of care was owed by a solicitor as a client's fiduciary, even though the solicitor was not acting for the client in the particular release of mortgage transaction. And in 1922, in *Glanzer v Shepard*[14], Cardozo CJ, writing for the New York Court of Appeals accepted that a public weighing scale operator owed a duty of care against purely economic loss. The question was whether the weigher owed a duty of care to a particular purchaser in weighing goods that to the weigher's knowledge were being sold to the purchaser for a price per unit of weight.

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10 [1964] AC 465, 529.

11 [1964] AC 465, 530.

12 [1964] AC 465, 530.

13 [1914] AC 932.

14 [1922] 135 NE 275.

14. I also mention *Nocton* and *Glanzer*, for the further reason that each is a direct earlier source of the "equivalent to contract" concept that Lord Devlin treated in *Hedley Byrne* as one way of finding an "assumption of responsibility" basis for the existence of a duty of care.

15. For Australia, *Hedley Byrne* was accepted in1968 and 1971 in *Mutual Life Assurance Co Ltd v Evatt*[15] by both the High Court, in terms that engaged the "equivalent to contract" concept, and by the Privy Council, although the majority in the Privy Council confined the liability to advice given in the course of a business or profession involving the giving of advice requiring a special skill. That limit has been controversial ever since.

Separate categories of "assumption of responsibility and "salient features"

16. It is of some significance that the plaintiffs in *Mallonland* did not expressly plead that the defendant owed a duty of care. The alleged facts included: the defendant's business of the production and distribution of the particular yearly batch of MR43 sorghum seed; the plaintiffs' purchase and planting of the particular batch of seed from distributors or re-sellers; that the seed was contaminated by seed from off type sorghum plants that the plaintiffs called "shattercane"; the defendant's negligence in producing the seed containing the contaminant; and the plaintiff's loss. However, because a duty of care was not expressly pleaded, there were no facts specifically alleged as raising up the duty.

17. By the time the case got to the High Court, the plaintiffs articulated a duty of care based in part on the contention that the defendant had assumed responsibility to the plaintiffs to exercise reasonable care in the production of the seed. The plaintiffs also contended that there were a number of other specific matters that raised the duty of care, as "salient features".

18. Both the plurality judgment of four members of the court and the separate judgment of Edelman J divided the analysis of whether there was a duty of care into two parts: first, whether the defendant had assumed responsibility to exercise reasonable care; second, whether the "salient factors" approach applied to the other specific salient factors relied upon resulted in the "imposition" of a duty of care.

19. Let me begin with the plurality who said this about the relevant approach:

> "In *Sullivan v Moody*, the Court observed that "[d]ifferent classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care ... The relevant problem will then become the focus of attention in **a judicial evaluation of the factors which tend for or against a conclusion**, to be arrived at as a matter of principle."
> Since *Sullivan v Moody*, **other than in cases involving an assumption of responsibility**, determining whether the relationship between the parties gives rise to a duty of care to avoid causing purely economic loss has been understood in Australia to involve such an evaluation. This "salient features" approach, as it is now known, has attracted significant academic and judicial criticism. However, neither the growers nor the producer argued that there should be a departure from the approach in this case."[16] (emphasis added)

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15 [1971] AC 793; (1968) 122 CLR 156.

16 [2024] HCA 25, [36].

20. Note the exclusion of cases involving an assumption of responsibility from analysis under the "salient features" approach. This is new, so far as I can tell. Let me try to explain why I think so. But first I need to identify the source and content of the "salient features" approach, again constrained by the brevity necessary for today's discussion.

