FOREWORD

The seventh edition of the standard New Zealand text on torts cannot help but be welcome to practitioners, judges and scholars. Any text, no matter how distinguished, languishes if not kept up to date and, in the case of a field of law as active as the law of torts, an out of date text is dangerous. But this edition is significant not only because it describes what has happened in the law of torts in the three years since the publication of the sixth edition. Its publication marks the 25th anniversary of the appearance of the first edition in 1991. I am very pleased to have been asked to contribute this foreword because it gives me the opportunity to acknowledge the influence The Law of Torts in New Zealand has had over the past quarter of a century.

In the preface to the first edition, Professor Todd described the hope that the text would “fill a major gap in New Zealand legal writing” by setting the “distinctive” approach taken in New Zealand in a wider comparative context. That was an ambitious goal, because the pre-existing gap was indeed major. And a comparative approach in this area requires not only deep learning but stamina. The first edition brought together significant scholars and resulted in a work of outstanding scholarship which was readable and lively. It fully realised the ambition of its principal author. The text was described by one reviewer as “imposing … in both a physical and intellectual sense”.1 It was immediately accepted as authoritative. Successive editions have continued to refine and build on the original work, keeping it abreast of the extraordinary developments in the law of torts in the past 25 years. It remains the first resource for all who work in the field. Its authority is such that it is the text most frequently cited by New Zealand courts.

Such a work has not been content to describe the law as it is by summarising the decisions of the courts. In the tradition of the great text-writers on torts, Salmond, Winfield and Fleming, The Law of Torts in New Zealand has influenced directions by its exposition of the principles and policies of the law and by its analysis and criticism. In Invercargill City Council v Hamlin [1996] 1 NZLR 513 (at 525), the Privy Council endorsed the first edition’s critique of English jurisprudence on the subject of liability for defective building. A decade and a half later, the Supreme Court of New Zealand relied on “the leading New Zealand text on torts” in Body Corporate No 207624 v North Shore City Council (Spencer on Byrne) [2012] NZSC 83, [2013] 2 NZLR 297 (at [89]).

In a time of rapid change in law, including in the recognition of new civil wrongs, the analysis and exposition of principle contained in The Law of Torts in New Zealand has been of great practical assistance to those struggling to keep up. The emerging tort of privacy is one such area. The text points to further challenges for law still to be addressed or developing. They include those arising out of technological advancement, social adjustment, new legislation and public body liabilities. With New Zealand’s accident compensation legislation, The Law of Torts in New Zealand has always paid close attention to the way in which statutes have

shaped New Zealand's distinctive approach to the law of torts. Statutes, including the transformative provisions of the New Zealand Bill of Rights Act, impact on a number of different torts. They affect the torts of defamation and privacy directly. But statutes concerned with consumer protection or the regulation or powers and duties of public bodies also impact on the wider policies behind liability in tort. Some of the more difficult problems for the law of torts arise here, as Professor Todd in the preface to this edition recognises.

In these emerging areas of dispute it is very helpful to look to the comparative world of ideas this text opens up. But it is just as important that we understand the differences which may prompt different paths. The close attention given in The Law of Torts in New Zealand to legislation, a principal source of difference between jurisdictions, is therefore a considerable strength.

The best legal writing both sparks the imagination and provides discipline. The Law of Torts in New Zealand is in that mould. It provides insights and analysis for all practising in this field. I expect it to remain the defining work on torts in New Zealand for the next 25 years and to continue to influence the direction of New Zealand law.

Sian Elias
Chief Justice of New Zealand
4 March 2016
Preface

The 7th edition of *The Law of Torts in New Zealand* marks the passage of 25 years since the book was first published in 1991. I am delighted to be able to point to this anniversary and to be able to say that the book is, I think, in good health. It remains the text that is most frequently cited in the decisions of the New Zealand courts, and I certainly hope that over the years it has been helpful in marking and commenting on the directions chosen by the courts in developing the law.

When I first thought about writing a book on torts I corresponded with Robert Chambers, then a young lecturer at the University of Auckland. Robert was enthusiastic and initially we planned a joint work written by the two of us. However Robert later decided to go into practice as a barrister, which meant that he did not have the time to write about half of the book. I was nonetheless keen that he should remain an author, and he agreed to write the chapters on Trespass to Land, Nuisance, the Rule in *Rylands v Fletcher*, and Remedies. He continued to write for the second edition, but on being appointed to the Bench in 1999 he ceased to be a contributor. Robert’s career as a judge thereafter flourished, being appointed to the Court of Appeal in 2004 and to the Supreme Court in 2012. Tragically, in May 2013, Robert unexpectedly died. He is sadly missed. I am taking the opportunity in writing this Preface to point to Robert’s major contribution in launching this book and writing those four initial chapters. His excellent work continues to be reflected in the book as it is today.

John Burrows also was one of the contributors to the first edition and he continued to write for the next five editions. John has now decided to retire as a contributing author and let others take his place. I have taken over responsibility for Chapter 8 on Breach of Statutory Duty and for the second half of Chapter 15, on Injurious Falsehood, and Ursula Cheer has taken over Chapter 16 on Defamation and Chapter 17 on Invasion of Privacy. Of course, these chapters very substantially remain John’s work. They demonstrate his special ability to write with clarity and precision in explaining what the law is and in teasing out its finer points and nuances, and also in commenting on new developments in ways that are always persuasive. I wish to record my very sincere thanks to John for all the wonderful work he has done in writing on his chosen topics and helping very significantly in making the book a success.

Let us turn now to consider how this new edition has taken account of all that has been happening in the law of torts since the publication of the 6th edition in 2013. As always, there have been many new and significant cases developing the common law. Chapter 4 (Trespass to the Person) includes a discussion of *Rhodes v OPO* (2015), where the UK Supreme Court examined and re-evaluated the long-standing rule in *Wilkinson v Downton* (1896). The claim in the particular case failed, but the rule was nonetheless seen as having a useful, albeit limited, role to play in complementing trespass notwithstanding the rise of negligence liability. Chapters 5, 6 and 7 concern the general principles of negligence, and decisions expounding upon these principles continue with unabated frequency. One question that does not go away is the ambit of liability of public bodies for alleged negligence...
in the exercise or non-exercise of their statutory powers. The cases are not always easy to reconcile, as is shown by a comparison between the decisions of the UK Supreme Court in Smith v Ministry of Defence (2013) (duty owed by the UK Ministry of Defence to take care to protect service personnel by providing adequate equipment for use in military operations) and Michael v Chief Constable of South Wales (2015) (no duty owed by the police to protect a woman at risk of being murdered by her ex-boyfriend). Another question involving the ambit of negligence, of great importance in New Zealand and highlighted in the last edition, is the extent to which negligence liability can provide a remedy for the purchasers of leaky buildings. The stream of decisions, prompted by the earlier and expansive determinations of the Supreme Court, has continued unabated. One immediate and controversial question, examined in chapter 6 and yet to be fully worked out, is whether a manufacturer can be liable in negligence or under the Consumer Guarantees Act 1993 for supplying defective material used in constructing a leaky building. In Carter Holt Harvey Ltd v Minister of Education (2015) the Court of Appeal refused to strike out a claim of this kind, and further litigation on the question is inevitable.

The courts have been busy in other fields as well. Chapter 9 considers two decisions by the UK Supreme Court about certain key principles in nuisance. The first (Lawrence v Fen Tigers (2014)) discusses the relevance of the locality where a nuisance-causing activity takes place and the availability of an injunction by way of remedy, and the second (Lawrence v Fen Tigers (No 2) (2014)) considers the extent of any liability of a landlord for a nuisance created by a tenant. The dignity torts of defamation (chapter 16) and privacy (chapter 17) have continued to expand and develop. The defamation chapter highlights cases in which the courts are attempting to settle the issue of liability for third party publication on the internet. The Court of Appeal has settled on a test based on actual knowledge and failure to remove material within a reasonable time. The continuing development of the Lange qualified privilege defence into a public interest defence is also chronicled, and the section on privilege has been expanded by the inclusion of a discussion of the Parliamentary Privilege Act 2014 and how it interacts with defamation privileges. The privacy chapter details the New Zealand decisions dealing with the new tort of intrusion into seclusion, and also discusses the relevance of the Harmful Digital Communications Act 2015. Chapter 18, concerning misuse of the legal process, has been reorganised to take into account the decision of the Supreme Court in Waterhouse v Contractors Bonding Ltd (2013), considering whether litigation funding agreements may be attacked as constituting the torts of maintenance or champerty or as an abuse of process. Chapter 21, on defences, includes a rewritten and extended discussion of the defence of illegality, this on account of a sudden flurry of cases. As will be explained, the two decisions by different benches of the UK Supreme Court in Homer v Allen (2014) and Les Laboratoires Servier v Apotex Inc (2014) are not really reconcilable.

There are many more new and interesting decisions that have not already been mentioned. They include: Taylor v A Novo Ltd (EWCA, 2013) (psychiatric injury suffered by a daughter on seeing her mother die at home three weeks after an accident at work); Dunnage v Randall (EWCA, 2015) (insurance claim alleging negligence by the insured in injuring the claimant whilst in the throes of an insane delusion); Montgomery v Lanarkshire Health Board (UKSC, 2015) (failure by an obstetrician to inform a patient about the risks involved in her medical treatment); Wu v Body Corporate 366611 (NZSC, 2014) (actions for trespass to land and for nuisance between co-owners); Easton Agriculture Ltd v Manawatu-Wanganui Regional
Council (NZCA, 2013) (whether a floodway was a non-natural use of land for the purposes of the rule in Rylands v Fletcher); Stannard (t/a Wyvern Tyres) v Gore (EWCA, 2012) (the application of the rule in Rylands v Fletcher in the case of an escape of fire); ParkingEye Ltd v Beavis (UKSC, 2015) (unauthorised parking and the question of consent to the risk of a trespass to, or a conversion of, a vehicle by detention or towing or clamping); Wagner v Gill (NZCA, 2014) (“unlawful means” in the tort of conspiracy); Starbucks (HK) Ltd v British Sky Broadcasting Group (No 2) (UKSC, 2015) (need for business goodwill within the jurisdiction in passing off claims); Vidal-Hall v Google Inc (EWCA, 2015) (distinction between the action for breach of confidence and action for misuse of private information); Cruddas v Calvert (EWCA, 2015) (applying the requirement of malice in injurious falsehood claims where words have more than one meaning); Weller v Associated Newspapers (EWCA, 2015) (invasion of privacy in relation to children); Representative Claimants v MGN Ltd (EWCA, 2015) (measure of damages for egregious hacking of personal information about celebrity claimants); Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd (UKPC, 2013) (whether an action for the malicious institution of civil proceedings can lie); Carrie v Clayton (NZCA, 2014) (whether a Crown prosecutor is a “public officer” for the purpose of the tort of misfeasance in a public office); Attorney-General v Essen (NZCA, 2015) (basis for the recovery of damages for breach of s 21 of the New Zealand Bill of Rights Act 1990 (unreasonable search)); Zurich Insurance plc UK Branch v International Energy Group Ltd (UKSC, 2015) (difficulties with the special rule of causation in Fairbairn); Wellesly Partners LLP v Withers LLP (EWCA, 2015) (the test for remoteness of damage in cases of concurrent liability in negligence and in contract); Leason v Attorney-General (NZCA, 2013) (the ambit and application of the defences of necessity and illegality); Biltik (UK) Ltd v Nazir (No 2) (UKSC, 2015) (contribution of a director’s illegal conduct to a company); Woodland v Essex County Council (UKSC, 2013); N.A v Nottingham County Council (EWCA, 2015) (the bases for the imposition of non-delegable duties in negligence); Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd and BC 2009 Ltd (NZHC, 2014) (whether a council settling a leaky building claim can take an assignment of the plaintiff’s cause of action against other defendants); Sea Shepherd UK v Fish & Fish Ltd (UKSC, 2015) (nature of the concept of “common design” giving rise to joint and several liability); Hotchin v New Zealand Guardian Trust Co Ltd (2014, NZCA) (co-ordinate liability of tortfeasors for the “same damage”).

