IN THE SUPREME COURT OF NEW ZEALAND

SC 58/2011
[2012] NZSC 83

BETWEEN	BODY CORPORATE NO. 207624 First Appellant
AND	ALAN MILLAR PARKER & OTHERS Second Appellants
AND	NORTH SHORE CITY COUNCIL Respondent

Hearing:	20, 21 and 26 March 2012
Court:	Elias CJ, Tipping, McGrath, William Young and Chambers JJ
Counsel:	J A Farmer QC, M C Josephson and G B Lewis for Appellants D J Goddard QC, S B Mitchell and N K Caldwell for Respondent
Judgment:	11 October 2012

JUDGMENT OF THE COURT

A The appeal is allowed.

B The orders made in the High Court and Court of Appeal are set aside.

C The appellants' claim against the respondent is permitted to proceed in the High Court.

D The appellants are entitled to costs in the High Court and the Court of Appeal. If the parties cannot agree quantum, costs are to be fixed in the respective Courts.

E The respondent is to pay the appellants' costs in this Court in the sum of $40,000 plus disbursements to be fixed, if necessary, by the Registrar.

REASONS

	Para No
Elias CJ	[1]
Tipping J	[23]
McGrath and Chambers JJ	[56]
William Young J	[226]

ELIAS CJ

[1] In *North Shore City Council v Body Corporate 188529* (*Sunset Terraces*)[1] this Court declined to depart from the line of authority followed in New Zealand for more than 30 years and affirmed by the Privy Council in *Invercargill City Council v Hamlin*.[2] We refused to strike out a claim that a territorial authority owed duties of care to a building owner in carrying out its statutory responsibilities of inspection and approval of building construction. The Court also rejected the fall-back argument (based on the absence of authorities where liability had been claimed in respect of buildings other than homes) that any duty of care was limited to the owner-occupiers of low-cost individual residential dwellings. *Sunset Terraces* concerned units in large residential apartment blocks.

[2] The present appeal concerns a 23 storey building in Byron Avenue, Takapuna, in which unit titles were purchased by individual owners for 249 hotel rooms and for 6 penthouse apartments. The owners of 219 units and the body corporate brought proceedings in the High Court claiming that the Council was in breach of duties of care owed to them when it passed as compliant with the building code the plans and construction of the building.[3] Their claims were struck out in the Court of Appeal and summary judgment entered for the Council on the basis that the duty of care recognised in *Invercargill City Council v Hamlin* is owed to the owners of wholly residential properties only.[4] The decision of the Supreme Court in *Sunset Terraces* had not been delivered when the Court of Appeal heard the present claim.[5] In deciding that a territorial authority owes duties of care in respect of inspection and

---

1 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

2 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

3 *Body Corporate No. 207624 v North Shore City Council* HC Auckland CIV-2007-404-4037, 11 November 2009.

4 *North Shore City Council v Body Corporate 207624* [2011] NZCA 164, [2011] 2 NZLR 744.

5 Our decision was delivered while the appeal in the present case was reserved in the Court of Appeal.

certification for building code compliance only in the case of residential properties, the Court of Appeal followed its earlier decisions in *Te Mata Properties Ltd v Hastings District Council*[6] and *Queenstown Lakes District Council v Charterhall Trustees Ltd*.[7] In those cases it was held that the tortious liability of territorial authorities in respect of building inspection and certification for building code compliance did not extend to claims in respect of buildings for commercial use, including the motel and lodge respectively in issue in those cases.

[3] This is the fifth case in which the Court has had occasion since 2008 to consider the principles on which liability in negligence arises against the background of statutory duties and following strike out or summary judgment for the defendant in the lower courts.[8] Three of the previous cases considered by the Supreme Court have been concerned with the inspection and building certification responsibilities of territorial authorities under the Building Act 1991. All three involved buildings which leaked, it is alleged because of failure to meet the performance standards of the building code.

[4] Once again, it is necessary to point out that if the claim were indeed novel, as the Council maintains it is (on the basis that existing authority recognises liability in respect of residential buildings only), then application for strike out or summary judgment is appropriate only in cases where there is clear legal impediment to liability in negligence (in which case strike out is appropriate) or where there is a complete and incontrovertible answer on the facts (in which case summary judgment may be entered for the defendant).[9] It is not clear why the Court of Appeal entered summary judgment in the present case. The case was not one where incontrovertible facts able to be established on summary procedure negated the claim (as for example where the terms of a contract provide a complete answer to a claim). The Court of Appeal's conclusion that the claim could not succeed because no duty of care was

---

6 *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460.

7 *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786.

8 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725; *Sunset Terraces*, above n 1; *McNamara v Auckland City Council* [2012] NZSC 34; *North Shore City Council v Attorney-General* [2012] NZSC 49 [*BIA*].

9 *Couch v Attorney-General*, above n 8, at [33] and [40]; *McNamara v Auckland City Council*, above n 8, at [80] and [81]; *BIA*, above n 8, at [25] per Elias CJ and [146] per Blanchard, Tipping, McGrath and William Young JJ. In novel cases, consideration of legal duties may require the context of facts found at trial to provide sufficient perspective.

owed by the Council to the owners of the units, if correct, would at most justify strike out of the claim, not summary judgment.[10]

[5] I consider that it is not possible to be satisfied that the claim cannot succeed. Strike out should in my view have been declined. As Cooke P pointed out in the leading New Zealand case of *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, liability in novel cases turns on a "judgment", not on "formulae", requiring close consideration of the material facts and policy considerations.[11] It will be rare that such consideration can confidently be undertaken on the pleadings.

[6] More fundamentally, I do not consider the claim to be novel. *Sunset Terraces* and the authorities upon which it is based establish that sufficient relationship to justify a duty of care exists between a Council (in the exercise of its functions under the Building Act 1991 to certify for code compliance) and an owner of a building certified to be compliant. As McGrath and Chambers JJ describe at [83]–[88] of their reasons (which I have had the advantage of reading in draft and with which I am in general agreement), the authorities which precede *Te Mata Properties Ltd v Hastings District Council* and *Queenstown Lakes District Council v Charterhall Trustees Ltd* do not purport to limit the duty of care recognised according to the type of building or its use. Nor, as they point out do the contemporary texts treat the duty of care owed by local authorities in relation to building construction as limited to residential buildings.

[7] The judgments in the Court of Appeal in *Hamlin*, particularly that of Richardson J, drew on New Zealand home-owning social circumstances and habits of reliance upon regulatory protections as a reason why *Murphy v Brentwood City Council*[12] should not be followed in New Zealand.[13] The point being made supported the conclusion in that case that New Zealand law should continue in the

---

10 See *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA); Robert McGechan and others *McGechan on Procedure* (looseleaf ed, Brookers) at [HR12.2.07].

11 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294.

12 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

13 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 524–525.

path set by *Bowen v Paramount Builders (Hamilton) Ltd*[14] and *Mt Albert Borough Council v Johnson*,[15] to meet the immediate challenge presented by the House of Lords change from *Anns v Merton London Borough Council*[16] in *Murphy.* I do not however read the judgments in the Court of Appeal in *Hamlin* as resiling from the more general statements of legal principle adopted in the earlier New Zealand authorities.

[8] I regard the approach taken in the Privy Council in *Hamlin* as supporting the view taken by the President in the Court of Appeal that the common law of New Zealand had legitimately taken a different path as a matter of what Sir Anthony Mason has described as "intellectual preference".[17] The question for the Privy Council in *Hamlin* was "whether New Zealand law should now be changed so as to bring it into line with *Murphy's* case".[18] The Board held that, since the New Zealand legislature had not chosen to make the change in the Building Act 1991 as a matter of policy, "it would hardly be appropriate for Their Lordships to do so by judicial decision".[19] That reason applies equally to this Court although, as I indicate, I think that the reasons of the Privy Council if anything understate the impact of the 1991 Act. The legislature not only failed to take an opportunity to change the law developed in the courts, its enactment adopted tortious responsibility as an element of the system of assurance of code compliance which replaced the earlier and more open-ended, responsibilities of councils to regulate the construction of buildings.

[9] No sufficient principled basis for drawing a distinction as a matter of law between home-owners and owners of other buildings passed by the Council as code-compliant is put forward. It is argued for the Council that its liability under *Hamlin* and under *Sunset Terraces* is anomalous and should be confined. I agree with Tipping J and Chambers J that there is no anomaly. *Sunset Terraces* affirms the approach taken in *Bowen* and *Mt Albert Borough Council*, themselves drawing on

---

14 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).
15 *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).
16 *Anns v Merton London Borough Council* [1978] AC 728 (HL).
17 Anthony Mason "The common law in final courts of appeal outside Britain" (2004) 78 ALJ 183 at 190–191. This is, I think, the tenor of the judgment of the Privy Council in *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 (PC).
18 At 522.
19 At 522.

Dutton v Bognor Regis Urban District Council,[20] in which the liability of the Council falls squarely within the wider principles of negligence law described in *South Pacific* and considered further in the context of statutory obligations by this Court in *Couch*. The claimed duty of care is closely linked with the negligent misstatement cause of action against the Council arising out of a Land Information Memorandum in *Marlborough District Council v Altimarloch Joint Venture Ltd*.[21] That the so-called *Hamlin* duty is not to be viewed narrowly is also implicit in the rejection in *Sunset Terraces* of the fall-back argument for the appellant, which similarly sought to have the Court impose an artificial boundary on the basis that *Hamlin* should be restricted narrowly to the facts there in issue which concerned a modest, stand-alone dwelling. In *Sunset Terraces* the Court did not accept arguments similar to those advanced here to the effect that, in developments more complex than a modest home, architects, engineers, and other experts were likely to be involved and purchasers were more likely to rely on such experts than the inspection and controls under the Building Act.[22] We took the view that the fact that there might be overlapping duties owed by different potential defendants was no answer to a claim based on loss caused by the Council's distinct fault.[23] In *Sunset Terraces* the Court was concerned with a residential development and, in the knowledge that the present case was under consideration in the Court of Appeal, we reserved the position in relation to non-residential buildings.[24] But, as was equally found to be the case in respect of the large development in *Sunset Terraces*, the likelihood that experts will be engaged in non-residential developments does not provide a proper basis for drawing a line according to the type of building. Again, the fact that there may be overlapping liabilities does not remove the justification for the Council's responsibility for code compliance, where undertaken.

[10] The statute sets up the relationship of sufficient proximity between the Council and building owners to give rise to a duty of care. The Council does not strongly suggest that there is insufficient relationship to give rise to a duty of care between the parties to the present appeal. It would be difficult to maintain such a

---

20 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA).

21 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

22 At [8] per Elias CJ and [47]–[48] per Blanchard, Tipping, McGrath and Anderson JJ.

23 At [8] per Elias CJ and [50]–[51] per Blanchard, Tipping, McGrath and Anderson JJ.

24 At [9] per Elias CJ and [51] per Blanchard, Tipping, McGrath and Anderson JJ.

submission following *Sunset Terraces*. The nature of the relationship between the Council and owners of buildings does not differ according to the use to which the building is put. The Council argues, rather, that the duty of care should be excluded for policy reasons, essentially to do with how the risk of failure in code compliance should be borne and whether it is "fair, just and reasonable" for the Council to be responsible for failure to identify deficiencies and require rectification in building work which is the primary responsibility of others.

[11] It should be noted that the present claim is not one which requires the Court to decide whether a duty to use available powers arises. Such cases, illustrated by *Stovin v Wise*,[25] *Fleming v Securities Commission*[26] and *McNamara* as well as by the claims arising out of the former regulatory responsibilities of councils to prescribe building standards (which applied before the Building Act 1991) can turn on questions of policy and priorities in spending which may make it inappropriate to recognise a duty of care which would transform the ability to avoid harm into an obligation to act to do so. That is not the case here. The Council is said to have been negligent in respect of inspection undertaken by its officers and in respect of its own certificates of code compliance. Except for the fact that the building in *Sunset Terraces* was entirely residential, the claim in the present case is in substance indistinguishable from the claim in that case, in which policy considerations of the sort here advanced to negate liability in negligence were rejected.

[12] I do not accept the arguments on behalf of the Council that the purposes and principles of the Building Act 1991 indicate concern only with safety and sanitariness, to the exclusion of property interests (to which it is said there is a sole exception for adjoining properties damaged by fire spreading from the subject premises). It is said that these policies require reconsideration of earlier authorities in which New Zealand judges declined to exclude from the Council's duty of care in inspection cases avoidance of "economic loss". There are three principal linked responses to be made. First, such distinction is inconsistent with *Sunset Terraces*, a recent decision of this Court, departure from which would require cogent and compelling reasons. Secondly, to the extent that the arguments rely on

---

25 *Stovin v Wise* [1996] AC 923 (HL).
26 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA).

characterisation of the loss in such cases as "economic loss", they depend upon what Lord Denning rightly described as "an impossible distinction",[27] a complication which has not found favour in New Zealand. Thirdly and more importantly, I consider that the submission depends on a mischaracterisation of the 1991 Act and the consequences of non-compliance with the code. This point needs to be developed by reference to the legislation.

[13] The "purposes and principles" of the Act are contained in ss 6–9. Although s 6 is itself headed "Purposes and principles", it comes under the general heading to Part 2 of "Purposes and principles" which also contains s 7 (compliance with the building code), s 8 (existing buildings not required to be upgraded) and s 9 (avoiding unreasonable delay). All four sections are properly to be regarded as setting out the overarching purposes and principles of the legislation. I do not think ss 7–9 are properly to be seen as subsidiary to s 6. On that basis, compliance with the code is a stand-alone purpose of the Act. Section 7 provides:

> **7 All building work to comply with building code**
>
> (1) All building work shall comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.
>
> (2) Except as specifically provided to the contrary in any Act, no person, in undertaking any building work, shall be required to achieve performance criteria additional to or more restrictive in relation to that building work than the performance criteria specified in the building code.

[14] It is impossible to conclude on what is known at present that failure to meet the code standards in relation to water exclusion does not impact directly on the safety and sanitariness of the building. They are the conditions of the building affecting the health and hygiene of occupants which the owner is obliged to remedy if not compliant with the code. The scheme of the Act is to provide the owner with assurance of compliance. If, through want of care on the part of the Council, that system of assurance fails, then the owner is entitled to look to the Council for his loss.

---

[27] *Dutton v Bognor Regis Urban District Council*, above n 20, at 396.

[15] In any event, the concern of s 6(1) is not simply with ensuring that buildings are "safe and sanitary".[28] As is relevant, s 6(1)(a) provides:

> **6 Purposes and principles**
>
> (1) The purposes of this Act are to provide for–
>
> (a) Necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary and have means of escape from fire; and ...

The "necessary controls relating to building work" are expressed as a distinct concern from ensuring that buildings are safe and sanitary. Again, such "necessary controls" are I think defined by s 7 and the requirement of code compliance (but no more than code compliance).

[16] The code, with which the Council certified compliance, is a minimum standard, as the legislation makes clear. Building work which is not code-compliant is contrary to the Act.[29] The Act sets up an interlocking system of assurance under which all undertaking building work or certifying compliance with the code are obliged to observe the standards set in it.[30] The principal mechanism of the Act for checking for code compliance is the building consent and certification undertaken here by the Council (but which, at the option of owners could be undertaken by private approved contractors engaged by the owner). Functions performed by the Council are explicitly recognised by the Act to be amenable to liability in tort and the statute sets no limits to such liability.[31] I consider that the preference for *Anns* maintained in New Zealand in *Hamlin*, as it has been in Canada,[32] is now overtaken by the Building Act 1991. The Act in my view now makes it impossible to maintain any distinction between commercial and residential building.

[17] First, the Act draws no such distinction. It is concerned with all building work, without differentiation. To the extent that the Act is concerned that buildings are safe and sanitary under s 6, those policies apply equally to commercial premises

---

28 Compare Tipping J at [50] who describes this as the "primary statutory purpose" of the Act.

29 Section 7.

30 Section 7 requires all building work to comply with the code. Territorial authorities are required by s 24(e) to enforce the provisions of the building code and regulations.

31 See *BIA*, above n 8, at [21]. Such liability was recognised by the generally expressed limitation and immunity defences in ss 89 and 91.

32 See *City of Kamloops v Nielsen* [1984] 2 SCR 2 and *Cooper v Hobart* [2001] 3 SCR 537.

as to residential purposes. To the extent that the Act requires by s 7 code compliance as a minimum standard that all buildings must attain, a division between residential and non-residential buildings makes no sense. Where the Council certifies for code compliance or has default responsibilities under the legislation, liability in negligence in respect of all building work so passed is wholly consistent with the legislation.[33]

[18] Secondly, the Act explicitly envisages tortious liability on the part of councils as well as private certifiers. The legislation provides immunity for servants of the Council and its members if they act in good faith, but no such immunity for the Council itself.[34] Since private certifiers are engaged by owners, the legislation provides that they are liable in tort and that they cannot contract out of such liability.[35] The legislation achieves symmetry in liability between councils and private certifiers.[36] It is also a pointer to the implausibility of any limitation of liability to residential premises, unless equivalent immunity is available to private certifiers – a proposition difficult to ground on policy considerations and to justify on any basis.

[19] Thirdly, the risk of moisture ingress (the cause of the damage to the building) through failure to meet the code standards was the very type of eventuality the Act, the code, and the checks here undertaken by the Council were designed to guard against. There is no floodgates concern of indeterminate liability to an indeterminate class. Those to whom the duty is owed are the owners of buildings constructed under the supervision and certification obligations of the Council. The occasion for liability is confined to failure to meet the minimum standards of the code (beyond which the Council has no authority). Wider floodgates concerns are met by a limitation period of 10 years.[37] The statutory context is consistent with the Council's liability for any carelessness in fulfilling its distinct part under the regime.

---

33 The fact that others (such as developers, designers, builders and certifiers) may have primary responsibility does not absolve the Council of its direct duty to the owners: *City of Kamloops v Nielsen*, above n 32, at 15 per Wilson J. The statutory system is one of checks: *BIA*, above n 8, at [62].

34 Section 89.

35 Section 57(2).

36 Section 90.

37 Section 91.

[20] The arguments invoked the cost implications for councils and the practicality of insurance. I do not think such speculation should be determinative of the existence of a duty of care on strike out application without evidence. In addition, any financial constraints bearing on the standard of care it is reasonable to expect of councils are best considered at trial in connection with breach.[38] In any event, such considerations are not convincing in respect of the administration of building consents and code compliance certificates, for which the Council obtains fees, and in respect of which private certifiers are also envisaged to be liable in tort. The matters which counter floodgates concerns (referred to in paragraph [19]) also suggest that such considerations ought not to outweigh the general scheme of liability.

[21] Nor do I accept that the effect of liability would be to treat the Council as warranting the quality of building work. The Act is concerned with the minimum standards of code compliance, imposed by the statute.[39] And it is only in the discharge of its own functions that the Council is exposed to liability.

[22] I agree with the conclusions summarised in the reasons of McGrath and Chambers JJ at [215]–[218], with the effect that the appeal is allowed and both causes of action against the Council are reinstated in the High Court.

TIPPING J

Introduction

[23] The issue on this appeal is whether a territorial authority owes a duty of care to present and future owners when inspecting and issuing code compliance certificates in respect of commercial buildings and other non-residential premises. The decision of this Court in *Sunset Terraces* confirmed previous authority that councils owe such a duty in respect of residential premises.[40]

---

38 *BIA*, above n 8, at [74], referring to Cory J for the Supreme Court of Canada in *Just v British Columbia* [1989] 2 SCR 1228 at 1244.

39 Sections 7 and 50.

40 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

[24] In *Sunset Terraces* the Court expressly left open the issue now before us.[41] That issue must be approached the same way as in all new situations where there is no binding authority either way. The ultimate question is whether it is reasonable to recognise the asserted duty.[42] This is looked at from two points of view: the relationship of the parties, and the wider public interest. These two aspects are conventionally discussed under the headings of proximity and policy.

[25] I am deliberately not going to couch the present issue as being whether the residential duty should be *extended* to all other buildings.[43] I prefer a more de novo, first principles, approach. But, that said, the law must be coherent as a whole. The fact that New Zealand has recognised the duty in residential cases, primarily under the rubric of control, suggests that if the same rubric applies, as it does, to other buildings, a similar duty should be recognised in their respect too, unless there is good reason not to do so.

[26] Chambers J has examined the arguments presented on behalf of the Council for denying the asserted duty of care. I agree, for the reasons he has given, that the premises on which those arguments were based cannot be supported. I reach the same conclusion as Chambers J in whose reasons McGrath J has joined. I expressly agree with his [215]–[218]. My reasons are designed to focus primarily on the policy considerations I see as arising in this case. Chambers J has surveyed the previous case law and I do not consider it necessary to embark on a similar exercise which would largely be repetitive. In the end, resolution of the issue in this case turns very much on a careful assessment and weighing up of those policy factors which are said to favour the imposition of the asserted duty of care and those which are said to point in the opposite direction. I must, however, first deal briefly with the issue of proximity.

---

41 At [9] per Elias CJ and [51] per Tipping J.

42 See *North Shore City Council v Attorney-General* [2012] NZLR 49 [*BIA*] at [218].

43 As tended to be the approach taken by the appellant.

Proximity

[27] There can be little doubt that a person who is building premises that are not residential is in the same relationship of proximity to the council as someone who is building residential premises. It would be highly anomalous if proximity were held to exist in residential cases but not in those involving non-residential buildings. In each case the council controls the building process to ensure that it conforms with the building code. In each case the person involved pays a fee to the council for the inspection and other work it does under the relevant legislation. In each case it is eminently foreseeable that carelessness on the part of the council may cause loss to both the present owner and to subsequent owners. And although the cause of action is in tort, the relationship between the parties in each case is close to a contractual one.

[28] As this Court said in *Altimarloch*, when a person pays a fee to a public body for a service, the parties will normally be in a proximate relationship.[44] Whether a duty of care is owed then turns on such general public interest factors as are relevant and comprehended under the policy head of the inquiry. So it is in this case. I turn then to consider those matters.