Salient features

21. I've already mentioned that the first High Court recognition of a duty of care against purely economic loss was in 1968 in *MLC v Evatt.* But the first High Court case to deploy the "salient features" approach, as it is now called, was in 1976 in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad*[17]. The relevant reference is in the judgment of Stephen J, part of which reads as follows:

> "The present case contains a number of **salient features** which will no doubt ultimately be **recognized as characteristic of one particular class** of case among the generality of cases involving economic loss. This will be typical of the development of the common law in which, in the words of Barwick C.J. in *Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt* (1968) 122 CLR, at p 569, **the elements of the relationships** out of which a duty of care is imposed by law '**will be elucidated in the course of time** as particular facts are submitted for consideration in cases coming forward for decision'. The existence of these features leaves no doubt in my mind that **there exists in this case sufficient proximity to entitle the plaintiff to recover** its reasonably foreseeable economic loss."[18] (emphasis added)

22. His Honour's reference to "proximity" was important to the use that he envisaged for the identified "salient features". The passages are too long to set out, but Stephen J deployed the "salient features" that he set out as identifying what was enough to satisfy the requirement of sufficient "proximity". In turn, Stephen J used "proximity" as a precondition of liability for negligence for purely economic loss. This can be seen in the following short passage from his Honour's judgment:

> "**Economic loss possesses** many of the characteristics which Lord Pearce attributed to negligence by word and **the need** which his Lordship recognized **for proximity as a precondition of liability** for negligence by word applies equally to all cases of recovery for purely economic loss."[19] (emphasis added)

23. The role of "proximity" as a pre-condition for a duty of care for purely economic loss was accepted by a majority of the High Court in 1985 in *Sutherland Shire Council v Heyman*[20]. But, by then, the content of the concept of "proximity" had been much affected by what came to be known as Lord Wilberforce's two-stage or step test for "proximity". The first step treated reasonable foreseeability as a prima facie basis for raising a duty of care. The second step considered whether there was a contrary reason or reasons to negate the duty, as the judgments in *Sutherland* discuss. The reasons of Brennan J rejecting that approach to proximity were later accepted in the House of

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17 (1976) 136 CLR 529.

18 (1976) 136 CLR 529, 576.

19 (1976) 136 CLR 529, 575.

20 (1985) 157 CLR 424.

Lords[21] and Brennan J's preference for an "incremental approach" was, ultimately, accepted in the High Court[22].

24. As the passage from *Mallonland* set out earlier says, by 2001, when *Sullivan v Moody* was decided, "proximity" was discarded as a conceptual determinant for a duty of care against purely economic loss in the High Court. But although the plurality reasons in *Mallonland* tie the "salient features" approach to *Sullivan*, the expression "salient features" wasn't used in *Sullivan*. It came into vogue from 1999 when *Perre v Apand Pty Ltd*[23] was decided, particularly from the judgment of Gummow J who expressed preference for Stephen J's approach in *Caltex Oil*. In discounting "proximity" as the conceptual determinant of a duty of care against purely economic loss, Gummow J said this:

> "I prefer **the approach take**n by Stephen J in *Caltex Oil*. His Honour **isolated a number of 'salient features' which combined to** constitute **a sufficiently close relationship** to give rise to a duty of care owed to Caltex for breach of which it might recover its purely economic loss."[24]

25. Subsequent High Court cases followed that approach. In none of them, before *Mallonland*, was there a separation of cases involving an assumption of responsibility from the operation of the general concept of the "salient features" approach in testing for a duty of care to avoid purely economic loss.

26. In *Mallonland*, Edelman J trenchantly criticizes both the "salient features" approach and the decision in *Caltex Oil*, which his Honour amusingly calls a "mule", for the purpose of repeating the colourful (and ancient) statement that "We should not attempt to breed from a mule". (As an aside, it seems that you cant breed from a mule because its cells have 63 chromosomes – an odd number – that renders mules sterile). Edelman J further calls *Perre* the "progeny" of the "mule". His Honour gives a withering analysis of the uncertain state of the law as at the time when *Perre* was decided that is important reading, in my respectful view, but there is reason for me to mention another aspect of that case, for today's discussion.

Vulnerability and "assumption of responsibility" before *Mallonland*

27. I have already mentioned Gummow J's preference in *Perre* for the "salient features" approach. Another reason to mention *Perre* is that McHugh J considered the place of the concept of "assumption of responsibility", in the following passage:

> "**Vulnerability will often include, but not be synonymous with, concepts of reliance and assumption of responsibility**. The widely used concepts of "reasonable reliance" and "assumption" of responsibility" have come under criticism. This Court has recognised that neither concept represents a necessary or a sufficient criterion for determination of a duty of care, saying that commonly, but not necessarily, a duty will arise in cases which "involve an identified element of known reliance (or dependence) or the assumption of responsibility or a combination of the two". This statement provides an insight into why both reliance and

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21 *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

22 *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

23 (1999) 198 CLR 180.