I would like to record my thanks to Courtney Ormiston, who did a lot of good work for me as my research assistant. Bill Atkin similarly wishes to acknowledge the helpful research of Sean Brennan and Fuzz Shahbaz. All of the authors would like to thank Hellena Briasco for her excellent work in editing the manuscript and in quickly and efficiently producing the final copy. We would like also to thank Ian McIntosh, Bridget Giblin and all members of staff at Thomson Reuters who have contributed to producing this new edition.

Responsibility as between the authors for the individual chapters is as stated in the table of contents.

We have attempted to state the law on the basis of the materials available to us on 1 January 2016.

Stephen Todd

Christchurch, 1 February 2016
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6.4 Liability for defective buildings

6.4.01 Introduction

(1) Nature of the damage

The preceding discussion demonstrates that a building contractor can be liable on ordinary principles of negligence for physical damage to property caused by faulty work of construction. *Donoghue v Stevenson* concerned a faulty chattel but in time the courts determined that no relevant distinction could be drawn between negligent manufacturing and negligent building, nor could it make any difference whether the work was done on the builder’s or someone else’s property. To this extent, then, the question of builders’ liability for negligence raises no special difficulties of principle. However, a different and much disputed question is whether, or the extent to which, the builder, developer, engineer, architect, local authority inspector or anyone else involved in the construction of a defective building, in the absence of any contract, may be liable to the owner in respect of the cost of putting right the property actually containing the defect. It is important to understand from the outset why this question poses special problems for the law of negligence. The owner’s claim is not in respect of physical damage done to the property but rather it is for the owner’s disappointed expectation as to the true value of the property. If we express the distinction in the context of the facts of *Donoghue v Stevenson*, the action is equivalent to the purchaser of the bottle of adulterated ginger beer suing the manufacturer not for injury caused by drinking the contents but for the money wasted in buying it. The question is therefore whether the principles of negligence can be extended to allow recovery by owners of defective property of the diminished value of the property or the cost of making good the defect.

As will be seen, in some of the earlier cases the distinction between these different types of claim tended to be obscured. Indeed, where a defect damages the structure of a building an action by the owner on the face of it looks like an ordinary action for physical loss caused by...
by negligent conduct. The appearance of the matter may deceive, however, for the physical
damage is merely a symptom of the underlying problem.\(^{169}\) The owner wishes to be
compensated for repairing the defect itself and not just for any damage that it may have
caus[ed. The property has never existed except in its defective state and in this sense it has
not been *damaged* by the defendant. Furthermore, the existence of the defect may be
discovered before it results in any physical harm, as where a house is built with inadequate
structural support or on land susceptible to slipping but for the time being the house remains
intact.\(^{170}\) Again, where a structural problem gradually develops it may be difficult and
artificial to seek to determine the moment that physical damage happened. The owner’s
claim is still for the financial loss he or she has suffered in acquiring already defective
property together with, in some cases, physical damage to the property. This being the true
nature of the action, we need to examine and evaluate the arguments bearing upon whether
the owner can recover this loss in an action for negligence against the builder.

(2) *Leaky buildings*

Many of the early cases raising the question whether a building owner could maintain an
action in tort against a negligent builder or council concerned defects in building
foundations. Then from the late 1990s onwards a major new problem with building
construction in New Zealand, dubbed “leaky building syndrome”, slowly started to
emerge.\(^{171}\) The expression is used to describe, inter alia, failings in design, inadequate
 provision for ventilation, the use of unsuitable or inadequate building materials, and the
 adoption of flawed building techniques which in various combinations allow water to leak
 into and rot the structure of a building.\(^{172}\) Fixing the problem is proving to be and will
continue to be hugely expensive. One estimate in 2009 put the total cost of repairs at
$11,000,000,000.\(^{173}\) but the ultimate figure seems likely to be far higher. Special statutory
procedures have had to be set up to attempt to deal with the problem. The enormous scale
of the problem and of the losses caused by leaky buildings have been a significant driver
of litigation by property owners. Leaking comes about as a consequence of acts or omissions
by any of the builder, developer, architect, engineer, manufacturer of materials, local
authority inspector, building industry regulator, or any other party involved in the
construction of a building. A flood of actions have sought to establish the liability of one

\(^{169}\) See *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [Spencer on
3 NZLR 42 at [41] (loss is cost to bring house into compliance with regulations/loss of market value);
Stevens J.

\(^{170}\) For example *Williams v Mount Eden Borough Council* (1986) 1 NZBLC 102,544 (HC); *Batty v Metropolitan
Property Realisations Ltd* [1978] QB 554 (CA).

\(^{171}\) See generally S Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson
Reuters, Wellington, 2011), considering a range of issues — legal, public health, economic, property valuation,
sociological, regulatory and dispute resolution — arising out of the disaster. For various views about the
legal principles that have been applied by the courts, some highly critical, see in particular G McLay
“Legal doctrine, the leaky homes crisis and the limits of judicial law-making” (ch 1), R Tobin “Tortious
liability for defective buildings” (ch 7) and P Watts “Managerial and worker liability for shortcomings in
the building of leaky homes — an antediluvian perspective” (ch 9).

\(^{172}\) William Young J gives a full description of the problem in *Attorney-General v Body Corporate 200200* [2007]
1 NZLR 95 (CA) [Sacramento] at [26]–[30].

\(^{173}\) PricewaterhouseCoopers *Weathertightness — Estimating the Cost* (Department of Building and Housing,
Wellington, 2009).
or more of these various potential defendants.\(^\text{174}\) The cases have raised a number of core issues about the ambit of liability for negligence and on four occasions the dispute has ended in the Supreme Court.\(^\text{175}\) And certainly some intractable difficulties have arisen.

Sometimes the owner of a defective building will be able to bring an action in contract against the vendor, but caveat emptor very often will apply.\(^\text{176}\) Again, the first owner may, perhaps, have an action in contract against the builder or other person or body said to be responsible for the defect. But very frequently, and certainly as regards subsequent owners, no such action is available. So the question whether an action in tort will lie is likely to matter a great deal, particularly in light of the widespread effects of the leaky buildings disaster. Indeed, at least as regards dwellinghouses, the nature of the injury which is inflicted, involving the creation and covering up of defects in property which is intended for more or less permanent use, coupled with the importance of giving a tort remedy in respect of a purchase which for most people is likely to be the most significant of their lifetime, suggests that a remedy is clearly necessary. So let us consider the arguments.

### 6.4.02 A divergence of principle

The whole line of recent authority started with the decision of the English Court of Appeal in 1972 in *Dutton v Bognor Regis Urban District Council*,\(^\text{177}\) holding that a local authority was liable to the owner of a house which had subsided after being built on a filled-in rubbish dump. The argument that the damage was irrecoverable as amounting to pure economic loss was rejected. Lord Denning MR remarked that if this were right it would mean that if the house collapsed and injured a person the council would be liable, but if the owner discovered the defect in time to repair it the council would not be liable. This, he thought, was an impossible distinction. The council was liable in either case. The damage was not solely economic loss but was physical damage to the house. Five years later the decision was affirmed by the House of Lords, although on slightly different grounds, in the much discussed case of *Anns v Merton London Borough Council*.\(^\text{178}\) Their Lordships held here that a local authority owed a duty to owners or occupiers who might suffer injury to health caused by defective foundations to take care in inspecting the foundations. Lord Wilberforce thought that the damage sustained by the plaintiff was “material, physical damage”. What was recoverable was the amount of expenditure necessary to restore the dwelling to a

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\(^{174}\) Special statutory procedures have had to be set up to attempt to deal with the large number of claimants. The Weathertight Homes Resolution Services Act 2006 provides for the mediation and adjudication of “leaky buildings” claims, but lays down no new principles of liability. Adjudicators make determinations in accordance with existing principles of law, that is the law of negligence and the law of contract (although s 50 makes special provision for the recovery of damages for mental distress). See generally *Hartley v Balemi* HC Auckland CIV-2006-404-2589, 29 March 2007.


\(^{176}\) The standard agreement for the sale and purchase of property produced by the Auckland District Law Society and the Real Estate Association of New Zealand Inc includes, in cl 6.2(5), a warranty that where a vendor has done work on property, all appropriate consents have been granted and that the work has been done in accordance with those consents. But beyond this it is apparent that the vendor gives no warranty as to the state of the building.

\(^{177}\) *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA).

\(^{178}\) *Anns v Merton London Borough Council* [1978] AC 728 (HL).
condition in which there was no longer a present or imminent danger to the health or safety of persons occupying it. In New Zealand at about the same time the courts were faced with much the same problem and came independently to a similar conclusion. In Bowen v Paramount Builders (Hamilton) Ltd, decided just before Anns, the Court of Appeal held that a builder who put up a house on inadequate foundations owed a duty of care to a subsequent purchaser of the building. Liability was founded on the builder having negligently created a hidden defect which was a source of danger to persons whom he or she could reasonably foresee were likely to suffer damage in the form of personal injuries or damage to property. Richmond P thought the cost of repairs actually incurred to prevent threatened damage was recoverable, whereas Woodhouse and Cooke J J both thought such cost was recoverable whether or not the work had actually been carried out. As in Dutton, the claim was seen primarily as being for physical damage to the structure of the house.

Thus far, then, physical damage to the structure coupled with the element of danger to the occupants seemed to be the basis for recovery by the owner. In later cases, the courts in both England and New Zealand moved towards recognising the owner’s claim as being for pure economic loss suffered through acquiring property of inferior quality, yet with sharply different conclusions about liability. When the issue next arose in New Zealand, in Mount Albert Borough Council v Johnson, the Court of Appeal regarded Bowen as having decided that an owner of defective property could recover in tort for financial loss caused by negligence, at least where the loss was associated with physical damage. Then in Stieller v Porirua City Council the Court of Appeal affirmed that an inspecting council’s obligations were not confined to defects affecting health and safety, nor to defects damaging or threatening to damage other parts of the structure. It was enough that they reduced the value of the premises. So by this time the liability of the builder and the local authority was firmly established. In England, on the other hand, the courts started having second thoughts. This did not happen immediately, and indeed in Junior Books Ltd v Veitchi Co Ltd the House of Lords was prepared to extend the Anns principle, holding that subcontractors who had built a defective floor in the plaintiff’s factory were liable for the cost of repairing the floor notwithstanding that the defect posed no injury to health. The claim was recognised as being for a financial loss, yet it was recoverable because of the close proximity between the parties. However, doubts about this decision quickly began to be expressed, culminating in its comprehensive rejection in D & F Estates Ltd v Church Commissioners for England.