Policy

The legislation

[29] Central to the policy inquiry are the relevant provisions of the Building Act 1991. The question whether the asserted duty is owed is profoundly influenced by the terms of the legislation.[45] While I recognise that the Act was passed before the decisions of the Court of Appeal and Privy Council in the *Hamlin* litigation,[46] it is important to note that the Act did not make any material distinction between residential and other premises. The Act was passed against a common law background which had already established that a duty was owed at least in respect of

---

44 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 [*Altimarloch*] at [86].

45 See *BIA*, above n 42, at [224].

46 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); aff'd [1996] 1 NZLR 513 (PC).

residential premises. In none of the cases decided up to that time was there any suggestion, by express reservation or otherwise, that the legal position might be different in respect of commercial or other non-residential premises.

[30] When Parliament provided that private certifiers were to be liable in tort,[47] it is unlikely to have been thought that the extent of that liability was confined to cases involving residential premises. Nothing in the law as it stood when the Act was passed gave any support for that view. Nor was there anything in the Building Industry Commission's report[48] that might have suggested that the liability of private certifiers was to be so confined. The position cannot have been viewed differently in respect of territorial authorities. There was no tenable basis for the rules that applied to councils to be different from those that applied to private certifiers.

[31] I recognise that the Act was silent on whether the liability of private certifiers applied in respect of all buildings. But, in light of the common law background, the greater likelihood is that the Act was not meant to confine the liability of private certifiers and, by parity of reasoning, territorial authorities to cases involving residential premises. If that outcome had been intended one could have expected express provision to that effect.

Efficiency

[32] The next point can be summarised as: do it once, do it right. If the owner of commercial premises cannot obtain redress when the council fails to do its job properly, then such owner, in order to obtain the necessary protection, will have to engage a suitable professional to do exactly what the council is charged with doing under the Act. The owner will then be paying two sets of fees, one to the council, with no prospect of redress if the council is negligent, and the other to the professional who will be liable for negligence, absent any limitation or exemption. The position could well be worse for a subsequent purchaser because by that time

---

47 Building Act 1991, ss 57(2) and 90.

48 Building Industry Commission *Reform of Building Controls: Volume 1 — Report to the Minister of Internal Affairs* (Wellington, 1990).

the relevant defects may have been covered up and therefore be more difficult and more expensive to detect.

[33] To create this situation by denying the asserted duty of care would be economically inefficient and would undermine the generally valid proposition that if you pay a fee for work you should, at least prima facie, be entitled to redress if the person performing the work fails to take reasonable care when doing so. While the work done by councils in respect of the construction of buildings looks to interests wider than those of the owner, it is not unreasonable for owners of any kind of building to be able to rely on the council not to be negligent. They should not have to pay twice to get appropriate protection.

Control

[34] In *Dutton*'s case, upon which the New Zealand line of authority both pre and post *Hamlin* was substantially based, the Court was influenced primarily by the fact that the Council had control of the work. Lord Denning MR considered that with such control came a responsibility to take care in performing all associated tasks.[49] In *Hamlin*, Cooke P justified the duty upheld in that case on the basis of the twin concepts of control and reliance.[50] Two years earlier in *South Pacific* his Honour had referred to reliance as one fact that might assume importance in some cases.[51] The centrality of reliance in negligent misstatement cases should not be transported wholesale into other cases of negligence. In misstatement cases reliance is necessary before there can be causation. That is not necessarily so in other cases of negligence such as the present.

[35] I consider it is the control aspect which is the most significant in the present kind of case. Such reliance as there may be in cases of faulty inspection is usually general rather than specific, and it is reliance as much on the state of the law as on the council. It is said that reliance features much less in the context of commercial

---

49 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA) at 392.
50 *Hamlin* (CA), above n 46, at 519.
51 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 297.

buildings than it does with residential buildings. But there can be no doubt that the control dimension applies equally in respect of buildings of all kinds.

[36] The retreat from *Anns*[52] that took place in *Murphy*[53] represented a deliberate policy choice by the English Judges not to impose a duty of care in respect of any buildings, despite the control element. That policy choice reflected the conditions that prevailed in England. But, as the Privy Council accepted in *Hamlin*, there is no clear right or wrong answer to the issues that arise in this field.[54] New Zealand and Canada have chosen to maintain the course adopted in earlier decisions and not to follow *Murphy*. The Australian position is less clear cut. It has to be said that once the control aspect is seen as the key feature, it is difficult to draw a convincing line between different types of building.

[37] The discussion in the judgments of the Court of Appeal in *Hamlin* was influenced substantially by a desire not to have the Privy Council adopt the *Murphy* approach for New Zealand. The decision in *Murphy* was the context in which the *Hamlin* case was taken to the Court of Appeal. Richardson J's judgment in particular, in its concentration on local conditions and circumstances, was designed to support the view that New Zealand should be allowed to choose its own path. That path was seen in London as a valid policy choice, albeit the case was only concerned with residential premises and did not foreshadow any particular view as to premises generally.

[38] I regard issues such as reliance and vulnerability as less persuasive indicators of the course we should adopt on the present issue. As already noted, reliance is usually at best only of a general kind and, as the Australian case of *Woolcock* shows,[55] issues of vulnerability are apt to be problematic and may give rise to more problems than they solve.[56] It is the feature of control which, in my view, is central to the policy choice this Court has to make. Councils control all aspects of building

---

52 *Anns v Merton London Borough Council* [1978] AC 728 (HL).
53 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).
54 *Hamlin* (PC), above n 46, at 521.
55 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, (2004) 216 CLR 515.
56 Any underlying assumption that commercial parties are generically not vulnerable cannot be right. Equally not all residential parties are vulnerable.

work to ensure that it complies with the building code. They are paid for doing so. They should, at least prima facie, owe a duty of care to beneficiaries of that work.

Interface with contract

[39] On that basis I turn to those matters which were said to militate against a duty of care. It is inherent in what I have already said that I do not regard them as sufficiently persuasive to deny the asserted duty. It is suggested that to recognise a duty of care for all buildings would tend to undermine relevant contractual relationships and loss allocation mechanisms or opportunities thereby provided. I regard this as an overstated problem. In the first place, private certifiers were unable under the 1991 Act to limit or contract out of liability.[57] The position must implicitly have been the same for councils when they were performing the same functions. In the second place, those performing functions under the Act or within the scope of the Act owed statutory duties not to breach the building code. So to that extent there was no capacity for anyone involved to limit their liability by contract.

[40] I accept that in circumstances where the parties have allocated, or have had the opportunity to allocate, risks by contract, tort law should be slow to impose a different allocation from that expressly or implicitly adopted by the parties. But because of the way the Act is framed I do not see that proposition as being a significant feature of the present case.

Economic loss

[41] I address now the contention that *Dutton* and the cases that have followed it have inappropriately extended *Donoghue v Stevenson*[58] into an area where what is involved is economic injury rather than physical injury or damage. New Zealand has never drawn the sharp divide that has been drawn between these types of harm, particularly in the present field, in England. Under New Zealand law the nature of the loss in suit is relevant to whether a duty of care to avoid it should be imposed. But the nature of the loss has never dictated the answer.

---

57 Section 57(2).

58 *Donoghue v Stevenson* [1932] AC 562 (HL).

[42] I agree 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. I do not however see the Act's health and safety focus as supporting the view that a duty of care should be denied in respect of commercial and other non-residential premises. Health and safety issues apply to both residential and non-residential premises. People's homes are important from this point of view, but so too are their workplaces and places such as motels and hotels where they may reside for shorter periods.

[43] Furthermore, a building owner will normally incur expense and hence economic loss when remedying health and safety deficiencies. In the same way as a residential landlord has to spend money if the premises are defective, in order to protect the health and safety of the tenant, so too an employer may have to spend money to protect the health and safety of employees in the workplace. The same is true of the hotelier and the motelier. It is unduly simplistic to say that the Act has a health and safety rather than an economic focus. It is unpersuasive and somewhat contradictory to say you can sue for the physical damage to your building but not for the cost of cure.

[44] The purpose of the Act and the building code is to maintain minimum standards of construction. Those standards are designed to protect the interest society has in having buildings constructed properly. The minimum standards avoid the waste, inefficiency, economic losses and health and safety issues that might well be encountered if the only potential control was contractual. The Act and code are also based on the premise that non-compliance with the code necessarily has a health or safety connotation; so that does not have to be established in addition to non-compliance.

[45] In cases where negligent inspection has given rise to the potential for physical damage but no such damage has yet occurred, it cannot be the law that you have to wait for physical damage to occur before you are regarded as having suffered loss or harm. It is not determinative whether the loss suffered at the outset is characterised as financial or physical. It is measured by the cost of bringing the building up to the standard required by the code and thereby removing the potential for physical damage and the associated health and safety concerns. A duty of care

should be recognised in respect of preemptive expenditure as well as expenditure necessary to reinstate or repair physical damage which has actually occurred. In the present situation the line between economic loss and physical damage is far from bright. Even if one were to analyse cases such as the present as resulting solely in economic loss, there is no good reason for denying a duty of care. There is no risk of indeterminate liability; only a current owner can sue. And, in this context, there cannot be any logical distinction between residential premises and premises of other kinds.

Quality

[46] In expressing myself in this way I am not to be taken as suggesting that the law of tort, through the mechanism of a duty of care, should provide the owner of a building with what amounts to a warranty of quality. Generally, quality is for contract. But if a negligently caused deficiency in a building is apt to impinge on the interests the Act is designed to protect, tort law can properly become involved.

[47] In *Rolls-Royce*, the Court of Appeal was concerned about how quality standards would be set if a duty were to be recognised.[59] That may be a valid concern if the tort duty would be unclear as to the precise standard required. But in the present context there is no difficulty in this respect. The standard the duty requires is compliance with the building code. That is as clear and precise as the subject matter allows. There is no quality or commercial uncertainty as to what the duty requires. The parties cannot bargain for a standard below code compliance in return for a lesser price. The imposition of the duty leads to total clarity as to where the risk falls.

Caution

[48] It is sometimes suggested, and was in this case, that imposition of a duty of the kind asserted would lead to excessive caution on the part of building inspectors. That, it is said, would be inefficient and would be inconsistent with the policy goals

---

[59] *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [67]–[69].

of the Act. Imposition of the duty is, however, wholly consistent with the fundamental policy goal of the Act, namely to ensure that all buildings are code compliant. If there is a risk of excessive caution I do not consider it is a serious risk, and I would rather run that risk than the risk of encouraging, or at least tolerating, poor performance by having no duty in non-residential cases. I also observe that imposition of the duty upheld in *Hamlin* certainly did not lead to excessive caution on the part of building inspectors. If anything the reverse seems to have been the case.

Negligent misstatement

[49] When it comes to the claim in negligent misstatement on account of the issue of the code compliance certificate, we must bear in mind that in *Altimarloch* this Court accepted that councils owe a duty of care in respect of Land Information Memoranda (LIMs). That duty is owed irrespective of the nature of the premises involved. In that light, and bearing in mind that the LIM duty includes protection for interests that are solely economic, it is not a long step to hold that councils should owe a duty of care when issuing code compliance certificates. That duty must of course be tailored to the exact form in which code compliance certificates are designed to be issued. If a duty is held to exist as regards all buildings to compensate for negligent misstatement in a code compliance certificate, it would be strange if a duty was denied in respect of all, save residential, buildings in the case of a negligent inspection which was the basis of the erroneous certificate.

Economic consequences

[50] One of the principal reasons advanced for denying the asserted duty is the substantial nature of the extra burden that would be placed on councils and the difficulty of assessing the effects, particularly the economic effects, that this would have on councils, their ratepayers and society generally. It can, however, reasonably be expected that councils will be able to obtain, no doubt at some cost, insurance cover against negligence by its officers causing loss in respect of all buildings. The cost of the premium involved should incentivise councils and their officers to fulfil their statutory responsibilities with appropriate care. That can only help fulfil the

primary statutory purpose, namely the construction of buildings that do not pose health and safety risks to their occupants.

[51] There has been no decision in New Zealand in the past determining at a sufficient level of authority that councils do not owe a duty beyond residential premises. Any assumption that this was so would have been inherently risky. Whether councils' insurance cover in the past has been so confined is not known. There is a risk that councils may be liable for past negligence on an unindemnified basis, but that does not persuade me that a duty that is otherwise appropriate should not be imposed.

[52] It is a respectable function of tort law, in appropriate circumstances, to facilitate loss-spreading. If a council through its negligence causes a building owner loss, the economic consequences for the council can surely be managed at least in part through fees and insurance. If that is not enough then ultimately the remaining loss caused by the council's negligence will be spread among all ratepayers. The council being at fault, it would not be reasonable that such loss fall solely on the disappointed building owner. Nor, as I have said, should such owner have to incur the additional cost of arranging for someone else to perform the same role in parallel with the council.

General methodology

[53] I wish finally to address an issue which relates as much to the general methodology to be employed in addressing assertions of a novel duty as it does to the circumstances of the present case. It is conventional to address issues of proximity before those of policy. The question I am concerned with is whether a finding in favour of proximity should lead to a duty of care unless policy considerations suggest otherwise; or whether one should address the second stage of the inquiry without any leaning towards a duty from the favourable answer given to the proximity question. The authorities are not entirely consistent on this topic.[60]

---

[60] See *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [79], fn 126.

[54] I consider the right approach to be this. Proximity is a necessary condition for finding a duty. Once proximity is established a duty should be found to exist unless it would not be in the public interest to recognise the duty. In policy terms, the existence of proximity tilts the scales in favour of a duty. This is because, unless there is some sufficient countervailing policy factor, those who negligently cause loss to parties with whom they are in a proximate relationship should be required to compensate for that loss. If the loss is reasonably foreseeable and the parties are otherwise in a proximate relationship I do not consider it just to deny the plaintiff a cause of action for loss negligently caused by the defendant unless the wider interests of society mandate that denial. Any alternative approach would not give enough weight to the finding of proximity, and the ex hypothesi existence of negligently inflicted harm, in the ultimate question whether it is reasonable to recognise the asserted duty of care.

[55] For the reasons given I do not consider the wider public interest requires the Court to deny the prima facie duty of care established by the existence of proximity between the present parties. I would therefore allow the appeal with the consequences proposed by Chambers J.[61]

MCGRATH AND CHAMBERS JJ

(Given by Chambers J)

Table of Contents

Leaky buildings: a council's duty of care [56]
Background to the arguments presented to us [64]
Has the liability of councils always been restricted to residential homes? [73]
Would recognising a duty of care in respect of commercial buildings be contrary to the Building Act 1991? [98]
Did the Court of Appeal in *Hamlin* restrict the duty of care to residential homes? [108]
Have courts, when squarely faced with an argument that the duty should be extended to commercial buildings, generally rejected the proposition? [136]
England [139]
Canada [140]
The United States [147]

[61] At [223]–[225].

Australia [148]
New Zealand [159]
Should we, for policy reasons, restrict the duty of care to residential homes? [182]
Councils do not protect financial interests [187]
No free warranties [188]
Cutting across contractual liability [193]
Architects and engineers [195]
Reliance and vulnerability [196]
Transferring costs to ratepayers [202]
Making inspectors cautious [205]
Line-drawing [206]
Conclusion on negligence cause of action [215]
Negligent misstatement [219]
Result [224]

Leaky buildings: a council's duty of care

[56] In 2000 Charco Ltd applied to the North Shore City Council, the respondent, for the building consents necessary to construct a 23 floor building in Byron Avenue on Auckland's North Shore. The building was to be and is known as Spencer on Byron. It was primarily to be a hotel. There were to be 249 "hotel rooms" spread over 18 floors of the building. Each was to have its own unit title under the Unit Titles Act 1972 and was to be individually owned. The unit owners were to be contractually obliged to lease the units to the hotel manager for a minimum term of 10 years. The twentieth and twenty-first floors were to have six penthouse apartments. They were not to form part of the hotel. Each of these apartments was to have its own title. The rest of the building comprised facilities available for the use of hotel guests and penthouse owners alike: parking facilities, a hotel lobby and foyer, entertainment and catering areas, a tennis court, gymnasium and swimming pool.

[57] The Council granted the necessary consents. Multiplex Construction (NZ) Ltd then constructed the building. ADC Architects Ltd supervised construction on behalf of Charco. Charco retained the Council as building inspector in terms of the Building Act 1991. On 13 July 2001 the Council issued a series of code compliance certificates under the Act.

[58] Unfortunately, like so many buildings constructed in the 1990s and the early part of this century, Spencer on Byron has leaked. Remedial work may cost more than $19 million. The body corporate (Body Corporate No 207624, the first appellant) and 219 of the 255 unit owners have sued a number of people in respect of their loss. Their first defendant is the Council. All of the plaintiffs have sued the Council in negligence. They allege the Council was negligent in issuing the building consents when the plans and specifications submitted for consent did not contain adequate details for the Council to be satisfied on reasonable grounds that the work would comply with the building code. They also assert the Council was negligent in failing to put in place an adequate inspection regime or in failing to carry out its inspections with sufficient thoroughness. As a consequence of this negligence, it is said the building as constructed did not comply with the building code.

[59] Some of the unit owners have brought a second cause of action against the Council, this one in negligent misstatement. They assert that the code compliance certificates issued by the Council constitute statements by the Council that as at the dates of issue the Council was satisfied on reasonable grounds that the construction work complied with the building code. They say they relied on those certificates in proceeding with the purchase of their units. They say the Council was negligent in making those statements because the Council did not have reasonable grounds to be satisfied the building complied with the building code. As a consequence of their reliance on the code compliance certificates, they have suffered economic loss.

[60] None of these allegations against the Council has yet been tested. That is because the Council promptly moved to have both causes of action against it struck out, essentially on the grounds that it owed no duty of care to the plaintiffs.

[61] In the High Court, the Council was largely successful. Potter J struck out the claims by the body corporate and the owners of the hotel units.[62] The owners of three of the six penthouse apartments were among the plaintiffs.[63] She permitted their claims against the Council to continue, but ordered they were to drop that part

---

62 *Body Corporate No 207624 v North Shore City Council* HC Auckland CIV-2007-404-4037, 11 November 2009.

63 A fourth has joined since the High Court delivered its judgment.

of their claim "based on health and safety risks".[64] She considered that part of their claim could not succeed on the authority of a recent Court of Appeal decision, *Queenstown Lakes District Council v Charterhall Trustees Ltd*.[65]

[62] Both sides appealed. The Council succeeded.[66] The Court struck out both causes of action against the Council and entered summary judgment in the Council's favour. Harrison J, however, dissented in part. He would have permitted the claim by the penthouse apartment owners to continue.[67] Neither the High Court's judgment nor the Court of Appeal's judgment will figure largely in these reasons. That is because both Courts, quite correctly given the doctrine of precedent, considered themselves bound by two earlier Court of Appeal decisions, namely *Te Mata Properties Ltd v Hastings District Council*[68] and *Charterhall*. Indeed, Harrison J recorded counsel's agreement that the appeal in that Court was to proceed on the basis that "the decisions in *Charterhall* and *Te Mata* represent good law and local authorities do not owe the *Hamlin* duty of care to owners of commercial properties".[69] Counsel before us accepted that "agreement" did not bind in this Court. Indeed, Mr Farmer QC, for the appellants, submitted that, in so far as *Te Mata* and *Charterhall* could not be distinguished, they were wrongly decided.

[63] This Court granted leave to appeal. While this Court has resolved that councils owed a duty of care, in their inspection role, to owners, both original and subsequent, of premises designed to be used as homes,[70] this Court has never before grappled with whether a like duty of care is owed in respect of buildings containing a mixture of hotel and residential apartments. That was a matter which was expressly left unresolved in *North Shore City Council v Body Corporate 188529* (*Sunset Terraces*).[71]

---

64 At [111] and [113].

65 *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786.

66 *North Shore City Council v Body Corporate 207624* [2011] NZCA 164, [2011] 2 NZLR 744 [*Spencer on Byron* (CA)].

67 At [55].

68 *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460.

69 At [25(c)].

70 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

71 At [9] per Elias CJ and at [51] per Blanchard, Tipping, McGrath and Anderson JJ. (For reasons of brevity, we shall refer to the majority reasons hereafter as "per Tipping J" after its author.)

Background to the arguments presented to us

[64] Whether the courts should recognise a duty of care in new circumstances is ultimately a matter for judicial evaluation of competing policy factors. Often an important policy factor is the relevant statutory framework within which the potential duty-bearer is working. The law in this area moves incrementally.[72]

[65] In *Sunset Terraces*, the North Shore City Council challenged the policy choices that courts throughout the Commonwealth had made in the 1970s and 1980s in holding that councils, builders, engineers and architects were subject to a duty of care with respect to their respective roles in the construction of buildings. It wanted this Court to do what the House of Lords had done in *Murphy v Brentwood District Council* in 1990.[73] In that case, their Lordships reviewed the law as it had developed in England and held that councils were not under a duty to take reasonable care with respect to the economic loss which could flow from inadequate inspections during the building process. The House of Lords "overruled" the English Court of Appeal decision which first imposed a duty of care on councils, *Dutton v Bognor Regis Urban District Council*,[74] and "departed from" the famous House of Lords authority which had confirmed the *Dutton* line of authority, *Anns v Merton London Borough Council*.[75] These cases, and the many relying on them, were held to be "an extension of principle that should not, as a matter of policy, be affirmed".[76]

[66] This Court rejected that submission. The Court affirmed the way in which the law had developed in New Zealand in the 1970s and 1980s and held that the Court of Appeal had been right in *Invercargill City Council v Hamlin*[77] not to follow *Murphy*. The Court reviewed a large number of the New Zealand cases affirming a

---

[72] When we use that term, we use it in the sense in which Cooke P used it in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 295: "Some Australian and English Judges speak in terms of an 'incremental' approach. I fully and respectfully agree that in deciding whether or not there is a duty of care in a new situation the Courts should decide gradually, step by step and by analogy with previous cases. That has invariably been done in New Zealand."

[73] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

[74] *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA).

[75] *Anns v Merton London Borough Council* [1978] AC 728 (HL).

[76] *Murphy*, above n 73, at 399.

[77] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) [*Hamlin* (CA)].

duty of care, including *Bowen v Paramount Builders (Hamilton) Ltd*,[78] *Mt Albert Borough Council v Johnson*,[79] *Stieller v Porirua City Council*,[80] *Brown v Heathcote County Council*,[81] and *Askin v Knox*.[82] This Court considered that line of authority to be strongly supported by the Building Act 1991.