24 (1999) 198 CLR 180, 254 [201].

> assumption of responsibility have been rejected as a unifying criterion in cases of purely economic loss. Like proximity, reliance and assumption of responsibility are neither necessary nor sufficient to found a duty of care."[25] (footnotes omitted) (emphasis added)

28. The other Judges in *Perre* didn't express any view about this classification of assumption of responsibility and reliance into vulnerability. But in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[26], the plurality judgment seemed to touch on the point again, in the following passage:

> "In other cases of purely economic loss (*Bryan v Maloney* is an example) reference has been made to notions of assumption of responsibility and known reliance. The negligent misstatement cases like *Mutual Life & Citizens' Assurance Co Ltd v Evatt* and *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]* can be seen as cases in which a central plank in the plaintiff's allegation that the defendant owed it a duty of care is the contention that the defendant knew that the plaintiff would rely on the accuracy of the information the defendant provided. **And it may be, as Professor Stapleton has suggested, that these cases, too, can be explained by reference to notions of vulnerability. (The reference in *Caltex Oil* to economic loss being "inherently likely" can also be seen as consistent with the importance of notions of vulnerability.) It is not necessary in this case, however, to attempt to identify or articulate the breadth of any general proposition about the importance of vulnerability**. This case can be decided without doing so."[27] (footnotes omitted) (emphasis added)

29. Given these statements, the division in *Mallonland* of cases involving an "assumption of liability" from other cases that fall to be decided by reference to the "salient features" approach may be thought surprising. However, if "vulnerability" is to be seen as mainly or exclusively as referring to the inability of a plaintiff to protect itself, the separation of assumption of responsibility by the defendant from vulnerability of the plaintiff can be understood. But does that make it necessary or useful to separate assumption of vulnerability from the salient features approach, unless perhaps the salient features approach is to be jettisoned?

30. A further possibility emerges that not only are cases of assumption of responsibility to be treated as a separate category but that the category is best confined to negligent misstatement cases and does not include cases of a negligent act or omission in the making of a thing. However, one of the more difficult High Court cases in this field of discourse, *Bryan v Maloney*[28], focussed on assumption of responsibility and reliance as central factors. Of course, *Bryan* has been criticised. And in the wake of the finding of the absence of the plaintiff's vulnerability in *Woolcock*, the result in *Bryan* may be difficult to sustain. But *Bryan* has not yet been overruled, although it has been distinguished as based in part on the conceptual determinant of "proximity". In any event, an explanation of *Bryan* was given in *Woolcock* (a case decided after "proximity" had been discarded as a conceptual determinant) as follows:

> "At least in terms, however, **the principles that were said to be engaged in *Bryan v Maloney*** did not depend for their operation upon any distinction between particular kinds of,

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25 (1999) 198 CLR 180, 228 [124].

26 (2004) 216 CLR 515.

27 (2004) 216 CLR 515, 531 [24].

28 (1995) 182 CLR 609.

> or uses for, buildings. They **depended upon considerations of assumption of responsibility, reliance, and proximity.**"[29] (emphasis added)

31. It may not be likely that "assumption of responsibility" will be confined to negligent misstatement cases by the High Court in the future - nothing in *Mallonland* said or suggests so - but it may be a possibility.

32. I should add that the division of the case law between "assumption of responsibility" and "salient features" approach was not made by the plurality alone. It was also made by Edelman J, as follows:

> "**In the absence of any undertaking by the respondent producer amounting to an assumption of responsibility** to the appellant growers, the duty of care (if any) owed by the respondent producer must be one that is imposed by law."[30] (emphasis added)

Assumption of responsibility in *Mallonland*

33. In *Mallonland*, a critical fact as to whether the defendant assumed or undertook responsibility to the plaintiffs was that the bags of seed had been clearly marked by the defendant with statements and conditions, inter alia, that: the bag had a minimum seed purity of 99 per cent; a maximum other seed contents of .1 per cent; and a disclaimer of responsibility for loss or damage arising out of the use of the product in the bag. There was also a statement that if the conditions were not acceptable, the bag could be returned for a refund.

