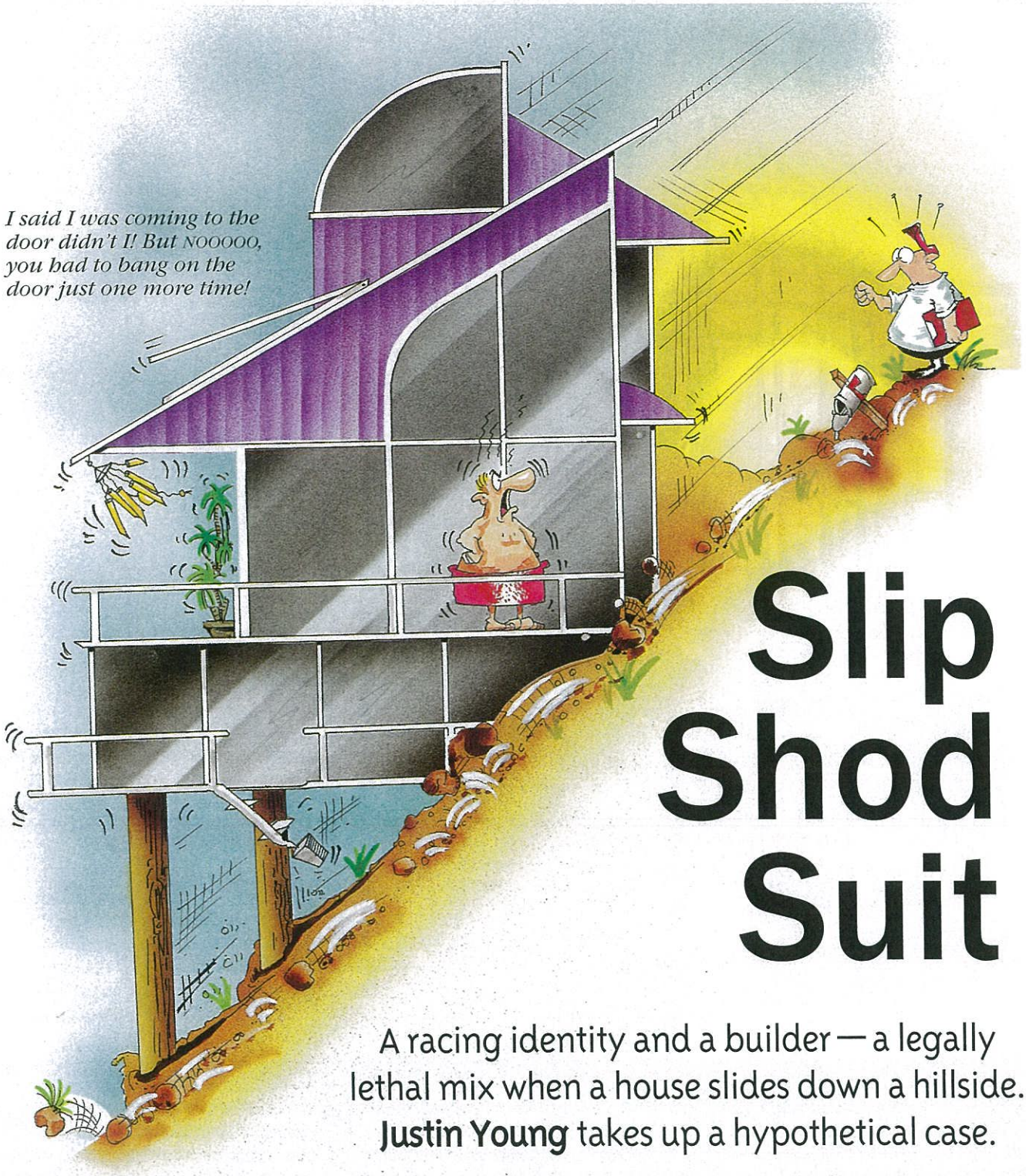

I said I was coming to the door didn't I! But NOOOOO, you had to bang on the door just one more time!

Slip Shod Suit

A racing identity and a builder — a legally lethal mix when a house slides down a hillside. **Justin Young** takes up a hypothetical case.

An American film star, his Australian film star wife and their children move into their new house in Point Piper. They have just bought it from a Mr Wong, an overseas businessman, for an undisclosed sum. Mr Wong had bought it only three years earlier from a well-known Sydney racing identity who had built it in the late 1980s after a particularly good day at Randwick.

It was an impressive property. It had absolute waterfrontage and was five storeys high. It cascaded down the steep harbourside to the waterfront. The garage was on the top storey at street level. It afforded the two BMWs the best of views.

The well-known Sydney racing identity had employed a builder/architect friend, Henry, to design and construct the property. Henry had plenty of experience in this sort of thing. As far as the arrangements were concerned, he left everything up to Henry. Henry showed him the plans, which he approved; Henry sorted things out with the council; Henry got in the people to carry out the work. All the well-known Sydney racing identity had to do was to sign a contract with Henry and make sure Henry was paid on time.

One day, shortly after our film stars moved in, quite unexpectedly and without any warning, the house slipped six feet down the hillside. They panicked and ran out into the street. One of their Oscars fell off the mantelpiece and landed on one of the children's heads. She managed to keep going but had a big bump on her head the next day. Once they all reached the street, they realised that the BMWs had been thrown off the garage roof.

They soon discovered that the mansion had become uninhabitable and would cost $2 million to repair. As a result, our film star family wasted no time in selling it, but the best price they could get resulted in a loss of $2 million compared to the price they would have got for it in a sound condition.