[67] On this appeal, Mr Goddard QC, for the North Shore City Council, was faced with what this Court had held in *Sunset Terraces*. Understandably he did not ask us to revisit that decision but in truth his argument did tend to challenge the logic of *Sunset Terraces* and *Hamlin* and the cases that preceded them. In his submission, the duty of care with respect to residential buildings was anomalous and the anomaly should be severely constrained. In *Sunset Terraces*, it was suggested, as the Council's fall-back position, that any duty of care should be restricted to cases involving stand-alone modest single dwelling-houses occupied by their owners.[83] This Court rejected the narrowness of that class and held that the duty extended to all residential properties, whatever their form of ownership, the type of residence or the value of the residential building.[84] The duty applied regardless of whether professionals such as engineers and architects had been involved in the construction.[85] Mr Goddard accepted before us, as he had to, that definition of "residential home", but he submitted we should not extend the category any further. The duty of care should not extend to mixed-use buildings such as Spencer on Byron; still more, it should not extend to purely commercial buildings.

[68] Mr Goddard advanced a number of arguments in support of two broad propositions:

(a) Existing authority does not recognise a duty of care in respect of commercial buildings. We are accordingly dealing with a "novel or borderline" case.

---

78 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).
79 *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).
80 *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA).
81 *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA); aff'd [1987] 1 NZLR 720 (PC).
82 *Askin v Knox* [1989] 1 NZLR 248 (CA).
83 *Sunset Terraces*, above n 70, at [1] per Elias CJ and at [27] per Tipping J.
84 At [7] per Elias CJ and at [49] per Tipping J.
85 At [8] per Elias CJ and at [50] per Tipping J.

(b) Policy factors are strongly against extending existing authority to commercial buildings. (This is the second stage of the two stage inquiry.)

[69] The first submission had four steps. We set them out separately, although they are logically linked and one proposition leads into the next. Separating the steps in the argument enables us to analyse closely whether each step is correct:

(a) The liability of councils has, as a matter of fact, always been restricted to residential homes.

(b) To recognise a wider duty would be contrary to the Building Industry Commission report of February 1990 and the Act it spawned, the Building Act 1991.

(c) The Court of Appeal in *Hamlin* restricted the duty to residential homes.

(d) Courts, both here and overseas, when squarely faced with an argument that the duty should be extended to commercial buildings, have generally rejected the proposition.

[70] For reasons which follow, we shall be rejecting Mr Goddard's primary submission. That still leaves, however, the question of what the overall policy of the law should be, which is Mr Goddard's second proposition above.[86] In this regard, Mr Goddard listed a number of factors. He presented them as reasons why we should not widen the duty of care so as to encompass commercial buildings. Even if the law has never been so constrained, it is nonetheless possible these factors might be of such import that we should act now to *restrict* the duty of care to residential homes. It may not matter too much whether these policy factors are viewed as potential restrictions on an existing duty of care or as potential extensions to a more constrained existing duty of care.

---

[86] At [68].

[71] For reasons we shall give, we are satisfied that the relationship between the appellants and the Council was sufficiently proximate. And we are further satisfied that there are no factors external to that relationship which would render the proposed duty of care unfair or unreasonable. There is no principled basis for distinguishing between the liability of those who played a role in the construction of residential buildings and the liability of those who played a role in the construction of other kinds of buildings. The policy considerations underlining the Privy Council's decision in *Hamlin* and this Court's decision in *Sunset Terraces* apply to the construction of all buildings. Any other conclusion would, in our view, be inconsistent with the principles underlying the Building Act 1991, where Parliament drew no distinction between different kinds of building so far as the responsibilities of local authorities and building certifiers were concerned. The common law duty of care which we endorse in these reasons marches in step with the statutory functions Parliament saw fit to place on local authorities and building certifiers.

[72] We shall analyse Mr Goddard's submissions in the order set out above. We shall then turn to consider counsel's submissions on the negligent misstatement cause of action. It will quickly become apparent that we have concentrated on the submissions of counsel for the respondent rather than the submissions advanced by the appellants. There are two reasons for that. First, as we are allowing the appeal, it is important we tell this council and the other local authorities throughout the country why we have rejected the submissions advanced on their behalf. Secondly, as we have said, the argument in the lower courts proceeded quite differently from the argument in this Court. We are not constrained by earlier authority as those two Courts were. We wish to record how helpful we found both Mr Farmer's submissions and Mr Goddard's. Many of Mr Farmer's submissions have been adopted without express attribution.

Has the liability of councils always been restricted to residential homes?

[73] A fundamental premise of Mr Goddard's argument was that, as a matter of fact, councils' liability had always been restricted to residential homes. From that premise he argued, on policy grounds, that the duty of care imposed on councils should not be *expanded* to other buildings. Is the fundamental premise right?

[74] In this section of these reasons, we concentrate on the development of the law up to 1991. We stop at 1991 for two reasons. First, in 1990 the Building Industry Commission, a New Zealand body, published a seminal report on building controls,[87] together with a draft Building Bill. The Government of the day later that year introduced into the House a Building Bill,[88] which in due course, in December 1991, became the Building Act 1991. The report and the Act that followed it were the central features of Mr Goddard's second argument, to which we shall shortly come. The second relevant event was the delivery of *Murphy* on 26 July 1990, reversing the previous line of authority in this area. (This decision was delivered after the Commission report was released.) Since *Murphy*, the English courts have not recognised a duty of care with respect to buildings of any kind.[89]

[75] We begin by considering English cases decided before *Murphy*, since it is an English case, *Dutton*, which first recognised the duty of care falling on building inspectors. It was, as this Court said in *Sunset Terraces*, *Dutton* "which gave the impetus to the New Zealand developments and provided much of their conceptual and policy basis".[90] *Dutton* involved damage to a house, but the Court of Appeal's reasoning was not limited to houses. For instance, Lord Denning MR said:[91]

> In this case the significant thing, to my mind, is that the legislature gives the local authority a great deal of *control* over building work and the way it is done. They make byelaws governing every stage of the work. They require plans to be submitted to them for approval. They appoint surveyors and inspectors to visit the work and see if the byelaws are being complied with. In case of any contravention of the byelaws, they can compel the owner to remove the offending work and make it comply with the byelaws. They can also take proceedings for a fine.
>
> In my opinion, the control thus entrusted to the local authority is so extensive that it carries with it a duty. It puts on the council the responsibility of exercising that control properly and with reasonable care. The common law has always held that a right of control over the doing of work carries with it a degree of responsibility in respect of the work.

---

87 Building Industry Commission *Reform of Building Controls: Volume 1 — Report to the Minister of Internal Affairs* (Wellington, 1990) [Building Industry Commission report].

88 Building Bill 1990.

89 We shall discuss *Murphy* later in these reasons.

90 *Sunset Terraces*, above n 70, at [28] per Tipping J.

91 At 392. The emphasis is in the original.

[76] The Master of the Rolls held that the plaintiff did not have to show he or she had relied on those responsible for the construction of the building:[92]

> Since [*Candler v Crane, Christmas & Co*[93]] the courts have had the instance of an architect or engineer. If he designs a house or a bridge so negligently that it falls down, he is liable to every one of those who are injured in the fall: see *Clay v A J Crump & Sons Ltd* [1964] 1 QB 533. None of those injured would have relied on the architect or the engineer. None of them would have known whether an architect or engineer was employed, or not. But beyond doubt, the architect and engineer would be liable. The reason is not because those injured relied on him, but because he knew, or ought to have known, that such persons might be injured if he did his work badly.

[77] *Anns* again involved damage to domestic premises, this time a two storey block of seven maisonettes. We accept immediately that their Lordships often in their reasons refer to "houses" and "homes". That is, after all, what they were dealing with in the case. At the same time, it is clear from the judgment that the building by-laws, on which the duty of care hung, applied to all buildings erected in the borough.[94] Further, there is nothing to suggest that the duty of care their Lordships found to exist was limited to houses. For example, Lord Wilberforce said:[95]

> Passing then to the duty as regards inspection, if made. On principle there must surely be a duty to exercise reasonable care. The standard of care must be related to the duty to be performed – namely to ensure compliance with the byelaws. It must be related to the fact that the person responsible for construction in accordance with the byelaws is the builder, and that the inspector's function is supervisory. It must be related to the fact that once the inspector has passed the foundations they will be covered up, with no subsequent opportunity for inspection. But this duty, heavily operational though it may be, is still a duty arising under the statute.

[78] In *Eames London Estates Ltd v North Hertfordshire District Council*,[96] the Council was held liable for the negligence of its building inspector who passed the foundations for the plaintiff's factory when he should not have done. As a consequence of this negligence, the factory suffered differential settlement. The foundations failed to comply with the relevant building by-laws.

---

92 At 395.
93 *Candler v Crane, Christmas & Co* [1951] 2 KB 164 (CA).
94 At 752.
95 At 755.
96 *Eames London Estates Ltd v North Hertfordshire District Council* (1980) 18 Build LR 50 (QB).

[79] *Pirelli General Cable Works Ltd v Oscar Faber and Partners (a firm)*[97] involved cracking to a factory chimney. The factory owners sued Oscar Faber, a firm of consulting engineers, in negligence. Pirelli did not sue the local authority. Oscar Faber were found to have been negligent. By the time the case reached the House of Lords, the sole issue involved limitation and when Pirelli's cause of action accrued. That is not an issue before us. The case has relevance for current purposes in that there was no suggestion that the engineers could not be liable in tort because the defective building was a factory, not a house. On the contrary, Lord Fraser of Tullybelton, with whom the other Law Lords agreed, said of the duty of care:[98]

> I think the true view is that the duty of the builder and of the local authority is owed to owners of the property as a class, and that if time runs against one owner, it also runs against all his successors in title.

[80] Lord Fraser added:[99]

> It seems to me that, except perhaps where the advice of an architect or consulting engineer leads to the erection of a building which is so defective as to be doomed from the start, the cause of action accrues only when physical damage occurs to the building.

[81] We appreciate that their Lordships' views on limitation did not find favour with the Privy Council in *Invercargill City Council v Hamlin*.[100] But that is irrelevant. We are not citing *Pirelli* for the views expressed in it on the topic of limitation but rather to demonstrate that their Lordships considered the duty referred to, whether owed by builders, engineers or local authorities, could apply in respect of commercial premises.

[82] In none of the standard English texts of the time was there any suggestion that the duty recognised in *Anns* was limited to residential homes.[101]

---

97 *Pirelli General Cable Works Ltd v Oscar Faber and Partners (a firm)* [1983] 2 AC 1 (HL).

98 At 18.

99 At 18.

100 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 525 [*Hamlin* (PC)].

101 See, for example, Rupert Jackson and John Powell *Professional Negligence* (2nd ed, Sweet & Maxwell, London, 1987) at [2.33]–[2.35]; RWM Dias and Andrew Tettenborn "Negligence" in RWM Dias (gen ed) *Clerk & Lindsell on Torts* (16th ed, Sweet and Maxwell, London, 1989) 426 at [10–37]; and Rodney Percy *Charlesworth & Percy on Negligence* (8th ed, Sweet & Maxwell, London, 1990) at [2–35].

[83] We turn now to the key New Zealand cases. We mention first *Bowen v Paramount Builders (Hamilton) Ltd*.[102] Although the case concerned subsidence of a two unit dwelling-house, the Court of Appeal's judgment was not limited to dwelling-houses. For example, Richmond P, considered the position in England at the date of writing to be as follows:[103]

> Quite clearly English law has now developed to the point where contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work.

[84] The Judge did not expressly consider the position of local authorities, as he noted that this was a topic shortly to be considered by the House of Lords, it having granted unconditional leave to appeal from the Court of Appeal's decision in *Anns*.[104]

[85] Woodhouse J identified the question before the Court in these terms:[105]

> ... [T]he critical question is whether as a matter of law such a builder does owe a duty of care in his building operations to a purchaser down the line from the original owner. The claim in this case goes beyond any question of liability for carelessness which results in damage external to the building – for example, to persons or to other property. The issue is whether the builder is responsible for damage which is caused to the building itself by the defects he has left behind in it.

[86] He answered that question "yes".[106] Cooke J's opinion was to similar effect on the law. He considered the plaintiffs had "a right of action for the kind of damage suffered by them if they [could] show that it was caused by negligence on the part of the builder in respect of the foundations, and if any expectation of intermediate examination was not enough to justify the builder in regarding that possibility as an adequate safeguard".[107]

[87] In none of the three judgments in that case was a distinction drawn between a builder's liability in tort for defective dwelling-houses as opposed to the builder's

---

102 *Bowen v Paramount Builders (Hamilton) Ltd*, above n 78.
103 At 406.
104 At 405.
105 At 415–416.
106 At 418.
107 At 425.

liability for other buildings. Nor did the Court say it was confining the reasoning to dwelling-houses.

[88] We mention briefly *Mt Albert Borough Council v Johnson*.[108] Again that case did involve a number of residential flats. But the Court of Appeal, when considering the nature of the duty of care, did not suggest that the duty arose only because it was a dwelling-house which had suffered damage.[109]

[89] The 1991 edition of the leading New Zealand text on torts did not suggest that a distinction was to be drawn between liability for dwelling-houses and liability for other buildings, notwithstanding that *Murphy* had been decided shortly before publication.[110]

[90] The final case to be noted is *The Otago Cheese Co Ltd v Nick Stoop Builders Ltd*.[111] The Otago Cheese Co Ltd owned a cheese factory which had been built between 1981 and 1983. Problems with the factory later emerged. The company sued the builder, the engineer and the Clutha District Council. As it turned out, the Council was held not to have been negligent. But the key point for present purposes is that no one sought to argue that the Council could not be liable because the damaged building was a factory. The distinction now sought to be drawn was, rightly, not on counsel's radar – nor for that matter on the trial judge's.

[91] We turn briefly to the position in Canada. Any discussion of this area of the law in Canada must begin with *Rivtow Marine Ltd v Washington Iron Works*[112] even though the case involved a defective crane on a barge rather than a defective building. That is because *Rivtow* proved central to the development of tortious liability in respect of defective buildings in Canada. Also, the decision was expressly noted and relied on by the House of Lords in *Anns*.[113] The crane had a

---

108 *Mt Albert Borough Council v Johnson*, above n 79.

109 See, for example, at 237–239 per Cooke and Somers JJ and at 242–243 per Richardson J.

110 Stephen Todd "Negligence: Particular Categories of Duty" in Stephen Todd (gen ed) *The Law of Torts in New Zealand* (Law Book Company, Sydney, 1991) at [5.5].

111 *The Otago Cheese Co Ltd v Nick Stoop Builders Ltd* HC Dunedin CP180/89, 18 May 1992. The case had been argued in 1991 prior to the enactment of the Building Act 1991 and was decided prior to that Act coming into force.

112 *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189.

113 *Anns*, above n 75, at 760.

structural defect which posed a risk of personal injury. Washington Iron Works, which had designed and manufactured the crane, was aware of the defect but failed to warn Rivtow Marine, the charterer of the barge. Washington was held to owe a duty to Rivtow to warn it of the potential danger as soon as it became aware of the defect. The underlying principles in this case were subsequently used by the Canadian courts when they decided to adopt the reasoning in *Dutton* and *Anns* with respect to tortious liability for defective buildings. The Court split on the damages recoverable. That disagreement is irrelevant for present purposes.

[92] The leading Canadian case in the period with which we are presently concerned was *City of Kamloops v Nielsen*.[114] The case involved a house built on loose fill. The builder did not take the footings down to solid bearing. The local authority, the City of Kamloops, was sued in respect of its role in permitting the house to be constructed in a defective manner. The Supreme Court divided on the facts, but all Judges accepted that a local authority did owe a duty of care with respect to its role under the by-laws in regulating the construction of buildings. We accept, of course, that the case involved a house, but none of the Judges placed any significance on the fact it was a house which had slumped as opposed to any other sort of building. The majority, Ritchie, Dickson and Wilson JJ, specifically dealt with a submission on the so-called "floodgates" argument. They said of that:[115]

> The floodgates argument would discourage a finding of private law duties owed by public officials on the ground that such a finding would open the flood–gates and create an "open season" on municipalities. No doubt a similar type of concern was expressed about the vulnerability of manufacturers following the decision in *Donoghue v Stevenson*, *supra*. While I think this is an argument which cannot be dismissed lightly, I believe that the decision in *Anns* contains its own built-in barriers against the flood.

[93] The majority then went on to discuss those barriers before concluding that they did not see "the principle in *Anns* ... as potentially ruinous financially to municipalities".[116] If they had thought the liability was limited to houses, they would surely have mentioned that as one of the "built-in barriers". The omission is significant. A distinction between houses and other buildings would have been illogical given their reliance on *Rivtow*, which concerned a defective crane on a

---

114 *City of Kamloops v Nielsen* [1984] 2 SCR 2.
115 At 25.
116 At 26.

barge, a concept much more akin to a defective commercial building than a defective house.

[94] *Rothfield v Manolakos*[117] involved liability for a defective retaining wall. Among the defendants was a local authority, the Corporation of the City of Vernon, which was sued in respect of its issue of a building permit and its subsequent failure to inspect the backfilling of the wall and the foundations. The Supreme Court confirmed the liability of the City. There is no suggestion in the judgment that liability arose because the wall happened to be on a piece of residential land rather than a piece of commercial land.

[95] Finally, we mention *University of Regina v Pettick*,[118] decided by the Saskatchewan Court of Appeal early in 1991. In this case, defects in the roof of the university's gymnasium became apparent 12 years after construction. The university sued in negligence the roof fabricator, the engineer and the architect. The case came before the Court of Appeal after *Murphy*. The Court of Appeal rejected *Murphy*'s overruling of *Anns* on the basis that "the principles in *Anns* [had] been accepted into the law of Canada by the Supreme Court [and accordingly remained] the law in Canada".[119] All three defendants were held to owe a duty of care. There was no suggestion that a duty should not be owed because this was a university gymnasium, not a residence.

[96] Finally, we turn to Australia. The leading Australian case in the period with which we are currently concerned was the High Court's decision in *The Council of the Shire of Sutherland v Heyman*.[120] A house in the Sutherland Shire Council's district had been erected in 1968. The Heymans, the respondents, bought it in January 1975. The following year they noticed cracking and distortion in some beams and supports. Investigations revealed footings which were inadequate given the nature of the land on which the house had been built. The Heymans sued the Council on the basis of the Council's alleged negligence in approving the erection of the building and in inspecting construction. All members of the High Court agreed

---

117 *Rothfield v Manolakos* [1989] 2 SCR 1259.
118 *University of Regina v Pettick* (1991) 77 DLR (4th) 615 (SKCA).
119 At 643.
120 *The Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424.

that the Council had not been negligent in approving the plans. All members of the Court also agreed that the Council was not liable for negligent inspection, but on this point their reasoning differed. Gibbs CJ and Wilson J thought there was no evidence the Council had acted negligently in undertaking its discretionary power of inspection.[121] The other three judges found in favour of the Council for slightly different reasons. For present purposes, their precise reasoning does not matter. What is significant is that all three:

(a) considered that, although the Council's inspector had been remiss in carrying out inspections of the foundations,[122] the Council was nonetheless not liable because it was not under a duty of care;[123]

(b) considered that Lord Wilberforce's statement of principle in *Anns* could not be supported in its entirety;[124]

(c) did not indicate that any distinction was to be drawn between cases involving damage to houses as opposed to damage to other structures.

[97] From this review, we conclude that the Commonwealth jurisdictions did not draw distinctions based on the nature of the building being constructed. On the contrary, the duty of care owed by those involved in the erection of a building applied whatever the nature of the building. That position was entirely logical: any duty sprang from councils' control over the erection of buildings and councils' obligation to ensure that buildings were erected in accordance with relevant by-laws. We do not accept, therefore, Mr Goddard's fundamental premise that historically the liability of councils has always been limited to residences. Whether the liability later came to be so confined is a different question, to which we shall shortly come.

---

121 At 447–448.
122 At 512 per Deane J.
123 At 470–471 per Mason J, at 494 per Brennan J and at 512 per Deane J.
124 At 464–465 per Mason J, at 476–479 per Brennan J and at 506–509 per Deane J.

Would recognising a duty of care in respect of commercial buildings be contrary to the Building Act 1991?

[98] Mr Goddard took us in some detail through the Building Industry Commission's report. We do not need to set out in any detail the central thesis of the report, as we accept Mr Goddard's submission in that respect. It is clear the Commission intended to stop councils from overprescribing and thereby, it was thought, to drive down building costs.[125] This strategy was to be achieved by means of a national building code, to which councils could not add. Secondly, the new code was to be performance-based, not prescriptive.[126] So long as those involved in erecting a proposed building could demonstrate that the code's performance criteria would be met, it did not matter how they were met. The aim thereby was to foster innovation in design, materials and workmanship. Thirdly, competition was to be introduced on the regulatory side by permitting owners of land to engage building certifiers instead of councils to undertake the supervisory role under the new regime.[127]

[99] We accept all of that. We also accept that the draft Bill annexed to the report was not significantly altered when the Building Bill was introduced into the House. Nor were significant changes made during the parliamentary process.

[100] There can be no doubt, as Mr Goddard accepted, that Parliament envisaged that local authorities would continue to be liable in tort if they negligently issued building consents or negligently inspected during the course of construction. If the building owner elected to retain a building certifier to undertake those tasks, that certifier would similarly be liable in tort. Section 90 of the Act specifically dealt with "civil proceedings against building certifiers". Section 91 dealt with limitation defences. Among those provisions was subs (2), introducing for the first time a 10 year long-stop: no civil proceeding could be brought more than 10 years after "the date of the act or omission on which the proceedings are based". The background to that provision is relevant for present purposes. The idea of having a

---

125 Building Industry Commission report, above n 87, at [1.2].

126 See discussion on the development of a performance-based code for New Zealand at [3.24]–[3.36].

127 See discussion on the option of engaging approved certifiers at [4.79]–[4.82].

long-stop provision appears to have arisen when the Building Bill was before the Internal Affairs and Local Government Committee of the House. When the Bill was reported from that committee, a long-stop provision of 15 years was recommended.[128] Following representations from "the building industry", the 15 year long-stop was reduced to 10 years because it was then believed that building certifiers would not be able to get insurance cover for longer than that.[129]

[101] Section 57 is also worth noting. It prohibited building certifiers, in their terms of engagement, from limiting "any civil liability which might arise from the issue of the building certificate or code compliance certificate by that building certifier".