34. At trial, it was not contended by the plaintiffs that the seed in the bags was not of 99 per cent purity or that the other seed contents were greater than .1 per cent. It was found that the disclaimer statements on the bag negated any assumption of responsibility by the defendant to the plaintiff growers that would raise a duty of care.

35. The finding on this point made by the plurality in the High Court was follows:

> "The producer arranged for production of the seed, intending that it would be produced in accordance with certain processes, **but without any undertaking to any potential purchaser** concerning those processes **beyond the information and warnings on the packaging**. Furthermore, the growers did not agree to purchase the seed in advance of its supply to distributors for sale. At most, the growers were potential end users of the producer's seed, if and when it was supplied to distributors for sale, in the packaging selected by the producer."[31] (emphasis added)

36. The plaintiffs submitted in the High Court that the disclaimer statements did not have any effect on the existence of a duty of care because: (1) a disclaimer can only have effect in a negligent misstatement case; (2) the defendant assumed or undertook responsibility to the plaintiffs during the process of production of the seed and placing the disclaimer on the bags of seed after production did not have any effect on the

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29 (2004) 216 CLR 515, 527 [14].

30 [2024] HCA 25, [71].

31 [2024] HCA 25, [46].

responsibility already assumed or undertaken by the defendant. These arguments were rejected.[32]

37. But the plurality went further, as follows:

> "In the primary judge's reasons in this case, there was some ambiguity about the finding that the producer had disclaimed an assumption of responsibility because his Honour did not identify facts that would have constituted an assumption of responsibility. It is unclear whether he found an assumption of responsibility that the producer disclaimed or that the producer had positively not assumed any relevant responsibility. If the former, the primary judge was in error in the absence of any basis for finding an assumption of responsibility in the sense identified in the Australian case law."[33]

38. The statement that the trial Judge didn't identify facts that would have constituted an assumption of responsibility is right. The trial Judge also didn't find that there was or would have been an assumption of responsibility, apart from the disclaimer. But the plaintiffs at trial did not plead an assumption of responsibility as a fact. Perhaps the point the plurality is making is that even if the facts had not included the disclaimer statements there was still no assumption of responsibility as a matter of fact.

39. In any event, in the context of the facts in *Mallonland*, it is not easy to follow the logic of an analysis that the defendant could have undertaken or assumed responsibility in the sense discussed in *Hedley Byrne* (or the Australian cases that followed it) and then disclaimed responsibility. There were no dealings between the plaintiffs and defendant before loss was suffered. They only came into any "relationship" when a relevant plaintiff acquired a bag of contaminated seed that already bore the disclaimer statements.

40. Edelman J dealt with assumption of responsibility in *Mallonland* in this way:

> "… it is not accurate to say that the respondent producer "assumed responsibility for ... the manufacture [of the seed]". …**there is no basis in any of the evidence for an implication that the respondent producer gave any undertaking to third parties that care would be taken to ensure that the grain sorghum seed was free from contamination**. **To the contrary, the "Conditions of Sale and Use" printed on the bags disclaimed any undertaking that could form the basis of an assumption of responsibility to ultimate consumers**."[34] (emphasis added)

Salient features in *Mallonland*

41. In the High Court, the plaintiffs relied on a number of matters as "salient features" giving rise to a duty of care that are identified in the plurality's reasons as follows:

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32 [2024] HCA 25, [47].

33 [2024] HCA 25, [35].

34 [2024] HCA 25, [67]. In that passage I have omitted another statement where his Honour suggested that there might have been an assumption of responsibility to the distributors as the defendant's customers. There is a contrary argument in relation to the consignment distributors, having regard to the terms of the standard form consignment contract, and also in relation to the straight out purchase distributors, who did not purchase the seed to plant but to re-sell it. However, it is unnecessary to pursue those questions.

