

***Donoghue v Stevenson* and local authorities: A New Zealand perspective - can the tort of negligence be built on shaky foundations?**

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Abstract

*Identifying the appropriate test for finding a duty of care is a matter which has exercised the minds of the judiciary across all common law jurisdictions since Lord Atkin's famous formulation of the 'neighbour' principle in *Donoghue v Stevenson*.¹ This paper examines that issue in the context of the cases relating to the liability of territorial authorities for negligently constructed buildings in New Zealand. It traces the jurisprudence which has evolved in the New Zealand courts over the past 40 years in the light of developments in other jurisdictions especially the English courts. The paper will also consider what this body of case law has to say about a number of the other important issues to emerge in the tort of negligence over the past 50 years or so such as the recovery of economic loss, reliance and vulnerability, and the liability of public bodies.*

The 1970s

In 1971 the English Court of Appeal in *Dutton v Bognor Regis Urban District Council*² applied the 'neighbour' test formulated by Lord Atkin in *Donoghue v Stevenson* and held that a local council could be liable to both the original and subsequent owners of a house where damage was suffered as a result of the council's surveyor having negligently approved the foundations during the construction of the property.³ Prior to that decision it had not been considered that a territorial authority would owe such a duty of care to original owners and subsequent purchasers of a property.

Six years later, in *Anns v Merton London Borough*,⁴ the House of Lords dealing with a similar set of facts confirmed the decision in *Dutton*.⁵ Lord Wilberforce, who delivered the leading speech,⁶ considered that although, as a public body discharging functions under statute, the powers and duties of a territorial authority were defined in terms of public law, there may nevertheless be other parallel private law duties arising out of the exercise of those functions which would enable

¹ [1932] AC 562 (HL) at 580-581

² [1972] WLR 299 (CA)

³ At 312

⁴ [1978] AC 728 (HL). *Anns* was also concerned with allegations of negligence against the local authority's building inspectors. There were two preliminary points of law at issue in *Anns*: the first was whether, on the facts, there was a breach of a duty of care owed by the council to the plaintiffs; the second was whether the claim was statute-barred.

⁵ While holding that *Dutton* was "in the result rightly decided", Lord Wilberforce considered that the approach taken by Lord Denning MR in that case, if applied generally, would put too high a duty on a local authority. The decision in *Dutton* was therefore approved subject to the House's explanation of the "correct legal basis for the decision".

⁶ Lord Diplock (at 761), Lord Simon of Glaisdale (at 761) and Lord Russell of Killowen (at 771) agreed with Lord Wilberforce. Lord Salmon while arriving at the same decision as the rest of the House delivered a separate speech dealing with one particular aspect of the case.

individuals to sue for damages in a civil court.⁷ In defining the circumstances in which those private law duties might be imposed, his Lordship drew a distinction between the policy, or discretionary, decisions and the operational decisions respectively which a council could be required to make in carrying out its statutory functions. Lord Wilberforce acknowledged that the distinction between the policy and the operational was one of degree but considered that generally policy decisions would be ones for the authority to make rather than the courts but the more “operational” a power or duty may be the easier it was to superimpose on it a common law duty of care.⁸

In relation to the factual matrix present in *Anns*, Lord Wilberforce⁹ considered that, while there would be a duty on the council to give proper consideration to the question whether it should inspect or not, the decision on the amount of resource to allocate to the inspection of foundations of residential buildings was essentially a policy decision which would be difficult to attack. However, if inspections were undertaken - the “operational” aspect - there was, in principle, a duty to exercise reasonable care. The standard of care had to be related to the duty to be performed – namely, to ensure compliance with the bylaws – and that should take into account not only the fact that the inspector’s function was supervisory but also the fact that once the inspector had passed the foundations they were covered up, with no subsequent opportunity for inspection by present or future owners. Lord Wilberforce considered that, in that situation, a cause of action arose when the state of the building was such that there was an imminent danger to the health or safety of persons occupying it.

There are two points to be noted at this juncture. First, both the majority of the Court of Appeal in *Dutton*¹⁰ and a majority of the House in *Anns*¹¹ characterised the loss to the plaintiff as being physical damage to the property itself rather than pure economic loss. Secondly, in reaching his decision in *Anns* Lord Wilberforce set out his well-known two stage approach for determining whether, on any particular set of facts, a duty of care exists between the parties:¹²

First, one has to ask whether as between the alleged wrongdoer and the person who has suffered damage there is a constant relationship or proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

In New Zealand

⁷ At 754

⁸ At 754

⁹ At 755

¹⁰ See: Lord Denning MR at 312; Sachs LJ at 319 considered that it was physical damage although he considered that to distinguish between physical damage and economic damage was to adopt a fallacious approach; Stamp LJ, relying on the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL), considered that the duty owed by the council could embrace economic damage.

¹¹ See Lord Wilberforce at 759

¹² At 751-752

In 1977 in *Bowen v Paramount Builders (Hamilton) Ltd*¹³ the New Zealand Court of Appeal followed the reasoning in *Dutton*. The case raised the question of whether a builder was responsible in negligence to a subsequent purchaser of a building for damage caused to that property by his carelessness in construction. Although Richardson P dissented and found that on the particular facts there had been no negligence on the part of the builder, all members of the Court considered that the situation was covered by *Dutton* and treated the damage not as pure economic loss but as economic loss associated with physical damage to the property itself.¹⁴ This characterisation of the loss was subsequently applied by the Court of Appeal in *Mount Albert Borough Council v Johnson*¹⁵ without further examination of the basis for recovery of such loss under the tort of negligence.

Anns had been decided between the first instance decision and the Court of Appeal hearing in *Mount Albert* and the Court of Appeal had already taken an earlier opportunity to approve the approach taken by the House of Lords. In *Scott Group Ltd v McFarlane*¹⁶ Woodhouse J had described the two-step test propounded by Lord Wilberforce as “a valuable and logical guide to the way in which a decision should be made as to whether a duty of care exists in an apparently novel situation”.¹⁷ In *Mount Albert* the Court of Appeal endorsed that earlier recognition considering that “an essentially pragmatic approach is currently appropriate in the field of negligence”.¹⁸

The 1980s

There was a mixed reaction to the decision in *Anns* and the mid-1980s witnessed a flurry of activity in the courts across the UK, Australian, Canadian and New Zealand jurisdictions where the two-stage approach to finding a duty of care was closely scrutinised. In the UK, where initially there had been favourable reaction to Lord Wilberforce’s formulation,¹⁹ the House of Lords began the process of reining in what it saw as the expansionist tendencies of the approach. Lord Keith of Kinkel in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson Ltd*²⁰ had warned against the “temptation” of treating the statements in *Anns* as being of a “definitive character”, preferring instead to consider whether it was “just and reasonable” to impose a duty of care of particular scope upon the defendant.²¹ The High Court of Australia in *Sutherland Shire Council v Heyman*²² had declined to follow the two-stage approach, advocating “that the law should develop novel categories

¹³ [1977] 1 NZLR 394 (CA)

¹⁴ See at 410 per Richardson P, at 417 per Woodhouse J, at 423 per Cooke J. At first instance, Speight J had found in favour of the builder on the basis that the loss was purely economic (see [1975] 2 NZLR 546 at 558).

¹⁵ [1979] 2 NZLR 234 (CA) at 239 per Cooke and Somers JJ, at 242 per Richardson J.

¹⁶ [1978] 1 NZLR 553 (CA)

¹⁷ At 573; and see Cooke J at 584.

¹⁸ At 238 per Cooke and Somers JJ, at 242 per Richardson J.

¹⁹ See eg *McLoughlin v O’Brian* [1983] 1 AC 410 (HL) and *Junior Books v Veitchi Co* [1983] 1 AC 520 (HL).

²⁰ [1985] 1 AC 201. See also: *Candlewood Navigation Corp v Mitsui O.S.K. Lines* [1986] AC 1 (HL); *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 786 (HL); *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 (PC); *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 (HL).

²¹ At pp 240-241

²² (1985) 157 CLR 424 (HCA) at 481

of negligence incrementally and by analogy with established categories”.²³ On the other hand, the principle in *Anns* was applied by the Supreme Court of Canada in *City of Kamloops v Nielsen*.²⁴

In New Zealand

In New Zealand’s Court of Appeal in 1986 there was a trilogy of cases which considered the question of the liability in negligence of local authorities.²⁵ In *Brown v Heathcote County Council*,²⁶ the first of those cases to be heard, the President of the Court of Appeal, Cooke P, explained that the length of time taken to issue the decision in the case had been occasioned both by the Court’s need to consider the other cases dealing with similar issues in “a developing and difficult field of law” and its desire to take into account “a number of major overseas decisions”.²⁷ The learned judge opined that while New Zealand’s law of negligence was “significantly indigenous in its origins and development”, the New Zealand courts had found it “helpful to think in a broad way” along the lines of the two-stage approach in *Anns* and that Lord Wilberforce’s analysis was “helpful” in determining whether it was “just and reasonable that a duty of care of a particular scope was incumbent upon the defendant”.²⁸ Cooke P also considered that while, “if the loss in question is merely economic, that may tell against a duty”, it would not be “automatically fatal to a duty of care”.²⁹

In *Stieller v Porirua City Council*³⁰ the Court of Appeal considered that the construction of houses with good materials and in a workmanlike manner was a matter within the Council’s control and that both the Council and its residents benefited from regulations which made for the economic and social well-being of the community and the creation of a pleasant environment. Accordingly, the Court held that the council’s liability was not confined to those defects which affected health and safety or to those which damaged or threatened other parts of the structure,³¹ and it awarded the plaintiff \$10,000 for the replacement of weatherboards on the house and \$1,000 for discomfort and inconvenience.

The 1990s

In 1990 two decisions of the House of Lords spelt the death knell for the *Anns* approach in the UK. In *Caparo Industries plc v Dickman*³² the House supported Lord Keith of Kinkel’s view that it was not possible for any single general principle to provide a practical test which could be applied to every situation to determine whether a duty of care was owed and the scope of any such duty. In fact, *Caparo* itself is notable for seeming to embrace two different approaches to finding a duty of care:

²³ At 588 per Brennan J.

²⁴ [1984] SCR 2 (SCC)

²⁵ *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA); *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA); *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA). Reserved judgments in all three cases were handed down simultaneously on 19 June 1986.

²⁶ [1986] 1 NZLR 76 (CA)

²⁷ At 78

²⁸ At 79 - referring rather pointedly perhaps to Lord Keith of Kinkel’s comments in *Peabody*.