[102] Even though the 1991 Act was not directly applicable in *Hamlin*, the Privy Council considered it. They said:[130]

> There is nothing in the Act to abrogate or amend the existing common law, as developed by New Zealand Judges, so as to bring it into line with *Murphy's* case. On the contrary, a number of provisions in the Act clearly envisaged that private law claims for damages against local authorities will continue to be made as before.

[103] The Privy Council then cited ss 90 and 91. They continued:

> It is neither here nor there that the Building Act 1991 was not in force at the time of the inspection of the foundations in the present case. The question is whether New Zealand law should now be changed so as to bring it into line with *Murphy's* case. If the New Zealand Parliament has not chosen to do so, as a matter of policy, it would hardly be appropriate for Their Lordships to do so by judicial decision.

[104] This Court endorsed that approach in *Sunset Terraces*.[131] There was nothing in the Building Act to suggest Parliament wanted to alter the line of New Zealand authority which had developed in the late 1970s and the 1980s. Further, there was nothing in that line of authority to suggest any distinction between councils' obligations with respect to the supervision of the construction of houses and their obligations with respect to supervision of the construction of other buildings.

---

128 Clause 73B(2) of the Building Bill 1990 (54–2).
129 (20 November 1991) 520 NZPD 5490.
130 *Hamlin* (PC), above n 100, at 522.
131 At [6] per Elias CJ and at [24] per Tipping J.

[105] Indeed, the 1991 Act can be seen as having *strengthened* the argument that local authorities should be liable if they performed their supervision tasks negligently. One of the concerns often expressed about *Anns*-type thinking was that local authorities were not under a duty to inspect but merely empowered to do so. Was it fair for the courts to impose a duty of care on councils which chose to exercise the powers conferred while councils which chose not to were immune from claims for compensation? Lord Wilberforce provided an answer to that, but not all found it convincing. Parliament when enacting the 1991 Act removed that as an issue as the need for building plan approval and the need for supervision became mandatory. The only choice was as to who was to carry out those functions: the relevant local authority or a building certifier.[132]

[106] There is nothing in the Building Industry Commission report or the 1991 Act to suggest either the Commission or Parliament was intending to draw a distinction so far as tort liability was concerned between houses and other buildings. The Act was confirmatory of existing common law. We accept that the Act did not impose "a wider duty" than had previously been recognised. The appellants' argument does not depend, however, on our finding that the 1991 Act did "widen" the nature of the duty. The flaw in the Council's submission is, in our respectful view, the premise that the duty of care at common law at that time was limited to councils' supervision of the construction of houses and that they had no responsibilities at common law with respect to their approval of and supervision of the construction of other buildings.

[107] Accordingly, in our view, recognising a duty of care in respect of commercial buildings would not be contrary to previous authority in New Zealand or to the 1991 Act.

---

[132] We use hereafter the expression "inspecting authority" as a general term where, in relation to the point being made, either the relevant local authority or a building certifier could be involved.

Did the Court of Appeal in *Hamlin* restrict the duty of care to residential homes?

[108] A major plank of Mr Goddard's argument was that the Court of Appeal in *Hamlin* had restricted local authorities' liability to residential homes and that such liability was recognised as anomalous but apparently justified by the special circumstances to which Richardson J referred in his opinion in *Hamlin*. It would be quite wrong, Mr Goddard submitted, to extend the anomalous result: none of the factors Richardson J relied on as justification for continuing to recognise a duty of care applied to buildings other than residential homes.

[109] If the law in this area were truly anomalous, then an argument against extending the anomaly would have considerable attraction. This Court has already held, however, in *Sunset Terraces* that "the *Hamlin* duty" is not anomalous. It was satisfied *Hamlin* was rightly decided.[133] This unanimous finding is a rather unhelpful start to an argument based on an anomalous "*Hamlin* duty".

[110] Any discussion of the Court of Appeal's decision in *Hamlin* must start with the House of Lords' decision in *Murphy*. In that case, the House of Lords overruled *Dutton* and rejected the essential reasoning in *Anns.* The House of Lords held that local authorities owed no duty of care to avoid damage to property which causes present or imminent danger to the health and safety of owners or occupiers. In their Lordships' view, the law had gone down the wrong path for the past 18 years. It was *Murphy* reasoning which Mr Goddard sought to persuade this Court to adopt in *Sunset Terraces*.

[111] It was inevitable that local authorities in this country would attempt to capitalise on Brentwood District Council's success in England. *Hamlin* became a test case. The facts of the case were commonplace. Mr Hamlin purchased a section in 1972 and contracted a builder to erect a house upon it. The Invercargill City Council was the local authority. It issued the building permit and inspected the house during the course of construction. Subsequently cracking occurred. Eventually experts concluded that the foundations had not been laid in accordance

[133] At [6] per Elias CJ and at [24] per Tipping J.

with the approved plan. Mr Hamlin sued the Council for negligence on the part of its building inspector. The trial judge, Williamson J, found in favour of Mr Hamlin and awarded damages totalling $53,550, the greater part being for the estimated cost of repairs.[134]

[112] The Council appealed. Most of the argument in the Court of Appeal was concentrated on the Council's contention "that this Court should now alter the established New Zealand approach in the light of certain recent decisions of the House of Lords, more particularly *Murphy*".[135] The Court of Appeal sat as a Full Court of five judges. All five judges wrote their own opinions. Four found in Mr Hamlin's favour. The fifth, McKay J, found in the Council's favour on the basis of a limitation defence. One thing is quite clear from the five opinions: none of the Judges was minded to follow the *Murphy* reasoning and to overturn what was said to be "reasonably constant" authority in this country.[136] The Court would have been, however, fully alive to the likelihood that the Council, if it lost in the Court of Appeal, would appeal to the Privy Council. Given the near identical make-up of the House of Lords and the Privy Council, it was distinctly possible therefore that *Murphy*-type reasoning would be imposed on New Zealand by their Lordships.

[113] There were only three ways in which that outcome could be avoided. The first would be for the Court of Appeal to show that the *Murphy* reasoning was so flawed that the Privy Council/House of Lords would, if *Hamlin* went on appeal, do another volte-face, reject *Murphy* and reinstate the line of authority it had overruled. Such an outcome would have been recognised as extremely unlikely. *Murphy* after all had itself been a test case in England on which seven Law Lords had sat. In any event, its reasoning was not so obviously flawed as to justify a volte-face.

[114] The second possibility was to demonstrate that both strands of authority were defensible, with the consequence that different jurisdictions within the Commonwealth should be permitted to follow their own course. The Privy Council

---

134 *Hamlin v Bruce Stirling Ltd* [1993] 1 NZLR 374 (HC).

135 *Hamlin* (CA), above n 77, at 516 per Cooke P.

136 At 522 per Cooke P, at 527–528 per Richardson J, 529 per Casey J, at 533 per Gault J and at 545–546 per McKay J.

had recognised this possibility in *Australian Consolidated Press Ltd v Uren*[137] and had affirmed the possibility again in *Attorney-General for Hong Kong v Reid*.[138] We shall call this the "defensible reasoning" justification for not following *Murphy*.

[115] The third possibility was to point to such singular local conditions as to render the House of Lords' decision inapplicable. We shall call this the "local conditions" justification for not following *Murphy*.

[116] Cooke P's opinion essentially relied on defensible reasoning. He noted[139] that in *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd*,[140] all seven Judges of the Supreme Court of Canada considered the reasoning in *Murphy* and were agreed that it did not represent the law of Canada.[141] They preferred, what Cooke P termed, "the more pragmatic *Kamloops* approach".[142] The President noted that all five Judges sitting on the present appeal were similarly "unanimous in their view as to *Murphy*".[143] The President continued:[144]

> Naturally this is far from implying any disrespect for the opinions of the eminent English and Scottish Law Lords who sat in those cases.[145] There can be few lawyers who would not agree that the field is difficult and reasonably open to varying solutions. And national perspectives can differ. Although more extensively expounded, the general approach of the Canadian Supreme Court in this area seems, with respect, much the same as the approach followed in this Court over many years.

[117] The President went on to quote the Privy Council's decisions in *Australian Consolidated Press Ltd v Uren* and *Attorney-General for Hong Kong v Reid* and said:[146]

> While the disharmony may be regrettable, it is inevitable now that the Commonwealth jurisdictions have gone on their own paths without taking English decisions as the invariable starting point. The idea of a uniform common law has proved as unattainable as any ideal of a uniform civil law. It could not survive the independence of the United States; constitutional

---

137 *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 (PC).
138 *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 (PC) at 338–339.
139 *Hamlin* (CA), above n 77, at 522.
140 *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021.
141 At 1054, 1134, 1149 and 1167.
142 *Hamlin* (CA), above n 77, at 522.
143 At 522.
144 At 523.
145 The other case disapproved of was the House of Lords' decision in *Pirelli*, above n 97.
146 At 523.

> evolution in the Commonwealth has done the rest. What of course is both desirable and feasible, within the limits of judicial and professional time, is to take into account and learn from decisions in other jurisdictions. It behoves us in New Zealand to be assiduous in that respect.

[118] The President therefore considered New Zealand, like Canada, should continue along the path set out in *Bowen* and *Johnson*, which had followed *Dutton*. The principles in those cases, he said, had not been shown to have been "developed by processes of faulty reasoning" or "founded upon misconceptions".[147]

[119] The President's judgment built on the thinking set out in his famous article, "An Impossible Distinction", published in January 1991.[148] While Sir Robin was, for obvious reasons, cautious about expressing views on "a controversial legal issue" extra-judicially,[149] his defence of New Zealand authority in the face of *Murphy* is clear enough. And the point he makes by way of conclusion is, in our respectful view, as potent today as it was in 1991:[150]

> The point is simply that, prima facie, he who puts into the community an apparently sound and durable structure, intended for use in all probability by a succession of persons, should be expected to take reasonable care that it is reasonably fit for that use and does not mislead. He is not merely exercising his freedom as a citizen to pursue his own ends. He is constructing, exploiting or sanctioning something for the use of others. Unless compelling grounds to the contrary can be made out, and subject to reasonable limitations as to time or otherwise, the natural consequences of failure to take due care should be accepted.

[120] Richardson J adopted a different approach. He declined to follow *Murphy* (the reasoning of which he chose not to engage with at all) on the basis of "six distinctive and long-standing features of the New Zealand housing scene" in the 1970s and 1980s.[151] These features were, Richardson J said, "special to New Zealand of the times".[152] In other words, in this part of his opinion, he justified adhering to New Zealand law on the basis of local conditions.[153]

---

147 At 523.

148 Robin Cooke "An Impossible Distinction" (1991) 107 LQR 46.

149 He gives the reasons for overcoming his hesitation at 47.

150 At 70.

151 At 524.

152 At 525.

153 Cooke P, in a paragraph written after he had seen Richardson J's draft reasons, also adopted Richardson J's analysis (at 519) but it was very much subsidiary reasoning on his part.

[121] There was a second string to Richardson J's bow. He also relied significantly on the Law Commission's report on limitation defences,[154] the Building Industry Commission's report and the Building Act 1991. Both the reports and the statute proceeded on an assumption, Richardson J said, that New Zealand law on this topic, as developed by the Courts, was right. He said:[155]

> The point of all this is that over a period of ten years building controls were the subject of detailed consideration, quite dramatic changes in approach were taken reflecting a particular economic and philosophical perspective, but without questioning the duty of care which the New Zealand Courts have required of local authorities in this field. While it may be going too far to characterise the Building Act 1991 as a ringing legislative endorsement of the approach of the New Zealand Courts over the last 20 years, there is nothing in the recent legislative history to justify reconsideration by this Court of its previous decisions in this field.

[122] This reasoning is akin to the defensible reasoning which had appealed to Cooke P, bolstered importantly by the legislative imprimatur implicit in various provisions of the Building Act 1991.

[123] Casey J agreed with the reasons the President had given.[156] Later, however, he also agreed with Richardson J's local conditions analysis.[157]

[124] Gault J referred to neither the President's opinion nor Richardson J's. It is clear, however, that his Honour embraced both forms of reasoning. He also, like Richardson J, saw much significance in the enactment of the Building Act 1991. He said:[158]

> I further agree that if the law in New Zealand was regarded as unsatisfactory the opportunity would have been taken to rectify it when, after the decision in *Murphy v Brentwood District Council*, the Building Act 1991 was passed.

[125] As we have already indicated, the fifth judge, McKay J, would have found in favour of the Council on limitation grounds. In an obiter dictum, however, he indicated that, but for that conclusion, he would not have followed *Murphy* and would have continued to apply well-established New Zealand law. His conclusion

---

154 Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) at [69]–[99].
155 At 527.
156 At 529.
157 At 530.
158 At 534.

was very much based on local conditions reasoning,[159] although he also drew support from the fact that the Building Act appeared to be an endorsement of New Zealand law.[160]

[126] We have analysed the five judgments in some detail as there has been a tendency in many discussions of the case to treat the decision as if it were based solely on local conditions reasoning. That in turn has led to a focus on Richardson J's judgment, in particular to the exclusion of Cooke P's. The first limb of Richardson J's judgment was, of course, focused on the domestic housing situation in New Zealand. It was that part of his judgment which has led to the submission that the Court of Appeal accepted the reasoning in *Murphy* but nonetheless acknowledged an (anomalous) exception for liability for residential homes. That is a misreading of the views of the Court as a whole. The Court of Appeal did *not* accept the reasoning in *Murphy*, while acknowledging *Murphy*-type reasoning was one of the solutions possible in this area of the law. The Court of Appeal was supported in its rejection of *Murphy* in New Zealand by the fact Parliament had not sought to interfere with current New Zealand law when enacting the 1991 Act. The present importance of this Court's decision in *Sunset Terraces* is that it confirmed the correctness of the *Hamlin* Court of Appeal in choosing not to follow *Murphy*, just as Canada elected not to follow *Murphy*. This Court did not confirm the correctness of *Hamlin* on the basis of local conditions reasoning. It could not do so as Richardson J's "six features of the New Zealand housing scene" were scarcely applicable to the sorts of multi-level apartment buildings being built in the 1990s and this century.[161] Similarly, Canada's rejection of *Murphy* had nothing to do with local conditions in Canada; it was simply that the Supreme Court of Canada chose a different solution to the problems in this field.

---

159 At 546.

160 At 546.

161 Associate Professor Rosemary Tobin, in her article "Leaky Buildings and the Local Authority: The Tortious Solution and the *Hamlin* Conundrum" (2011) 17 NZBLQ 346, said, at 351: "One thing that is obvious is that the six factors identified by Richardson J do not withstand scrutiny today." We agree.

[127] This is precisely the point the Privy Council took in *Hamlin* when it upheld the Court of Appeal's decision. Their Lordships observed, in language very similar to Cooke P's:[162]

> The particular branch of the law of negligence with which the present appeal is concerned is especially unsuited for the imposition of a single monolithic solution. There are a number of reasons why this is so. The first and most obvious reason is that there is already a marked divergence of view among other common law jurisdictions.

[128] Lord Lloyd, writing for the Board, then referred to the Canadian approach in *Kamloops*, *Canadian National Railway* and *Winnipeg Condominium Corp No 36 v Bird Construction Co*[163] in which the Supreme Court of Canada had declined to follow *Murphy*.

[129] Lord Lloyd then turned to the position in Australia.[164] He referred to the High Court's decision in *Heyman* and noted that a lengthy passage from Brennan J's judgment in that case had been quoted with approval in *Murphy*. His Lordship went on:

> But ten years later Brennan J found himself in a minority of one when the High Court changed tack. In *Bryan v Maloney* (1995) 69 ALJR 375 it was held that a negligent builder was liable for economic loss suffered by a subsequent purchaser.

[130] Lord Lloyd noted that the High Court of Australia had rejected *Murphy* 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 is acceptable under the law of this country".[165]

[131] His Lordship then said:[166]

> Their Lordships cite these judgments in other common law jurisdictions not to cast any doubt on *Murphy*'s case, but rather to illustrate the point that in this branch of the law more than one view is possible: there is no single correct answer. In *Bryan v Maloney* the majority decision was based on the

---

162 *Hamlin* (PC), above n 100, at 520.

163 *Winnipeg Condominium Corp No 36 v Bird Construction Co* [1995] 1 SCR 85 at [30]–[34].

164 At 521.

165 At 521, citing *Bryan v Maloney* (1995) 182 CLR 609 at 629 per Mason CJ, Deane and Gaudron JJ.

166 At 521.

> twin concepts of assumption of responsibility and reliance by the subsequent purchaser. If that be a possible and indeed respectable view, it cannot be said that the decision of the Court of Appeal in the present case, based as it was on the same or very similar twin concepts, was reached by a process of faulty reasoning, or that the decision was based on some misconception: see *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590.

[132] That reasoning was on all fours with Cooke P's in the Court of Appeal.

[133] Lord Lloyd then noted the view of "Richardson J and McKay J in their judgment in the court below … that to change New Zealand law so as to make it comply with *Murphy's* case would have 'significant community implications' and would require a 'major attitudinal shift'", a view he considered " would be rash for the Board to ignore".[167] Finally, the Board referred to the 1991 Act. As already referred to above,[168] the Privy Council thought it inappropriate to bring New Zealand law into line with *Murphy* when the New Zealand Parliament had not chosen to do so.

[134] The effect of the Court of Appeal's and the Privy Council's decisions in *Hamlin* was to confirm pre-*Murphy* New Zealand law and to permit New Zealand courts to continue to apply the reasoning of the New Zealand case law of the 1970s and 1980s in preference to *Murphy* reasoning. The Privy Council did not regard that earlier New Zealand reasoning as anomalous. On the contrary, they expressly stated the New Zealand view, shared by the highest courts in Canada and Australia, was *not* "a process of faulty reasoning" or "based on some misconception".

[135] The duty of care owed by those responsible for the construction or supervision of the erection of buildings was never expressly or implicitly confined to residential homes. The submission to the contrary involves a concentration on one part of Richardson J's reasoning in *Hamlin.* It fails to recognise the more fundamental point that the Privy Council endorsed as "respectable" the view that the law of negligence could be used to compensate building owners for economic loss sustained through latent defects in a building for which defendants (which might include local authorities) had responsibility.

---

167 At 521.

168 See at [102]–[104] above.

Have courts, when squarely faced with an argument that the duty should be extended to commercial buildings, generally rejected the proposition?

[136] Mr Goddard's next argument was that courts, both here and overseas, when squarely faced with an argument that the duty of care should be extended to commercial buildings, have generally rejected the proposition.

[137] It is inherent within this proposition that the duty of care, as developed by courts throughout the Commonwealth, has been confined to residential homes. Based on this premise, Mr Goddard argued against *an incremental extension* of the duty so as to embrace mixed-use buildings, like Spencer on Byron, and other commercial buildings. He developed various arguments as to why such an incremental extension would be unsound in policy terms. But for reasons already given, we cannot accept the premise on which this argument is based.

[138] Before looking at what the New Zealand Court of Appeal has held on this topic, we turn first to overseas jurisdictions in order to assess whether Mr Goddard's submission is correct.

England

[139] Obviously no help on this issue is forthcoming from England as in that jurisdiction *Murphy* precludes the finding of a duty of care with respect to any type of building.

Canada

[140] In Canada, as Mr Goddard acknowledged, the courts have drawn no distinction between residential properties and commercial properties so far as the relevant duty of care is concerned. There have been cases in Canada of negligence

claims in respect of defective commercial properties. We gave an example above.[169] Associate Professor Tobin, in her article on this topic, gives others.[170] We would also add *Privest Properties Ltd v Foundation Co of Canada Ltd*,[171] where the owners of a large retail/commercial complex in downtown Vancouver sued, among others, the installers and manufacturers of a fire-proofing agent used in the construction of the building. The claim in negligence failed on the facts, but that is of course irrelevant for current purposes.

[141] Mr Goddard effectively invited us to ignore Canadian authority as "not helpful" because of the nature of the duty of care the Canadian courts have developed. Mr Goddard submitted that Canada had kept tortious liability within bounds by adopting another mechanism, namely by restricting local authorities' and contractors' duties of care "to avoid *dangerous* defects". He strongly cautioned against the New Zealand courts taking that route.

[142] We have five comments to make about that submission. First, the important point for present purposes is that Canada has not drawn a distinction between residential buildings and commercial buildings. To that extent Canadian authority supports the appellants on this appeal.

[143] Secondly, the submission presupposes that some form of limitation on local authorities' responsibility must be found. But why? The Building Act draws no distinction between the functions and the responsibilities of local authorities depending on the nature of the type of building.[172] If Parliament drew no distinction, why should the courts?

[144] Thirdly, Professor Stephen Todd has pointed out that Canadian case law is not completely consistent in any event in its adherence to a "dangerous defects"

---

169 See at [95] above.

170 Tobin, above n 161, at 358 and fn 72. She cites the following cases: *Caromar Sales Ltd v Urban Design Group Architects* 2001 BCSC 1408, (2001) 13 CLR (3d) 61, *Sable Offshore Energy Inc v Ameron International Corp* 2007 NSCA 70, (2007) 61 CLR (3d) 173, and *Valley Agricultural Society v Behlen Industries Inc* 2003 MBQB 51, (2003) 225 DLR (4th) 357; rev'd 2004 MBCA 80, (2004) 241 DLR (4th) 169.

171 *Privest Properties Ltd v Foundation Co of Canada Ltd* [1997] 5 WWR 265 (BCCA).

172 Of course the building code draws a distinction as to how different buildings must be erected, but that is a different issue.

doctrine. He said in his enlightening article, "Policy Issues in Defective Property Cases", with respect to the position in Canada:[173]

> Interestingly, the decision in *Winnipeg* does not give any particular significance to the commercial context in which the duty question arose. So builders creating potentially dangerous defects can owe a duty to commercial claimants in the same way as to private owners living in their dwellings. The decision leaves open the question whether contractors should be liable for the cost of repairing non-dangerous defects, and later determinations of lower courts have given varied answers where the element of dangerousness has been in issue. Some courts have allowed a claim, or at least have refused a striking out application, where the defect was not dangerous. But others have insisted that real and substantial danger be shown, although not that the danger should be imminent.