> "…1) the reasonable foreseeability of the relevant risk of economic loss if reasonable care was not taken in seed production; **(2) the producer's knowledge of the risks of economic loss to which the growers were exposed if reasonable care was not taken in seed production;** (3) the producer's capacity to control those risks by careful production; (**4) the growers' vulnerability, in the sense that they could not protect themselves from the consequences of a want of reasonable care in the production of the seed in such a way that would cast the consequences on the producer;** (5) as the intended consumers of the product, the growers were not in an indeterminate class of victims of the producer's want of care; and (6) the recognition of the alleged duty of care would not give rise to legal incoherence."[35] (emphasis added)

42. It is not necessary to mention the plurality's views on all these points. My interest for today's discussion is in numbers 2) and 4). As to the defendant's knowledge of the risk, the plurality said:

> "Secondly, as to the producer's knowledge, the critical fact is that the producer did not know that the seed it placed into the market for sale was contaminated. The producer knew that if it did not take reasonable care in its production processes, there was a risk that an ascertainable class of persons, being persons who would purchase and plant MR43 seed, would suffer economic loss if the seed contained an off-type seed with a shattering characteristic. **However, that was not knowledge of the risk of economic loss to the appellant growers specifically, because the producer did not know that those growers would purchase and plant the contaminated seed."**[36] (emphasis added**)**

43. In some factual situations, it has been significant to a finding of a duty of care that a defendant had knowledge and foresight of the risk of loss to a specific defendant. But, as a matter of logic, nothing in *Mallonland* suggests that the defendant's knowledge of the identities of the plaintiffs would have strengthened the plaintiffs' cases, given that the seed was produced for general sale to sorghum growers. The risk of loss to a grower and the defendant's knowledge or awareness of that risk would have been no more apparent to the defendant if it had known the growers' identities. If knowledge of the risk by a maker or producer has to be of the specific end user, that would operate as a significant limit on the cases where a duty of care could arise. That degree of knowledge has not required in all previous cases. For example, in *Caltex Oil*, the defendant did not know of the identity of the users or owners of the damaged oil pipe.

44. As to vulnerability, the plurality said:

> "Fourthly, **the growers' contention that they were unable to protect themselves** from the risk of shattercane in their crops and the economic loss that would result if that risk materialised **fails**. In truth, **the growers were able to protect themselves**. **The packaging enabled** potential future purchasers, including **the growers, to inform themselves that the seed might not be free from contamination and to decide whether or not to plant the seed** on that basis. On receipt of the seed in the packaging, the growers were able to make an informed choice to plant or not to plant seed that might not be free from contamination.
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> The growers may not have been able to insist on a warranty from either the producer or the distributor which guaranteed that the producer had complied with reasonable production processes to avoid seed contamination, or an indemnity for economic losses resulting from

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35 [2024] HCA 25, [42].

36 [2024] HCA 25, [51].

> sowing seed contaminated as a result of a failure of compliance. However, **when the growers obtained possession of the seed in the packaging they had a choice to return the seed if they did not want to accept the risk of impurity identified by the packaging**…"[37] (emphasis added)

45. In my respectful view, these arguments may not be entirely convincing. At least arguably, reading a statement that the bag contents are 99 per cent **minimum** purity of the purchased sorghum seed and .1 percent **maximum** of other seeds does not clearly convey a risk of significant contamination. And if that is right, the statement that there is a choice to return the seed if the risk of impurity is not acceptable does not as clearly enable an acquirer of the seed to protect itself.

46. Edelman J identified the "salient features" relied upon by the plaintiffs as follows:

> "(i) reasonable foreseeability of economic loss to end-users such as the appellant growers if the seed was contaminated; (ii) a group such as the appellant growers forming a determinate class of persons; **(iii) knowledge of the respondent producer of the risk of economic harm to growers if reasonable care were not taken in seed production**; and **(iv) the ability of the respondent producer to control that risk by taking reasonable precautions and conversely the vulnerability of the appellant growers, who could not protect themselves from the consequences of a failure by the respondent producer to take reasonable care**.[38]

47. By and large, the substance of that list is not different from the "salient features" relied upon identified by the plurality. Edelman J identified the question as whether items (iii) and (iv) were enough to raise a duty of care.