²⁹ At 79-80. It is interesting that, on appeal, the Privy Council upheld the award of remedial damages and appeared to accept Cooke P’s conclusion that a mere economic loss would not be fatal to finding a duty of care: see [1987] 1 NZLR 720 (PC) at 725-726 per Lord Templeman; and see Cooke P’s subsequent comments on that Privy Council decision in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 519.

³⁰ [1986] 1 NZLR 84

³¹ At 94. See eg *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 at 533 per Gault J.

³² [1990] 2 AC 605 (HL)

first, a majority of the House³³ expressed a preference for the incremental approach which had been propounded by Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman*;³⁴ secondly, *Caparo* has been generally regarded as introducing a tripartite test for the determination of the duty of care which asks whether the harm was foreseeable, whether there was sufficient proximity between the parties and whether the imposition of a duty of care would be fair, just and reasonable.³⁵

The second case, which was directly significant for the particular issue of the liability of territorial authorities, was the House of Lords' decision in *Murphy v Brentwood District Council*.³⁶ Following a number of cases where the House of Lords had shown a marked inclination to confine the *Anns* doctrine within narrow limits,³⁷ *Murphy* was concerned with the liability of a District Council which had negligently approved plans resulting in a residential property being built on defective foundations and consequently directly raised the question of whether *Anns* had been correctly decided.

The House of Lords considered that Lord Wilberforce in *Anns* had been wrong to characterise the loss as physical damage. Rather it was pure economic loss³⁸ and, on the basis of the law as it stood at the time of the decision in *Anns*, pure economic loss was not within the scope of any duty of care owed to the plaintiffs by the local authority.³⁹ Lord Keith of Kinkel criticised *Anns* for introducing "a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property". He considered that it was an unsatisfactory principle and expressed a preference for the incremental approach to finding a duty of care advocated by Brennan J in *Sutherland Shire Council*.⁴⁰ The decision in *Murphy* was that *Anns* had been wrongly decided as regards the scope of any private law duty of care resting upon local authorities in relation to their function of taking steps to secure compliance with building bylaws or regulations. The House of Lords recognised that the decision in *Anns* had been relied on for 13 years, but nevertheless concluded that departing from it would re-establish a degree of certainty into this area of the tort of negligence.⁴¹ As a result *Dutton* and all the cases decided in reliance on *Anns* were overruled.⁴²

³³ At 618 per Lord Bridge of Harwich, at 628 per Lord Roskill, at 629 per Lord Ackner, at 633 and 635 per Lord Oliver of Aylmerton

³⁴ (1985) 157 CLR 424 (HCA) at 481

³⁵ At pp 617-618 per Lord Bridge. And see eg: *Spring v Guardian Assurance* [1995] 2 AC 296 (HL); *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181 (HL).

³⁶ [1991] 1 AC 398 (HL)

³⁷ At 471 per Lord Keith of Kinkel; at 474 per Lord Bridge of Harwich

³⁸ At 466 and 470 per Lord Keith of Kinkel; at 475 per Lord Bridge of Harwich; at 484 per Lord Oliver of Aylmerton; at 492 per Lord Jauncey of Tullichettle

³⁹ See at 468 per Lord Keith of Kinkel

⁴⁰ At 461 and see above at n 23.

⁴¹ At 471 – 472; see also at 475 per Lord Bridge of Harwich

⁴² At 472

In New Zealand

In *Murphy* the House of Lords⁴³ had questioned the approach of the New Zealand Court of Appeal in *Bowen*⁴⁴ so the question was whether the New Zealand courts would continue to apply the *Anns* principle following the decision in *Murphy*. In *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*⁴⁵ a full bench of the Court of Appeal was unanimous in agreeing that the decision in *Murphy* should not lead to any changed approach to negligence law in New Zealand.⁴⁶ In support of Lord Wilberforce's two-stage approach, Cooke P said:⁴⁷

A broad two-stage approach or any other approach is only a framework, a more or less methodical way of tackling a problem. How it is formulated should not matter in the end. Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.

In 1994 in *Invercargill City Council v Hamlin*⁴⁸ the Court of Appeal was asked to consider the specific question of whether the established New Zealand law on the liability of a territorial authority to house owners and subsequent owners should be altered in the light *Murphy* and other House of Lords' decisions.⁴⁹ Again a full bench of the Court of Appeal was unanimous in holding that the approach of the New Zealand courts to the issue should not be changed.

While the respective judgments contain differences of focus in setting out the reasons for the New Zealand courts not following *Murphy*,⁵⁰ there are essentially three aspects to the reasoning: first,

⁴³ At 469 per Lord Keith of Kinkel; at 477 – 478 per Lord Bridge of Harwich; at 487 per Lord Oliver of Aylmerton; at 495 – 496 per Lord Jauncey of Tullichettle.

⁴⁴ Following *Dutton v Bognor Regis* – see above n 13.

⁴⁵ [1992] 2 NZLR 282 (CA). These two proceedings involved separate applications to strike out an allegation of negligence against an investigator engaged by the insurer to investigate and report to it on claims under the respective policies. . Rule 15.1(1)(a) of the High Court Rules provides that the Court may, at any stage of a proceeding, strike all or part of a pleading out where a pleading discloses no reasonable cause of action or defence or other case appropriate to the nature of the proceeding. The jurisdiction is to be exercised sparingly and only in clear cases. In relation to applications to strike out claims which plead novel duties of care the Supreme Court has said: “[T]he case should be allowed to go to trial, unless as a matter of law the pleaded facts are incapable of giving rise to the duty of care asserted”: see *Couch v Attorney General* [2008] 3 NZLR 725 (SC) at [118].

⁴⁶ At 304 per Cooke P, at 306 per Richardson J, at 316 per Hardie Boys J, at 312 per Casey J, at 325 per Sir Gordon Bisson

⁴⁷ At 294

⁴⁸ [1994] 3 NZLR 513 (CA)

⁴⁹ The first defendant building company had ceased trading, had no assets and took no part in the proceedings. At first instance it was accepted by all parties that the City Council owed a duty of care to the plaintiff but counsel for the local authority reserved the right to argue the *Murphy* issue on appeal. The issue in the High Court was whether plaintiff's claim was time barred under the Limitation Act 1950. In finding for the plaintiff, Williamson J in the High Court applied *Mount Albert Borough Council v Johnson*[1979] 2 NZLR 234 and *Askin v Knox* [1989] 1 NZLR 248 in holding that in New Zealand time begins to run when the defect in the building becomes apparent or manifest (“the reasonable discoverability test”): *Hamlin v Bruce Stirling Ltd* [1993] 1 NZLR 374

⁵⁰ Cooke P for example emphasises the orthodoxy of the New Zealand approach by contrasting the “upheavals in high level precedent” in the UK with the constancy of the New Zealand approach over 20 years, by pointing

there is a consideration of the social conditions at the time when the facts giving rise to the cause of action in the case arose; secondly, there is consideration of the impact of decisions from the courts, government policy and the legislative changes which had occurred over the intervening years; and thirdly, there is a consideration of the likely ramifications of changing the law relating to the liability of local councils.

In *Hamlin* the plaintiff's house had been built in 1972 and Richardson J recognised that there were "obvious difficulties" in examining the case from a 1994 perspective.⁵¹ When deciding whether it was just and equitable for the local authority to be under a duty of care to the owner (and successors in title) in respect of the discharge of its responsibilities in relation to the inspection of houses under construction the learned judge considered it important to consider "the social and governmental context" at the time when the events giving rise to the cause of action occurred. Accordingly, Richardson J identified six distinctive features of the New Zealand housing environment existing in the 1970s and 1980s:⁵²

- The high proportion of occupier-owned housing;
- Much of the housing construction was undertaken by small-scale cottage builders for individual purchasers;⁵³
- The nature and extent of governmental support for private home building and home ownership;
- The surge in house building construction that occurred in the buoyant economy of the 1950s and 1960s – in 25 years through to the mid-1970s the housing stock more than doubled;
- The wider central and local governmental support for private home building;
- The fact that it had never been a common practice for new house buyers, including those contracting with builders for construction of houses, to commission engineering or architectural examinations or surveys of the building or proposed building.

In that general context the Court considered that the role of the local authority in relation to the building of homes in New Zealand was very different to the role of the local authorities in the UK. It considered that the scope of local authority involvement extended beyond pure health and safety concerns⁵⁴ to consideration of comfort and convenience and standards of workmanship and sound construction, that the powers of local authorities were intended to be exercised for the protection

out the similarity between the New Zealand approach and that adopted in the Canadian Supreme Court, and by concluding that it is legitimate for judges in different common law countries to reach different conclusions on such issues. Richardson J on the other hand suggests that the differing social contexts and legislative regimes within the respective jurisdictions justify a difference in approach. For a trenchant criticism of Richardson J's judgment in *Hamlin* see Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, Oxford, 2007) at 253 - 254.

⁵¹ [1994] 3 NZLR 513 (CA) at 528

⁵² At 524 – 525. Richardson J's analysis of those conditions was approved by Cooke P (at 519), by Casey J (at 530), by Gault J (at 534) and by McKay J (at 546).

⁵³ Richardson J (at 524) referred to the "Commission of Enquiry into Housing in New Zealand" ([1971] 4 AJHR H-51) in noting that the New Zealand house was not a factory produced article but was custom built to suit the site and owner and that, apart from comparatively few major operators, most firms in the building industry at the time were small with 85 per cent of home builders employing fewer than six workers.