[145] Fourthly, sometimes Canadian courts have circumvented the "dangerous defects" doctrine by use of what has sometimes been called the "complex structure" theory. The theory appears to have been articulated for the first time by the House of Lords in *D & F Estates Ltd v Church Commissioners for England*.[174] Their Lordships, edging towards the coup de grâce to *Anns* to be administered in *Murphy*, held that financial loss was not recoverable in negligence, but 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 of a building 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. "Complex structure" thinking can be seen, for instance, in cases like *Rychter v Isle of Mann Construction Ltd*.[175] Truscott J refused to strike out a claim against a contractor on the basis it owed no duty of care. A water pipe in a house came apart and caused water damage to other parts of the residence. The house owner sued the contractor in negligence. While the defect was not dangerous, the Judge held that the pipe was a "defective item" separate from the rest of the structure, with the consequence that it was arguable a duty of care arose.[176]

---

173 Stephen Todd "Policy Issues in Defective Property Cases" in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds) *Emerging Issues in Tort Law* (Hart Publishing, Oxford, 2007) 199 at 207 (footnotes omitted).

174 *D & F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177 (HL) at 206–207 and 214.

175 *Rychter v Isle of Mann Construction Ltd* 2011 BCSC 1502.

176 At [47]–[50].

[146] Fifthly, New Zealand has never drawn the Canadian distinction between dangerous defects and other defects in buildings. The nature of the duty of care owed by councils is fully explained in this Court's decision in *Sunset Terraces*. The duty is limited to councils' "functions and duties" under the Building Act 1991,[177] and in particular its duty "to enforce the provisions of the building code and regulations".[178] Since, as Mr Goddard submitted, nearly all of the provisions in the building code are designed to ensure health and safety, it may well be that the outcome in practice is not much different in New Zealand from the position in Canada under the "dangerous defects" test.

The United States

[147] The United States provides little guidance on this issue. As Mr Goddard correctly submitted, "the United States position is complex". The starting point in the United States, according to Professor David Partlett, in a paper cited to us by Mr Goddard, is "the economic loss rule", which prevents "recovery in tort for loss that is purely financial rather than damage to person or property".[179] The professor points out that the United States Supreme Court has never considered a defective building case.[180] Courts at state level have in some cases applied the economic loss rule rigorously, while other courts have carved out exceptions to it, exceptions not always consistent with each other. State legislatures have also become involved, with the needs of home owners being seen as requiring particular protection. Professor Partlett says:[181]

> So various and inconsistent is the United States case law on defective property that the approaches taken in England, Australia, Canada and New Zealand can all be found somewhere in the kaleidoscope. Many jurisdictions impose a duty of care on builders and other professionals outside contract to promote professional accountability. Florida recognises professional malpractice as an exception to the economic loss doctrine, and has applied it specifically to inspection engineers who were not in privity with the homeowner.

---

177 See Building Act 1991, s 24.
178 Section 24(e).
179 David Partlett "Defective Structures and Economic Loss in the United States: Law and Policy" in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds) *Emerging Issues in Tort Law* (Hart Publishing, Oxford, 2007) 233 at 234.
180 At 236.
181 At 242 (footnote omitted).

Australia

[148] Mr Goddard placed strong reliance on the High Court's decision in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*.[182] In that case, an engineer had 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 new owner brought proceedings in negligence against the engineer. The High Court held by a majority (Gleeson CJ, Gummow, Hayne and Heydon JJ) that the engineer owed no duty of care to the owner.[183]

[149] This decision is to be contrasted with the High Court's earlier decision in *Bryan v Maloney*[184] where, as we have said,[185] the Court held that a builder did owe a duty of care with respect to the economic loss suffered by the owner of a residential home. The High Court in *Woolcock Street* did not expressly overrule *Bryan*.

[150] At first blush, the two decisions, when contrasted in this way, do appear to provide support for Mr Goddard's submission of a dividing line between liability for residential buildings and non-liability for all others. But on closer examination it will be found that the decisions do not provide support for that proposition.

[151] As we have already noted,[186] the High Court of Australia was from the start sceptical of *Dutton* and *Anns*-style reasoning and rejected the idea that those involved in the construction of buildings owed a duty of care with respect to those affected. Its decision in *Heyman* to that effect was influential in the House of Lords' volte-face in *Murphy*.[187] Then in *Bryan v Maloney*, the High Court, to use the Privy Council's words in *Hamlin*, "changed tack"[188] and held that a builder did owe a duty of care and could be liable for economic loss suffered by a subsequent purchaser.

---

182 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, (2004) 216 CLR 515.
183 McHugh and Callinan JJ delivered concurring judgments. Kirby J dissented.
184 *Bryan v Maloney*, above n 165.
185 At [129]–[131] above.
186 See at [96] above.
187 The House of Lords cited *Heyman* in *Murphy*, above n 73, at 466–467 per Lord Keith, at 473-474 and 481 per Lord Bridge and at 485 per Lord Oliver.
188 *Hamlin* (PC), above n 100, at 521.

[152] It is arguable *Bryan* settled only the responsibility of builders in tort, leaving *Heyman* as the controlling authority for councils' responsibilities in tort. For instance, that appears to be the view of a leading Australian text.[189] We do not share that view. The Privy Council in *Hamlin* clearly thought *Bryan* was applicable to local authorities and represented a change of tack from *Heyman*. The *Bryan* majority, in reaching their view, cited a number of authorities involving the responsibilities of councils.[190] Even if we are wrong about that, however, it does not assist the Council in this case. If *Heyman* continues to represent the law relating to councils' liability, then the conclusion would be that Australia remains, so far as local authorities are concerned, in the *Murphy* camp with respect to all buildings.

[153] The current status of *Bryan*, in light of *Woolcock Street*, is unclear. Professor Todd, with commendable understatement, says the majority's reasoning in *Woolcock Street* "can hardly be read as a ringing affirmation of *Bryan v Maloney*" and thinks "their Honours would be receptive to arguments directly challenging it, but for the time being, the decision stands".[191] But one thing is clear: the majority thought adopting a policy which involved drawing a distinction between dwellings and other buildings would be difficult. They said:

> [17] First, for the reasons given earlier, it may be doubted that the decision in *Bryan v Maloney* should be understood as depending upon drawing a bright line between cases concerning the construction of dwellings and cases concerning the construction of other building. If it were to be understood as attempting to draw such a line, it would turn out to be far from bright, straight, clearly defined, or even clearly definable. As has been pointed out subsequently,[192] some buildings are used for mixed purposes: shop and dwelling; dwelling and commercial art gallery; general practitioner's surgery and residence. Some high-rise apartment blocks are built in ways not very different from high-rise office towers. The original owner of a high-rise apartment block may be a large commercial enterprise. The list of difficulties in distinguishing between dwellings and other buildings could be extended.

[154] So the case is not authority for drawing a dividing line between residential buildings and other buildings, the dividing line which Mr Goddard has urged on

---

189 RP Balkin and JLR Davis *Law of Torts* (4th ed, LexisNexis Butterworths, Chatswood (NSW), 2009) at [13.64]–[13.72].

190 See, for example, at 628–630.

191 Todd, above n 173, at 205.

192 See for example, *Zumpano v Montagnese* [1997] 2 VR 525 (SC) at 528–529 per Brooking JA.

us.[193] Rather, the majority seem to have adopted a middle course between *Murphy*-type reasoning and *Anns*-type reasoning.[194] The majority appear to have adopted the position that a duty of care to avoid economic loss may be owed provided the plaintiff can show he or she was vulnerable. The majority described the concept of "vulnerability" in these terms:[195]

> "Vulnerability" in this context, is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, "vulnerability" is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant.

[155] Woolcock Street's statement of claim was struck out because:[196]

> Neither the facts alleged in the statement of claim nor those set out in the Case Stated show that the appellant was, in any relevant sense, vulnerable to the economic consequences of any negligence of the respondents in the design of their foundations for the building. Those facts do not show that the appellant could not have protected itself against the economic loss it alleges it has suffered.

[156] No one urged the "vulnerability" solution on this Court in *Sunset Terraces*; indeed, this Court did not refer to *Woolcock Street* in its reasons for judgment. With respect to the High Court, we do not think this concept should be introduced into New Zealand law. The High Court's test will, we suspect, prove to be difficult to apply. In *Sunset Terraces*, this Court thought it crucial that the duty of care in this area "be capable of reasonably clear and consistent administration".[197]

[157] Finally, we note Kirby J's dissent. He would have allowed Woolcock Street to proceed to trial. His reasoning might be termed *Anns*-type reasoning. He noted

---

193 See, in this regard, the useful article of Tracey Carver "Beyond *Bryan*: Builders' Liability and Pure Economic Loss" (2005) 29 Melbourne University Law Review 270 at 290–291.

194 We use the expression "*Anns*-type reasoning" as shorthand for the underlying reasoning followed to date in Canada and New Zealand.

195 At [23] (footnote omitted).

196 At [31].

197 At [49].

that the majority's decision in the case would put Australia out of step with much overseas authority.[198] He referred to the position in Canada[199] and New Zealand.[200] He also observed that Malaysia and Singapore had also declined to follow *Murphy*.[201] He described the majority's conclusion as an "unfortunate misstep in the development of the law".[202]

[158] For these reasons, we do not consider the Australian authorities help Mr Goddard's argument.

New Zealand

[159] Finally we come to New Zealand. We hope we will not be considered discourteous to the High Court if we limit our discussion to Court of Appeal authority.

[160] Before we discuss the three relevant cases, we wish to make clear that in none of them did the Court of Appeal have the extensive help we have had on the present appeal. Nor in the first two of the cases did the Court of Appeal have the benefit of reading this Court's decision in *Sunset Terraces*. The fact the Court of Appeal was to some extent flying blind means that we can be relatively brief in our discussion of the three cases. We of course are starting from the position unanimously reached in *Sunset Terraces*.

[161] The first case dealing with councils' liability in respect of commercial buildings was *Te Mata*. The facts of *Te Mata* can be briefly stated. Te Mata

---

198 At [190] per Kirby J. The majority did not consider it necessary to look at overseas authority because, they said, Woolcock Street had not contended "that principles of a kind which have found favour in other jurisdictions should now be adopted in Australia": at [34]. That was because, of course, the appellant was relying on *Bryan*. The appellant no doubt had not anticipated the treatment *Bryan* was to receive!

199 At [186].

200 At [187].

201 At [188] citing, with respect to Malaysia, *Dr Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants* [1997] 3 MLJ 546 (HC) and *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon* [2003] 1 MLJ 567 (CA) and, with respect to Singapore, *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1995] 1 SGCA 79, [1996] 1 SLR 113 and *RSP Architects Planners & Engineers v Management Corporation Strata Title Plan No 1075* [1999] SGCA 30, [1999] 2 SLR 449.

202 At [189].

Properties Ltd and Te Mata Village Properties Ltd bought two motels at Havelock North in 2002 and then discovered that each suffered from what has become known as leaky building syndrome. Te Mata sued, among others, the Hastings District Council for the cost of remedial works, the loss of value of the property, consequential losses and general damages. Te Mata claimed the Council was negligent in performing its obligations under the Building Act 1991, including the grant of building permits, inspection of construction and issue of certificates of compliance with the building code. Williams J struck out Te Mata's claim on the ground that the Council was under no obligation to it.[203] Te Mata appealed. The Court of Appeal divided. O'Regan and Robertson JJ supported dismissal of the appeal. Baragwanath J, while critical of Te Mata's pleadings, would have allowed Te Mata to replead.[204]

[162] The majority's reasoning was briefly stated. Essentially they considered *Hamlin* to be an anomaly which should not be extended. Its underpinning rationale, they said, was "the need to protect vulnerable home owners from economic loss".[205] That reasoning is inconsistent with what this Court later held in *Sunset Terraces*. The underpinning rationale of the duty of care in this area is the need to provide encouragement to those responsible for the construction of buildings to use reasonable care in their respective tasks within that overall undertaking. Councils, operating under the Building Act 1991, were under a statutory duty to enforce the provisions of the building code. The law of negligence stands behind this statutory duty by providing compensation should the Council contribute to breaches of the building code through careless acts or omissions in supervising construction.

[163] Ever since *Dutton*, the courts, in those jurisdictions which have approved *Dutton*-style reasoning, have been concerned to protect two interests. One interest is the habitation interest of those who use buildings. Undisputedly that is one of the aims of the building code. Baragwanath J referred to this as "the interests of habitation and health".[206] The majority in the Court of Appeal were not prepared to

---

203 *Te Mata Properties Ltd v Hastings District Council* HC Napier CIV-2004-441-151, 17 August 2007.
204 *Te Mata*, above n 68.
205 At [84].
206 At [57].

recognise that interest, which they said "was not part of this case".[207] The majority appear to have thought this interest had not only not been pleaded but *could not be* an interest protected by negligence, as they were not prepared to sanction the repleading Baragwanath J advocated. We respectfully disagree with the majority's reasoning on this point. This Court in *Sunset Terraces* recognised the health and safety interest, which it rephrased in these terms:[208]

> The duty affirmed in *Hamlin* is designed to protect the interests citizens have in their homes.

[164] In context this was a shorthand way of referring to health and safety interests, as well as associated economic interests. The reference to "in their homes" simply reflects the fact that the Court was consciously limiting its discussion to the issue of whether a duty of care should be owed in respect of residential buildings. As we have already discussed, the Court was at pains to leave open whether the duty encompassed all buildings. That the expression "the interests citizens have in their homes" was intended to include the interests of citizens in being safe and healthy was made clear several paragraphs further on, in a passage to which Mr Farmer returned, quite appropriately, again and again:[209]

> Protection of a non-owner occupant, such as a tenant, can be achieved only through a duty owed to the owner, as it is only the owner whose pocket is damaged as a result of the negligence of the building inspector. It is only the owner who can undertake the necessary remedial action.

[165] The non-owner occupant of premises has no economic interest requiring protection; his or her interest is in health and safety. It is the owner who has the responsibility to occupants to make sure the premises are safe and healthy. If the premises are not safe and healthy because of the negligence of others, then it is to those others the owner should be able to turn for appropriate compensation.

[166] The second interest the negligence action in this area is intended to support is the economic interest of owners in their property. The majority in *Te Mata* did recognise this interest although they considered the duty restricted to "vulnerable

---

207 At [85].
208 At [49] (footnote omitted).
209 At [53].

home owners".[210] It is not clear what the majority meant by "vulnerable". Perhaps they were using the term in the technical sense in which the term was used in *Woolcock Street*, although they did not cite that case and their formulation of the duty does not accord with the majority's position in that case. We suspect in context they were referring to the owners of modest homes.[211] This Court in *Sunset Terraces* was later to dispose of a similar argument in these terms:[212]

> As we have already mentioned, Mr Goddard argued that the duty recognised in *Hamlin* should apply only to single stand-alone modest dwellings whose owners personally occupied them. But that, in our view, would be an unpersuasive restriction on the duty, quite apart from the difficulty of having to decide when a dwelling was more than modest.

[167] Accordingly, while the majority were correct to recognise that the duty in this area was intended to protect property owners from economic loss, they were not correct in concluding it was limited to "vulnerable home owners".

[168] Baragwanath J was obviously troubled by the arbitrariness of the majority's position. He said, for instance:

> [62] I have reflected with care on the contrary opinion of the respected authority Professor Todd. He argues that the dissenting view of Kirby J in *Woolcock Street* should be endorsed, on the basis that there is no principled distinction between domestic dwellings and commercial premises ("Policy Issues in Defective Property Cases" in Neyers, Chamberlain and Pitel, *Emerging Issues in Tort Law* (2007), p 228). We accept his logic but not his conclusion.

[169] As will be apparent, we accept Professor Todd's logic and his conclusion.[213] Baragwanath J appears to have rejected Professor Todd's conclusion on the basis that *Hamlin* was exceptional and justified because of "the public interest in secure habitation".[214] It appears he considered there could not be such an interest with respect to motels "where the habitation is for much shorter periods, including overnight".[215] We find it impossible to accept the logic of that distinction. A person

---

210 At [84].
211 Mr Goddard acted for the Council in *Te Mata.*
212 At [47] per Tipping J. See also at [7] per Elias CJ.
213 Professor Todd thought the duty of care should be owed in respect of all buildings: Todd, above n 173, at 228. See also Stephen Todd "Difficulties with Leaky Building Litigation" (2012) 20 Tort L Rev 19 at 26.
214 At [62].
215 At [64].

staying the night in a motel has as much interest in the walls not collapsing on him during the night from a hidden defect in construction as the occupier of a home has. The building code does not tolerate lower health and safety standards for commercial buildings than pertain to residential buildings. The motel owner has as much responsibility to ensure the safety and health of motel users as the house owner has to ensure the health and safety of house occupiers.

[170] Baragwanath J then approached the question of health and safety from a different viewpoint. He noted that under the Building Act buildings are intended generally to have a 50 year life.[216] He said:

> [77] It is in my opinion arguable that the public interest in ensuring that the building stock meets the 50-year life span warrants a cause of action founded squarely on the statutory health and safety considerations.

[171] Our views are not dissimilar to Baragwanath J's in that we think the building code was essentially designed to bring about safe and healthy buildings. Whether recognising that requires a new or independent cause of action is where we respectfully differ from him. In our view, the existing cause of action is itself "founded squarely on the statutory health and safety considerations". If a building is constructed otherwise than in compliance with the building code, it will almost certainly not be a safe and healthy building. Mr Goddard was correct, as we have said, in his submission on the overall thrust of the 1991 reform. The national building code, which replaced individual councils' by-laws, was pared back to what Parliament considered to be the essential requirements for health and safety.

[172] Accordingly, while we do not agree with all of Baragwanath J's reasoning, we certainly consider he was on the right track. Had he had the benefit of the argument we heard and the benefit of *Sunset Terraces* as his springboard, we suspect he might well have come to a conclusion very similar to ours.

[173] We now turn to the second case, *Charterhall*.[217] Charterhall built and later operated a luxury lodge at Blanket Bay on Lake Wakatipu. Queenstown Lakes District Council granted a building consent, carried out inspections during

---

[216] Building Act 1991, s 39.
[217] *Charterhall*, above n 65.

construction and, on completion of construction, issued a code compliance certificate. On 1 December 2003 a fire occurred. Hot embers from an open fireplace came into contact with unprotected timber in a tower of the lodge. Because of the fire the lodge had to close while remedial work was undertaken. Charterhall then sued its architects and the Council, alleging the fire occurred owing to a defect in the design. Charterhall contended the drawings did not comply with the building code. The Council applied to have the claim against it struck out on the basis that it did not owe a duty of care to owners of commercial buildings. The Court of Appeal acceded to the Council's application and struck out Charterhall's statement of claim against the Council.

[174] *Charterhall* does not really advance matters for the Council in this case. The case was indistinguishable from *Te Mata*.[218] Charterhall's counsel had not submitted the Court should overrule *Te Mata*; rather, what was attempted was a circumvention of *Te Mata* via the "health and safety" cause of action Baragwanath J had suggested. In any event, it would not have been appropriate for the Court of Appeal to have overruled such a recent decision of the Court.[219]

[175] The attempt by Charterhall's counsel to circumvent *Te Mata* was doomed to failure, as the majority in *Te Mata* did not accept Baragwanath J's new cause of action. As Baragwanath J said, while he would have given *Te Mata* leave to replead, the majority opinion meant "that amendment could make no difference",[220] with the consequence that the claim had to be struck out.

[176] The Court of Appeal also considered that Charterhall's claim must fail because the cause of action was not intended to protect owners' economic interest in their property. Charterhall did not sue, the Court of Appeal noted, "as a person whose health and safety [had] been jeopardised".[221] Such an approach is inconsistent with this Court's decision in *Sunset Terraces*, where the Court held "investor" owners could sue and where the Court further held that all owners could

---

218 At [40].

219 Overruling would not have been consistent with the principles set out in *R v Chilton* [2006] 2 NZLR 341 (CA) at [66]–[101].

220 At [79].

221 At [42].

sue for the cost of undertaking remedial action needed to ensure the health and safety of non-owner occupants.[222]

[177] The third case is the decision under appeal. It needs no discussion because, as we have said, counsel had agreed, for the purposes of the hearing in the Court of Appeal, that "the decisions in *Charterhall* and *Te Mata* represent good law and local authorities do not owe the *Hamlin* duty of care to owners of commercial properties".[223] The thinking behind counsel's agreement is important. Counsel were at the time of the hearing in the Court of Appeal awaiting this Court's decision in *Sunset Terraces*. It was possible that would be a king hit for the Council if this Court were to adopt *Murphy*-type reasoning, as Mr Goddard had urged. Counsel on neither side wanted to waste time and money relitigating that point in the Court of Appeal. At the same time, counsel recognised that the Court of Appeal was not the appropriate forum for challenging the correctness of *Te Mata* and *Charterhall*. Rather, counsel wanted to test which side of the residential-commercial dividing line a mixed-use building came. Almost certainly counsel on both sides recognised the case was destined for this Court unless Mr Goddard scored his king hit in *Sunset Terraces*.

[178] The argument as presented in the Court of Appeal was "all or nothing".[224] That is to say, the owners contended that the presence of *some* residential apartments meant that all owners could sue, regardless of the characterisation of their particular units. The Council contended that, because the building was predominantly non-residential, no one could sue. The majority went along with counsel's agreement and accepted the Council's submissions. Harrison J rebelled and considered an "all or nothing" conclusion unacceptable.[225] But that was the focus of the argument in the Court of Appeal. No one was arguing there, because of earlier binding authority, that the nature of the units was irrelevant to whether a council owed a duty of care.

[179] We note that, after the hearing in the Court of Appeal but before delivery of the judgment, this Court's decision in *Sunset Terraces* was released. Counsel told us

---

222 At [53].
223 *Spencer on Byron* (CA), above n 66, at [25(c)].
224 At [25(d)].
225 At [33].

that the Court of Appeal did not call for further submissions. Presumably that was because the Court of Appeal recognised the decision was not a king hit. Our decision expressly left open whether a duty of care should be owed in respect of commercial buildings. Accordingly, at least the majority thought it made sense to proceed on the basis counsel had agreed and on the "all or nothing" approach.