48. As to knowledge of the risk, Edelman J continued:

> "…**The less specific the knowledge, the less force the salient feature will have**. In this case, as the joint reasons observe, **the knowledge of the respondent producer was limited. In broad terms that knowledge was that end-users would have difficulty in controlling or eradicating the consequences of contaminated seed**."[39] (emphasis added)

49. As to the control of the defendant and vulnerability of the plaintiffs, Edelman J said:

> …speaking of the vulnerability of the appellant growers to this risk of contaminated seed (and, by extension, of the corresponding control over this risk by the respondent producer), **the respondent producer submitted that in transactions for the sale of goods "such vulnerability is of limited utility as a salient factor". That submission should be accepted, at least in the circumstances of this case. The appellant growers had methods by which they could reduce the extent of their vulnerability to the risk controlled by the conduct of the respondent producer**. As the joint reasons observe, **those methods included choosing not to plant the seed or choosing to return the seed after reading the "Conditions** of Sale and Use" printed on the bags, which warned about contamination.[40] (emphasis added)

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37 [2024] HCA 25, [53]-[54].

38 [2024] HCA 25, [105].

39 [2024] HCA 25, [107.

40 [2024] HCA 25, [109].

50. His Honour had previously reviewed whether the "salient features" approach was sound and had concluded it was not.[41] However, because it was not challenged in *Mallonland*, he agreed that it was still to be applied, but on the basis that "any application of that analysis should be as narrow as possible"[42], and concluded that "the weaknesses of the two central salient features relied upon by the appellant growers are fatal to their submission that the respondent producer owed them a duty of care"[43].

51. It is useful for the purposes of this discussion to briefly mention Edelman J's attacks on Stephen J's judgment in *Caltex Oil* and the salient feature of "vulnerability" that has come to the fore in recent cases, particularly *Woolcock* and *Brookfield Multiplex.*

52. Edelman J said that Stephen J's reasons in *Caltex Oil* contain two errors. The first "was to treat his "salient features" approach as an extension of the recognition of a duty of care that arose in cases based upon an assumption of responsibility, particularly *Hedley Byrne*."[44] In my respectful view, it is at least arguable that is not how Stephen J deployed *Hedley Byrne*. Another way of viewing it is that he treated *Hedley Byrne* as breaking down the wall previously thought to exist against a duty of care to avoid purely economic loss that permitted development of new categories of case and proposed his identification of the salient features in *Caltex* as an approach to creating one new category.[45]

53. The second error of Stephen J identified by Edelman J was "to treat the whole concept of a duty of care as abstract, not referable to any right of the plaintiff but based upon a class of potentially unlimited 'salient features'"[46]. His Honour continued that "until recognition of a duty of care based on "salient features", the private duty of care at common law was equally concerned only with a plaintiff's rights, either (i) rights to person or property or (ii) rights arising from an assumption of responsibility".[47]

54. In my respectful view, it is not all that clear what this particular "rights" classification adds to the discussion. Rights "to person or property" concern and in this context are concerned with the damage that a duty of care obliges a defendant to take reasonable care to avoid. The rights "arising from an assumption of responsibility", as a separate category, are concerned with damage to neither person nor property but another kind of damage that we label purely economic loss. And a duty of care arising from assumption of responsibility obliges the defendant to take reasonable care to avoid purely economic loss. Once that nature or significance of the postulated "rights" is recognised, the question remains: what is it that is wrong with the creation of further categories of case concerning purely economic loss, in the way expressly contemplated by Stephen J's reasoning as arising from "a reflection of the piecemeal conclusions arrived at in precedent cases" having regard to "salient features"? Does that really amount to "treat[ing] the whole concept of duty of care as abstract" or "negligence in the air"?[48]

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41 [2024] HCA 25, [93] – [95].