174 See also Askin v Knox [1989] 1 NZLR 248 (CA) at 253, where Cooke P observed that negligence liability had been a difficult and in some respects a controversial development in the building control field, but in the view of the Court a necessary one.
176 Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1985] AC 210 (HL); Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd [1986] AC 785 (HL) [The Aliakmon]; Murrhead v Industrial Tank Specialities Ltd [1986] QB 507 (CA); Simaan General Contracting Co v Pilkington Glass Ltd (No 2) [1988] QB 758 (CA); Greater Nottingham Co-op Society Ltd v Cementation Piling and Foundations Ltd [1989] QB 71 (CA).
House of Lords held here that the defendant builders could not be liable to the lessees of a flat in respect of the financial loss incurred by the lessees in renewing plaster work incorrectly applied by subcontractors. Junior Books was a “unique” case and could not be regarded as laying down any principle of general application. Rather, to recognise a duty would be to impose on the builders for the benefit of those with whom they had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose. A claim based on breach of a warranty of quality could be maintained only by one contracting party against the other. Their Lordships also regarded Lord Wilberforce’s “danger to health” argument with suspicion, but expressed no concluded view about it as on the facts there was no such danger. In addition, they left open the possibility that one element of a complex structure could be regarded as distinct from another element, so that damage to one part caused by a hidden defect in another part might qualify as physical damage to “other property”. The recoverable damages might then include the cost of making good the defect, as essential to the repair of the property which had been damaged by it. Where, however, no physical damage had been inflicted, or where such damage was not to “other property”, the owner’s financial loss was not recoverable in an action in negligence.

D & F Estates appeared fatally to undermine Anns but did not actually overrule it. A direct challenge came with Murphy v Brentwood District Council. The defendant council had approved a faulty design for the foundations of a house, with the result that the house was built with defective foundations. It later cracked and subsided and the owner, instead of repairing it, sold it for less than half its market value in an undamaged state. The owner sought to recover from the council the amount of the diminution in value and other losses and expenses. In the Court of Appeal, the claim succeeded, on the ground that the condition of the house was such as to pose an imminent danger to the health or safety of the plaintiff while occupying it. In the House of Lords, however, a bench of seven Lords of Appeal held unanimously that the claim should fail and that Anns should be overruled. Their Lordships rejected the “danger to health” argument as illogical and lacking in all principle and affirmed that no sensible distinction could be drawn between a mere defect of quality and a supposedly dangerous defect. Lord Oliver said that it was incontestable that what the plaintiffs suffered in Anns was economic loss and nothing more. If one asked “What were the damages to be awarded for?”, clearly they were not to be awarded for injury to health of the plaintiffs, for they had suffered none. Equally clearly the description of the damage as physical or material did not withstand analysis. The manifestations of the defective nature of the structure by some physical symptoms were merely the outward signs of a

187 Their Lordships also held that the defendants could not in any event be liable for the negligence of an independent contractor. But in New Zealand a developer is under a non-delegable duty to take care: see Mount Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA); applied in Body Corporate No 199348 v Nielsen HC Auckland CIV-2004-404-3989, 3 December 2008; Body Corporate 185960 v North Shore City Council HC Auckland CIV-2006-004-3535, 22 December 2008; see [22.5].

188 D & F Estates Ltd v Church Commissioners for England [1989] AC 177 (HL) at 206–207 and 214; Anns Engineering Establishment Co v Lapdune Ltd [1987] 1 WLR 1 (CA); see [6.5.02(3)].

189 Murphy v Brentwood District Council [1991] 1 AC 398 (HL); R v Dair (1991) 54 MLR 561. See also Department of the Environment v Thomas Bate & Son [1991] 1 AC 499 (HL) (builder not liable to lessees of building for cost of remedial work which was necessary for the purpose of rendering the building fit to support its design load).

190 Murphy v Brentwood District Council [1991] 1 AC 398 (HL) at 470, 479, 484, 488 and 497.
deterioration resulting from the inherently defective condition with which the building had
been brought into being from its inception, and could not properly be described as damage
cased to the building in any accepted use of the word “damage”. Their Lordships all agreed
that the “complex structure” theory could provide no escape from this conclusion. Lord
Bridge said that a critical distinction should be drawn between some part of a complex
structure which did not perform its proper function in sustaining the other parts and some
distinct item which positively malfunctioned so as to inflict positive damage on the structure
in which it was incorporated. Thus if a negligently defective central heating boiler exploded
and damaged a house, the owner could recover damages from the manufacturer on Donoghue
v Stevenson principles, But where inadequate foundations led to differential settlement and
cracking, the structure as a whole was seen to be defective and as it deteriorated it damaged
only itself. The owner’s claim thus being for pure economic loss, their Lordships concluded
that the local authority could not be liable in negligence to the owner, essentially for the
same reasons as led them to their earlier decision in D & F Estates. If a duty were incumbent
upon a local authority it would also be incumbent upon the builder and, indeed, the
manufacturer of a chattel, opening up a very wide field of claims involving the introduction
of something in the nature of an indefinitely transmissible warranty of quality. Lord Keith
remarked, echoing Lord Bridge in D & F Estates, that in what was essentially a consumer
protection field there was much to be said for the view that the precise extent and limits of
the liabilities which in the public interest should be imposed on builders and local authorities
were best left to the legislature.

6.4.03 Residential buildings

(1) Hamlin and Sunset Terraces

The immediate question raised by the decision in Murphy naturally was whether it would be
applied in New Zealand. This question was resolved by the decision of the Privy Council in
Invercargill City Council v Hamlin. In 1972 the plaintiff contracted with a builder for the
construction of a house and applied to the defendant council for a building permit. The
foundations were inspected and approved by the building inspector. Within two years of
completion the first signs of something amiss began to appear and during the next 15 years
the plaintiff experienced problems with cracks and sticking doors. However, he thought
that the problems arose out of normal settling and because of weather changes. Only in
1989 did the plaintiff contact a builder, who advised that the foundations were faulty.
Proceedings were issued in 1990 against both the original builder and the council, but the
builder had long since gone out of business and the case was fought over the liability of the
council. In the High Court it was held by Williamson J that the claim was not barred by
the Limitation Act 1950 and that on the evidence the inspector had been negligent in
carrying out his inspection of the foundations. The council appealed on the limitation
issue and also, relying on Murphy, denied that it owed to the plaintiff any duty of care.

191 Murphy v Brentwood District Council [1991] 1 AC 398 (HL) at 470, 476, 484 and 497.
192 Sec Nitrigin Eireann Teoranta v Inco Alloys Ltd [1992] 1 WLR 498; Beltfield Computer Services Ltd v E Turner
193 Invercargill City Council v Hamlin [1994] 3 NZLR 513 (CA); Invercargill City Council v Hamlin [1996]
1 NZLR 513 (PC); In Duncan Wallace (1996) 112 LQR 369; R Tobin (1996) 4 TLJ 13; R Martin (1997)
60 MLR 94.
194 Hamlin v Bruce Sterling Ltd [1993] 1 NZLR 374 (HC).

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Not surprisingly, however, the Court of Appeal preferred its own approach to that of their Lordships in *Murphy*.

All members of the Court dwelt upon the dictates of the particular New Zealand social and historical context. This theme was developed in some detail in the judgment of Richardson J. His Honour noted six distinctive and long-standing features of the New Zealand housing scene at the times when the courts were consistently imposing duties of care on the part of local authorities undertaking building inspections. These were: (1) the high proportion of owner-occupied housing; (2) the fact that much housing construction was undertaken by small scale cottage builders for individual purchasers; (3) the substantial responsibility accepted by the state for financing low-cost housing; (4) the surge in house building construction through to the mid-1970s; (5) the wider central and local government support for private house building as regards planning and building controls; and (6) the lack of any common practice for new house buyers to commission their own architectural or engineering surveys, particularly in the field of low-cost housing. Cooke P observed that in the light of this background it was apparent that homeowners in New Zealand did traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the bylaws.

A second major factor to which the members of the Court gave emphasis was the enactment of the Building Act 1991. The Act set up a whole new structure for the control of the building industry, requiring that all building work comply with the building code and giving territorial authorities the power and responsibility of enforcing its provisions.196 Richardson J observed that in the 10-year period of research and study culminating in its passage there had been no questioning of the duty of care which the New Zealand courts had required of local authorities in this field. So there was nothing in the recent legislative history to justify reconsideration of the existing decisions. A further point was that the Act provided a longstop limitation period of 10 years in building construction cases.197 The opportunity to change the law was there had there been dissatisfaction with it, but, as Cooke P noted, further change was evidently not thought to be required.

In the circumstances it was the unanimous view of the Court of Appeal that the existing law in New Zealand ought not to be disturbed. Cooke P observed that the upheavals in high-level precedent culminating in *Murphy* in the United Kingdom had no counterpart in New Zealand. The cases had been at least reasonably constant, and as far as was known there was no sense that they did other than justice. Furthermore, they concerned only private dwellinghouses, and it would be open to the Court to hold that in the case of industrial construction the network of contractual relationships normally would provide sufficient avenues of redress without any supervening tort duties. Judges in different common law countries might legitimately differ in their conclusions, and while the disharmony might be regrettable, it was inevitable now that Commonwealth jurisdictions had gone on their own paths without taking English decisions as their invariable starting point. Richardson J thought that to change tort law as it has been understood in New Zealand would have significant economic implications affecting homeowners, the building industry, local

195 See [26.5.06(3)].
196 Building Act 1991, ss 7 and 24; see now s 17 of the Building Act 2004, and more generally pts 2–3 of that Act.
197 Building Act 1991, s 91(2) (now s 393(2) of the Building Act 2004); see [26.5.06(3)].
bodies, approved certifiers of houses and the insurance industry. Changing the basis of risk allocation would necessarily have various direct and indirect economic impacts, which could be assessed and weighed only in a comprehensive inquiry by those charged with that responsibility. The material before the Court was totally inadequate to determine the short-run and long-run implications, to quantify the costs involved and to assess the feasibility and desirability of change.

On the council’s further appeal to the Privy Council the decision of the Court of Appeal was upheld. Their Lordships said nothing about the nature of the reasoning which persuaded the House of Lords to reach its decision in *Murphy*. Rather, they recognised that the judges of the New Zealand Court of Appeal were consciously departing from English case law on the grounds that conditions in New Zealand are different. In delivering judgment Lord Lloyd saw the particular branch of the law of negligence with which the instant appeal was concerned as especially unsuited for the imposition of a single monolithic solution. There was already a marked divergence of view among other common law jurisdictions, with the courts in both Canada and Australia declining to apply the *Murphy* decision. Such decisions were bound to be based at least in part on policy considerations. Thus in a succession of cases in New Zealand over the last 20 years it had been decided that community standards and expectations demanded the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws. New Zealand judges were in a much better position to decide on such matters than the Board. Lord Lloyd added that whether circumstances are in fact so very different in England and New Zealand may not matter greatly. Rather, what matters is the perception. In the Court of Appeal’s view, to change New Zealand law so as to make it comply with *Murphy* would have significant community implications and would require a major attitudinal shift. It would be rash for the Board to ignore these views. Furthermore, the New Zealand Parliament having passed the Building Act 1991 and having chosen not to change the law so as to bring it into line with *Murphy*, it would hardly be appropriate for their Lordships to do so by judicial decision.