[180] Finally, for the sake of completeness, we refer to *Attorney-General v Carter*,[226] a case on which Mr Goddard strongly relied in support of a proposition that the law of negligence had turned its face against recognising liability for economic loss. Neil Carter and Irene Wright bought a ship, the *Nivanga*. At the time of purchase the ship had certificates of survey issued under s 217 of the Shipping and Seaman Act 1952. Mr Carter and Ms Wright claimed that the survey certificates had been issued negligently in that the condition of the *Nivanga* at the relevant times did not justify their issue. They sued for their financial losses on the purchase. The Court of Appeal held the issuing authorities were not under a duty of care when issuing the certificates. We distinguish *Carter*: it involved different legislation. *Carter* is not the case to which to turn for "first principles" in this area, as Mr Goddard submitted. Our starting point is *Sunset Terraces* and the line of authority which it confirmed, notably *Dutton*, *Bowen* and *Hamlin*.

[181] From the above analysis, it will be seen that we consider Mr Goddard's submission to be overstated. Different jurisdictions have reached different conclusions but no other jurisdiction has adopted a position of drawing the dividing line between residential buildings on the one hand and all other buildings on the other. In so far as that division appealed to the Court of Appeal in *Te Mata*, we consider that Court to have been in error.

Should we, for policy reasons, restrict the duty of care to residential homes?

[182] What we have established so far is that the reasoning behind the leading New Zealand cases (*Bowen*, *Hamlin* and *Sunset Terraces*) is supportive of a duty of care being owed in respect of all buildings. We have also confirmed that the courts in this country have rejected *Murphy*-type thinking. It is true, however, that neither

[226] *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

this Court nor the Privy Council has, up to now, ever had to grapple with the issue of a defective commercial building. It would be possible for us to determine that, notwithstanding the general reasoning which has found favour in this country, the duty of care should, for policy reasons, be restricted to residential homes.

[183] Before considering Mr Goddard's policy factors, we make two points about how New Zealand courts approach novel negligence claims. We can be brief because this Court has just recently in *North Shore City Council v Attorney-General* (*BIA*) surveyed in some depth the different formulations courts in New Zealand and overseas have adopted when faced with apparently novel situations.[227]

[184] The first point is to note that this Court reiterated that, while it is impossible to state "any single general principle to provide a practical test which can be applied to every situation,"[228] the focus has always been in New Zealand "on two broad fields of inquiry".[229] Cooke P articulated these in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*,[230] a judgment cited since on countless occasions. In shorthand form, those two "fields of inquiry" can be summarised as proximity/foreseeability of harm on the one hand and policy factors going to the fairness and justice of the claimed duty of care on the other. This Court's analysis in *BIA* perhaps refined to some extent what Cooke P had said but there was nothing new in what was suggested so far as methodology was concerned.[231] Importantly, this Court approved the following caution Cooke P had stated:[232]

> Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formulae be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.

---

227 *North Shore City Council v Attorney-General* [2012] NZSC 49 [*BIA*] at [147]–[161].

228 At [150].

229 At [149].

230 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*, above n 72.

231 That is not to deny *BIA*'s status as "seminal" and as potentially "in time … the leading authority on the duty of care in New Zealand": Andrew Barker "One test to rule them all" (2012) 190 NZLawyer 14 at 14.

232 At 294, cited with approval in *BIA*, above n 227, at [161].

[185] The second point to note is that nearly all the relevant factors were analysed in *Sunset Terraces*. Most of the factors there discussed apply equally in the residential building situation and the commercial building situation. For example, as a result of *Sunset Terraces*, we consider there can be no doubt about the proximity of the relationship between the appellants and the Council. The focus must be on whether there are factors "external to that relationship"[233] which would render the proposed duty of care unfair or unreasonable in the slightly different situation of the construction of commercial buildings.

[186] We have already discussed some of Mr Goddard's policy factors in the discussion above. We shall not repeat ourselves by relisting them in this section of these reasons. There are, however, eight factors we think require discussion here.

Councils do not protect financial interests

[187] A key theme of Mr Goddard's submission was that "the focus of the council's regulatory role [was] to protect the health and safety of building users, not to protect the financial interests of building owners". He continued: "Commercial building owners cannot reasonably rely on councils to protect the value of their investments." This submission is really an attack on the reasoning of *Sunset Terraces* and the earlier New Zealand authority it affirmed. Mr Goddard's submission reflects *Murphy*-type reasoning, which this jurisdiction, in common with others, has respectfully chosen not to follow. We have said that the protection of financial interests is secondary. A building which is constructed otherwise than in accordance with the building code will, arising from that fact, not be safe and healthy (as we are using that term) or, at the least, be at risk from a safety and health viewpoint. Because of the owner's responsibility towards users of the building, the owner is bound to repair. If the cause of the non-compliance can be attributed to the negligence of one or more of those responsible for the construction of the building, then it is appropriate they (including a council, if responsible) should contribute to the cost of repair. This Court settled this point in *Sunset Terraces*.[234] This reasoning

---

233 *BIA*, above n 227, at [160].

234 At [47] per Tipping J. See also at [7] per Elias CJ. See also the discussion above at [163] and [164].

applies with as much force to the owners of commercial buildings as it does to the owners of residential homes.

No free warranties

[188] Mr Goddard submitted that in general the tort of negligence is not intended to provide compensation for economic loss. If a person wants protection against economic loss, he or she should in general have to buy that protection. Warranties of quality should not come free via the imposition of a duty of care in tort. *Hamlin* and now *Sunset Terraces* provided an exception to that general proposition in the case of residential homes, but the anomaly should not be extended further. Commercial building owners have the ability to protect their own interests and to contract for such advice and such warranties as they are willing to pay for.

[189] We do not accept that proposition. First, the imposition of a duty of care is not the equivalent of the imposition of a warranty. As Sir Robin Cooke made clear in "An Impossible Distinction", New Zealand law has never gone so far as to impose "strict or absolute liability based on building byelaws".[235]

[190] Secondly, neither councils nor building certifiers provided their services free. Mr Goddard's submission would mean that those commissioning the construction of a building, despite paying a fee, would be entitled to none of the protection against negligence a client normally contracting with a professional would expect. Indeed, the suggestion would appear to cut across s 57(2), which, at least in the case of a building certifier, prohibited the certifier from attempting to limit his or her civil liability.[236] Traditionally the owner's claim was brought in tort rather than contract but nothing turned on that (other than the start of the limitation period). Intriguingly, Parliament decreed that any claim against a building certifier had to be brought in tort, not contract.[237] It could not have been intended that councils were to be in a better position than building certifiers when performing the same statutory functions as them.

---

235 Cooke, above n 148, at 48.

236 There is no equivalent provision with respect to local authorities. Perhaps it was thought they would not attempt to limit their liability.

237 Section 90.

[191] Since New Zealand law in this area has never drawn a distinction between the first owner and subsequent owners (at least those who purchase without knowledge of the defect), it is hard to see why the latter, just because they have not contracted with the inspecting authority, should be put in a different position from the original owner so far as tort liability is concerned. In any event, even though subsequent purchasers may not directly pay for the services of the inspecting authority, indirectly the cost of inspecting services gets built into the general level of prices for properties.

[192] Thirdly, as Mr Farmer pointed out, it is simplistic to say that those proposing to purchase commercial buildings can obtain warranties as to quality. It is unrealistic to think that the unit title owner of level 12 of a 20 storey building would be prepared to give a warranty as to the overall state of the building. He or she simply will not know the condition of all the other units; it would be impossible often for him or her to find out the information. It makes more sense economically for liability to fall on those responsible for negligent construction, including, where appropriate, the inspecting authority which saw the building under construction and was therefore in a position to prevent defective construction occurring.

Cutting across contractual liability

[193] It is said that recognising a duty of care in the case of commercial buildings, which are likely to be much more complicated structures than residential homes, would cut across contractual relationships the developer has put in place. We disagree. Recognising a duty in tort does not in any way cut across contractual obligations the inspecting authority assumed towards the first owner who employed their services. No one can be party to the construction of a building which does not comply with the building code. The duty in tort imposes no higher duty than that: for example, the inspecting authority is not responsible for ensuring the building is constructed in accordance with the plans and specifications, which will inevitably go beyond building code requirements. Obligations in tort, whether of the inspecting authority or of any supervising architect or engineer, will be limited to the exercise of reasonable care with a view to ensuring compliance with the building code.

[194] Thus, these cases do not give rise to the kinds of issues which arose in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*,[238] a case cited by Mr Goddard. That was a case in which Carter Holt was attempting to argue that Rolls-Royce was under a duty to it in tort to take reasonable care to perform a contract between Rolls-Royce and the Electricity Corporation of New Zealand Ltd, a proposition the Court of Appeal rejected. The obligation falling on inspecting authorities is quite different. It marches hand-in-hand with its statutory obligation and requires of the inspecting authority no more than Parliament has imposed.

Architects and engineers

[195] Allied to the previous point is Mr Goddard's submission that those developing commercial buildings are much more likely than those building residential homes to "retain architects and engineers to manage … risks". As a matter of fact, that may be so, but this Court dealt with a similar proposition in *Sunset Terraces* and rejected the relevance of the involvement of other professionals in the construction.[239]

Reliance and vulnerability

[196] Mr Goddard submitted that commercial building owners were "not vulnerable vis-à-vis the council" unlike residential home owners. Accordingly, it could not be said that they reasonably relied on inspecting authorities in the way residential home owners did.

[197] We do not accept the proposition that, as a matter of policy, home owners as a class should be assumed vulnerable or naive while the owners of commercial properties are not. Indeed, the proposition is self-evidently wrong, as many home owners are very sophisticated and wealthy, well able to bargain for warranties of quality if that is what the law should be. Mr Goddard accepted that was so as a matter of fact, but submitted the effect of *Hamlin* and *Sunset Terraces* was to deem residential owners a vulnerable and naive class worthy of special protection. On this

---

238 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).
239 At [8] per Elias CJ and at [50] per Tipping J.

argument, sophisticated and wealthy home owners get from tort a windfall advantage they do not really deserve. While they are getting a windfall, a truly naive purchaser of a defective dairy in a country town gets no protection from tort law, simply because that owner falls on the wrong side of the residential-commercial dividing line.[240]

[198] We do not accept the assumptions underlying this argument. It does not make much sense for the law to assume all home owners are vulnerable and naive and to assume the owners of commercial buildings are wealthy and sophisticated. Many owners of commercial buildings, deemed as such to be wealthy and sophisticated, will also be, of course, home owners, where they are apparently to be deemed vulnerable and naive. The assumptions have too many exceptions to make them safe assumptions on which to build a legal policy.

[199] We also consider the linkage between alleged vulnerability and reliance to be misplaced. Reliance has only a limited role to play in the tort of negligence, as opposed to the tort of negligent misstatement, where (specific) reliance is an essential feature in the chain of causation. Reliance is mentioned in the Court of Appeal's decision in *Hamlin*, but in a quite different context. What the Court of Appeal was facing in *Hamlin* was an argument that the law had taken a wrong turn and that New Zealand should follow *Murphy*. The Court of Appeal was not minded to do that. And one of the reasons why they did not think New Zealand should change course was that for two decades New Zealanders (and their lawyers) had got used to a legal regime under which local authorities could be liable for negligence if their building inspectors carried out their professional duties negligently. This reliance on the existing state of the law – which the Court thought might well have influenced behaviour over the previous 20 years – was an important *policy factor* for *not changing the law*. That policy factor was important whether one was following local conditions reasoning or a defensible reasoning approach or a mixture of the

---

[240] The line of authority supporting a residential-commercial dividing line "does not explain in any satisfactory way why the local authority will owe a duty to the owners of the residential apartments in the multi-story apartment building, but not to the owners of the multi-story office complex: a leaky building will put the health of the occupants of both complexes at risk. In the same way it does not explain why a duty is owed to the owner of the $10 million residential house, but not the owner of a small two-unit motel": Tobin, above n 161, at 364.

two. Some have since interpreted *Hamlin* as if, in some vague way, it introduced an element of reliance into the tort. It did not.

[200] In *Sunset Terraces*, the question of whether councils should be liable was again under attack. The Council in that case tried to persuade this Court to turn the clock back and to follow *Murphy*. Just as in 1994, it was appropriate that this Court, when determining *policy*, should take into account the fact that for well over 30 years New Zealanders had relied on a legal system which provided for local authority liability for negligent inspection.[241] So once again reliance was relevant to the policy discussion in that case.

[201] In the present case, the concept of reliance has only a small role to play in the policy analysis. What we have attempted to show is that until *Hamlin* no one thought of drawing a distinction between homes and other buildings. Until *Te Mata* in the Court of Appeal, no one would have been clear that commercial buildings might not be covered. To that extent, New Zealanders, until *Te Mata*, would have relied on a state of the law which provided for local authority liability in respect of inspection services, probably no matter what kind of building was being inspected. We accept that the "reliance" was much weaker with respect to commercial buildings because no New Zealand case, at least at appellate level, had expressly permitted recovery other than for a home. So it is a weak policy factor in the present case – but that is all it is, a policy factor. A plaintiff does not have to prove reliance as an element in the tort.[242]

Transferring costs to ratepayers

[202] Mr Goddard submitted that widening the net to embrace commercial properties would result in the "transfer [of] hundreds of millions, if not billions, of dollars of losses from commercial building owners to ratepayers, including, rather ironically, whoever currently lives in Mr Hamlin's … modest home in Invercargill".

---

241 *Sunset Terraces*, above n 70, at [23] per Tipping J: "Hundreds, if not thousands, of people must in the meantime have relied upon the proposition that the 1991 Act had not affected the common law position [that liability did lie against councils for negligent inspections]."

242 See, to similar effect, Stephen Todd "Torts" [2012] NZ L Rev 373 at 388.

This would be, Mr Goddard said, "an odd social value judgment". This is a more elegant version of the floodgates argument.

[203] The submission is, with respect, loaded with assumptions. We do not know whether the figures are even remotely correct. If they are, then it suggests local authorities have generally been lax in carrying out their statutory function of securing compliance with the building code. Secondly, inherent within the proposition is the assumption previously discussed that all commercial building owners are wealthy and sophisticated while home owners are poor and vulnerable. The burden is not being shifted to ratepayers but rather to councils, whose financial backing is much greater than virtually all commercial building owners. Local authorities may, in the event their officers are negligent, meet liabilities from insurance (if available), the income generated by carrying out inspection work, or, in the last resort, rates. Everybody contributes to rates, whether directly or indirectly. Since everybody uses buildings, everybody gains the benefit if, by imposition of a duty in tort, buildings are rendered safer and healthier.

[204] Further, the submission appears to assume that local authorities have to meet the cost of remedying defects entirely on their own. Usually they will be sharing liability with others. We acknowledge in some cases builders and others involved in the construction process have gone bankrupt or into liquidation by the time defects manifest themselves. But that is not always the case. The policy of the law in this area should not be determined from an assumption that the local authority stands alone as defendant. If this is a concern, then legislative action to create a form of builders guarantee scheme might be a solution.

Making inspectors cautious

[205] Mr Goddard submitted Mr Farmer was wrong to suggest that imposing liability on councils in relation to commercial buildings would encourage the maintenance of standards. On the contrary, he said, making councils liable was "more likely to result in excessive caution when performing [their statutory] functions". There may be something in this point, although excessive caution would seem preferable to the laxness which has contributed to the leaky building disaster.

But this is really an argument against the imposition of any duty of care in the building area. This Court in *Sunset Terraces* did not accept that policy argument.

Line-drawing

[206] The final factor is in a slightly different category from the previous seven. Mr Farmer in his submissions set out a number of practical examples of mixed-use buildings where, he said, it would be extremely difficult to work out whether the building should be classified as a residential home (where, on the Council's argument, a duty of care would apply) or a commercial building (where a duty of care would not lie). Even if a "bright line" could be devised, anomalies would result. The present case typified the sorts of anomalies which might result. On the Council's argument, it is simply bad luck that the apartment owners miss out on cover. They should have bought their apartments, apparently, in a 23 floor block of apartments. The result is even more anomalous than that. Some of the units which were originally leased to the hotel have now reverted to being residential homes. But those owners too cannot sue the Council, even on Harrison J's halfway-house approach.

[207] Mr Goddard responded to this submission by suggesting an easy method of line-drawing. He pointed to the fact that, when Charco applied for a building consent, it described the building as "New Commercial/Industrial". Mr Goddard referred to the seven categories of buildings set out in cl A1 of the building code.[243] The seven categories were: housing; communal residential; communal non-residential; commercial; industrial; outbuildings; and ancillary. Only the first ("housing") would apparently attract a duty of care.

[208] We do not accept this approach to line-drawing is either principled or workable. For a start, it is a misuse of the building code categories. The fact the building code contains categories at all is not something Parliament approved when

[243] The building code constituted the First Schedule of the Building Regulations 1992.

passing the 1991 Act. Parliament, by s 48, delegated to the executive the power to draft the building code.[244] It would be unprincipled for the courts to formulate who should or should not get tort cover by reference to an executive document, in circumstances where Parliament gave no hint that it expected differentiation in tort liability based on the type of building.

[209] Further, the executive never intended its categories to have any function other than that of prescribing what functional requirements and what performance characteristics particular buildings had to achieve. The purpose of the categorisation had nothing to do with the circumstances in which a local authority should be liable in tort.

[210] Mr Goddard appeared to suggest that the relevant local authority's categorisation would be definitive. He seemed to envisage that a prospective purchaser would go and inspect the council's building consent. Only if it recorded the "intended use" as "housing" would the prospective purchaser know the council owed a duty of care. If any other "intended use" was recorded, the prospective purchaser would apparently know he or she needed to satisfy himself or herself as to quality by other means. Mr Goddard did not tell us what the answer would be if two or more uses were recorded, one of which was "housing". That two or more uses (categories) could be recorded is clear from reg 3(2) – and indeed we see it in this case, the uses having been described as "commercial/industrial".

[211] Presumably the ultimate decision as to building categorisation lay with the inspecting authority. It seems decidedly odd to permit the entity potentially subject to a duty of care to choose the building category. The temptation on an inspecting authority or certifier, on this thesis, to categorise a building other than as "housing" would be strong. Presumably, Mr Goddard would say, there must be some "good

---

[244] We accept, of course, that Parliament would have been aware of the general nature of the proposed building code from the Building Industry Commission report.

faith" requirement. But the chance of miscategorisation is not theoretical: it seems strongly arguable it has occurred in this case.[245]

[212] It is clear from the definition of "building" in s 3 of the Act and from reg 3(2) of the Building Regulations that different parts of a building may have different categorisations and further that different parts may have more than one categorisation. We think it strongly arguable that Spencer on Byron has been incorrectly categorised as "commercial/industrial". The top two floors arguably should have been categorised as "housing", "flats" and "multi-unit apartments" being given as examples of this category. Most of the building would appear to be "communal residential", an example of which is a "hotel". Arguably the garage area of the building came within the "outbuildings" category. The two categories that, in fact, seem *inapposite* on the definitions provided are "commercial" and "industrial".

[213] The above analysis of the categorisation of this building is not meant to be definitive. If it is relevant at all, it will be a trial matter. We mention it only to demonstrate that reliance on the inspecting authorities' categorisation of use has significant difficulty. Of course, no line-drawing is required for tort purposes on the law as we have outlined it.

[214] We accept that other courts and judges could reasonably evaluate the policy factors differently from us. We have not been satisfied, however, that it would be just and reasonable to restrict the duty of care to residential buildings.

Conclusion on negligence cause of action

[215] Tipping J concluded the majority opinion in *Sunset Terraces* as follows:

> [85] It may be helpful to summarise here the principal conclusions to which we have come:

---

[245] We are not suggesting the North Shore City Council succumbed to the temptation mentioned. It would not have occurred to them in 2000 that by selecting the building categories they were choosing whether or not they would owe a duty of care in tort.

(1) We have declined to review the law as confirmed by the Privy Council in the *Hamlin* case, and have decided that *Hamlin* was, in any event, correctly decided.

(2) Councils owe a duty of care in their inspection role to owners, both original and subsequent, of premises designed to be used as homes.

(3) Subsequent purchasers of such premises are not barred from suing for beach of the duty owed to them by reason of the cause of action having accrued to a predecessor in title.

[216] The effect of this decision is to remove the qualification to proposition (2), namely "designed to be used as homes". The duty of care is owed regardless of the nature of the premises.

[217] This decision, like *Sunset Terraces*, is restricted to work done by councils while the Building Act 1991 was in force. The Building Act 2004 came into force on a variety of dates; for the most part on 31 March 2005.[246] It is likely that the conclusions we have reached in this decision will also apply under the 2004 Act, but we reserve our position in that regard as we have not had detailed argument as to the effect that Act may have had in the area under discussion here.

[218] We should also add that the duty of care imposed by the general law on councils would also be imposed on building certifiers, where, under the 1991 Act, owners elected to have inspection work carried out by such certifiers rather than the local council. Obviously too the shorthand reference to councils' "inspection role" is intended to cover their obligations in granting building consents and code compliance certificates.

Negligent misstatement

[219] As we have said, some of the owners also brought a claim under the tort of negligent misstatement. In essence, these owners asserted that they had relied on the Council's code compliance certificates when deciding to purchase their units. The Court of Appeal struck out this cause of action as well.

---

[246] See s 2.

[220] Counsel spent little time on this cause of action. That is because it really adds nothing. If a council owes a duty of care when inspecting the construction of a building, as this Court has held in *Sunset Terraces* and now here, then a negligent misstatement cause of action will bring no additional relief to those affected by the negligence.[247] Indeed, all it may do is put an additional hurdle in the plaintiff's way. Negligent misstatement has traditionally required, among other things, the plaintiff to demonstrate he or she relied on the defendant's statement. The pure negligence action in this area has never required the plaintiff (property owner) to establish actual reliance on the council. The property owner, for instance, does not have to prove that he or she went to look at council records and assured himself or herself that a code compliance certificate had been given. An owner has been able to recover loss sustained by the council's negligence whether or not the owner checked council records before purchasing. This Court made that clear in *Sunset Terraces*:[248]

> The duty is owed and (if such be the case) breached at the time of the relevant inspection or its absence.