42 [2024] HCA 25, [104]

43 [2014] HCA 25, [110].

44 [2024] HCA 25, [87].

45 (1976) 136 CLR 529, 558-576.

46 [2024] HCA 25, [89].

47 [2024] HCA 25, [89].

48 [2024] HCA 25, [[91].

55. For my part, it may be accepted that the "salient features" approach is not itself a principle. It is a technique that requires identification of what is in the facts that gives rise to the alleged duty of care. Also, for my part, as a practical matter, Stephen J's use of "notions of proximity between tortious act and resultant detriment" arrived at by the "salient features" approach as the "control mechanism" for a duty of care against purely economic loss does not necessarily mark another real defect in the "salient features" approach. Since the High Court discarded "proximity" as the conceptual determinant in 2001 it has deployed the "salient features" approach without being distracted by the debate about the content of the conclusionary label of "proximity" as a conceptual determinant.

A possible problem with separating "assumption of responsibility" from the "salient features approach

56. Regrettably, I don't have time in today's discussion to further delve into Edelman J's or the plurality's reasons. Before trying to gather some threads together by way of conclusion, I will content myself with one further observation about *Mallonland*.

57. Separation of the analysis of the "assumption of responsibility" basis from the "salient features" basis for a duty of care created at least the theoretical possibility of a finding that the defendant producer had positively and effectively disclaimed an assumption of responsibility but the court might still "impose" a duty of care because of the other "salient features".

58. In a case like *Mallonland*, that may not be a realistic possibility. But in another case, depending on the facts, such a possibility could create difficulty. For example, take a case like *Glanzer*, or other similar "equivalent to contract" cases. The defendant weigher's knowledge of the risk of loss to the plaintiff purchaser, specifically and solely, from overweighing the beans the plaintiff was purchasing would give rise to much stronger "salient feature" of knowledge of the risk as against the defendant. But, with a timely positive disclaimer of responsibility by the defendant, an assumption of responsibility basis for a duty of care would most likely still be precluded. The potential problem of an inconsistent finding of a duty of care based on the "salient features" approach could be resolved in many cases by the High Court's present restrictive approach to "vulnerability" because the plaintiff might be able to protect himself by obtaining a contractual warranty from the weigher or the vendor or by choosing not to permit the goods to be weighed by that weigher, with the consequence that the plaintiff is not vulnerable.

59. But what if, still in a case like *Glanzer*, the plaintiff purchaser and the seller of the goods had agreed in their contract that the goods would be weighed by the particular weigher and the plaintiff was not able to obtain a warranty from the operator or to choose not to have that operator do the weighing? The suggested problem of inconsistency would not be so easily resolved by vulnerability.[49]

After *Mallonland*

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[49] Such a scenario is not far-fetched. See, for example, *Interchase Corporation Limited v ACN 010 087 573 Pty Ltd & Ors* [2001] QCA 191, [3], [47]-[51] and [93].

60. What are the vital takeaways from *Mallonland*? Here are my views, which I emphasise have no particular value beyond being my personal assessment of what arises out of the High Court's reasons.

61. First, the result in *Mallonland* was unsurprising in the context of both recent case law and older cases. A finding of assumption of responsibility or duty of care was always likely to be precluded by the disclaimer statements.

62. Second, *Mallonland* is another case a showing the high hurdle of the requirement of the plaintiff being unable to protect itself before vulnerability can be established, in using the "salient features" approach.

63. Third, the High Court in *Mallonland* appears to have separated cases involving an "assumption of responsibility" as a distinct category for the existence of a duty of care, from other cases where a duty of care may be imposed based on the "salient features" approach.

64. Fourth, the future of the "salient features" approach is under a cloud. If Edelman J can attract enough other Judges to his views, when it is reconsidered, it is likely to be discarded.

65. Fifth, there is no real indication from *Mallonland* about what would be left of the last 20 years of relevant case law in Australia finding a duty of care to avoid purely economic loss if the "salient features" approach is discarded in the future, beyond the preservation of the "assumption of responsibility" category of cases.

Brisbane
27 March 2025