Other courts of high authority also declined to follow *Murphy*. In *Bryan v Maloney* the High Court of Australia held that the builder of a house who had negligently installed inadequate footings causing damage to the fabric owed a duty of care to a subsequent purchaser, who was entitled to recover the consequential loss measured by the decrease in the value of the house. The duty arose out of the relationship of close proximity between builder and owner. Their only connection was the house itself, yet it was a substantial connection. Economic loss to a subsequent owner was obviously foreseeable, for the house was a permanent structure to be used indefinitely and likely to represent a major investment for the owner. Their relationship was characterised both by an assumption of responsibility on the part of the builder and by reliance on the part of the owner. The existence of a duty also was supported by analogy with the duty owed to those suffering physical injury to person or property by reason of the defect. It could hardly be right to differentiate between circumstances of liability and no liability according to whether remedial work was done in...
time to avert any physical damage. As for D & F Estates and Murphy, their Lordships’ opinions were dismissed as resting upon a narrower view of the scope of the modern law of negligence and a more rigid compartmentalisation of contract and tort than was acceptable in Australian law.

In Winnipeg Condominium Corp No 36 v Bird Construction Co the Supreme Court of Canada also rejected Murphy. In this case the owner of a 94-unit apartment building sued the builder after a large piece of concrete cladding fell from the building, necessitating the removal and replacement of the entire cladding. It was held that where negligence in planning or constructing a building caused the building to be dangerous, the owner could recover the costs of making the building safe. La Forest J, drawing upon the words of Sir Robin Cooke, expressed the underlying rationale as being that a person who participated in the construction of a large and permanent structure which, if negligently constructed, had the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care. He also recognised that maintaining a bar against recoverability for the cost of repair of dangerous defects provided no incentive for plaintiffs to mitigate potential losses. On the contrary, it tended to encourage economically inefficient and socially irresponsible behaviour.

In each of New Zealand, Australia and Canada, then, Murphy received a hostile reception. Even so, as will be explained, applying the rule of liability recognised in Hamlin has proved to be problematic in a number of respects, and in North Shore City Council v Body Corporate 188529 (Sunset Terraces) the Supreme Court was invited to reconsider it. “Sunset Terraces” was a linear unit title development comprising 21 townhouses. The dwellings were built using untreated timber framing and monolithic cladding, but they were not watertight, water got in and the wooden framings rotted. Remediation work was carried out on a number of units, and that work was itself alleged to be defective. So there were failed attempts to mitigate. Actions were brought by various owners, the body corporate, and lessees or assignees of the owners. Some owners lived in the units and some were rented. The claims against the defendant council were for negligence in issuing building consents, inspecting the building work and issuing code compliance certificates and for negligent misstatements; those against the developers alleged breaches of a non-delegable duty to take care; and those against the designer alleged negligence in design and in certification of the building. The claims broadly succeeded before Heath J at first instance, although not in all respects. The council (and certain others) appealed, but the Court of Appeal dismissed the appeal, holding that Hamlin applied and that the council was under a duty to take care. A further appeal was taken to the Supreme Court, and this also was dismissed. Tipping J delivered the joint judgment of four members of the Court, and Elias CJ gave a short concurring judgment.

201 R Cooke (1991) 107 LQR 46 at 70.
203 Body Corporate 188529 v North Shore City Council [2008] 3 NZLR 479 (HC).
205 Blanchard, Tipping, McGrath and Anderson JJ.
The council’s first submission was that *Hamlin* should not be followed, on the basis that a materially different legislative landscape came into force under the Building Act 1991 which had not been enacted at the time of the events giving rise to the *Hamlin* litigation. However, Tipping J was satisfied that *Hamlin* was rightly decided and that the enactment of the 1991 Act gave no basis for its reconsideration. Nothing in the Act signalled with the necessary clarity that the Act was intended to remove the common law duty. Then it was submitted that if *Hamlin* stood, it should be confined to stand-alone, modest, single dwellinghouses occupied by their owners. But his Honour considered that the duty should extend to all homes, whatever form the home took. The duty should be capable of reasonably clear and consistent administration, and distinctions based on the ownership structure, size, configuration, value or other facets of premises intended to be used as a home were apt to produce arbitrary consequences. A third argument, that councils should not owe a duty in cases where professionals such as engineers and architects had been involved, he thought was not persuasive either. Purchasers were unlikely to know the extent of the instructions upon which other professionals were engaged. Their involvement might have been limited and might have been irrelevant to the problems giving rise to the loss in question. The proper way to reflect the involvement of others was to require them, if negligent in a relevant way, to bear an appropriate share of the responsibility for the ultimate loss.

For these reasons Tipping J agreed with the Court of Appeal that a building’s intended use, in accordance with plans lodged with the council, was the most appropriate determinant of the scope of the *Hamlin* duty. Councils owed a duty of care, in their inspection role, to owners, both original and subsequent, of premises designed to be used as homes. So “investor” owners of residential property were within the scope of the duty. Protection of a non-owner occupant, such as a tenant, could be achieved only through a duty owed to the owner, as it was only the owner who suffered the loss and who could undertake the necessary remedial action.206

*Hamlin* accordingly was affirmed. Indeed, it was hardly likely that the Court would be minded to overrule it, particularly as the suggested inconsistency with the policy of the Building Act 1991 escaped both the Court of Appeal and the Privy Council in the decision itself. The limits on its scope proposed by the council were unacceptable as well, for they would certainly have been a recipe for arbitrary line-drawing. However, the case decides only that a duty may be owed in respect of a building that is intended for residential use. The possibility that a duty may be owed in respect of other buildings, like schools and offices, was left open. To this question we shall return.

206 A further question from *Byrne Avenue* (see n 202 above) was the significance of the absence of a code compliance certificate. The council argued that there was nothing for the home owners to rely on, but Tipping J regarded the point as unsound. Homeowners were entitled to place general reliance on councils to inspect residential premises with care, and the absence of a certificate could not somehow retrospectively abrogate their duty. The duty was owed and, if such be the case, breached at the time of the relevant inspection or its absence. What loss the homeowner might be able to claim on account of the breach might be influenced by the absence of the certificate and whether the owner should have been aware of that fact. The point might go to causation or it might go to contributory negligence (as to which see [21.2.05]).
In contrast to *Sunset Terraces*, in *McNamara v Auckland City Council*\(^\text{207}\) the context provided by the Building Act 1991 was held point away from any duty of care. The developer of a dwellinghouse had used a private certifier (ABC) appointed under the 1991 Act who was not authorised to certify that the building complied with the weathertightness standard of the building code. However, the council overlooked ABC’s lack of authority and issued a building consent. The house did not comply with the standard, and the owners sued the council (the certifier and the developer having gone into liquidation), alleging breach of the *Hamlin* duty and also breach of a *Hedley Byrne* duty in processing the Code Compliance Certificate (CCC) without taking steps to check ABC’s authority. A majority of the Supreme Court (Blanchard, McGrath, William Young and Tipping JJ; Elias CJ dissenting) held that the claim should be struck out. As regards the *Hamlin* claim, and given the certificate issued by ABC, there was nothing to suggest that territorial authorities had a roving certifying or inspecting role, and nothing happened to trigger the council’s responsibilities under the statute. There was no relationship of proximity, no reliance and no assumption of responsibility as between potential purchasers and the council. As regards the *Hedley Byrne* claim, the CCC was regular on its face and the council was required to accept it as establishing compliance. The representation by the council that a CCC had been issued could not be construed as implying that the certificate had been issued in conformity with ABC’s certifying competence, given that such an assessment was not a necessary part of any statutory functions the council was required to perform. And in any event the claim had to fail by reason of s 50(3) of the 1991 Act, which barred civil proceedings against a territorial authority or certifier for anything done in good faith in reliance on a building certificate or CCC.

(2) *Warranties imposed by the Building Act 2004*

Apart from any common law action, an owner also may have an action for breach of a statutory warranty under the Building Act 2004.\(^\text{208}\) The Act requires that all building work must comply with the building code, and lays down an elaborate regulatory framework for building practitioners and building consent authorities. The Act is not generally concerned with issues of liability, leaving these to be determined by ordinary principles of contract and tort. However, it does lay down mandatory statutory warranties in all contracts for building work for “household units” and contracts of sale of household units made by a “residential property developer”.\(^\text{209}\) The warranties require, broadly: that all building work be done with reasonable care, properly and competently, and in accordance with the plans and building

\(^{207}\) *McNamara v Auckland City Council* [2012] NZSC 34, [2012] 3 NZLR 701; and see *Smandle v Far North District Council* [2012] NZCA 52.

\(^{208}\) An original or subsequent owner also may be able to claim under a private scheme operated by the Master Builders’ Federation, which is of more limited scope than that in the United Kingdom. The scheme covers homes built by members of the Master Builders’ Federation of up to three levels (which are governed by the New Zealand building code), but not apartments requiring specific design. It guarantees workmanship, materials and structure for a two-year period and designated structural elements for a further five years. The guarantee can be transferred to one subsequent purchaser.

\(^{209}\) Building Act 2004, ss 396–397. A household unit is a building or part of a building that is used or intended to be used only or mainly for residential purposes and occupied or intended to be occupied by a single household, and does not include a hostel, boardinghouse or other specialised accommodation: s 7. A residential property developer is a person who, in trade, builds the household unit or arranges for it to be built or acquires it from a person who built it or arranged for it to be built, for the purpose of selling it: s 7.
consents; that materials used will be suitable and, unless otherwise stated, new; that household units intended to be occupied on completion of the work will be suitable for occupation; and if the contract specifies the particular purpose for which the work is required, that the work and materials will be reasonably fit for that purpose. A right of action for breach of any of these warranties is not confined to the other contracting purchaser. By s 398(1), a subsequent owner may take proceedings as if the owner were a party to the contract. The action is therefore subject to any contractual controls, including the operation of the six-year limitation period running from the date of the breach of contract. Accordingly, a subsequent owner will inherit the balance of the period, if any.

The 2004 Act cannot assist in relation to complaints about defects created prior to the coming into force of s 398(1) (30 November 2004), or where the six-year limitation period in contract has expired, or where the action is against an inspecting authority or other person who is not a party to a contract for the building or sale of a household unit to which the statutory warranties attach. We can see, then, that even after the introduction of these statutory warranties, benefiting both original and subsequent owners, the main or only avenue for redress in many cases still may be an action against the builder, architect or local authority in tort for negligence in designing, building or inspecting the house.

6.4.04 Other buildings

(1) **Drawing the line at residential buildings**

Whether a duty ought to be recognised in the case of offices, factories and other industrial property is a difficult question. The first major decision to address the issue was that of the High Court of Australia in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*. An engineer designed a warehouse for a developer who later sold it to a new owner. One year later it became apparent that the building was suffering substantial structural distress, and the owner brought proceedings in negligence against the engineer. The High Court held that the engineer owed the owner no duty to take care. The joint majority judgment focused on the question of vulnerability. The facts alleged did not show that the owner could not have protected itself from the economic consequences of the defendant’s negligence, by obtaining a warranty from the vendor against defects in the building or by an assignment of any rights of the vendor against third parties. In so deciding the High Court recognised...
difficulties in determining the ambit of the principle laid down in *Bryan v Maloney*, and left its precise standing in some doubt.