⁵⁴ In *Anns* a majority of the House of Lords considered that the question whether the Council came under a duty of care towards the plaintiffs had to be considered in relation to the powers, duties and discretions arising under the Public Health Act 1936: see at [1978] AC 728 (HL) at 760 per Lord Wilberforce.

of owners, occupiers or users of buildings, that building inspectors employed by the council had a significant advisory and educative role, and that home-owners in New Zealand did traditionally rely on the local council to exercise reasonable care not to allow unstable houses to be built in breach of the bylaws.⁵⁵

The second aspect in the reasoning of the Court of Appeal was that there was nothing in the cases since *Bowen* and, more significantly perhaps, nothing in the building legislation passed since the 1970s, which provided any basis for altering the approach adopted by the New Zealand courts. The Court observed that over the previous 20 years the courts had been consistent in imposing liability on local authorities for latent defects in dwelling houses caused, or contributed to, by the carelessness of building inspectors in the exercise of their supervisory and controlling functions “without as far as is known any sense that it does other than justice”.⁵⁶

The Court of Appeal also noted, obiter, that it was significant that after 18 years of case law in this field “embodying what is essentially a social value judgment”,⁵⁷ and following the House of Lords’ decision in *Murphy*, Parliament had not taken the opportunity to change the law in relation to private damage claims against councils when it had enacted the Building Act 1991.⁵⁸ On the contrary, the structure of the legislation indicated that the possible liability of local authorities was part of the accountability at which the legislation was directed. In particular, it was noted that s 91 of the Act, which imposed a long stop limitation period on civil proceedings, implicitly recognised that territorial authorities amongst others could be liable for careless acts or omissions in relation to latent building defects.⁵⁹ Against the background of judicial authority, comprehensive reviews of building controls and legislation which had made no attempt to change the basic law in the area, the Court of Appeal considered that any change should come from Parliament rather than the courts.⁶⁰

The third strand to be extracted from the Court of Appeal’s deliberations in *Hamlin* was its consideration of the possible ramifications of any change to the law. Richardson J⁶¹ identified three policy considerations which he considered would need to be taken into account before there was any move to change the law in this area. First, changing the law would have significant community implications particularly affecting home-owners, the building industry, local bodies, approved certifiers and insurers. The relationships and fee structures developed under the extant legislative regime would have to change if the local authorities were no longer liable for the negligent acts and omissions of their building inspectors. Secondly, any change would have significant economic implications for the country because the legislation and the risk allocation inherent in it is predicated on the shared understanding that local authorities can be held liable if they are negligent. Thirdly, the rights of subsequent purchasers of a house with unknown or known building defects would need

⁵⁵ At 525 – 526 per Richardson J, at 519 per Cooke P, at 530 per Casey J, at 534 per Gault J, at 546 per McKay J

⁵⁶ At 522 and 524 per Cooke P, at 524 and 528 per Richardson J, at 529 per Casey J, at 533 per Gault J

⁵⁷ At 528 per Richardson J

⁵⁸ At 523 per Cooke P, at 534 per Gault J. The Building Act 1991 which moved the emphasis away from the previous prescriptive regime to a performance-based code (ie it stated how a building and its various components must perform rather than prescribe how it must be designed and constructed) was enacted following a decade of research and study which culminated in the 1990 Report of the Building Industry Commission to the Minister of Internal Affairs, “Reform of Building Controls”.

⁵⁹ At 524 per Cooke P, at 526 – 527 per Richardson J,

⁶⁰ At 528 per Richardson J, at 546 per McKay J

⁶¹ At 528 – 529, at 546 per McKay J

to be considered and any move to put their ability to recover on a contractual basis⁶² would raise further questions of risk allocation under the building control regime and would require a wide-ranging analysis of all the economic and social implications.

Hamlin was appealed to the Privy Council⁶³ which upheld the Court of Appeal's decision. Lord Lloyd⁶⁴ had doubts that the circumstances were in fact so very different in England and New Zealand but considered that it was the perception that mattered and that New Zealand judges were in a much better position to decide on such matters as community standards and expectations. He also considered that it would be "rash" for the Board to ignore the concern expressed that to change New Zealand law in this area to make it consistent with the decision in *Murphy* would have "significant community implications" and would require a "major attitudinal shift".

"Leaky buildings"

As it happened, the *Hamlin* duty or principle as it has become known has been given new life in recent cases dealing with the so called "leaky buildings" crisis in New Zealand. In the late 1990s and early 2000s a combination of factors resulted in a large number of buildings being built which were vulnerable to moisture ingress. Those factors included:

- The Building Act 1991 had reduced controls on the building industry on the assumption that building quality would be mostly assured by market-driven forces.
- A boom in the housing market in New Zealand which resulted in (1) a large number of builders with little or no industry related qualifications⁶⁵ or experience who were carrying out often quite complex construction work with little or no supervision and (2) developers who had no incentive to pay for the proper design of the buildings and failed to deliver the appropriate level of supervision of construction to ensure that the buildings were built properly.
- A preference for design features in buildings which made them susceptible to moisture ingress - many leaky buildings were constructed in the Mediterranean style with parapets, flat roofs and inadequate or no eaves.
- The use of modern monolithic cladding systems which were used outside their specifications or installed incorrectly.

⁶² See *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL)

⁶³ [1996] 1 NZLR 513 (CA)

⁶⁴ At 521.

⁶⁵ In 1992 the Government subsidised workplace-based training which operated mainly through the apprenticeship system was replaced by an industry training scheme which was voluntary for employers and industries. The Ministry of Education is currently undertaking a review of industry training – see at <http://www.minedu.govt.nz/NZEducation/EducationPolicies/TertiaryEducation/PolicyAndStrategy/ReviewIndustryTraining.aspx>

- Air-tight sealing of claddings and windows and wall cavities filled insulation.
- The approval by the Building Industry Authority of the use of untreated kiln dried framing timber which was particularly susceptible to any moisture ingress.

In 2009 a Government report⁶⁶ estimated that the likely number of homes affected was in a range from 22,000 to 89,000 with a “consensus forecast” of 42,000 failures at an economic cost to repair of \$11.3 billion. However, the report also recorded the view of many experts that the majority of monolithic-clad dwellings constructed before 2006 would suffer from ‘weathertightness’ issues making the total number of failures in excess of 110,000 homes at an estimated repair cost of around \$30 billion.

The crisis has resulted in a number of claims being brought against local councils for failing to properly enforce the requirements of the Building Act 1991 and the associated regulations.⁶⁷ *Dicks v Hobson Swan Construction Ltd (in Liquidation)*⁶⁸ has the distinction of being the first of the “leaky buildings” cases to come before the New Zealand courts. In the High Court Baragwanath J accepted that the relevant law was that as stated in *Hamlin* and the relevant legislation⁶⁹ and that the council’s liability for negligence was plainly contemplated by s 91 of the Building Act 1991.⁷⁰ Perhaps the most notable aspect of the case was the line of argument put forward by the Council; it accepted that it owed the plaintiff a duty of care for the purposes of the claim but denied that it was in breach of that duty. Rather perversely it suggested that it had come up to the required standard because councils generally had been slow to meet the requirements of the new statutory regime introduced by the Building Act 1991 and as a result standards generally were low in relation to what the councils would accept in lieu of the well-proven cavity and flashing requirements of the previous regime.⁷¹ Unsurprisingly, Baragwanath J was not impressed, commenting that the large number of leaky homes across the country tended “to suggest a wholesale failure by councils to face systematically and robustly the reality that without firm control of standards the temptation for developers to throw up cheap buildings of defective quality would be irresistible”⁷² and that the council’s evidence of wide-spread low standards suggested a “systemic failure by councils to perform their obligations”.⁷³ The council’s task, he said, was to implement the legislation not to “pay lip service” to it.⁷⁴

There was nothing remarkable about the decision in *Dicks* in confirming that the *Hamlin* claim was, subject to the limitation periods, available to owners of leaky homes. Subsequent cases arising from the leaky buildings crisis, however, have thrown up more challenging issues for the courts.

⁶⁶ *Weathertightness – Estimating the Cost*, prepared by PricewaterhouseCoopers for the Department of Building and Housing, Wellington (2009). See also: Building Industry Authority (2002), *Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority* (“The Hunn Report”), Wellington New Zealand; Department of Building and Housing, *Internal Evaluation Report*, Wellington (2008); Department of Building and housing (2002), *Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority*, Wellington New Zealand.

⁶⁷ As a result of the leaky buildings crisis Parliament enacted the Building Act 2004 to strengthen the regulatory regime – see below at n 203.

⁶⁸ [2006] 7 NZCPR 681 (HC)

⁶⁹ At [2]

⁷⁰ At [76]

⁷¹ At [97] and [108]

⁷² At [98]

⁷³ At [99]

⁷⁴ At [109]

The *Hamlin* claim and commercial buildings

A more general question is whether the *Hamlin* duty applies in a commercial context. *Bowen, Johnson* and *Hamlin* itself all involved residential properties and, on the face of it, the basis for the decision in *Hamlin* would suggest that the duty of care owed by councils to home-owners would not extend to the owners of commercial property suing for economic loss. Cooke P in *Hamlin* had left the point open but observed that in a case of commercial or industrial construction “the network of contractual relationships normally provides sufficient avenues of redress to make the imposition of supervening tort duties not demanded”.⁷⁵

The first case which directly considered the question of whether the *Hamlin* duty would be extended to a commercial property owner was *Three Meade Street Limited v Rotorua District Council*.⁷⁶ The case, which involved a defective motel, was complicated by the fact that the builder was the sole director and principal shareholder of the plaintiff developer and Venning J considered there was no duty on the council to recompense the plaintiff for its own negligent work. On the broader question, Venning J was clear that the *Hamlin* duty did not automatically extend to owners of commercial property but he was also of the view that it was not possible to lay down a rule that under no circumstances would councils owe a duty to such property owners.⁷⁷ Ultimately, he said, the question was whether in light of all the circumstances of the particular case it was just and reasonable that a duty of care should be imposed on the defendant council.⁷⁸

Venning J considered that the contractual arrangements between the plaintiff company on the one hand and the builders, engineers and architects involved in the development on the other and the potential for the plaintiff to protect itself from damage through those contractual obligations told against finding a duty of care against a council whose role was relatively minor and whose charges were relatively insignificant.⁷⁹ The *Hamlin* duty is based on the recognition that members of the public are vulnerable when they buy homes and do rely on council inspectors to validate that those homes have been constructed in accordance with the requirements. It is these related elements of vulnerability and reliance which distinguish the residential home owner from the owner of commercial or industrial property.⁸⁰ Parties to commercial dealing have better means of protecting themselves through their contractual arrangements and, as a general proposition, it is much less likely that the courts will be prepared to find a duty of care arising where the owner could have protected itself from the economic consequences of the defendant’s negligence by obtaining a warranty from the builder, architect or engineer against defects in the building.⁸¹ Indeed, in many

⁷⁵ [1996] 1 NZLR 513 (CA) at 520. Cooke P was referring to the contractual relationship between developers, builders, engineers and architects, but as Lord Denning MR said in *Dutton*, “if the builder is not liable for the bad work the council ought not to be liable for passing it”: [1972] 2 WLR 299 (CA) at 309.