[221] On the other hand, if we had held that local authorities were not under a duty of care when inspecting (other than in respect of residential buildings), then plaintiffs could not circumvent such a conclusion by asserting actual reliance on a code compliance certificate. If a council owed no duty of care when inspecting, then the fact it recorded the outcome of its inspection in a certificate could not impose an obligation by way of the tort of negligent misstatement. If councils assume no responsibility with respect to commercial buildings, they cannot be held liable through the back door. An essential element of the tort of negligent misstatement is that the person making the statement has assumed responsibility for that statement.

[222] The code compliance certificate regime is nonetheless of relevance in this case. Parliament clearly initiated this scheme so that everyone with an interest in a particular building, whether as owner, prospective owner or user, could check the extent to which the erection of the building was undertaken in compliance with the building code. Mr Goddard submitted the certificate was provided only for the benefit of Charco. We do not accept that submission. The certificates have a

---

[247] The plaintiffs in this case claim exactly the same relief in the two causes of action.
[248] At [61].

continuing purpose of providing information on how a building was constructed, a matter not easily ascertained once a building is completed. One of the primary purposes of code compliance certificates is to provide assurance to building users that the building was built properly and accordingly does not have hidden defects. The fact that Parliament provided that all construction was to be subject to the code compliance certificate regime and that such certificates were to be publicly available strongly suggests that Parliament assumed inspecting authorities' liability for negligent error was not to hinge on the nature of the particular building being constructed.

[223] It follows that the negligent misstatement cause of action should not have been struck out. The owners may well consider, however, whether they need to continue with it, given that it adds nothing to their cause of action in negligence.

Result

[224] For these reasons, we allow the owners' appeal. They may continue their claim against the (former) North Shore City Council.[249] Mr Farmer provided us with a proposed draft statement of claim should the appeal succeed. While we did not receive detailed submissions concerning it, the negligence cause of action does appear to be properly pleaded. Paragraph 37, which sets out the factors said to justify the imposition of a duty of care, now becomes superfluous. Paragraph 38 sets out what the owners contend the Council did negligently. We express no view as to whether the alleged negligent errors have been adequately particularised. There is no need to plead that the breach in fact caused damage to health or safety. Paragraph 39 then sets out the losses allegedly suffered as a result of the Council's negligence. We make only two comments on that. First, the Council's responsibility is limited to the exercise of reasonable care solely with respect to construction in accordance with the building code. Secondly, some of the owners, after the defects became apparent, sold their units, having disclosed to the purchasers the defects.

---

[249] No amendment to the proceedings is required, as the Auckland Council assumes responsibility for any liability of the former North Shore City Council: see s 35(1) of the Local Government (Tamaki Makaurau Reorganisation) Act 2009.

They thereby suffered, they allege, loss by diminution of the sale price. This Court held in *Sunset Terraces* that such losses would be recoverable.[250]

[225] In accordance with normal principles, costs must follow the event in this Court. Costs orders in the High Court and the Court of Appeal will need to be revisited in light of the outcome in this Court.

WILLIAM YOUNG J

Table of Contents

	Para No
Summary of my views	[226]
Preliminaries	
Judicial formulations of the test of imposition of a duty of care	[228]
A comment on policy	[232]
A comment on economic loss	[241]
The early cases in which duties of care were imposed	
The rationale on which liability was imposed	[245]
Policy considerations	[249]
The initial move away from *Anns* in England and the Australian and the New Zealand responses	[262]
Further developments in England	[271]
Hamlin	
The legal context in which the case was decided	[273]
The judgments in Hamlin *in the Court of Appeal*	[278]
Hamlin *in the Privy Council*	[283]
***Hamlin* and *Sunset Terraces* in the context of the 1991 Act**	
Hamlin	[284]
The existing authorities and the principles they establish	[293]
The relationship between commercial and industrial building owners and territorial authorities	[296]
The rationale and the rule	[297]
Is it practical to draw a distinction between residential buildings and other buildings?	[300]
Cutting across contractual allocation of responsibility and risk	[302]
The 2004 Act and likely changes of the building control regime	[306]
Broader policy assessments	[309]
This case	[317]

[250] See situation 2 in [67].

Summary of my views

[226] I am of the view that territorial authorities do not owe a duty of care in relation to non-residential buildings. This is for reasons which, in summary, are as follows:

(a) The early defective building cases[251] in which duties of care were imposed on territorial authorities and builders rested on the view that manifestations of defective construction (for instance, subsidence due to faulty foundations) involve property damage for the purpose of the principles established in *Donoghue v Stevenson*.[252] On this basis, the statutory functions of territorial authorities and the likelihood of loss if these functions were not diligently performed established a prima facie duty of care.

(b) By 1994, when *Hamlin*[253] was decided in the Court of Appeal, the imposition of duties of care could no longer be sustained on this basis. It was by then generally (albeit not universally) accepted that the manifestations of faulty construction were not physical damage in the sense contemplated by Lord Atkin in *Donoghue v Stevenson*[254] and it was also recognised that foreseeability of loss did not in itself warrant a conclusion that proximity was established.

(c) Accordingly, when the New Zealand Court of Appeal decided in *Hamlin* to persist with existing duties of care associated with defective buildings, it was necessary to reformulate the rationale for their imposition. The reformulation which followed was expressly confined to houses and to considerations referable to houses. And because

---

[251] By which I mean *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA); *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA); *Anns v Merton London Borough Council* [1978] AC 728 (HL); and *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

[252] *Donoghue v Stevenson* [1932] AC 562 (HL) at 580.

[253] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA).

[254] *Donoghue*, above n 252.

foreseeability was no longer in itself sufficient to warrant the imposition of a duty, reliance (both general reliance and what I will describe as second-order reliance[255]) was pressed into service.

(d) *Hamlin* was rightly decided (in relation to the pre-1991 building control regime) as was *Sunset Terraces*[256] (in relation to the 1991 Building Act) and are justified on the bases of foreseeability and reliance (both general and second-order).

(e) An extension of this duty to commercial buildings would be wrong.

[227] I differ from the approach favoured by the majority in the following critical respects:

(a) They conclude, very much as a matter of course, that proximity is established, a conclusion which is based on their interpretation of *Hamlin* with the added consideration in respect of the original owner, that he or she will have paid fees to the Council for its services.[257] As will become apparent, I disagree with their interpretation of *Hamlin*. I am also of the opinion that the primary responsibility for complying with the Building Act rests with the building owner[258] who, if in default, is not well-placed to blame the territorial authority. This is all the more so if the territorial authority has relied on producer statements provided by the building owner's engineer, architect and builder.[259] If a duty of care is owed, the fees charged will presumably be correspondingly greater than if no such duty applies (and vice versa). So the fact that fees are paid is not controlling.

(b) McGrath and Chambers JJ's conclusions as to proximity are reinforced by a survey of the cases prior to 1991 (which is when the Building Act

---

255 A concept which I will explain in context later: see [280] below.

256 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

257 At [20] per Elias CJ, at [28] per Tipping J and at [190] per McGrath and Chambers JJ.

258 This is now explicitly provided for by s 14B of the Building Act 2004.

259 I discuss producer statements below at [311]–[314].

came into effect) which, as they show, did not distinguish between residential and other buildings. This is because those cases proceeded on a broad view of *Donoghue v Stevenson* and on the premise that foreseeability of loss warranted a conclusion of proximity. On this basis, there was no occasion to distinguish between different types of buildings. However:

(i) For the last 20 years or so, New Zealand courts have rejected the direct applicability of *Donoghue v Stevenson* in cases not involving personal injury or property damage; and

(ii) When the Court of Appeal decided *Hamlin* in favour of the plaintiff, it was not on the basis of the reasoning which underpinned the old cases. Rather it was by reference to a paradigm of reliance which was explained in ways confined to residential buildings and is not easily extendable to commercial and industrial buildings.

(c) For those reasons, and others which will become apparent (including my reservations as to underlying policy considerations and incongruity with the general pattern of the current New Zealand law of negligence), I am of the view that proximity is not established.

Preliminaries

Judicial formulations of the test for the imposition of a duty of care

[228] The obvious starting point for any discussion as to the circumstances in which a duty of care may be imposed is the speech of Lord Atkin in *Donoghue v Stevenson*:[260]

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or

[260] *Donoghue*, above n 252, at 580.

> omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

When Lord Atkin came to apply that approach to the case at hand, he held:[261]

> [A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

[229] The high-water mark (in terms of expansiveness) of the English jurisprudence is the speech of Lord Wilberforce in *Anns v Merton London Borough Council* and, in particular, this statement of principle:[262]

> Through the trilogy of cases in this House – *Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v Home Offic*e [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: ... .

[230] Lord Wilberforce's speech was sometimes interpreted very broadly as the following extract from the judgment of Woodhouse J in *Scott Group Ltd v Macfarlane* demonstrates:[263]

> [T]he metaphorical implications of proximity which are carried by the word "neighbour" when it is used in relation to a duty of care are illuminating only for the purpose of considering the relevance of particular relationships in that wider social sense. If it is applied too literally I think it becomes inhibiting because the area of responsibility seems to be limited to the more physical or

---

261 At 599.

262 *Anns*, above n 251, at 751–752.

263 *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 (CA) at 574.

> immediate relationships; and at the same time there seems to be a legitimate if not a logical reason for restricting compensation to the more tangible effects of negligent conduct. In this regard it will be noticed that although the first part of the inquiry outlined by Lord Wilberforce [in *Anns*] is to ask whether "there is a sufficient relationship of proximity" in order to decide whether there is a prima facie duty of care, he would test the sufficiency of proximity simply by the reasonable contemplation of likely harm. And, with respect, I do not think there is any need for or any sound reason in favour of a more restrictive approach. The issue has been made increasingly complex by the successive and varying formulas that have been used in an effort to confine the general area of responsibility, in particular for negligent words or in respect of purely economic losses. At this initial stage at least it should be possible to remove some degree of uncertainty – in my opinion it is done by the comprehensible and straightforward test of foreseeability.

[231] The modern New Zealand position was first comprehensively stated in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*[264] and was recently restated by this Court in the *Building Industry Authority* case (*BIA*).[265] New Zealand courts continue to adopt a two stage process, which in structure may seem similar to the test propounded by Lord Wilberforce, but requires more than foreseeability of loss to establish proximity. All of this is explained in *BIA*:

> [157] Where the person who has suffered an injury or loss asserts that the defendant owed a duty of care in a novel situation – one which falls outside an established category – it will naturally remain necessary to satisfy the court that the loss was a reasonably foreseeable consequence of the plaintiff's act or omission. But that will rarely, if ever, be determinative in such cases. ... Foreseeability is in such novel cases at best a screening mechanism, to exclude claims which must obviously fail because no reasonable person in the shoes of the defendant would have foreseen the loss. The law would then regard the loss as such an unlikely result of the plaintiff's act or omission that it would not be fair to impose liability even if that act or omission were actually a cause, or even the sole cause, of the loss.
>
> [158] Assuming foreseeability is established in a novel situation, the court must then address the more difficult question of whether the foreseeable loss occurred within a relationship that was sufficiently proximate. ... An examination of proximity requires the court to consider the closeness of the connection between the parties. It is, to paraphrase Professor Todd, a means of identifying whether the defendant was someone most appropriately placed to take care in the avoidance of damage to the plaintiff.
>
> [159] Richardson J has observed that the concept of proximity enables the balancing of the moral claims of the parties: the plaintiff's claim for compensation for avoidable harm and the defendant's claim to be protected

---

264 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA).

265 *North Shore City Council v Attorney-General* [2012] NZSC 49 [*BIA*].

> from an undue burden of legal responsibility. A particular concern will be whether a finding of liability will create disproportion between the defendant's carelessness and the actual form of loss suffered by the plaintiff. Another concern is whether it will expose the defendant and others in the position of the defendant to an indeterminate liability. The latter consideration may, however, be better examined at the second stage of the inquiry: whether the finding of a duty of care will lead to similar claims from other persons who have suffered, or will in the future suffer, losses of the same kind, but who may not presently be able to be identified.
>
> [160] In a relatively small number of cases, at the final stage of the inquiry the court will find no duty of care exists notwithstanding that the loss was foreseeable and the relationship sufficiently proximate. It will do so because a factor or factors external to that relationship (perhaps indeterminate liability) would make it not fair, just and reasonable to impose the claimed duty of care on the defendant. At this last stage of the inquiry the court looks beyond the parties and assesses any wider effects of its decision on society and on the law generally. Issues such as the capacity of each party to insure against the liability, the likely behaviour of other potential defendants in reaction to the decision, and the consistency of imposition of liability with the legal system more generally may arise.
>
> (footnotes omitted)

A comment on policy

[232] Policy considerations can come into play at both the first and second stages of the exercise. At the first stage, they will be addressed to the nature of the relationship between plaintiff and defendant while those which fall for consideration at the second stage are more general.[266] Some may have to be considered at both stages. At the first stage, the assessment is for the purpose of deciding whether proximity is established. At the second stage, the issue tends to be expressed the other way round – that is, whether there are any reasons not to impose a duty of care despite proximity having been established.[267] Applied formalistically, this two stage process could result in an outcome that favours either the plaintiff or defendant depending on whether uncertainties associated with a particular policy consideration are addressed at the first or second stage.[268] But so long as courts keep steadily in

---

266 See also *Cooper v Hobart* [2001] 3 SCR 537 at [23]–[30].

267 This is not always the case. For example, Lord Denning in *Dutton*, above n 251, at 397 approached policy as a free-standing issue, thus raising the question: "what is the best policy for the law to adopt?".

268 If addressed at the first stage, such uncertainties might tell against the imposition of a duty but, if dealt with at the second stage, they might result in the conclusion that a prima facie duty is not excluded by the underlying policy considerations because of the associated uncertainties.

mind the ultimate question – namely, whether it is fair, just and reasonable to impose a duty – perversity of outcome should be avoidable.

[233] In novel-duty cases, as in other cases, judges proceed by reference to existing authorities and established legal principles. But the nature of novel-duty cases is that existing authorities and legal principles do not always provide a clear answer one way or the other. So policy must necessarily be addressed.

[234] Sometimes the policy considerations that arise are very legal in nature – so much so that perhaps they could be described as high-level principles – and are often associated with the consistency or otherwise of the proposed duty of care with other aspects of the legal system. So, for example, where the proposed duty relates to the dissemination of reputational information, the court will have to decide whether recognition of the duty would unacceptably cut across the law of defamation.[269] In a statutory context, the court may have to determine whether the imposition of a duty is inconsistent with the overall statutory scheme.[270] And another issue which has arisen acutely in defective building cases is whether recognising a duty of care owed by builders to subsequent purchasers unacceptably cuts across contractual relationships. Policy considerations of this sort are well within the competence of the judiciary and are not problematical.

[235] Courts are also required to address policy arguments of a different character. These relate to the broad, although usually unarticulated,[271] question whether, from the viewpoint of society as a whole, a rule (which I will call Rule A) that there is a duty of care is better than a rule (Rule B) that there is no such duty (or vice versa). This is more awkward. The court will be required to balance incommensurables, for instance, the personal predicament and needs of the plaintiff (which are likely to favour the adoption of Rule A) as against broader systemic and financial considerations (which may support Rule B). This tends to involve value judgments

---

269 Illustrative cases are *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (CA) at 156; and *Spring v Guardian Assurance Plc* [1995] 2 AC 296 (HL). See also *South Pacific Manufacturing Co Ltd*, above n 264, at 298–299.

270 See *South Pacific Manufacturing Co Ltd*, above n 264, at 297–298.

271 Though it is not always unarticulated, see the way Lord Denning posed the issue in *Dutton*, above n 251, at 390: "Never before has an action of this kind been brought before our courts. ... We have been treated to a wide-ranging argument well presented on both sides. … In the end it will be found to be a question of policy which we, as judges, have to decide."

of a kind which judges prefer to (although cannot always) avoid. As well, and perhaps more importantly, judges are not well-placed to assess competing policy arguments. This last point warrants brief elaboration.

[236] Seventy years ago, Professor KC Davis in his well known article, "An Approach to Problems of Evidence in the Administrative Process"[272] drew a distinction between "adjudicative facts" – which relate to what is directly in dispute between the parties – and "legislative facts" – addressed to policy considerations, such as, for instance, the way in which a particular rule operates as compared to how a differently formulated rule might operate. There has been some debate both in the cases[273] and the literature[274] as to how the courts can properly and effectively deal with legislative facts. Of course, the usual close examination of the facts associated with the particular case at hand which occurs at trial may throw some light on wider policy considerations.[275] As well, it may be open for a party to lead (in the sense of calling witnesses) evidence which bears directly on policy.[276] More generally, however, I think that argument as to legislative fact is not required to be based on evidence of the kind necessary to establish adjudicative fact. Rather it is open to counsel and the courts to address such arguments on the basis of whatever relevant material, including published studies and the like, are available.[277]

---

272 KC Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 Harv L Rev 364.

273 In *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA): a strike-out appeal in a case concerning alleged negligence as to (a) the approval of an adoption and (b) the failure to follow up on a later complaint that the plaintiff was not being well-looked after, where the then John McGrath QC sought to adduce evidence in the Court of Appeal as to the resources and responsibilities of the Social Welfare Department and social work practices and accountabilities. Although the evidence was rejected, it was clearly seen as being of a kind which might be relevant at trial. This Court addressed the topic in *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [9] per Elias CJ, [50] per Blanchard J, [132]–[133] per Tipping J and [230]–[232] per McGrath J.

274 As to this, I think it sufficient to refer to Justice Heydon's article, "How the courts develop commercial law by looking outside the trial record into the external world" [2012] LMCLQ 30.

275 A point explained by Heydon, above n 274, at 35.

276 In *Perrett v Collins* [1998] 2 Lloyd's Rep 255 (CA) at 277, Buxton LJ noted that the defendant (which provided aircraft certifying services under delegated statutory powers) had not led evidence to the effect that it would withdraw from the field if found liable in relation to an aviation accident resulting from negligent certification. The inference to be drawn from that comment is that such evidence could have been admissible even though directed solely to the question whether a duty of care was owed and not the actual factual controversy before the court.

277 I take this from *Hansen*, above n 273, particularly observation (ii) at 2.

[237] But allowing full scope for the development of legislative fact arguments, the courts remain badly placed to determine policy issues. Such issues tend to lie outside core judicial competencies. As well, the rules as to the determination of civil litigation do not provide for the sort of policy-formation exercises which are customary in other areas of public life, for instance the commissioning of empirical research, consultation with stakeholders, the publication of exposure drafts and the like.[278] As well, available material bearing closely on the policy considerations in issue in a case may be thin on the ground. By way of illustration of this, there is – at least to my knowledge – very little published research which analyses the responses of public authorities to the imposition of novel duties of care.[279] Unsurprisingly therefore, in deciding whether the imposition of a duty of care will be a "good thing" (for instance as incentivising better performance of public functions) or a "bad thing" (as encouraging overly defensive official conduct and wasteful litigation), judges often rely on what can be no more than hunches.[280] Such hunches may be right, particularly where they relate to issues closely associated with the way in which civil litigation is conducted and its expense.[281] But in relation to other issues, such hunches are quite likely to be wrong, a proposition which I think may be exemplified by defective building cases, as I will indicate shortly.

[238] As I have noted, the question whether Rule A is better than Rule B (or vice versa) is usually unarticulated. Most judges would see a direct choice between Rule A and Rule B based solely on policy considerations as unacceptably legislative in nature. In any event, the occasion for such a choice hardly ever, if ever, arises. Courts never start with a clean slate. There will always be a pattern of existing authority and principle which must be addressed. A decision to reject a duty of care usually proceeds on the basis that because Rule A cannot be justified on the basis of the existing authorities and established principle, it should be rejected (with any

---

278 Compare the comment in *McLoughlin v O'Brian* [1983] 1 AC 410 (HL) at 431 per Lord Scarman that issues of "social, economic, and financial policy" are "not justiciable" as they are not "capable of being handled within the limits of the forensic process".

279 An exception is John Hartshorne, Nicholas Smith and Rosemarie Everton "'*Caparo* under Fire': A Study into the Effects upon the Fire Service of Liability in Negligence" (2000) 63 MLR 502.

280 Cherie Booth and Daniel Squires *The Negligence Liability of Public Authorities* (Oxford University Press, Oxford, 2006) at [4.99]–[4.100] refers to a number of House of Lords decisions where novel duties were rejected on policy grounds and academic criticism to the effect that the policy assessments involved were simply "hunches".

281 Judges, by reason of professional background and experience, are better placed than most to assess such issues.

change of the law being left for the legislature). If the decision is to recognise a duty of care, the court will usually conclude Rule A is supported by authority and principle and should therefore be adopted unless excluded by compelling policy considerations.

[239] The point I have just discussed is illustrated by this case:

(a) The majority proceed broadly on the basis that proximity is established largely on the basis of the existing authorities resulting in the imposition of a duty of care unless it is excluded on policy grounds. On this approach, uncertainty as to where the balance of the policy considerations lies is likely to be resolved against the defendant (because such uncertainty does not admit of the conclusion that the duty should be excluded), and the duty is thus imposed.

(b) In contradistinction, I am of the opinion that the case is not within existing authority, a view which is based primarily on my analysis of what was decided in *Hamlin*. My conclusion that proximity is not established is also contributed to by my sense that the experience the judiciary has of the duty in relation to residential buildings does not enable us to assess accurately what may be the considerable, and not necessarily beneficial, impact of the proposed extension. On my approach, uncertainties as to policy tell against the imposition of a duty.

[240] Policy can come into the picture in other less formal ways. As will become apparent, I am sceptical (and I think more so than the majority) about the utility of actions for negligence as a mechanism for addressing the consequences, and mitigating the risks, of defective building practices,[282] particularly given the systemic and polycentric nature of the problem.[283] I believe that the availability of what, at best, is a clumsy, uncertain and expensive remedy in negligence may have

---

[282] I have in mind the usual problems associated with (a) the need to prove negligence against a solvent defendant (not a problem so far with territorial authorities but rather awkward where building certifiers were involved); (b) limitation periods which may mean a claim becomes barred before the defects become apparent; and (c) the costs and delays associated with litigation.