In *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* the High Court applied *Woolcock* by analogy and held that the builder of a strata-titled block of flats owed no duty of care to the corporation owning the common property to avoid causing it to suffer economic loss by having to pay for repairs to defective common property. The decision is founded on the lack of vulnerability of the owners’ corporation in all the circumstances: the owners could have made appropriate contractual arrangements to protect themselves, and to some extent they had done so. *Bryan v Maloney* was left untouched, but the Court declined to follow the *Winnipeg* decision in Canada and, indeed, *Hamilton* in New Zealand. Seemingly, then, the recovery of damages in defective building claims in Australia is limited to cases where the building is a dwelling house and the owner can be shown to be vulnerable to the consequences of the builder’s want of care.

Shortly after *Woolcock Street* was decided, the same view was taken in a first instance decision in New Zealand. Then in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* the Court of Appeal was required to determine the question. Carter Holt Harvey (CHH) contracted with the Electricity Corporation of New Zealand (ECNZ) and another to procure the design, manufacture, construction, purchase and installation of an industrial plant at CHH’s Mill (the Cogeneration Contract). Shortly afterwards ECNZ entered into an agreement with Rolls-Royce (RR) to design, construct and commission the plant (the Turnkey Contract). There was no direct contractual relationship between CHH and RR, although the Cogeneration Contract had been entered into on the basis that RR would be the subcontractor. CHH claimed that the plant built by RR was defective and did not conform to the contractual specifications. It alleged that RR owed and was in breach of a duty to take reasonable care to ensure the plant was constructed in accordance with the Turnkey Contract, free from defects and in accordance with good engineering practice. It also claimed, on the basis of the *Hedley Byrne* principle, that RR owed and was in breach of a duty to take care in making statements and giving advice about the plant. RR sought to strike out the former claim, although it accepted that the *Hedley Byrne* claim could not be determined on a strike out application.

Glazebrook J, delivering the judgment of the Court, was satisfied that in these circumstances there was no duty to take care. First, the contractual context pointed clearly against any duty being recognised. The parties were sophisticated commercial parties with equality of bargaining power, and CHH for its own reasons chose not to enter a direct contract with RR. Secondly, the terms of the main contract and of the subcontract differed in various respects and both contained limitation clauses. As regards the Cogeneration Contract, CHH had only paid for what was to be provided under that contract and should not be able to improve on its bargain by direct suit. As for the Turnkey Contract, a limitation clause could impact upon CHH even though it was not a party. The presence of a limitation clause in a contract between a head contractor and a subcontractor could signify clearly, if known to

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216 *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504 (HC); and see also *R v Mike Barns & Associates Ltd* HC Rotorua CIV-2005-463-323, 1 September 2006 (question left open); compare *Otago Cheese Co Ltd v Nick Stop Brothers Ltd* HC Dunedin CP180/89, 18 May 1992.

217 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).
the owner, the subcontractor’s unwillingness to do the job otherwise than subject to the limitation. Thirdly, the difficulty in setting quality standards in cases involving contractual specifications had long been a reason for not imposing a duty of care in the kind of case under consideration. The problem was not so serious in the case of buildings or products destined for private individuals, but it was acute in commercial construction contracts for specialist plant with detailed specifications. Lastly, there was the need for commercial certainty. Commercial parties were normally entitled to expect that the risk allocation that they had negotiated and paid for would not be disturbed by the courts. It was also to be expected that commercial parties were capable of looking after their own interests, including the risk of insolvency of an intermediate party. By contrast, private individuals might not necessarily be in a position to protect themselves, and this could justify a difference in treatment.\textsuperscript{218}

The Court of Appeal gave further consideration to the question in \textit{Te Mata Properties Ltd v Hastings District Council}.\textsuperscript{219} The plaintiff had bought two motels, and both turned out to require major work to stop water leaking into the walls. They sued, among others, the defendant council, alleging negligence in the grant of building permits, in inspecting the buildings and in issuing building code compliance certificates, and sought compensation for various losses. But the claim failed, the Court holding that the \textit{Hamlin} cause of action could apply only in the case of private dwellings. Baragwanath J identified the interests of habitation and health, recognised initially in \textit{Dutton}, as values of such a high order as to warrant special protection. \textit{Hamlin} did not turn on the issue of habitation: its focus was on the protection of investment in property. But it could be rationalised as an exceptional and practical response to the position of an average domestic homeowner, justified by a presumed economic vulnerability. The decision provided no basis for extrapolation to an investor in non-residential property seeking to protect a mere economic interest. However, his Honour accepted that a duty founded on a potential risk to public health, as in Canada, was arguable, but this had not been pleaded and the case could not be determined on this basis.

This last point made by Baragwanath J suggested a possibly fruitful line of argument for the future, but in \textit{Queenstown Lakes District Council v Charterhall Trustees Ltd}\textsuperscript{220} it was firmly rejected. A fire occurred at a tourist lodge owned by the respondents, caused by the defective design of a chimney. The respondents sought damages from the appellant council, which had granted consent for the building of the lodge, conducted inspections during its construction and issued a certificate of code compliance upon its completion. But it was held that the claim could not be maintained. Although the damage was caused by fire, it was of the same type as damage resulting from leaky building syndrome or defective foundations. It would be illogical to recognise a duty of care to secure compliance with the appropriate standards in relation to fire safety but not those in relation to matters such as weathertightness or foundations. And policy concerns of the kind articulated in \textit{Te Mata} pointed away from a duty. So Charterhall’s claim against the council should be struck out.

\textsuperscript{218} In further proceedings, in \textit{Carter Holt Harvey Ltd v Genesis Power Ltd (No 4)} HC Auckland CIV-2001-404-1974, 24 October 2006 Randerson J held that the pleadings should be amended to plead a traditional \textit{Hedley Byrne} claim and a duty not to install industrial plant with dangerous defects.

\textsuperscript{219} \textit{Te Mata Properties Ltd v Hastings District Council} [2008] NZCA 446, [2009] 1 NZLR 460; \textit{Marina Holdings Ltd (in rec) v Thames-Coromandel District Council} [2010] 12 NZCPR 277 (HC) at [26]–[33].

By contrast, in Minister of Education v Econicorp Holdings Ltd221 the Court of Appeal refused to strike out a claim by the Minister of Education seeking damages from a builder for negligence in building a school hall pursuant to a contract between the builder and the school’s board of trustees. The majority took the view that this was not a truly commercial situation and that it was not clear beyond argument that it was not fair, just and reasonable that the builder should owe a duty to the Minister as owner of the hall.222

(2) Spencer on Byron

In Body Corporate No 207624 v North Shore City Council (Spencer on Byron)223 a 23-storey building in Takapuna on Auckland’s North Shore had both residential and commercial uses. Six residential apartments occupied the top two floors, 249 individually-owned hotel rooms occupied 18 floors, and the rest of the building comprised facilities available for hotel guests and the apartment owners. The building leaked and the body corporate, 219 owners of the hotel units and three owners of the apartments sued the North Shore City Council, alleging, inter alia, negligence in issuing the building consents and in inspecting and approving the development. The High Court struck out the claims by the body corporate and the owners of the hotel units, on the basis that they were claims in respect of commercial property and the council could not arguably owe a duty of care. But the Court did not strike out the claims by the owners of the apartments, which were used as residential dwellings. The building owners appealed and the council cross-appealed against the refusal to strike out the apartment owners’ claims. Ellen France and Randerson JJ, giving the majority judgment of the Court of Appeal, held that this was an “all or nothing” case, that the essential character of the building was commercial, and that the local authority did not owe a duty of care to any of the owners.224 Harrison J, in a partial dissent, was prepared to accept that a duty was owed to the apartment owners but not to the hotel unit owners. The body corporate and the owners appealed once again, and in the Supreme Court, in a majority decision,225 they were successful in establishing that the council owed all of the owners a duty to take care. We will look first at the joint judgment of McGrath and Chambers JJ, noting here that many of the points they make are found also in the judgments of Elias CJ and Tipping J. We will then consider the dissenting views of William Young J.

Chambers J, delivering the joint judgment, rejected the argument that councils’ liability had always been restricted to residential homes. His Honour said that none of the early cases drew a distinction between different kinds of buildings. On the contrary, the duty sprang from the councils’ position of control and their obligation to ensure all buildings were erected in accordance with relevant bylaws. Nor was a duty inconsistent with the Building Act 1991. There was nothing in the Act to indicate that Parliament wanted to alter the line of New Zealand authority that developed in the 1970s and 1980s, nor to suggest that there was a distinction between houses and other buildings. And Hamlin confirmed the pre-
Murphy law and permitted the New Zealand courts to continue to apply the reasoning in the New Zealand case law. However, since that decision the High Court of Australia (in Woollock) had introduced a control based on vulnerability, this amounting to a middle course between Murphy-type reasoning and Anns-type reasoning. Yet no one had urged that solution in Sunset Terraces, and there was no case for introducing it in New Zealand, for it would very likely prove difficult to apply.

Turning to the more recent New Zealand cases, Chambers J found it impossible to accept the logic of Baragwanath J in Te Mata, which treated Hamlin as an exceptional case which was justified because of the public interest in secure habitation yet which excluded habitation in hotels. There was no principled distinction between domestic dwellings and commercial premises. However, his Honour agreed with Baragwanath J that the building code was essentially designed to bring about safe and healthy buildings, and that the existing cause of action was squarely founded on statutory health and safety considerations. As regards Charterhall, the Court of Appeal held there that the claim should fail because the cause of action was not intended to protect owners’ economic interests in their property. Yet such an approach was inconsistent with Sunset Terraces, where the Court determined that all owners, including investors, could sue for the cost of undertaking remedial action needed to ensure the health and safety of non-owner occupants. As for Rolls-Royce, this raised different issues and was decided on the basis that there could be no duty in tort to take care to perform a contract with another.

Turning from the authorities to the policy of the matter, Chambers J was satisfied that policy did not require the restriction of the duty to cases involving residential homes. First, the argument that councils did not protect financial interests was really an attack on Sunset Terraces and the earlier authorities and should be rejected. Secondly, the imposition of a duty of care was not the equivalent of the imposition of a free warranty. There was no strict or absolute liability based on building bylaws, neither councils nor building certifiers provided their services free, and New Zealand law had drawn no distinction between first and subsequent owners. Thirdly, the duty did not cut across contractual obligations assumed by the inspecting authority towards the first owner. The authority was not responsible for ensuring that a building was constructed in accordance with its plans and specifications, which would inevitably go beyond building code requirements. Fourthly, it did not make much sense to assume that all homeowners were vulnerable and all owners of commercial buildings wealthy and sophisticated. Such assumptions had too many exceptions to make it safe to build legal policy on such a basis. Fifthly, it was argued that widening the net to embrace commercial property would result in the transfer of huge losses from commercial building owners to ratepayers. Yet whether the figures were even remotely correct was unknown, the burden was being shifted to councils with substantial financial backing, the councils might meet liabilities from insurance income generated by inspection work and, in the last resort, from rates, and council liability usually would be shared with others. Lastly, there would be great difficulty in drawing the line between residential and commercial buildings. To use the council’s own categorisation would be decidedly odd, for the council

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227 For discussion and affirmation of this principle, see Jojaro Investments Ltd v ASB Bank Ltd [2012] NZHC 980, [2012] NZCCLR 22 at [87]–[106].
would be choosing whether or not it would owe a duty of care in tort. Further, the chance of miscategorisation was real and very arguably had occurred in the instant case.228

His Honour concluded that councils owed a duty in their inspection role to owners, both original and subsequent, of all premises. The duty was restricted to work done while the Building Act 1991 was in force. It was likely that the same would apply under the Building Act 2004, but the Court had not heard detailed argument and reserved its position on the point.