⁷⁶ [2005] 1 NZLR 504 (HC)

⁷⁷ At [39] - [40] and echoing Cooke P’s caution in *Hamlin* (see at [1994] 3 NZLR 513 (CA) at 520).

⁷⁸ At [43]

⁷⁹ At [50] – [52]. The Court found that all told the fees charged by the council amounted to less than 1 per cent of the sale price of \$835,000, which represented the value of the motel when sold to the plaintiff.

⁸⁰ *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 per Richardson J at 308-309; Stephen Todd (ed) *The Law of Torts in New Zealand* (5 ed 2009) Thomson Reuters, Wellington at 281; Jane Stapleton *Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence* (1995) 111 LQR 301 at 344.

⁸¹ In this respect the New Zealand courts to date have been generally aligned with the position adopted by the Australian High Court: see eg *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515. But note that in *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85 the Supreme Court of Canada refused to strike out a claim by the owner of an apartment building holding that where negligence in

cases to impose a duty of care where such contractual arrangements do exist could tend to undermine the contractual negotiation of risks and liabilities, particularly where there was a closely negotiated network of contracts.⁸²

The Court of Appeal refused to find a duty of care owed by councils to owners of commercial properties in two subsequent cases.⁸³ In *Te Mata Properties Ltd v Hastings District Council*⁸⁴ the appellants discovered that two motels which they had purchased suffered from leaky building syndrome. They sued (among others) the District Council for the cost of the necessary remedial works, the loss of value of the properties, consequential losses and general damages. They relied principally on *Hamlin* in alleging that the Council owed a duty of care to them in performing its obligations under the Building Act 1991, which included granting the relevant business permits, inspecting the properties as they were being constructed and issuing certificates of compliance on completion. The Court of Appeal was unanimous in holding that there was no justification for extending the *Hamlin* cause of action beyond the specific limits of private dwellings.⁸⁵

*Queenstown Lakes District Council v Charterhall Trustees Ltd*⁸⁶ involved an upmarket lodge which had been damaged by fire alleged to have been caused by a faulty design and/or construction in the lodge's chimney. The appeal was from a decision by Fogarty J in the High Court not to allow a strike-out application by the Council which it argued was justified on the ground, inter alia, that Charterhall, as a commercial operator of the lodge, was not covered by the *Hamlin* duty. The Court of Appeal considered that Charterhall could not be classified as "vulnerable" in the same way as house-owners and that it was able to manage the risk of errors by its contractors through the contractual arrangements which it made with them.⁸⁷

While the "vulnerability" of the building owner has provided a useful basis for treating commercial property differently from residential property, the distinction does not necessarily provide a clear bright line. The High Court has granted strike out applications by the respective councils in relation to a variety of buildings where although the context was not a residential one, neither was it a truly commercial one;⁸⁸ these have included a residential and medical facility for the aged,⁸⁹ a church,⁹⁰ and a number of schools.⁹¹

the planning or construction of a building caused it to be dangerous, the subsequent purchaser could recover the costs of making the building safe.

⁸² See eg *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) per Glazebrook J at [122]

⁸³ Both cases involved strike out applications.

⁸⁴ [2009] 1 NZLR 460 (CA)

⁸⁵ At [73] per Baragwanath J; at [84] per Robertson and O'Regan JJ. The Court of Appeal referred to the definition of "household unit" in s 2 of the Building Act 1991 as ". . . any building or group or buildings, used or intended to be used solely or principally for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than one household; but does not include a hostel or boardinghouse or other specialised accommodation."

⁸⁶ [2009] 3 NZLR 786 (CA)

⁸⁷ At [39]

⁸⁸ See *Minister of Education v Econicorp Holdings Ltd* [2011] NZCA 450 per Arnold J at s [39] and [61]

⁸⁹ *Kerikeri Village Trust v Nicholas* HC Auckland CIV-2006-404-0005110, 27 November 2008

⁹⁰ *Auckland Christian Mandarin Church Trust Board v Canam Construction (1955) Ltd* HC Auckland CIV-2008-404-8526, 25 June 2010

⁹¹ *Mt Albert Grammar School Board of Trustees v Auckland City Council* HC Auckland CIV-2007-404-4090, 25 June 2009. But note that in *Minister of Education v Econicorp Holdings Ltd* [2011] NZCA 450, while acknowledging that the Ministry was "large, well resourced and no stranger to property transactions" (at [34]) and that there were "significant policy considerations pointing against imposing a duty of care" (at [62]), a majority of the Court of Appeal nevertheless refused to strike out an action brought against the builder and the architect of a school hall. In 2009 the Minister of Education said that at least 73 schools were affected; and

Three Meade Street, Te Mata and *Charterhall* all involved properties which, while being classified by the respective courts as commercial properties, nevertheless had the purpose of providing (transitory) accommodation for members of the public. Indeed, the same could be said of other types of commercial buildings such as office blocks where employees spend a significant amount of their time. One of the issues raised in *Charterhall* was whether a duty of care would be owed to the owner of a commercial building where the defects in the building threatened the health and safety of anyone who might occupy it for the time being.⁹² While accepting that the Building Act did have a purpose of protecting the health and safety of those who use buildings the Court of Appeal considered that the fact that a body has statutory responsibility for a task does not necessarily mean that it will be liable at common law for damages to anyone who suffers loss as a result of its careless performance of the task. Further the Court noted that even if the imposition of a duty of care in relation to health and safety was consistent with the policy of the Building Act, *Charterhall* had not brought the action as a person whose health and safety had been jeopardised; it had sued as an entity which had suffered financial loss, in part through property damage but principally through the loss of income.⁹³ While it appears that the Council will not owe the owner of a defective commercial building a duty of care in respect of economic harm, the question of whether it might be held to owe a duty of care to occupiers of that building in respect of health and safety issues arising from exposure to that defect remains open.⁹⁴

In *Three Meade Street* Venning J had anticipated other possible anomalies arising from the residential/commercial dichotomy when he said:⁹⁵

There are a myriad of situations that may arise. A 30-floor high-rise office complex will involve different considerations to the construction of a corner dairy, yet on one view both are commercial in nature. A number of “commercial” buildings may have dual use. A commercial block of shops may have flats above them providing residence for owner/occupiers of the units. A multi-storey apartment may be a commercial development but provide for residential use. The value of the property in issue may vary widely. A commercial warehouse in Timaru might be worth \$100,000 as opposed to an architecturally designed home in Auckland worth \$5m.

in 2011 that 157 schools still needed repairs, at an estimated cost of at least \$1.5 billion: Gibson, Anne (18 September 2009). "Schools' leaky building toll soars" *The New Zealand Herald* at http://www.nzherald.co.nz/leaky-buildings/news/article.cfm?c_id=562&objectid=10598073 (Retrieved 6 April 2012); Fisher, Amanda (28 January 2011). "Huge bill for leaky schools" *The Dominion Post* at <http://www.stuff.co.nz/national/education/4591094/Huge-bill-for-leaky-schools> (Retrieved 6 April 2012).

⁹² In *Te Mata* Baragwanath J considered that it was arguable that the need to protect occupants' health and safety could justify the imposition of liability on councils even in a commercial context (see at [37] – [60]) and the judge would have given the appellants time to amend their pleadings to include such a claim (see at [80]). However, the other members of the Court of Appeal, Robertson and O'Regan JJ, did not agree with Baragwanath J on this point noting that despite having had ample opportunity to include in their statement of claim pleadings relating to a duty based on health and safety concerns, the appellants had chosen not to do so (see at [85] – [86]). The Court of Appeal decision in *Te Mata* was issued after Fogarty J in the High Court had delivered his judgment in *Queenstown Lakes* and before the latter case was heard by the Court of Appeal *Charterhall* submitted a draft amended statement of claim which incorporated the health and safety pleading.⁹³ At [42]

⁹⁴ For an interesting discussion of the possible health effects arising from exposure to “leaky buildings” see Jeroen Douwes and Philippa Howden-Chapman *An Overview of possible health effects from exposure to “leaky buildings”* in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at 71.

⁹⁵ [2005] 1NZLR 504 (HC) at [40]

A number of these issues have arisen in recent cases involving bodies corporate⁹⁶ and apartment owners in multi-unit residential developments which have found themselves caught up in the leaky building crisis.

The multi-unit residential development

In *North Shore City Council v Body Corporate 188529 (Sunset Terraces)*⁹⁷ the Council was appealing from findings in the High Court,⁹⁸ affirmed by the Court of Appeal,⁹⁹ that it was liable to the owners of units in two residential apartment blocks for their losses due to water damage resulting from faulty construction which would have been identified had the Council performed its statutory duties of inspection and consent with reasonable care.

Having first confirmed the application of the *Hamlin* duty as “a soundly and firmly based principle of New Zealand law”,¹⁰⁰ the Supreme Court then had to consider whether it should be confined to the circumstances of the *Hamlin* case itself¹⁰¹ or whether it could be applied to any building which was intended for residential use.

The Supreme Court upheld the decisions in the lower courts, holding that the Council owed a duty of care to the owners of the apartments.¹⁰² In defining the scope of the *Hamlin* duty the Court said that the rationale for a duty owed to home owners is the combination of two related proximity elements – general reliance by the owners and the authority’s control over the process.¹⁰³ It therefore saw no reason to confine the application of the principle to “single stand-alone modest dwellings whose owners personally occupy them”. If the duty was “designed to protect the interests citizens have in their homes” then, as a matter of principle and logic, that duty should extend to all homes irrespective of “ownership structure, size, configuration, value or other facets of premises intended to be used as a home”.¹⁰⁴

The Supreme Court considered that the fact that professionals such as engineers and architects were involved in large scale developments should make no difference to the liability of the Council;

⁹⁶ Under s 15 (1)(f) of the Unit Titles Act 1972 (replaced recently by the Unit Titles Act 2010) the body corporate is responsible for the repair and maintenance of common property within multi unit developments. For a discussion of the obligations of the body corporate under the 1972 Act and the 2010 Act see Rod Thomas, *Repairing leaky unit titles, Tisch, and appointment of administrators* in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at 71.

⁹⁷ [2011] 2 NZLR 289 (SC)

⁹⁸ [2008] 3 NZLR 479 (HC)

⁹⁹ The appeal to the Supreme Court joined two separate appeals from judgments of the Court of Appeal: *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] 3 NZLR 486 (CA) and *O’Hagan v Body Corporate 189855 (Byron Avenue)* [2010] 3 NZLR 445 (CA).