They discovered that Henry had built the house on bad foundations. It had only been a matter of time before the foundations

would fail and the property would slip.

The first thing our film star friends did was to call a lawyer. Their lawyer, on hearing the story, was filled with both horror and delight — horror because he knew he was entering into the law of defective structures and delight when he realised how many chargeable hours it would take him to get to the bottom of it. The first question he was asked was, who he could sue. He looked at all the possible defendants. They were:

- the well-known Sydney racing identity;
- Mr Wong;
- Henry; and
- the Council.

He noted almost straight away that the only person our film star friends had any kind of contract with was Mr Wong. Sadly, Mr Wong was nowhere to be found. But after flicking over a few pages of a few text books, our lawyer friend realised that even if Mr Wong could have been found, it would not have mattered. This was because of the doctrine of caveat emptor which, he discovered by looking at his dictionary of legal Latin, meant "buyer beware", or in other words that it was up to them as buyers to satisfy themselves about what they were buying.

Our film star friends' lawyer, who acted on the purchase as well, quickly looked back through the conveyancing file and discovered, with a sigh of relief, that he had made all the usual requisitions and carried out all the necessary searches and enquiries at the time and found nothing untoward. In the absence of the vendor's fraud, our film star friends had no recourse against Mr Wong under the contract for the purchase of the property.

So he cast his net wider. The only construction contract anywhere to be found was between the well known Sydney racing identity and Henry. That did not help his client. What other remedy might there be? He turned to the law of negligence. He suspected the answer was there somewhere but, to be sure, he spent a few chargeable hours going back over the case law.

Where to start, he asked himself? Where else? If in doubt: Donoghue v Stevenson (1932) AC 562 — the case of the woman who sued the manufacturer of her ginger beer for personal injury when she found a semi-decomposed snail in the bottle.

Our lawyer friend discovered Lord Atkin's speech in Donoghue v Stevenson where he stated the basic principle: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

So the test was reasonable foreseeability. But what was the definition of "injure"? He found it there as well. It meant: "injury to the consumer's life or property".

In other words, there was a claim for any reasonably foreseeable injury to someone's life or property. So where does this leave his clients, he asked himself? It meant they could recover compensation for the damaged BMWs and the child's bump on the head. They were "property" and "life" under these definitions. But our lawyer friend asked himself: is not the house itself "property"? If they could recover for that, it would be tantamount to Mrs Donoghue recovering for the value of the ginger beer itself and not only for the injury caused to her. The House of Lords in Donoghue v Stevenson said a claim like that could only be brought against the person who sold the ginger beer because they were the only people that Mrs Donoghue had had a contract with.

He asked himself: who would the claim for the BMWs and bump on the head be brought against? It could not be the racing identity or Mr Wong because neither of them did anything towards building or designing the house except to pay for it. The answer must be Henry, he exclaimed in triumph. It was reasonably foreseeable to Henry when he was building the house that, if he were negligent, then the injury which in fact occurred could occur. He trawled through the books and realised he was right. But he realised the film star family might look elsewhere for a lawyer if he could not find some way of recovering the $2 million loss as well as the loss of the BMWs and the compensation for the bump on the head.

So he started burning the midnight oil, and this is where he really began to earn his fees. He asked himself: what if nothing was damaged when the house slipped? The house was still standing; it even looked habitable; but it was likely to slip again at any time and it needed $2 million worth of work to prevent it. His clients were obliged to answer truthfully any requisitions asked of them when they came to sell the house. It either would have cost $2 million to fix or they would have lost $2 million on the sale. Either way they would have lost $2 million. This was pure economic loss, our lawyer friend realised, not damage to property.

Is economic loss recoverable or not? Can our film stars sue someone for the $2 million? Over the last 20 years or so there have been plenty of judicial pronouncements on the issue.— the difficulty is in deciphering them.

What all the courts throughout Australia, England and Wales, the United States, Canada and New Zealand have in common is a belief that something more than reasonable foreseeability is required to establish a claim in negligence for economic loss. There has developed a notion of proximity. It is the definition of proximity which has been such a fruitful area for lawyers.

The High Court of Australia in the decision of Bryan v Maloney was prepared to accept that, at least in our film star family's situation, there is sufficient proximity between the owner for the time being and the builder to allow a claim for economic loss. In short, our lawyer friend can breathe a sigh of relief. His client has a claim.

The case involved — surprise, surprise — a claim against a builder by a subsequent purchaser of a house which slipped due to inadequate foundations. They subjected the facts to very close analysis and found sufficient proximity in two areas.

Firstly, the house itself: "the nature of the property involved, namely a dwelling house, constitutes an important consideration supporting the conclusion that a relevant relationship of proximity existed . . It is a permanent structure to be used indefinitely and . . is likely to be . . the most significant investment which the purchaser will make during his or her lifetime."

This factor is very specific: it relates to a claim in respect of a house and does not give any help in deciding whether there is a claim in respect of any other defective structure.

The second factor the court looked at had two elements: "the assumption of responsibility on the one part (ie the builder) and known reliance on the other (the building owner)."

In other words, a relationship of proximity was said to exist sufficient to establish liability due to the fact that the builder knew that a subsequent owner would rely upon his performance and the builder assumed that responsibility.

So what happened to our film star friends? They have got their $2 million from Henry and have walked away unscathed except for a bump on the head. What do they do? After paying their lawyer, and celebrating over a nice ginger beer at the airport, they give up on Australia forever, send orders to their British lawyers to sell that nice little house they bought from Mr Murphy in Brentwood and return to their mansion in Hollywood, stopping in at their attorney's office on the way — just in case.

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