William Young J delivered a strong dissenting judgment. In his Honour’s opinion, for a number of reasons, territorial authorities did not owe a duty of care in relation to non-residential buildings. The early defective building cases in which duties were imposed on territorial authorities and builders — Dutton, Bowen, Anns, Mount Albert — rested on the view that manifestations of defective construction involved property damage for the purpose of the principles established in Donoghue v Stevenson. On that basis, the statutory functions of councils and the likelihood of loss if these functions were not diligently performed established a prima facie duty of care. However, once it became generally accepted that claims of this kind did not involve physical damage in the Donoghue sense, it became necessary to reformulate the rationale for imposing a duty; and the reformulation in the Court of Appeal in Hamlin was expressly confined to houses and to considerations involving houses. Further, because foreseeability was no longer in itself sufficient to warrant the imposition of a duty, both general reliance and “second-order” reliance — the decisions of the courts engendering public expectations regarding the role of local authorities in the building control process — were pressed into service. Hamlin and Sunset Terraces were rightly decided and justified on the bases of foreseeability and both types of reliance. But any extension of the duty to commercial buildings would, he thought, be wrong.

His Honour observed that the majority approached the matter broadly on the basis that proximity was established largely on the basis of existing authorities, resulting in the imposition of a duty unless it was excluded on policy grounds. So uncertainty as to where the balance of the policy considerations lay was likely to be resolved against the defendant (because such uncertainty did not admit of the conclusion that the duty should be excluded) and the duty was thus imposed. But his Honour considered that the case was not within existing authority and that proximity was not established, and that on this approach uncertainties as to policy told against a duty. He was sceptical about the utility of actions for negligence as a mechanism for addressing the consequences, and mitigating the risks, of defective building practices, particularly given the systemic and polycentric nature of the problem. The availability of what was at best a clumsy, uncertain and expensive remedy in negligence might have blunted a need to come up with more efficient loss-avoidance and loss-spreading mechanisms. And there was a substantial risk, which the Court was not well placed to assess, that the extension of the duty might produce inefficiencies and other adverse behavioural consequences which might outweigh any societal benefits.

Certain practical considerations also applied differently, depending on whether a building was a home or was built for commercial or industrial purposes. Homes tended to be smaller, less complex and more likely to be built by small-scale builders. Homeowners were usually consumers rather than investors and less likely to protect themselves contractually than

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228 See [6.4.06(4)].
owners of commercial property. And for most people their home often would be their most significant asset. There were particular statutory rules that applied in relation to homes, and these provisions were premised on a legislative policy that homes justified different legal treatment. Further, health and safety considerations, while of some limited weight in relation to houses, were of less weight in relation to commercial buildings. The statutory powers of councils to address insanitary or dangerous buildings were likely to be a more complete and practical answer to health and safety issues in relation to such buildings, and occupational safety and health requirements also applied.

A number of further considerations in addition were seen as pointing away from a duty. First, his Honour considered that the defendant’s duty would tend to cut across underlying contractual undertakings. In practical terms, the more complex the building and the greater the number of responsible participants, the greater the problem. He could not see why someone who was contracted to provide a discrete component of what might be a complex project should be expected to second-guess the building owner as to whether that component had been appropriately stipulated. And imposing a duty which was not limited to the contractual commitments of the defendant had the potential to disrupt what might be perfectly natural and perhaps very efficient decisions as to the allocation of risk and responsibility. Second, the duty would almost certainly continue to apply under the Building Act 2004, and all involved in the building process would act on that basis. This would serve to so occupy the relevant policy space as to significantly reduce the scope for more effective changes of law and practice. Third, there was a risk of “overkill”, with building inspectors trying to avoid civil liability by imposing unnecessarily onerous obligations on building owners. All in all, the extension of the duty to non-residential buildings gave rise to policy issues of a kind which the courts were not well placed to assess and were quite likely to get wrong. Given the possible extent of the claims which would be based on the instant judgment, his Honour saw the potential for serious adverse consequences.

6.4.05 The negligent building owner

The special position of a building owner who actually commissions the building and who then sues the local authority for negligence in inspecting it needs separate consideration. In *Anns* Lord Wilberforce said that the council’s duty was owed to owners or occupiers who might suffer injury to health and not to a negligent building owner who was the source of his own loss. It might be thought that Lord Wilberforce had in mind a building owner who was *personally* negligent in doing building work, but in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* a wider view was taken. The House of Lords held here that a building owner upon whom lay an obligation to comply with building regulations and who had building work done for him which, due to the negligence of his architect, did not comply with those regulations, was himself to be regarded as a “negligent building owner”.

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229 Instances were the Weathertight Homes Resolution Services Act 2006, ss 396–399 of the Building Act 2004 (see [6.4.03(2)]), the Earthquake Commission Act 1993, the Building Performance Guarantee Corporation Act 1977 (repealed), and ss 52G–52Y of the Building Act 2004 (introduced by s 17 of the Building Amendment Act 2012 but not yet in force).

230 *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 758. Although apparently contrasted, the two categories are not mutually exclusive. And see *Wellington District Law Society v Price Waterhouse* [2002] 2 NZLR 767 (CA) at [73]–[77] (WDLS not obliged to protect auditors from loss caused by their own negligence).

231 *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 (HL).
6.4 LIABILITY FOR DEFECTIVE BUILDINGS

owner” as contemplated by Lord Wilberforce in *Anns*. Taking this view would mean that irrespective of any duty of care that might be owed to a subsequent owner, a local authority would owe no duty of care to the original owner because it would normally be incumbent upon that owner personally to satisfy the regulations.232

In *Rothfield v Manolakos*,233 the Supreme Court of Canada took a narrower view of Lord Wilberforce’s words. Building owners had breached certain bylaws in failing to give timely notice for an inspection before the pouring of concrete for a retaining wall. The question was whether they should be barred as being negligent building owners. The Court thought that the issue was one of personal responsibility, and on the particular facts split three ways in determining it. La Forest J (with Dickson CJ and Gonthier J concurring) maintained that owner-builders were within the ambit of the duty of care owed by a building inspector and that it would make no sense to proceed on the assumption that every negligent act of an owner-builder relieved the municipality of its duty to show reasonable care in approving plans and inspecting construction. A negligent owner would be viewed as the sole source of his or her loss where, for example, he or she knowingly flouted the applicable regulations or directives of the inspector or was completely indifferent to the responsibilities placed on him or her by the bylaws. In the instant case the inspector was negligent in allowing the project to proceed, but the owners’ own failings were such that 30 per cent of the responsibility should be attributed to them. Wilson and L’Heureux-Dubé JJ thought that no blame could be attributed to the owners and that the city should be fully liable. Cory and Lamer J thought that the cause of the loss was the owners’ failure to give timely notice, so the city should not be liable at all.

In *Ingles v Tutkaluk Construction Ltd*,234 the Supreme Court of Canada affirmed that an owner-builder’s negligence does not remove him or her from the scope of a municipality’s duty of care. Rather, in very rare circumstances it can be considered as a complete defence to a finding of negligence on the part of municipal inspectors.235

In New Zealand, in *Riddell v Porteous*,236 the Court of Appeal considered that the question under consideration was one of causation and contributory negligence, not of legal duty. Sometimes the effective cause of the loss would be the conduct of the council, sometimes responsibility should be laid at the door of the owners, and sometimes there should be an apportionment between them. In the instant case an owner had employed a building contractor who had deliberately departed from the plans, after which the council had negligently failed to make a proper inspection. In these circumstances the owner was held free of any blame. On the other hand, in *Three Meade Street Ltd v Rotorua District Council*,237 the builder of a defective motel was the sole director and principal shareholder of the

235 In this case responsibility was apportioned six per cent to the plaintiff, 14 per cent to the city and 80 per cent to the builder.
236 *Riddell v Porteous* [1999] 1 NZLR 1 (CA); STodd (1999) 7 Tort L Rev 81; and see *Bell v Hughes* HC Hamilton A110/80, 10 October 1984. In *JW Harris & Son Ltd v Demolition & Reading Contractors (NZ) Ltd* [1979] 2 NZLR 166 (SC) a claim by a negligent builder for a contribution from the council towards the damages payable to the owner was held to fail.
237 *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504 (HC) at [54]–[57].
plaintiff developer. Venning J was satisfied that for this and other reasons there could be no duty on the inspecting council to recompense the plaintiff for its own negligent work.

Most recently, in *Spencer on Byron*238 William Young J in his dissenting judgment said that the primary responsibility for complying with Building Act requirements should rest with the building owner who, if in default, was not well placed to blame the territorial authority. In taking this view his Honour did not appear to distinguish between a first building owner seeking council approval and subsequent owners. However, the majority did not see William Young J’s view as compelling, and seemingly the first owner’s position should continue to be determined on the basis of an assessment of the cause of the harm and of any possible contributory negligence.239

A variation on the theme is found in the decision of the Supreme Court in *North Shore City Council v Attorney-General (The Grange)*.240 A council failed to take care in ensuring that a building under construction complied with the building code, with the result that the building leaked. The owners brought an action against the council, alleging negligence in its inspections and certifications. The council then claimed indemnity or contribution from the Building Industry Authority (BIA), on the basis that it had relied on the BIA’s positive review of its operations and, as a consequence, did not take steps to identify the leaky building problem and to prevent the damage from happening. But it was held that no duty was owed by the BIA to the council, and one reason was that the council was seeking to be compensated in respect of its own negligence.241 Blanchard J was not aware of any case in which a duty of care had been successfully claimed in circumstances in which the asserted duty on the part of one body exercising statutory functions or powers against another such body was to protect the claimant against its own negligence towards someone else, and certainly not one in which that negligence itself consisted of a failure to protect that other person against separate negligence by third parties.

### 6.4.06 Appraisal

In the United Kingdom almost all owners of new residential buildings are covered by the National House Building Council’s warranty scheme,242 and there is in addition a limited right of action under statute.243 Arguably there is no pressing need for a tort remedy for homeowners. In New Zealand, as we have seen, the statutory and regulatory environment is not the same. There may be a remedy under the Building Act 2004 but often there will not. And we observed at the outset that there was and is a special need for a common law action in New Zealand in light of the leaky buildings disaster.

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238 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [207] and [304].