¹⁰⁰ At [26]. The Council argued that the Court of Appeal and Privy Council decisions in *Hamlin* should not be followed on the basis first, that there had been material changes in the socio-economic fabric of New Zealand society in the intervening years and, secondly, that a materially different legislative landscape came into force with the Building Act 1991, which had not been enacted at the time of the events giving rise to the *Hamlin* litigation. The courts below did not have to consider this issue because they were bound by the decision of the Privy Council in *Hamlin*.

¹⁰¹ At issue in *Hamlin* was a stand-alone “modest” single dwellinghouse occupied by its owners.

¹⁰² With respect to the appeal in the *Byron Avenue* case the Supreme Court agreed with the Court of Appeal that under s 13 of the Unit Titles Act 1972 the body corporate could sue on behalf of the unit holders for damage suffered by the common areas of the building: at [55] – [59] per Tipping J and at [11] per Elias CJ.

¹⁰³ At [48]

¹⁰⁴ At [47] – [49] per Tipping J and at [7] per Elias CJ

purchasers were unlikely to know the extent of the professionals' involvement and it may have been limited or not relevant to the problems giving rise to the loss in question. But, more fundamentally, input from professionals should not absolve Councils from liability because the rationale for the *Hamlin* duty was the Council's power of control and the general reliance which is placed on their independent inspection role.¹⁰⁵

Both the Court of Appeal¹⁰⁶ and the Supreme Court¹⁰⁷ accepted the view of Heath J in the High Court¹⁰⁸ that a duty of care should be premised on the *intended* end use of a building, which would have the dual advantages of simplicity of expression and predictability in outcome.¹⁰⁹ The judge considered that councils should owe a duty of care to original or subsequent owners or occupiers of a unit where the intended use of the building was disclosed as residential in the plans and specifications (or where the council knew that to be the intended use).¹¹⁰ Where a residential use was disclosed it would have the effect of putting the Council on notice that it would owe a duty of care to prospective purchasers; it could then put in place appropriate processes to manage the risks of the statutory obligations cast upon it. While simplicity of expression and predictability of outcome are to be desired, the "bright line" proposed by Heath J does raise some questions.

First, because the approach focuses on the use of the premises rather than the relationship owners have with the premises, the *Hamlin* duty is extended to owners who have residential premises built for commercial reasons (or those who purchase them for such reasons). The Supreme Court considered that this was consistent with the policy reasons for the duty pointing out that protection of a non-owner occupant, such as a tenant, can be achieved only through a duty owed to the owner.¹¹¹

Secondly, a related issue which was not discussed directly in *Sunset Terraces*, is the effect, if any, of a subsequent change to the use of the premises on the duty. If, for example, a barrister subsequently purchases a unit in a development identified as being for residential use and sets up her chambers in that unit does the duty continue to apply? Presumably, the answer must be yes because any duty would arise at the time the consents and code compliance certificates are issued and the potential for changed use is not a factor which should affect the designation of a building as identified in the plans.¹¹² Certainly the predictability or certainty of outcome should require that the purchasing barrister is owed the same duty as the person selling the unit.

The third issue which arises is probably the most problematic. It concerns the question of what happens where, in Heath J's words, there is "the troublesome possibility of a mixed-use development."¹¹³ The court in *Sunset Terraces* was not required to consider this question and left the issue open¹¹⁴ but a case where the issue was being raised was already before the courts.

*North Shore City Council v Body Corporate 207624 (Spencer on Byron)*¹¹⁵ concerned a multi-storey building of 23 floors located in Takapuna, Auckland. The complex is described as a hotel, it is run as

¹⁰⁵ At [50] per Tipping J and at [8] per Elias CJ

¹⁰⁶ [2010] 3 NZLR 486 (SC) at [69]

¹⁰⁷ [2011] 2 NZLR 289 (SC) at [51] per Tipping J

¹⁰⁸ [2008] 3 NZLR 479 (HC)

¹⁰⁹ At [214] and [217]

¹¹⁰ At [220]

¹¹¹ [2011] 2 NZLR 289 (SC) at [53] per Tipping J

¹¹² See the obiter comments of Potter J in *North Shore City Council v Body Corporate 207624 (Spencer on Byron)* HC Auckland CIV-2007-404-4037, 11 November 2009 at [22]

¹¹³ [2008] 3 NZLR 479 (HC) at [219]

¹¹⁴ [2011] 2 NZLR 289 (SC) at [51] per Tipping J

¹¹⁵ [2011] 2 NZLR 744 (CA)

a hotel and it contains all the associated amenities which you might expect from a hotel including a tennis court, gymnasium and swimming pool. While the building contains 243 units which are all individually owned¹¹⁶ and rented almost exclusively to paying guests, there are also six residential penthouse apartments in the complex which are used as private dwellings.

The plans submitted to Council clearly showed the proposed penthouse apartments but the four building consents issued in 2000 all described the building as “New Commercial/Industrial”. Spencer on Byron was completed in 2001 and the Council issued a series of code of compliance certificates pursuant to the Building Act 1991 for the building consents issued. Soon after completion the properties in the complex began to show evidence of physical defects allegedly due to lack of weathertightness. Extensive remedial work was required with a total estimated cost of almost \$19.5m.¹¹⁷ The Body Corporate and the owners brought actions against a number of parties including the builders, the architects, the engineers, the insurer of a cladding company and the North Shore City Council. The claims against the Council alleged negligence in performing its statutory functions of issuing building consents, inspecting and approving the development and in the issuing of the code compliance certificates.

On an application by the Council, the High Court¹¹⁸ struck out the claims in negligence by the Body Corporate and the owners of the hotel units on the basis that they were commercial properties and the Council could not arguably owe those owners a duty of care. However the High Court did not strike out the claims by the owners of the residential apartments which were used as private dwellings. While finding that the existence of the residential apartments could not, and did not, affect the designation of the building as a commercial building, Potter J concluded that the possibility that the owners of the penthouses might succeed in establishing against the Council a duty of care based on *Hamlin* could not reasonably be excluded.¹¹⁹ Potter J considered that, if the “bright line” approach was the appropriate test,¹²⁰ then the claim by the penthouse owners would fail¹²¹ but considered the “situation in respect of any duty of care to be at least arguable”.¹²² The building owners appealed and the Council cross-appealed against the refusal to strike out the apartment owners’ claims in negligence.

Significantly, in argument before the Court of Appeal it was common ground between the parties that in the High Court Potter J had not been correct in considering that it was arguable that the Council might owe a duty of care to one group of owners but not to others; the parties agreed that it was simply not feasible to isolate the waterproofing issues by reference to the residential and commercial components in the building and either the Council owed a duty of care to all owners and the Body Corporate or none.

The Court of Appeal was unanimous in finding that the six residential apartments were no more than incidental to the hotel units or the commercial nature of the building as a whole; that their presence

¹¹⁶ Each had its own unit title issued pursuant to the Unit titles Act 1972

¹¹⁷ Lost rental income or alternative accommodation costs of almost \$2.4m and general damages of almost \$4.4m were also claimed.

¹¹⁸ HC Auckland CIV-2007-404-4037, 11 November 2009

¹¹⁹ At [108]

¹²⁰ Potter J released her decision after the High Court and Court of Appeal decisions in *Sunset Terraces* but before the Supreme Court decision in that case.

¹²¹ Potter J (at [110]) considered that the claim would fail because the description of the building in consent applications and certificates was “New Commercial/Industrial” and the judge considered that would entitle the Council to proceed on the basis that it did not owe a duty of care in relation to the building generally. However, as noted, the plans did indicate the presence of the residential apartments and in *Sunset Terraces* the courts at all levels referred to the intended use of the building as identified in “the plans”.

¹²² At [111]

in the Spencer on Byron complex could not convert its essential character into a residential building; and that it did not change the nature of the hotel units owners' interests from commercial to residential. Further, the Court considered that the scope of the Council's liability could not be expanded to include a class which was not entitled to protection by the expedient of an argument that a duty owed to one owner in the building equates to an obligation to all.¹²³

The Court divided however on the question of whether a separate duty could be owed to the residential apartment owners. Dissenting on this point, Harrison J regretted that "no principled attempt" had been made in argument by the apartment owners to follow through on Potter J's judgment and reasoning in support of such an approach.¹²⁴ He considered that the *Hamlin* duty was absolute and its articulation in *Sunset Terraces* did not seem to allow for exceptions. The duty was designed to protect the interests which owners have in their homes and it was owed to all home-owners alike without distinctions based on structure, size, value or the nature of ownership.¹²⁵ Given that, Harrison J concluded that the fact that the residential properties were within the same structure as commercial properties, that the building as whole was predominantly commercial in nature, and that the Council performed its statutory functions in relation to the building as a whole, could not operate individually or collectively at a policy level to displace the Council's liability to the apartment owners.¹²⁶

The majority of the Court of Appeal on the other hand felt that to impose a duty of care solely in respect of the residential component in the circumstances of this case would not be fair, just and reasonable; to do so would be to impose different tortious duties on the Council in respect of the residential and commercial components of the building, with no logical justification given the acceptance by the parties of the integrated nature of building and the indivisibility of the watertightness issues affecting the entire building.¹²⁷

The majority agreed that there might be cases where it was feasible to separate out a residential component in a commercial building but it considered that, even then, an assessment would need to be made of the extent and nature of the residential component.¹²⁸

If the residential component is no more than incidental to the commercial component of a building and does not change its essential character as a commercial building, then the *Hamlin* duty should not be imposed on a council. On the other hand, if the residential component is more than incidental to the commercial component and is a substantial component in its own right, different questions may arise and it is possible that the *Hamlin* duty may then be imposed.

In the author's view the approach taken by the majority is fraught with difficulties. There is the obvious problem of determining the point at which a residential component in a development constitutes the "substantial component" which will trigger a duty arising. More crucially though, denying the Council's liability to residential home owners in the context of mixed-use developments just because the proportion of residential accommodation has not reached the undefined threshold which makes it a "substantial component" runs counter to the rationale of the *Hamlin* duty.

¹²³ [2011] 2 NZLR 744 (CA) at [39] per Harrison J, at [102] per Ellen France and Randerson JJ

¹²⁴ At [34]

¹²⁵ At [42]

¹²⁶ At [43] – [44]

¹²⁷ [2011] 2 NZLR 744 (CA) at [106]

¹²⁸ At [109]

Harrison J's approach is to be preferred.¹²⁹ While there may have been practical implications in finding a duty owed to just the residential owners these were not insurmountable¹³⁰ and the majority's approach has the effect of making the existence of a duty conditional upon arbitrary or variable factors, a situation which was rejected by the Supreme Court in *Sunset Terraces*.¹³¹

Conclusions

Hamlin is without doubt one of the most significant decisions in New Zealand's civil jurisprudence.¹³² It was a response to the country's attitude to housing at the time. Home-ownership was the holy-grail for many New Zealand families throughout the twentieth century and, from the 1950s, the post-war baby boom and the expanding economy created increased demand for new housing; unfortunately that led to many New Zealand homes being negligently constructed.¹³³

It is true that a number of the socio-political-economic factors identified by Richardson J in *Hamlin* as being distinctive of the New Zealand housing market in the early 70s would no longer be relevant today. However, there is still a high proportion of occupier-owned housing (although the percentage has been steadily decreasing¹³⁴) and it is still the case that new house buyers would not normally commission independent engineering or architectural examinations or surveys. Of course, we should not be surprised by the latter – the *Hamlin* decision itself may have provided a self fulfilling prophecy in that regard.

In *Hamlin* the Court of Appeal approved the 18 years of precedent since *Bowen*. The Supreme Court decision in *Sunset Terraces* 15 years later confirmed that the duty continued to be firmly established within New Zealand jurisprudence and applies to all residential homes irrespective of "ownership structure, size, configuration, value or other facets of premises intended to be used as a home".¹³⁵ Given the weight of judicial authority, the approach taken by the legislature in the Building Act 1991 (and in the Building Act 2004), and the significant continuing economic and political implications which flow from the decision, it is hardly surprising that there is a general consensus that if there

¹²⁹ As Harrison J recognised (at [36]) there will need to be a clarification of the appropriate "bright line" test regarding intended use. In *Sunset Terraces* the reference was to the intended use of "the building" (see above n 107) which was appropriate to the facts of that case; it is suggested that an alternative test focusing on the intended use of the component properties would be more appropriate.

¹³⁰ As Harrison J pointed out (at [51]) the division of ownership does not affect the ability to carry out the physical repair or maintenance; it will simply be reflected in an allocation of loss.

¹³¹ Above n 104. An appeal from the decision of the Court of Appeal in *Spencer on Byron* was heard by the Supreme Court in March 2012. The Supreme Court reserved its decision which, at the time of writing, has not yet been issued.

¹³² See eg: Susan Glazebrook *What makes a leading case? The narrow lens of the law or a wider perspective?* (2010) 41 VUWLR 339; Ivor Richardson *The Permanent Court of Appeal: Surveying the 50 Years* in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oregon, 2009)

¹³³ Peter Spiller *New Zealand Court of Appeal 1958-1996: A History* (Thomson Brookers, Wellington, 2002) at 405

¹³⁴ The percentage of owner-occupier housing in New Zealand decreased from 74% in 1991 to 67% in 2006; see at http://www.stats.govt.nz/browse_for_stats/people_and_communities/geographic-areas/mapping-trends-in-the-auckland-region/housing.aspx

¹³⁵ Above n 104

were to be any significant change to the *Hamlin* duty now it will be brought about by Parliament rather than the courts.¹³⁶

The body of New Zealand case law dealing with defective buildings has included discussion of a number of issues which have been the subject of debate in tort of negligence actions generally across common law jurisdictions at various times over the past 50 years. The paper will conclude with a brief review of some of those issues.

The *Anns* approach and the New Zealand courts

The House of Lords started raising doubts about the *Anns* approach to finding a duty of care in the mid-80s¹³⁷ before finally rejecting it in *Murphy* in 1990. Lord Keith of Kinkel led the move to recognise a test for finding a duty based on it being “just and reasonable” to do so¹³⁸ and that was eventually formalised in the tripartite test proposed by Lord Bridge in *Caparo*.¹³⁹

The New Zealand courts, on the other hand, have consistently emphasised that they are following *Anns*,¹⁴⁰ treating Lord Wilberforce’s two-stage approach as an aid to analysis rather than as a formula to provide answers.¹⁴¹ Essentially the courts have taken the view that there is no substantial difference between the *Anns* approach of considering “whether there are any considerations which ought to negate or reduce or limit the scope of the duty” and the subsequent *Caparo* refinement. The Court of Appeal set out the test to be applied in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*,¹⁴² delivering the decision of the Court of Appeal, Glazebrook J stated:¹⁴³

. . . The ultimate question when deciding whether a duty of care should be recognised in New Zealand is whether, in the light of all the circumstances of the case, it is just and reasonable that such a duty be imposed. The focus is on two broad fields of inquiry but

¹³⁶ See for example: *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 528 per Richardson J; *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2011] 2 NZLR 289 (SC) at [20] per Tipping J; Geoff McLay, *Legal doctrine, the leaky homes crisis and the limits of judicial law-making*, in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at 16 – 17.

¹³⁷ Above n 20

¹³⁸ See eg *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson* [1985] AC 210 (HL) at 240 -241 where Lord Keith of Kinkel relies on a statement by Lord Morris in *Dorset Yacht Co Ltd v Home Office* [1970] 1 AC 1004 (HL) at 1039 where he refers to it being “just and reasonable that a duty of care exist” (an approach echoed by Lord Pearson in *Dorset Yacht* at 1054).

¹³⁹ Above n 35. *Caparo* applied the test in a claim for economic loss; in *Marc Rich & Co AG v Bishop Rock Marines Co Ltd, The Nicholas H* [1996] 1 AC 211 (AC) the “fair, just and reasonable formula” was confirmed in England as one of general application (see at 221 – 225 per Lord Lloyd).

¹⁴⁰ The Supreme Court of Canada has taken a similar stance to the New Zealand courts; see eg *City of Kamloops v Nielsen* [1984] 2 SCR 2 (SCC), *Cooper v Hobart* [2001] 3 SCR 537 (SCC).

¹⁴¹ *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294 per Cooke P; *Couch v Attorney General (on appeal from Hobson v Attorney General)* [2008] 3 NZLR 725 (SC) at [52] per Elias CJ and Anderson J.

¹⁴² [2005] 1 NZLR 324. See also: *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA) at 79 per Cooke P; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294 – 295 per Cooke P, at 305 – 306 per Richardson J, at 312 per Casey J, at 316 – 318 per Hardie Boys J; *Attorney-General v Carter* at [22] and [30].

¹⁴³ [2005] 1 NZLR 324 at [58]

these provide only a framework rather than a straitjacket. The first area of inquiry is as to the degree of proximity or relationship between the parties. The second is whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty in the particular class of case. At this second stage, the Court's inquiry is concerned with the effect of the recognition of a duty on other legal duties and, more generally, on society.

The New Zealand courts also acknowledge that the inquiry into proximity will involve consideration of the degree of analogy with cases in which duties are already established so that any development of the law occurs in a principled and cohesive manner.¹⁴⁴

Ultimately it has to be asked whether there is, in substance, any significant difference between the general approach to finding a duty of care followed in the New Zealand courts and the approaches adopted in the English courts and in other jurisdictions. A number of statements in the House of Lords would seem to support this view. In *Caparo*,¹⁴⁵ where the tripartite test was identified as a replacement for the *Anns* approach,¹⁴⁶ Lord Bridge of Harwich accepted¹⁴⁷ that the concepts of proximity and fairness were incapable of any precise definition which would give them “utility as practical tests”. In *Takaro Properties Ltd v Rowling*¹⁴⁸ Lord Keith of Kinkel¹⁴⁹ emphasised the importance of considering all the relevant circumstances in deciding whether a duty of care should be imposed, and that the question was of an intensely pragmatic character well suited for gradual development but requiring most careful analysis. And in *Customs and Excise Commissioners v Barclays Bank plc*¹⁵⁰ Lord Bingham considered that the “threefold test provides no straightforward answer”¹⁵¹ and that the incremental test was only helpful “when used in combination with a test or principle which identifies the legally significant features of a situation”.¹⁵²

Certainly, there are differences in the decisions reached on particular issues within the respective jurisdictions - and the defective building cases are a prime example of that – but ultimately those differences turn on what the courts have concluded is “fair, just and reasonable” having regard to the policy considerations within those jurisdictions.¹⁵³ As Lord Bingham said in *Customs and Excise Commissioners*:¹⁵⁴

[I]t seems to me that the outcomes (or majority outcomes) of the leading cases . . . are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. That is not to disparage the value of and need for a test of liability in tortious

¹⁴⁴ At [59]. See also: *Connell v Odlum* [1993] 2 NZLR 257 (CA) at 265 per Thomas J; *first City Corporation Ltd v Downsvie Nominees Ltd* [1990] 3 NZLR 265 at 275 per Richardson J; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 293 - 295 per Cooke P

¹⁴⁵ [1990] 2 AC 605 (HL)

¹⁴⁶ Above n 35

¹⁴⁷ At 618

¹⁴⁸ [1987] 2 NZLR 700 (PC)

¹⁴⁹ At 709

¹⁵⁰ [2007] 1 AC 181 (HL)

¹⁵¹ At [6]

¹⁵² At [7]

¹⁵³ See eg *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 295 per Cooke P

¹⁵⁴ [2007] 1 AC 181 (HL) at [8]

negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole.

Defective buildings and economic loss

Despite some strained depictions of the nature of the loss in the early cases dealing with defective buildings,¹⁵⁵ it has been clear since *Murphy* that in most of these cases the damage claimed – the cost of repair - is correctly characterised as pure economic loss.¹⁵⁶ That has been accepted by the New Zealand courts and the underpinning logic of the *Hamlin* decision is the need to protect vulnerable home owners from economic loss.¹⁵⁷

It was the fact that the courts were dealing with pure economic loss which provided the impetus for the House of Lords in *Murphy* to overrule *Anns*¹⁵⁸ and confirmed the tendency of the English Courts to exclude the recovery of pure economic loss¹⁵⁹ except in cases involving negligent misstatement.¹⁶⁰ The most often articulated policy reason for the presumption against the recovery of economic loss is the fear of indeterminate liability¹⁶¹ or opening the floodgates of litigation.¹⁶² However the English courts have denied such recovery even where, on the particular facts, there have not been such concerns.¹⁶³

In other jurisdictions the blanket exclusionary rule has not been applied¹⁶⁴ and courts have considered various factors in determining whether there should be recovery of economic loss.¹⁶⁵ In

¹⁵⁵ Above n 10, n 11, n 14, n 15

¹⁵⁶ Above n 38

¹⁵⁷ *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 533 per Gault J; *Te Mata Properties v Hastings District Council* [2009] 1 NZLR 460 at [84] per Robertson and O'Regan JJ.