239 See for example *Johnson v Auckland Council* [2013] NZCA 662; see [21.2.05].


241 For further details see [6.6.02(2)(a)].

242 The warranty protects successive owners against defects in materials and workmanship for a two-year period and against structural defects for another eight years. The builder is obliged to insure against liabilities arising under the scheme.

What other arguments, apart from need, can support a remedy for the homeowner? First, there is no risk of “opening the floodgates”, at least in the sense that the liability of the builder is limited to the cost of repair or replacement of the property and, perhaps, consequential loss. Only the owner for the time being can suffer the loss and thus there is no danger of a single act of negligence resulting in liability in limitless amounts to an uncertain number of plaintiffs. Secondly, allowing the action avoids the need to draw a somewhat arbitrary distinction between negligent work and negligent advice. In the United Kingdom a negligent surveyor can be liable to a property owner pursuant to the *Hedley Byrne* principle, whereas a negligent builder cannot. Thirdly, denying the action tends to create intractable difficulties in applying the complex structure argument. This attaches a crucial yet, from the point of view of a subsequent purchaser, quite arbitrary significance to the nature of the contractual set-up pursuant to which the house was built. In *Murphy* their Lordships contemplated that defective work done by a subcontractor in installing wiring, or a boiler, or a steel frame could give rise to liability, on the basis that the negligence has caused damage to other property. On this view a subsequent owner has no action where the building is put up by only one contractor but can sue where the work of one contractor damages that of another. Holding the builder liable in tort for economic loss may remove any need to embark upon this unsatisfactory inquiry.

On the other hand, if a duty is to be imposed it has to be reasonably coherent in principle and workable in practice, and certainly there are difficulties needing to be faced and resolved. In particular, we will consider (1) the standard of care expected of the builder, (2) the relevance of the element of danger, (3) the effect of contractual provisions on tort actions


245 *Smith v Eric S Bush* [1990] 1 AC 831 (HL); but compare *Scullion v Bank of Scotland plc* [2002] EWCA Civ 1823, [2003] Lloyd’s Rep PN 53 (contribution proceedings against the builder’s architect). In *Baxall Securities Ltd v Sheard Walshaw Partnership* [2002] EWCA Civ 9, [2002] BLR 100 the defendant architects were not liable for damage by flooding caused by a poorly-designed gutter, because the defect was latent and the claimants’ own surveyors should have discovered it by the exercise of reasonable care and skill; IN Duncan Wallace (2003) 119 LQR 17.

246 Accordingly, putting aside *Hedley Byrne*, where there is a contract between the builder and the owner the builder’s liability for defects is in contract alone. In *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2012] QB 44 the Court of Appeal in England held that builders who had contracted to do work for the claimants owed no duty of care in tort coextensive with their contractual obligations, and that, absent any specific assumption of responsibility by one party to another as to give rise to a tortious duty in respect of economic loss, the only tortious duty owed by the builders to those who would foreseeably own or use the building was to take reasonable care to prevent any defect in it causing personal injury to them or damage to other property of theirs.

247 See *Belfield Computer Services Ltd v E Turner & Sons Ltd* [2000] BLR 97 (CA) (builder who constructed insufficient internal fire wall separating a storage area from the rest of a factory, allowing a subsequent fire to pass over the top, was liable for damage to the owner’s plant and equipment outside the storage area but not for damage to the fabric of the building itself), and IN Duncan Wallace (2000) 116 LQR 530; and see further *Belfield Computer Services Ltd v E Turner & Sons Ltd* [2002] EWCA Civ 1823, [2003] Lloyd’s Rep PN 53 (contribution proceedings against the builder’s architect). In *Baxall Securities Ltd v Sheard Walshaw Partnership* [2002] EWCA Civ 9, [2002] BLR 100 the defendant architects were not liable for damage by flooding caused by a poorly-designed gutter, because the defect was latent and the claimants’ own surveyors should have discovered it by the exercise of reasonable care and skill; IN Duncan Wallace (2003) 119 LQR 17.

248 In *Bryan v Maloney* (1995) 182 CLR 609 at 623 Mason CJ and Deane and Gaudron JJ suggested that this might be the effect of *Murphy*. 319
brought against or by non-contracting parties, and (4) whether a duty of care should extend
to either commercial or personal property.240

(1) **Objective standard of care**

It is clear that the standard of care expected of the builder must be objectively ascertainable,
and that it cannot depend for its existence on the particular terms of a contract pursuant
to which a building was constructed. A mere complaint about quality without more cannot
be enough, for the content of an obligation of quality must vary in accordance with what
the builder has undertaken by contract to do. The builder may have agreed to do a quick
and nasty job at a minimal price, or to adhere to the highest possible standards of building
construction using the most expensive materials, or to do the work at some intermediate
standard. So some external touchstone is needed.

In many of the cases the courts have used the test laid down by the Court of Appeal in
**Stieller v Porirua City Council.**250 It was held here that the builder’s duty was to take care
to build a reasonably sound structure, using good materials and workmanlike practices. The
notion of reasonable habitability also can assist, and certainly the obligation to build a
habitable dwelling is long established as a matter of contract. In the case of a contract for
the sale of a house to be built there is an implied warranty that the builder will do the work
in a good and workmanlike manner and will supply good and proper materials, and that
the house will be reasonably fit for human habitation.251 Seemingly the content of an
equivalent obligation in tort is no more difficult to determine.252 Both require the court to
decide whether a dwelling is reasonably habitable, the difference being that in contract the
duty is strict and in tort the duty is to take care. So in contract the builder warrants that the
materials are good and proper, whereas in tort the builder must take care to use good
materials, and is not liable if without personal fault they unexpectedly turn out to be
defective. In other respects, of course, the tort duty goes a good deal further. In particular,
in the case of a house already complete before sale there is at common law no implied
warranty as to its state or fitness.253 So here tort has filled the gap and at the same time has
extended a right of action to subsequent purchasers.

External standards also may assist in setting a standard of care. The common practices of
skilled and experienced builders or other professionals and any legislative or regulatory
standards are all relevant to, although not determinative of, the common law standard of
reasonable care. In **Askin v Knox,**254 Cooke P recognised that the provisions of building
bylaws and whether due care had been taken to comply with them were important in
considering allegations of negligence. And the Supreme Court in **Spencer on Byron** has now
based the standard of construction expected of the builder and the council firmly on the
requirements of the building code. As Tipping J remarked, the purpose of the Building Act

249 Other issues are considered elsewhere in this book. They include: whether a duty should be imposed on
the local council or the Building Industry Authority for failing to prevent the harm (see [6.6.02(2)(a)]); whether a
director of a building company should be held personally liable in respect of defects in the building (see [6.8.03]); and
whether the owner’s claim is statute-barred (see [26.5.06(3)]).

250 **Stieller v Porirua City Council** [1986] 1 NZLR 84 (CA) at 94; **Williams v Mount Eden Borough Council** (1986)
1 NZBLC 102,544 (HC) (defects affecting basic structural integrity).

251 **Perry v Sharon Development Ltd** [1937] 4 All ER 390 (CA); **McKey v Rorison** [1953] NZLR 498 (CA).

252 Such an obligation is imposed by statute in the United Kingdom: see n 243 above.

253 **Perry v Sharon Development Ltd** [1937] 4 All ER 390 (CA).

254 **Askin v Knox** [1989] 1 NZLR 248 (CA) at 253.
1991 and building code was to maintain minimum standards of construction. These standards avoided the waste, inefficiency, economic losses that might be encountered if the only control was contractual. The code standard was as clear and precise as the subject matter allowed.255

(2) Dangerous defects

Another approach is to focus on the element of danger. In Canada, liability is confined to dangerous defects. La Forest J in the Winnipeg case256 explained that the duty in contract with respect to materials and workmanship flows from the terms of the contract between the contractor and homeowner, whereas the duty in tort extends only to reasonable standards of safe construction and the bounds of that duty are not defined by reference to the original contract. He said that a contractor who enters into a contract with the original owner for the use of high-grade materials or special ornamental features will not be liable to subsequent purchasers for failure to meet these special standards,257 but the contract cannot absolve the contractor from a duty in tort to construct according to reasonable standards. His Honour said that a tort duty in respect of dangerous defects serves to protect the bodily integrity of inhabitants of buildings, whereas workmanship which is shoddy but not dangerous merely brings into play the questions of the quality of the work and its fitness for the particular purpose.

In Rolls-Royce Glazebrook J recognised that the danger posed by a defect was a possible test, but pointed to difficulties in its application and to its rejection in Stieller and other decisions. In Te Mata Baragwanath J thought it was arguable that the public interest in ensuring that the building stock should meet the 50-year lifespan contemplated by the Building Act 1991 and building code warranted a cause of action founded squarely on statutory health and safety considerations.258 But shortly afterwards, in the Charterhall case,259 the Court of Appeal rejected the idea.

In Spencer on Byron there was a certain difference of view about whether the basis for the duty could be seen as lying in health and safety factors.260 Elias CJ did not accept the argument that the Building Act 1991 was concerned only with safety and sanitariness, to the exclusion of property interests. The distinction was inconsistent with Sunset Terraces, it depended upon what Lord Denning MR called “an impossible distinction”261 and it involved a mischaracterisation of the Act and the consequences of non-compliance with


257 Simaan General Contracting Co v Pilkington Glass Ltd (No 2) [1988] QB 758 (CA) (supplier of glass under subcontract not liable to main contractor for failing to meet contractual specifications as to colour).


261 Dutton v Bognor Regis Urban District Council [1972] 1 QB 373 (CA) at 396; see n 177 above and accompanying text.
the building code. Tipping J agreed that the 1991 Act had a sharper focus on the health and safety of those occupying buildings than on the economic interests of building owners. But this did not support denying a duty in respect of non-residential premises. Health and safety issues applied to both residential and non-residential premises. McGrath and Chambers J J, agreeing with Baragwanath J on this point, considered that the cause of action in respect of any building was indeed founded squarely on the statutory health and safety considerations. If a building was constructed otherwise than in compliance with the building code, it would almost certainly not be a safe and healthy building. In the result, then, the duty protects building owners’ economic interests only to the extent that the standard of construction fails to meet the requirements of the building code, and on the majority view those requirements are founded on health and safety factors.

(3) Contractual modification of the objective or statutory standard

In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* the High Court of Australia accepted that the provisions of a contract pursuant to which building work was carried out could affect the standard of care required of the builder in an action by a third party. Gleeson CJ, Gummow, Hayne and Heydon JJ in a joint judgment remarked that at the least the contract defined the task which the builder or engineer undertook. They thought that there would be evident difficulty in holding that a builder owed a subsequent owner a duty of care to avoid economic loss if performance of that duty would have required the builder to do more or different work than the contract with the original owner required or permitted.

In *Rolls-Royce* Glazebrook J referred to the view expressed in *Woolcock Street* with seeming approval. Yet the question arises how the purchaser’s rights can vary according to the terms of a contract made between other persons about which he or she knows nothing. As Richmond P observed in *Bowen*, the builder cannot say that the nature of his contractual duties to the owner sets a limit to the duty of care which he owes to third parties. To allow the builder to rely on the contract would be to place the burden of the contract on a person who is not party to it, and this is contrary to principle. So the builder should remain liable for putting into circulation property which is not built according to reasonable standards of sound construction, assessed on an objective basis and independently of the terms of any contract. It is hard to understand why a builder should not be liable for, say, manifestly inadequate foundations because the builder agreed with someone else to build them inadequately.