¹⁵⁸ Above n 39

¹⁵⁹ See eg: *Candlewood Navigation Corp Ltd v Mitsui O.S.K. Lines Ltd* [1986] AC 1 (HL); *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 786 (HL).

¹⁶⁰ See eg *Hedley Byrne & Co v Heller & Partners* [1964] AC 465 (HL)

¹⁶¹ *Ultramares Corp v Touche, Niven & Co* (1931) 174 NE 441 at 444 per Cardozo CJ.

¹⁶² See eg *Spartan Steel v Martin & Co* [1973] 1 QB 27 at 38 – 39 per Lord Denning MR.

¹⁶³ *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 786 (HL).

¹⁶⁴ For example, in opposition to the exclusionary approach adopted in the English jurisdiction, courts in Canada, Australia and New Zealand have allowed recovery for relational financial loss in certain circumstances although there have been differences in opinion regarding the scope of such recovery: for a summary of the approaches in the respective jurisdictions see for example Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, Wellington, 2009) at [5.9.03]

¹⁶⁵ In *Perre v Apand Pty Ltd* (1999) 198 CLR 180 (HCA) McHugh J (at [102] – [105]) identified five factors to be considered in cases of economic loss: the reasonable foreseeability of the loss; the avoidance of indeterminate liability; the protection of the autonomy of individuals; the vulnerability to risk; and the extent, if at all, to which the defendant knew of the risk and its magnitude.

New Zealand the courts have not rejected claims simply because they involve recovery of pure economic loss.¹⁶⁶ In *Hamlin Cooke P* said:¹⁶⁷

Harm to the person is one thing: harm to economic interests, whether caused by damage to property or in some less tangible way, is another. Broad distinctions, if required, can perhaps be more usefully and more realistically drawn on those lines than on the basis of sometimes metaphysical and controversial distinctions between “pure” and “impure” economic damage. Much tort law, possibly even most, is concerned with economic damage of some kind.

To date the New Zealand courts have not had occasion to wrestle with the indeterminate liability issue¹⁶⁸ - and in the personal injuries area the accident compensation regime means that the courts have been relieved of the concern that the floodgates of litigation might be opened.¹⁶⁹ Caution has been exercised however in cases where to allow the recovery of economic loss under the tort of negligence would cut across a coherent body of law in another field; where there are, or could realistically have been, other remedies for the plaintiff has been treated as relevant to the assessment of vulnerability.¹⁷⁰

In *Te Mata Baragwanath J* suggested that *Hamlin* was an exception to the general principle that damages for pure economic loss are generally irrecoverable in negligence¹⁷¹ but, with respect, that does not appear to accurately represent the position in New Zealand. There have been a number of cases where recovery for pure economic loss has been allowed,¹⁷² and the courts have consistently

¹⁶⁶ In *Spring v Guardian Assurance Plc* [1995] 2 AC 296 (HL) at 313 per Lord Keith Of Kinkel the New Zealand jurisdiction was described as being “tender in its approach to claims in negligence involving pure economic loss”.

¹⁶⁷ [1994] 3 NZLR 513 at 521

¹⁶⁸ The leaky buildings crisis probably represents the closest the courts have come to having to deal with that type of situation. It remains to be seen whether the grounding of the MV *Rena* on the Astrolabe Reef off the coast on New Zealand in October 2011 will lead to significant civil claims against the owner of the ship for damages in respect of economic loss suffered by businesses in the Bay of Plenty region: see the Interim Report Marine inquiry 11-204: Containership MV *Rena* grounding on Astrolabe Reef 5 October 2011 at <http://static.stuff.co.nz/files/rena.pdf>

¹⁶⁹ *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 297 per Cooke P. This of course raises the interesting, but ultimately unanswerable, question as to how the New Zealand jurisprudence in the tort of negligence generally and the recovery of economic loss in particular would have developed had the accident compensation regime not been introduced.

¹⁷⁰ *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 324 at [62]; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 309 -309 per Richardson J; *Perre Apand Pty Ltd* (1999) 198 CLR 180 (HCA) at [120] per McHugh J; *Jane Stapleton Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence* (1995) 111 LQR 301.

¹⁷¹ [2009] 1 NZLR 460 (CA) at [62] and [73] per Baragwanath J; at [84] per Robertson and O’Regan JJ.

¹⁷² See eg: *New Zealand Forest Products Ltd v Attorney-General* [1986] 1 NZLR 14 (CA); *Mainguard Packaging Ltd v Hilton Haulage Ltd* [1990] 1 NZLR 360 (HC). In *Taupo Borough Council v Birnie* [1978] 2 NZLR 397 (CA) the Court of Appeal held that a hotel owner could recover for loss of business profits after the defendant caused his hotel to flood, on the basis that the flooding not only made some rooms unavailable for a time but also deterred travellers and travel agents from making further bookings because of doubt about whether satisfactory accommodation would be available. The Court of Appeal’s categorisation of this loss as consequential has been questioned: see Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, Wellington, 2009) at [5.9.02]

made clear their view that while the fact that the damage suffered is economic loss may weigh against a duty of care it is not decisive per se.¹⁷³

The statutory context and the liability of public authorities

Public authorities discharging statutory functions operate within a statutory framework. Under the Building Act 1991 Parliament conferred on the council:¹⁷⁴

- The obligation within ten days to grant or refuse a building consent;
- The power to charge for the cost of doing so;
- The power to defer its decision until necessary information was provided;
- The power to take all reasonable steps to ensure that building work was performed in accordance with the consent;
- The duty of issuing a certificate of compliance if satisfied on reasonable grounds that the work complied with the building code, such compliance including conformity with its weatherproofness and durability provisions; and
- The duty in the event of non-compliance to issue a notice to rectify.

The courts have agreed that, at least in respect of dwelling houses, a council is under an obligation to perform such inspections during building work as will enable it to issue an accurate code compliance certificate.¹⁷⁵

Whether a statutory duty gives rise to a private cause of action is a question of construction. It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach.¹⁷⁶ Except in cases of clear impediment (such as where tortious liability is inconsistent with statute), the judgment whether as a matter of proximity and policy it is right to recognise a duty of care in novel circumstances will usually be intensely fact-specific. In *Gorringe v Calderdale Metropolitan Borough Council*¹⁷⁷ Lord Steyn emphasised the need to focus closely on the facts and background social context when negligence arises in the exercise of statutory duties and powers, a subject he regarded as one of “great complexity and very much an evolving area of the law”.¹⁷⁸

In *Attorney-General v Carter*¹⁷⁹ the Court of Appeal noted obiter that, from a policy perspective, there was a “legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence”, and considered the defective building cases as sui generis in that respect.¹⁸⁰

¹⁷³ See eg: *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294 per Cooke P; *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [63]; *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2011] 2 NZLR 289 (SC) at [30]

¹⁷⁴ *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 (CA) at 472

¹⁷⁵ At 473; and see *Dicks v Hobson Swan Construction Ltd (in liquidation)* (2006) 7 NZCPR 881 (HC) at [74]–[75]

¹⁷⁶ *Stovin v Wise* [1996] AC 923(HL) at 952 per Lord Hoffman; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 739 per Lord Browne-Wilkinson

¹⁷⁷ [2004] 1 WLR 1057 (HL) at p 1059

¹⁷⁸ At 1059; and see *Couch v Attorney-General* [2008] 3 NZLR 725 (SC) at [53] per Elias CJ and Anderson J

¹⁷⁹ [2003] 2 NZLR 160 (CA)

¹⁸⁰ At [35]

As already discussed, the decision in *Hamlin* was rooted in the socio-political context of the New Zealand of the times and the decision turned on the importance of habitation as a primary interest to be recognised and the extent to which home owners relied on inspections by local authorities when buying houses. In the Privy Council¹⁸¹ their Lordships noted (having regard to the decision in *Murphy*) that in England the issue of habitation was dealt with by a separate statute¹⁸² and that it was not appropriate for a more extensive common law duty to be superimposed on what Parliament had provided for by statute.¹⁸³ In New Zealand there was no corresponding legislation.

Although the Building Act 1991 was not relevant to the facts in *Hamlin*, its enactment, against the background of 15 years of judicial pronouncements in cases involving defective buildings, provided a compelling argument for both the Court of Appeal¹⁸⁴ and the Privy Council¹⁸⁵ that Parliament had accepted that there was a common law duty owed by councils to home owners.¹⁸⁶

The nature of the reliance

The rationale for a duty owed to residential property owners is the combination of two related elements which go to proximity – namely, the territorial authority’s control over the process and the general reliance by the owners.¹⁸⁷ The authority’s control is common to both residential property owners and commercial property owners. It is the element of reliance which the law recognises as distinguishing the two different groups.¹⁸⁸

It is not necessary for the home owner to prove actual reliance. Instead the thrust of the defective buildings cases in New Zealand is that the concept of general reliance by a home owner is generated by community expectations that a council vested with wide statutory powers to control building work will act with skill and care; and legal responsibility is based upon knowledge of that general dependence.¹⁸⁹ In these cases reliance is assumed without proof.¹⁹⁰

¹⁸¹ [1996] 1 NZLR 513 (PC) at 521 - 522

¹⁸² The Defective Premises Act 1972 (UK)

¹⁸³ At 472 per Lord Keith of Kinkel; at 480 – 481 per Lord Bridge of Harwich; at 490 per Lord Oliver of Aylmerton; at 498 per Lord Jauncey of Tullichettle

¹⁸⁴ [1994] 3 NZLR 513 at 524 per Cooke P, at 526 -527 per Richardson J

¹⁸⁵ [1996] 1 NZLR 513 at 522

¹⁸⁶ In *Sunset Terraces* the Supreme Court was unanimous in concluding that the enactment of the Building Act 1991 gave no basis for the reconsideration of the appropriateness of the common law duty as affirmed in *Hamlin*: see at [6] and [24]

¹⁸⁷ *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2011] 2 NZLR 289 (SC) at [48]

¹⁸⁸ *North Shore City Council v Body Corporate 207624 (Spencer on Byron)* [2011] 2 NZLR 744 (CA) at [46] per Harrison J