If we accept that a builder can modify the standard of the duty owed to a subsequent owner of property without that owner’s consent, then it would appear that a builder equally can limit or exclude its duty to a subsequent owner via its contract with the original owner. In such a case the builder has simply negotiated a limit on the extent of its liability rather than a limit on the obligations it has agreed to assume. There is no separate question of principle.

262 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, (2004) 216 CLR 515 at [28]; and see *Vadi v Inglewood Shire Council* (1963) 110 CLR 74 at 85.


265 Burrows, Finn and Todd at [15.3].
involved. But, once again, this cannot be done by prior unilateral decision. If the subsequent owner is to be bound it must be on the basis that the builder has given reasonable notice to the new owner limiting or excluding its liability, as in *Hedley Byrne*, or that the owner has in some way consented to or acquiesced in the limit on the builder’s liability, as in *Rolls-Royce*.

In *Spencer on Byron* the majority agreed that the builder’s and the council’s duty did not undermine relevant contractual relationships. Tipping J noted that private certifiers could not contract out of liability under the Building Act 1991 and the position had to be the same for councils. So there was no capacity for anyone involved to limit their liability by contract. He accepted that where parties had allocated risks by contract, tort law should be slow to impose a different allocation. But that proposition was not a significant feature in the instant case. Again, McGrath and Chambers JJ pointed out that the council’s obligation required no more than Parliament had imposed. By contrast, as already noted, William Young J considered that there was a serious risk of disrupting agreed contractual arrangements. But if, as held by the majority, the obligation is founded upon statute, then the fact that a person might agree with another to construct a building or part of a building in breach of the building code cannot be a reason for refusing to impose a duty on that person. However, the terms of a contract sometimes can provide the initial frame for the obligations of a builder in terms of the scope of expected works. It may also be that in all the circumstances there is no breach of the duty, depending on whether, say, a subcontractor doing work to contractual specifications ought to know that those specifications do not comply with code requirements. Sometimes, depending on the particular facts, it may be reasonable for a subcontractor to proceed on the basis that they do comply.

(4) The residential/commercial distinction

A key remaining question is whether distinctions should be drawn between different kinds of property. Taking personal property first of all, their Lordships in *Murphy* thought that if a builder was to be held liable to a subsequent house owner, then a manufacturer logically would owe a similar duty to the ultimate purchaser of a chattel. However, the English Court of Appeal had earlier held that there was not the same relationship of proximity, and the High Court of Australia expressly left the point open. The question of the liability of the manufacturer of chattels will be considered in more detail later on, it sufficing to note for the moment that the Consumer Guarantees Act 1993 imposes a statutory liability on manufacturers of defective chattels and that there is little room, or need, for a common law duty.

Turning to buildings, *Spencer on Byron* has now determined that residential and commercial buildings, and indeed buildings generally, should be treated in a similar way. There are

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266 We shall return to these questions when considering the exclusion of liability as a defence to an action in tort: see [21.5.03].
268 Body Corporate 160361 v BC 2004 Ltd [2015] NZHC 1803, especially at [92]–[105].
271 See [6.5.03(2)].
some good arguments in favour of this view,\(^{273}\) many of which were articulated by Kirby J in his dissenting judgment in *Woolcock*. Financial loss to a subsequent owner certainly is a reasonably foreseeable consequence of a builder’s failure to take care. There is a public interest in discouraging the putting up of defective buildings, of whatever kind, and tort law can respond by giving a remedy to the owner. And commercial purchasers in truth are just as vulnerable to suffering loss through acquiring structures for long-term use but with hidden defects. Certainly it is hard to see that there is any very principled distinction between domestic dwellings and commercial premises. And recognising a duty applying to both avoids the need either to rely on a vulnerability principle, which is unacceptably uncertain, or to classify buildings as one or the other, with all the attendant difficulties in drawing the distinction. Indeed, as regards the latter solution the majority of the Court of Appeal in *Spencer on Byron*, faced with the problem of classifying a building with mixed uses, decided that it was necessary to make a determination about the “essential character” of a building and whether or not a residential component could be seen as “incidental”. But a residential component might be more than incidental, and a building might not have one essential character, such as a building development with commercial uses on the ground floor and residences above. The majority did indeed recognise that in this case the *Hamlin* duty might possibly be imposed in respect of the residential component. Yet the practical difficulty in seeking to separate out the commercial and the residential parts would exist in all cases where an entire mixed-use development was afflicted by leaky building syndrome, whatever the division between commercial and residential uses. And it is hard to accept that the recovery of damages ought to depend on whether the residential element is small or incidental.

The Court of Appeal’s solution was not, then, entirely satisfactory. Better perhaps was Harrison J’s minority view, allowing damages for the residential apartment owners but not the hotel owners.\(^{274}\) But the initial problem of classification would still exist. In the Supreme Court Chambers J thought it strongly arguable that the *Spencer on Byron* building had been incorrectly categorised as “commercial/industrial”. The top two floors should have been categorised as “housing”, most of the building appeared to be “communal residential” (an example of which was a “hotel”), and the garage area arguably came within the “outbuildings” category. And in making any classification, as already noted, the entity

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274 On this view, damages perhaps could be based on the principle of *Bevan Investments Ltd v Blackhall & Struthers (No 2)* [1978] 2 NZLR 97 (CA), where the Court of Appeal held that damages could be awarded representing the cost of reinstatement where the plaintiff intended to restore the property and it was reasonable to do so. But if the plaintiff intended to sell, or the cost of repairs exceeded the diminution in value, or there was doubt whether repairs could be made, then the court could award damages based on the diminution in value of the property. The choice ultimately was based on considerations of reasonableness. So if, say, a residential unit in a mixed-use development could only be repaired satisfactorily by a recladding of the entire building, the repair costs would be unreasonable and the difference in value of the unit with and without the problem could be the measure of the damages. The owner then could sell the unit with the defect in it, or use the damages to contribute towards the remediation of the entire building. If the building could not be remediated, it might be that the damages would be the full market value of the unit without the defect.
potentially subject to a duty of care paradoxically would be choosing whether it would come under a duty to take care.

These various arguments all provide support for the Supreme Court’s decision applying the existing Hamlin/Sunset Terraces duty. Indeed, it was driven by the terms of the Building Act 1991, which on the majority view required that the council’s arguments be rejected. This raises the question whether the same view would be reached in a case governed by the Building Act 2004. The statutory warranties applying to dwelling houses perhaps is some indication that Parliament intends to treat residential owners differently, but the Act certainly continues to apply to commercial buildings as well. The majority reserved their opinion on the point, although they thought it likely that their conclusions in the instant case would still apply. Maybe the introduction of a “stepped consenting” regime (not yet in force) could make a difference for this indicates an intention to limit the role and responsibility of councils as regards commercial buildings.

Underlying the whole debate, and a likely source of disquiet about the Spencer on Byron decision, is the enormous scale of the leaky buildings problem and the difficulty in determining how best to deal with its myriad consequences. Councils already were subject to major liabilities in relation to residences, and now they have to shoulder a further burden. The financial consequences are very hard to predict. The task of the Supreme Court in seeking to reach a solution which on balance can be recognised as socially beneficial certainly was not straightforward. Whether the consequences will be manageable, or whether William Young J’s fears that they will be adverse will be substantiated, very likely will only gradually emerge. However, let us consider certain aspects of this concern.

We should note to begin with that there are many other potential defendants who may be held to owe a duty of care in respect of defective building construction. Fairly clearly they also are open to claims founded on Spencer on Byron to the extent that they negligently contribute to buildings being erected that do not comply with the building code. It could hardly be right that a council is potentially liable as regards the negligent exercise of its inspection and approval functions but that those responsible for the actual creation of any defects are not. However, the position of the supplier of allegedly defective building

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275 See [6.4.03(2)].


277 In the case of a commercial building consent (provided for in ss 52O–52Y), the council is not required to inspect the work or check the plans or specifications. Rather, the owner must prepare a “risk profile” and a “quality assurance system”, which the council must approve if satisfied that it complies with the Act and regulations and makes appropriate provision for supervision, testing, inspection and third party review. Following this, the council must grant its consent provided it is satisfied that there is nothing that would, if known, have resulted in the council withholding approval. The council has power to take all reasonable steps to ensure that all necessary processes under the approved system are being carried out.

278 In Body Corporate No 207624 v North Shore City Council [2012] NZSC 83, [2013] 2 NZLR 297 [Spencer on Byron] at [193], Chambers and McGrath JJ remarked that no one can be party to the construction of a building that does not comply with the building code, and spoke in particular of the obligations of the inspecting authority or of any supervising architect or engineer. See also Blain v Evan Jones Construction Ltd [2013] NZCA 680.

279 This point was noted in Judge v Dempsey [2014] NZHC 2864 at [39]–[40].
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materials may be different, and this question will be considered separately in the following discussion concerning liability for defective chattels.\textsuperscript{280} Certain other factors also will operate to limit the potential liability of any defendant in a defective building claim. First, there is the likely difficulty in particularising and proving actionable negligence.\textsuperscript{281} The task facing the plaintiff seeking a remedy in respect of a leaky building may well be considerably more onerous than in, say, a simple foundations case where the single technical issue is whether the foundations were excavated to solid ground.\textsuperscript{282} And sometimes the difficulties involved are such that the claim will fail.\textsuperscript{283} Second, a problem with leaky buildings first started to emerge in the late 1990s, and its widespread and insidious nature was fully recognised in the early 2000s. Building practices certainly have changed in response. It may be, then, that most of the possible claims already have been or are being litigated. And where the leaking has not yet come to light, any potential claims are likely to be statute-barred by the 10 year long-stop period.\textsuperscript{284}

This brings us to a final point. The position of councils in particular would be eased by a change to the rule of proportionate liability. In building inspection cases by far the greater part of the harm is seen as attributable to builders and others who positively create defects in a building: the council only fails to intervene to prevent this happening.\textsuperscript{285} Also of substantial practical importance in this context is the rule of liability in solidum — the rule that several tortfeasors contributing to an indivisible result are each liable for the whole loss. In 2012 the Law Commission published an Issues Paper\textsuperscript{286} seeking views on whether the rule ought to be retained and on possible alternatives, but in its report in 2014\textsuperscript{287} it recommended that the rule be retained, albeit with adjustments in certain circumstances.\textsuperscript{288} So the position of councils is unlikely to change, at least in the immediate future. The reality in many defective building cases is that the council is the only solvent defendant left standing, the builder or other potentially liable defendants having gone into liquidation.

6.5 Liability for defective chattels

Liability for loss caused by dangerous or defective goods needs to be treated as a discrete topic of inquiry for a number of reasons. First, the plaintiff may have an action in contract against his or her vendor. The practical significance of this option is such that it deserves to be considered here as a preliminary matter. Secondly, the liability of the manufacturer in negligence traditionally has been treated as falling into a special category of duty. As regards simple manufacturing defects causing physical damage the principles of liability are straightforward, but greater difficulty attends problems such as alleged defects in design, where the degree of safety may need to be balanced against cost implications and consumer