¹⁸⁹ *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 525 -527 per Richardson J; *North Shore City Council v Body Corporate 207624 (Spencer on Byron)* [2011] 2 NZLR 744 (CA) at [46] per Harrison J

¹⁹⁰ *North Shore City Council v Body Corporate 207624 (Spencer on Byron)* [2011] 2 NZLR 744 (CA) at [70] per Harrison J

By contrast the tort of negligent misstatement requires proof of actual reliance and its reasonableness.¹⁹¹ In *Spencer on Byron*¹⁹² an alternative claim put forward by the owners was that the council was liable for negligent misstatement in issuing code of compliance certificates without reasonable grounds for satisfaction that the building complied with the Building Code.¹⁹³ The Court of Appeal unanimously held that the argument could not succeed. The owners could not establish that they had reasonably relied on the certificates to claim protection against economic loss. First, applying *Caparo* the Court of Appeal considered that the purpose for which the statement was prepared determines whether any reliance was reasonable and the legislative purpose of the Building Act under which the certificates were issued was to protect health and safety, not economic interests.¹⁹⁴ Secondly, the Court said that, in order to establish the necessary proximity which would justify finding liability on the part of the council, it was necessary to show that it had assumed a responsibility to the owners for the accuracy, truth or reliability of the codes of compliance and that would normally have required a direct dealing between the parties.¹⁹⁵

Postscript: “Leaky buildings” – update

The size of the potential claims against territorial authorities in relation to leaky buildings may represent the nearest New Zealand has come to a “floodgates” situation. As John Green, a director of the Building Disputes Tribunal in New Zealand, says, “leaky building claims are by their very nature complex, hugely time consuming, expensive to investigate and resolve, and they invariably involve high levels of stress, anxiety and disturbance, loss of amenity and general inconvenience for claimants”.¹⁹⁶ In *Sunset Terraces* Arnold J made the point that litigation was a poor instrument to provide appropriate remedies to people affected by “large-scale systemic failure of the type that has occurred”.¹⁹⁷

¹⁹¹ See eg: *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 623 -624 per Lord Bridge of Harwich, at 638 per Lord Oliver of Aylmerton; *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 (CA) at 566 per Richmond P; *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA) at [45].

¹⁹² *North Shore City Council v Body Corporate 207624 (Spencer on Byron)* [2011] 2 NZLR 744 (CA)

¹⁹³ At [64] – [66]

¹⁹⁴ At [79]

¹⁹⁵ At [71]. In a recent decision in *Marlborough District Council v Altimarloch Joint Venture Limited* [2012] NZSC 11, the Supreme Court has held that the Council owed a duty of care to a purchaser of land who had been supplied with a negligently prepared Land Information Memorandum (LIM). Under s 44A of the Local Government Official Information and Meetings Act 1987 provides that the LIM should contain information on a number of matters including features of the land, storm water and sewerage drains, and supply of drinking water. Tipping J (with whom the rest of the Court agreed on this point) stated (at [88]): “Reasonable and foreseeable reliance on a written statement made in a business context is a conventional indicator of both proximity between the maker and the recipient and, subject to any countervailing considerations, that as a matter of policy a duty of care should be imposed on the maker. In the case of the supply of a service for a fee under the provisions of a statute, questions of policy are likely to be of greater import than the proximity that must necessarily exist”.

¹⁹⁶ John Green *Resolving leaky building claims* in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at 238.

¹⁹⁷ [2010] 3 NZLR 486 at [212]

Parliament has made three attempts at addressing the large number of claims arising from weathertightness issues.¹⁹⁸ The initial response was the introduction of the Weathertight Homes Resolution Services Act in 2002 which put in place a system for the assessment of claims and provided additional resources¹⁹⁹ to the owners of leaky buildings to enable resolution of the legal claims for compensation through mediation or adjudication. This was later replaced by the Weathertight Homes Resolution Services Act 2006 which was intended to provide speedy, flexible, and cost-effective procedures for assessment and resolution of claims through the Weathertight Homes Tribunal.²⁰⁰ Finally the Financial Assistance Package (FAP) was introduced in July 2011²⁰¹ to assist eligible owners get their homes repaired, and to resolve leaky building claims against the government and the council to the extent provided for under the package.²⁰²

As a direct result of the leaky building crisis Parliament also enacted the Building Act 2004²⁰³ which has broadly similar purposes to the previous legislation but is designed to strengthen the regulatory environment governing the construction of buildings. The Act provides the owners of residential dwellings with enhanced protection through mandatory warranties in all building contracts and any sale agreements made by developers and additional remedies should the regulatory regime fail them.²⁰⁴

Limitation periods²⁰⁵

Under s 4 of the Limitation Act 1950²⁰⁶ the limitation period for actions in tort (and contract) is six years from the date of the accrual of the cause of action. In the defective buildings cases the courts are usually confronted with latent defects which do not become apparent for some time after the construction of the building and in New Zealand the courts take the view that the cause of action in defective buildings cases arises when the defect becomes apparent or manifest (the “reasonable

¹⁹⁸ See generally: John Green *Resolving leaky building claims* in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at 237; Tim Rainey *Leaky homes – long term solutions* in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at 317.

¹⁹⁸ [2010] 3 NZLR 486 (CA) at [212]

¹⁹⁹ The resources were managed by the Weathertight Homes Resolution Service.

²⁰⁰ The Tribunal is a judicially independent tribunal under the Ministry of Justice. Its powers and procedures are flexible and its determinations are binding and enforceable though subject to appeal.

²⁰¹ See s 7 of the Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Act 2011 (2011 N0 50)

²⁰² Under the FAP the home owner share the agreed cost of repairing the property with the government (which contributes 25%) and the local council (up to 25%) if it approved the work and is participating in the FAP. To use the FAP the home owner must agree not to sue the contributing council and the government, although action can still be pursued against other liable parties such as builders, developers and manufacturers of defective products.

²⁰³ Replacing the Building Act 1991

²⁰⁴ A review of the Building Act in 2009 found that the Act had contributed much-needed improvements to the quality of building work but that it was costly and inefficient: see at www.dbh.govt.nz (accessed on 17 April 2012)

²⁰⁵ For a more detailed analysis see Stephen Todd *Leaky buildings: limitation issues and successive owners* in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at 123

²⁰⁶ The Limitation Act 1950 has now been replaced by the Limitation Act 2010 which came into force on 1 January 2011 but the 1950 Act continues to apply to claims based on acts or omissions before that date and will therefore be the relevant legislation in leaky building claims.

discoverability” test).²⁰⁷ It was for that reason that Mr Hamlin was able to commence proceedings in 1990 for a house which was built in 1972, the defects having been held to have been reasonably discoverable only in 1989.

The reasonable discoverability approach was seen as being potentially unfair to builders and others involved in the construction industry. As a result Parliament included in the Building Act 1991 a long-stop provision designed to mitigate the problems the reasonable discoverability rule had created for the industry and as a way to avoid the litigation of stale factual disputes.²⁰⁸ Section 91(2)²⁰⁹ provided that civil proceedings relating to building work could not be brought against a person after 10 years or more from the date of the act or omission on which proceedings are based.²¹⁰ In relation to a proceedings against a territorial authority arising out of the issue of building consents, certificates or determinations the date of the act or omission is the date of issue of the consent, certificate, or determination;²¹¹ it is the approval of the work not the work itself which is the relevant act or omission.²¹² The limitation periods prescribed under the Limitation Act continue to apply within the context of the long-stop provision in the Building Acts.

²⁰⁷ See eg: *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) at 239; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 524 per Cooke P, at 533 per Casey J, at 534 per Gault J.

²⁰⁸ *Gedye v South* [2010] 3 NZLR 271 (CA) at [39]

²⁰⁹ The provision was re-enacted with minor amendments by s 393(2) of the Building Act 2004

²¹⁰ The inclusion of this provision in the Building Act 1991 reinforced the view of the Court of Appeal in *Hamlin* that Parliament had accepted the common law position that those involved in the building industry and in building controls, including territorial authorities, could be held liable under the tort of negligence for damage caused by carelessly created or carelessly overlooked latent building defects – see above at n 59.

²¹¹ Section 91(3) of the Building Act 1991; section 393(3) of the Building Act 2004

²¹² See the observation of Pankhurst J in *Gedye v South* [2010] 3 NZLR 271 (CA) at [41]

APPENDIX: Milestone cases

	UK	NZ	Australia	Canada
1970	<i>Dutton v Bognor Regis</i> (1972) CA <i>Anns v Merton LB</i> (1978) HL	<i>Bowen v Paramount Builders</i> (1977) CA <i>Scott Group v McFarlane</i> (1978) CA <i>Mount Albert BC v Johnson</i> (1979) CA		
1980	<i>McLoughlin v O’Brian</i> (1983) HL; <i>Junior Books v Veitchi Co</i> (1983) HL <i>Governors of the Peabody Donation Fund v Sir Lindsay Parkinson</i> (1985) HL <i>Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd</i> [1986] HL <i>Yuen Kun Yeu v Attorney-General of Hong Kong</i> (1988) HL <i>D & F Estates Ltd v Church Commissioners for England</i> (1989) HL	<i>Brown v Heathcote CC</i> (1986) CA <i>Stieller v Porirua CC</i> (1986) CA <i>Craig v East Coast Bays CC</i> (1986) CA	<i>Sutherland Shire Council v Heyman</i> (1985) HCA	<i>City of Kamloops v Nielsen</i> (1984) SCC
1990	<i>Caparo Industries v Dickman</i> (1990) HL <i>Murphy v Brentwood DC</i> (1990) HL	<i>South Pacific Manufacturing Co Ltd v NZ Security Consultants and Investigations Ltd</i> (1992) CA <i>Invercargill City Council v Hamlin</i> (1994) CA PC	<i>Bryan v Maloney</i> (1995) HCA	<i>Winnipeg Condominium Corp No 36 v Bird Construction Co</i> (1995) SCC
2000		<i>Three Meade Street Ltd v Rotorua DC</i> (2005) HC <i>Te Mata Properties Ltd v Hastings DC</i> (2009) CA <i>Queenstown Lakes DC V Charterhall Trustees Ltd</i> (2009) CA	<i>Woolcock Street Investments Pty Ltd v CDG Pty Ltd</i> (2004) HCA	
Leaky buildings		<i>Dicks v Hobson Swan Construction Ltd</i> (2006) HC <i>Sunset Terraces</i> (2011) SC <i>Spencer on Byron</i> (2011) SC		