[283] On this point I agree with the comments of Arnold J in the Court of Appeal in *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] 3 NZLR 486 at [206]–[215].

blunted – and will continue to blunt – what would otherwise have been seen as the need to come up with more efficient loss-avoidance (and possibly loss-spreading) mechanisms, a point to which I will revert shortly. I also consider that there is a substantial risk, albeit one that this Court is not well-placed to assess, that the extension of the duty of care to non-residential buildings may produce inefficiencies and other adverse behavioural consequences which may outweigh any societal benefits. So it is fair to acknowledge that my approach, as just noted in [239](b), is affected by policy concerns in a rather broader way than that bare summary, taken alone, might suggest.

A comment on economic loss

[241] It is right that everyone should to take reasonable care not to damage the person or property of others. This is why Lord Atkin's speech in *Donoghue v Stevenson* makes perfect sense when the foreseeable loss involves personal injury or damage to property. That speech, however, is not so easily applicable to economic loss. Indeed, it makes no sense to talk of a general obligation to take reasonable care not to inflict financial loss on others. A trite example of this is that a new supermarket operator whose operations have a predictably adverse effect on the turnover of local retailers is not liable to recompense them for their loss.

[242] As I will demonstrate, the early defective building cases in which the courts imposed duties of care on territorial authorities and builders proceeded on the basis that the cases involved damage to property so as to engage the principle discussed by Lord Atkin. This is not entirely surprising. The physical manifestations of defective construction often look very much like damage caused by the actions of third parties. A house which has subsided because its foundations were inadequate may look exactly the same as a house which has subsided because of mining operations conducted underneath it. This approach, however, was not logically sustainable. In a defective building case, the complaint of the owner is not that the builder and territorial authority damaged the house; it is rather that the owner paid more for the house than it was worth. The owner's loss is therefore economic. This categorisation is not, in itself, inconsistent with allowing recovery. What it means,

however, is that Lord Atkin's speech in *Donoghue v Stevenson* is not a sufficient basis for imposing liability. Something more is required.

[243] The complex structure theory referred to by McGrath and Chambers JJ was postulated as a possible mechanism for treating some of the manifestations of defective construction as property damage as envisaged by Lord Atkin. Where a house and its contents are water damaged because of faulty plumbing or destroyed by fire as a result of faulty wiring, I see a claim against the plumber or electrician as legally unproblematic. But it has not been easy to apply this approach to an orthodox defective building case, involving say, faulty foundations resulting in the whole house subsiding. Indeed I am not aware of cases outside the sort of simple plumbing or electrical examples I have given where a plaintiff has successfully relied on complex structure theory.[284] This means that there is no practical escape from the conclusion that the duty of care invoked in a defective building case is addressed to economic loss.

[244] There is also an associated factor. As I have noted, the real complaint of the plaintiff in a defective building case is as to the quality of the building. Traditionally-minded lawyers tend to see complaints about the quality of a product as being more appropriately the subject of a claim in contract rather than in tort. This is not just arid doctrine. Price and quality are usually reasonably closely correlated. The risk of latent defects can be addressed by obtaining warranties. A product which is fully warranted is likely to cost more than one which is not. Allowing a claim in tort provides a buyer with something akin to an unpurchased warranty.[285] So there is at least a problem to be addressed in determining whether the producer of a product with a latent defect is liable to an end-purchaser who has

---

[284] There is a hint of complex structure theory in the judgment of Woodhouse J in *Bowen*, above n 251, at 417 when he said that "the defect referable to the foundations caused actual physical damage to the building" but the point was not really developed.

[285] Of course it is not exactly the same as a warranty (as negligence must be established), but I do not see my comment as overstated: see for instance Duncan Wallace "Negligence and Defective Buildings: Confusion Confounded?" (1989) 105 LQR 46 at 51 referring to "the equivalent of a tortious warranty of due care to ensure the suitability of the product or work ... for its required purpose". Lord Oliver in his very interesting but unfortunately not very accessible paper: "Judicial Legislation: Retreat from *Anns*" in Visu Sinnadurai (ed) *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* (Professional Law Books Publishers, Malaysia, 2004) 51 at 72 referred to the duty of care as "amounting in effect, to a non-contractual warranty of fitness to each successive owner without limit of time".

paid too much for it.[286] This is not to say that a claim in tort is necessarily not sustainable; it is just to reinforce the point already made that it is necessary to go beyond *Donoghue v Stevenson* and foreseeability of loss to justify it.

The early cases in which duties of care were imposed

The rationale on which liability was imposed

[245] Although Woodhouse J's views (as set out in [230] above) were not necessarily shared by all senior New Zealand judges, the overall judicial climate in the 1970s and early 1980s was extremely favourable to plaintiffs, as Professor JA Smillie demonstrated in his important 1984 article, "Principle, Policy and Negligence".[287] "Foreseeability of loss" did not provide a very exacting standard for establishing a prima facie duty of care and defendants who sought to rely on policy considerations to displace a prima facie duty were usually not successful.

[246] All of this is well illustrated by the early defective building cases: *Dutton*, *Bowen*, *Anns* and *Mt Albert Borough Council*.[288] In each case an expansive view was taken of *Donoghue v Stevenson* and particularly the speech of Lord Atkin.[289] By concluding that the physical manifestations of defective building cases involved damage to property[290] (or sometimes by rejecting the relevance of a distinction between economic loss and property damage[291]), judges were able to bring defective building cases within the scope of *Donoghue v Stevenson*.[292]

[247] It is sometimes said that the liability of territorial authorities in relation to defective buildings is a function, in part, of the control they have over

---

286 An issue which was addressed in *Dutton*, above n 251, by Stamp LJ at 414–415.
287 JA Smillie "Principle, Policy and Negligence" (1984) 11 NZULR 111.
288 See above n 251.
289 See *Dutton*, above n 251, at 396 per Lord Denning.
290 See *Dutton*, above n 251, at 396 per Lord Denning and at 403–404 per Sachs LJ; *Bowen*, above n 251, at 406 and 410 per Richmond P, at 417 per Woodhouse J and at 423 per Cooke J; and *Anns*, above n 251, at 759 per Lord Wilberforce.
291 See *Dutton*, above n 251, at 403–404 per Sachs LJ; and *Bowen*, above n 1, at 423 per Cooke J.
292 See *Dutton*, above n 251, at 396 per Lord Denning and at 405 per Sachs LJ. See also 411 for the approach of Stamp LJ, which was rather different. See also *Bowen*, above n 251, at 418 per Woodhouse J.

construction.[293] This is obviously so, at least in one sense which I will explain, but I do not see this as having explanatory value or as detracting from my conclusion that defective building cases were seen as within the scope of *Donoghue v Stevenson*. If the regulator under a building control regime was a department of the central government, it would be ludicrous to seek to impose liability for defective buildings on territorial authorities, because on this hypothesis they would have nothing to do with the process. Control, in the sense of an ability to affect events for better or worse, is a sine qua non for the imposition of a duty of care.[294] But, in reality, it is just a facet of foreseeability, in the sense that unless someone's act (or omission) has the potential to adversely affect others, there cannot be the possibility of consequential foreseeable loss. It is of the essence of any regulatory system (and a building control regime is a regulatory system) that the regulator has a measure of control over the activities to be regulated. But, on the whole, such control does not result in the imposition of a duty of care to prevent foreseeable harm.[295] So to point to the control that a territorial authority has under a building control regime does not serve to explain why a duty of care ought to be imposed (given that similar duties of care are not usually imposed on other regulators).

[248] I have not lost sight of the fact that the early cases involved defects that were entirely latent and not susceptible of intermediate examination.[296] As well, the English cases were decided in the context of a building control regime under which territorial authorities had a discretion whether to conduct inspections. Although this was seen as posing something of a problem if there had been no inspections, it also left scope for the argument that by choosing to make inspections, territorial authorities accepted responsibility for doing them diligently. There are thus some indications in the early cases of the imposition of the duty being affected by the vulnerability of purchasers (due to the latent defects not being detected by pre-purchase inspection) and the assumption of responsibility by the territorial authority

---

293 See for instance *Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd* [1983] NZLR 190 (CA) at 196 and Sir Robin Cooke "An Impossible Distinction" (1991) 107 LQR 46 at 51.

294 As explained by Lord Hoffmann in *Sutradhar v National Environment Research Council* [2006] UKHL 33, [2006] 4 All ER 490 at [38].

295 See, for instance, the cases referred to below at [294]–[295].

296 A point made clearly in *Dutton*, above n 251, at 401 by Sachs LJ and at 411 per Stamp LJ and in *Anns*, above n 251, at 758 by Lord Wilberforce.

or builder.[297] These indications, however, do not detract from my overall assessment that the early cases proceeded on the basis of the applicability of *Donoghue v Stevenson*.

Policy considerations

[249] In the early defective building cases, policy arguments were resolved in favour of plaintiffs. Thus:

(a) "Floodgates" arguments were rejected on the basis that the circumstances in which territorial authorities would be held liable would be rare.[298]

(b) The courts considered that the imposition of a duty was broadly consistent with the policy underlying the building control regime which extended to protecting those who owned or occupied houses against "jerry-building".[299] There was an associated conclusion that there would be no detriment associated with the imposition of the duty as it would "tend ... to make [building inspectors] do their work better, rather than worse".[300]

(c) There was some reliance on loss-spreading, on the basis that what would otherwise be the losses of faultless owners should be assumed by those who were responsible, usually the builder and territorial authority.[301] This view was sometimes buttressed with assumptions that the "shoulders" of the territorial authority were "broad enough to bear

---

297 See the remarks of Stamp LJ in *Dutton*, above n 251, at 414–415. He recognised the essentially economic nature of the loss but proceeded on the basis of control and assumption of responsibility: "The defendant council here was ... in control of the situation, in that it had taken upon itself to see whether or not the foundations were safe ... ." In *Anns*, above n 251, at 760 Lord Wilberforce referred to the building inspector as "having assumed the duty of inspecting the foundations".

298 See *Dutton*, above n 251, at 398 per Lord Denning, at 407 per Sachs LJ; and *Bowen* at 419 per Woodhouse J and at 422 per Cooke J.

299 A point developed in *Dutton*, above n 251, at 400 per Lord Denning, at 406–407 per Sachs LJ and also by Stamp LJ at 409; and *Bowen*, above n 251, at 419 per Woodhouse J; and *Anns*, above n 251, at 761 per Lord Salmon.

300 See *Dutton*, above n 251, at 398 per Lord Denning.

301 See for instance *Bowen*, above n 251, at 419 per Woodhouse J.

the loss" and that the builder would usually be insured whereas owners would find it difficult to find first party insurance.[302]

[250] The policy analysis was pretty light. Breezy assertions that claims would be rare and that builders would usually be insured must now evoke wry smiles from those responsible for managing leaky home litigation for many New Zealand territorial authorities. To my way of thinking, the impact of imposing a duty on the behaviours of those involved with residential buildings, most particularly territorial authorities and new home owners, warranted rather more in the way of analysis and caution. I propose to develop this proposition by reference to (a) the behavioural consequences of the imposition of a duty of care on territorial authorities and (b) first party insurance.

[251] On a law and economics approach, an ideal law of negligence would minimise the sum of the cost of accidents and the cost of avoiding them.[303] Considered from this particular point of view, imposing liability in negligence on any defendant may produce:

(a) No discernible impact possibly because a potentially insurable risk of liability is of no material significance given other factors which dictate the way the defendant, and others similarly situated, operate;

(b) A "just right" response involving the development and implementation of risk-avoidance strategies and techniques to the level that produces economically optimal outcomes; or

(c) An "over the top" response involving economically inefficient avoidance costs.

---

302 See *Dutton*, above n 251, at 398 per Lord Denning: "In nearly every case the builder will be primarily liable. He will be insured and his insurance company will pay the damages. It will be very rarely that the council will be sued or found liable." This point was developed in some detail by Woodhouse J in *Bowen*, above n 251, at 419. I discuss the availability of first party insurance later in these reasons: see [250] below.

303 There is a wealth of literature on this, including, for instance, Mark Grady "A New Positive Economic Theory of Negligence" (1983) 92 Yale LJ 799. Associated thinking sometimes finds its way into judicial decisions on negligence, see for instance *Shirt v Wyong Shire Council* (1980) 146 CLR 40 at 47–48 per Mason J.

[252] A fourth and perhaps slightly different possible response (although it overlaps with (c)) is that the defendant (and others similarly situated) may either behave in an overly cautious way or withdraw, in whole or in part, from the provision of services, with a view to avoiding, or at least limiting, what they see as unacceptable liability risks.

[253] Although responses within this range can be expected of both private sector and public sector potential defendants, there are differences both as to the detail of the likely actual responses and as to their policy significance. The mix of risk and reward tends to be different in the public and private sectors. More specifically, in the private sector, competition serves to keep a lid on avoidance costs which will often not be the case in the public sector.[304] As well, changes in the way in which public bodies exercise their statutory functions tend to give rise to policy issues (for instance as to congruence with underlying statutory polices) which do not arise in quite the same way with private firms.

[254] Given what I have just said, it is possible to hypothesise that the imposition of a duty of care on territorial authorities in relation to defective buildings tends (a) to encourage overly defensive behaviour from building inspectors and (b) to incentivise territorial authorities to withdraw as far as possible from the provision of the sort of building services which carry the greatest risk of liability. Although empirical evidence is pretty limited, I see this hypothesis as reasonably plausible. I note that (a) the Building Industry Commission report of 1990 suggests that there were concerns as to the imposition of excessive costs in the period before 1990[305] and (b) recent policy development work (which I will discuss later) in relation to the Building Act 2004 raises concerns as to whether territorial authorities are now acting in an overly-defensive way. As I will also discuss later, it may be possible to view current territorial authority practice in relation to producer statements as associated

---

304 Between 1991 and 2002, territorial authorities faced competition from certifiers which, at least in theory, should have limited their ability to engage in economically inefficient risk-avoidance. Indeed, the extent of leaky building syndrome suggests that there may well have been some overshoot as territorial authorities (and certifiers too) may have underdone risk-avoidance.

305 Building Industry Commission *Reform of Building Controls: Volume 1 — Report to the Minister of Internal Affairs* (Wellington, 1990) [Building Industry Commission report] at [2.9]–[2.11] and [2.28]–[2.34].

with a desire to limit the circumstances in which building inspectors are personally required to form the sort of building judgments which may later result in liability.[306]

[255] The other policy consideration on which I wish to dwell relates to insurance. Judicial assumptions about the way in which insurance actually works are often adrift of from reality[307] and I think that this is exemplified by the early defective building cases.

[256] In *Murphy v Brentwood District Council* counsel for the appellant noted:[308]

> Most householders are insured against such damage [i.e. latent damage] and most of these actions are simply contests between insurance companies. There are also now schemes such as the National House-Builders Registration Council which provide protection for the householder is the builder fails.

This remark was picked up in the speeches in *Murphy*,[309] where it was observed it appears that most of the English litigation based on the *Dutton* duty (including *Murphy* itself) was between insurance companies. The National House-Builders Registration Council referred to by counsel in *Murphy* in the remarks just cited was, by 1990, known as the National House Building Council and it had since 1965 offered (as it still does) a Buildmark warranty, a product which is part builder's warranty and part latent defect insurance.[310] As early as 1970 (that is before *Dutton* was decided) virtually all new houses built in the United Kingdom for private sale or letting were covered by the Buildmark warranty and thus were the subject of latent defect insurance.[311] This had significant effects of the behaviours of those who bought and lent on residential property, as explained in a 1987 article on latent defect insurance, where the author noted that it was:[312]

---

306 See [311]–[313] below.

307 See Rob Merkin "Tort, Insurance and Ideology: Further Thoughts" (2012) 75 MLR 301. Of course, judges are not alone in developing policy based on misunderstandings as to the way insurance markets operate. The policy as to building certifiers recommended by the Building Industry Commission and implemented by the Building Act 1991 was based on a seriously flawed understanding of the level of protection which could practically be secured by insurance: see *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) [*Sacramento*] at [82]-[85].

308 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) at 425 and 440.

309 See, for example, Lord Keith at 472.

310 Details of the scheme are discussed in the report of the Law Commission for England and Wales *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com No 40, 1970) at [22].

311 See the Law Commission Report No 40, above n 310, at [23].

312 "Latent Defects Insurance" (8 July 1987) Law Society Gazette <www.lawgazette.co.uk>.

> ... almost impossible to obtain a mortgage or to sell a residential property which does not ... have NHBC cover … .

Those providing latent defect insurance can be expected to take a keen interest in the construction of the buildings that are to be covered, and the associated procedures they put in place should ensure that any buildings, which are or were subject to the warranty, have been well-built.[313]

[257] There is no hint in the judgments in *Dutton* of an appreciation that virtually all new buildings were by then subject to latent defect insurance. Indeed the tone of the judgments (and particularly that of Lord Denning is strongly indicative of an assumption to the contrary).[314] All of this leaves with me with the uncomfortable suspicion that *Dutton*, decided as it was in the 1970s about facts which occurred more than a decade earlier, was based on a fundamental misunderstanding of relevant contemporary practice. And it may be that this is also true of *Bowen*. As noted, the assumption of the Court in *Bowen* was that builders would be insured. As will be apparent, I do not think that this has been the general experience in relation to leaky homes litigation and indeed I doubt if it was ever the case. This was well explained (and in some detail) by Professor Smillie as long ago as 1990.[315]

[258] Under the Building Performance Guarantee Corporation Act 1977, a Buildguard warranty, including latent defect insurance was available in New Zealand and between 1978 and 1987 around 24 per cent of new homes were covered by this warranty.[316] The corporation was dissolved in 1987 and its functions were taken over by the Housing Corporation which appears to have shortly afterwards discontinued the scheme.[317] As Professor Smillie has noted, this may well have been contributed to by the "rapid expansion of tort liability for latent construction defects".[318]

---

313 This is discussed in the Building Industry Commission report, above n 305, at [2.47]–[2.48] in not entirely uncritical terms because of, inter alia, a perceived tendency for insurance company-directed quality assurance to stifle innovation.

314 The events which gave rise to the litigation occurred between 1958 and 1960 and thus preceded the introduction of the Buildmark warranty. So Mrs Dutton was likely uninsured.

315 See John Smillie "Compensation for latent building defects" [1990] NZLJ 310 at 312.

316 Smillie, above n 315, at 317.

317 I have not been able to identify the actual date. The Building Industry Commission report, above n 305, at [2.47] noted that the scheme was then (ie in 1990) under review by the Housing Corporation.

318 See Smillie, above n 315, at 313.

[259] I confess to thinking that the demise of the Buildguard warranty may have been unfortunate. The 1991 Act changed the utility of the tort remedy in ways which were not fully recognised at the time. First, the introduction of the long-stop limitation period of 10 years has seriously eroded the practical efficacy of tort claims in relation to latent building defects. Secondly, the prevalence of private certifiers – as provided for in the 1991 Act – and the fragility of their insurance arrangements have meant that even where latent defects have become patent within the limitation period, the only obvious defendant (apart from the usually insolvent builder) is not worth suing.

[260] There is also a further consideration that if first party insurance had been commonplace in relation to new buildings, it is at least possible that the leaky building problem would have been of less moment that it has proved to be. This is for two reasons. If the New Zealand building industry had been subject to the quality control measures which first party insurers would presumably have insisted on, it seems likely that less defective buildings would been constructed. As well, first party insurers may have provided more vigorous responses to the first indications of leaky building syndrome than those which in fact eventuated.

[261] All in all, I think that there is scope for the view that a not entirely adequate tort remedy has occupied the policy space which other, possibly more efficient, loss-avoidance and loss-spreading mechanisms might otherwise have occupied.[319]

The initial move away from *Anns* in England and the Australian and the New Zealand responses

[262] Lord Brandon's dissenting judgment in *Junior Books Ltd v Veitchi Ltd*[320] was an advance signal of the change of course away from the approach favoured in *Dutton*[321] and *Anns*.[322] This change first became manifest in 1984 with the judgment of the House of Lords in *Governors of the Peabody Donation Fund v Sir Lindsay*

---

319 For an economist's analysis of the problem, see Brian Easton "Regulation and Leaky Buildings" in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issue*s (Thomson Reuters, Wellington, 2011) 35 at 42.

320 *Junior Books Ltd v Veitchi Ltd* [1983] 1 AC 520 (HL).

321 *Dutton*, above n 251.

322 *Anns*, above n 251.

Parkinson & Co Ltd,[323] where the commercial developer of a housing development sought damages in relation to a defective drainage system against, inter alia, the territorial authority. To the knowledge of the building inspector, the as-built system was not in conformity with the approved design but the inspector took no action to address the problem. Notwithstanding this, the plaintiff still lost. Lord Keith (whose speech was adopted by the other four judges) referred to the passage from *Anns* which I have earlier set out,[324] and went on:[325]

> There has been a tendency in some recent cases to treat these passages as being themselves of a definitive character. This is a temptation which should be resisted. The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise but the scope of the duty must depend on all the circumstances of the case.

Having reviewed other authorities, he concluded:[326]

> So in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so.

Applying this to the case at hand, he concluded that there was no duty of care:[327]

> In the instant case Peabody, the owners of the building site and the undertakers of the development thereon, bore responsibility, under paragraph 13 of Part III of Schedule 9 to the Act of 1963, for securing that the drains conformed to the design approved by [the territorial authority]. .... Peabody no doubt had no personal knowledge or understanding of what was going on. They relied on the advice of their architects, engineers and contractors, and in the event they were sadly let down, particularly by the architects. But it would be neither reasonable nor just, in these circumstances, to impose upon [the territorial authority] a liability to indemnify Peabody against loss resulting from such disastrous reliance.

[263] The tone of this was of course very different from that of the speeches in *Anns*. And although the House of Lords did not disapprove *Anns* directly, Lord Keith commented that Lord Wilberforce's speech raised "certain

---

323 *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] 1 AC 210 (HL) [*Peabody*].
324 At [229].
325 At 240.
326 At 241.
327 At 241.

difficulties".[328] These were primarily related to the interrelationship between the duty of care and nature of damages recoverable on the one hand, and the public health and safety focus of the relevant legislation on the other hand. Having concluded that the "solution of these difficulties is not, however, necessary to the determination of the instant appeal", Lord Keith went on to say:[329]

> It is sufficient to hold that [the territorial authority] owed no duty to Peabody to activate their ... powers, notwithstanding that they might reasonably have foreseen that failure to do so would result in economic loss to Peabody, because the purpose of avoiding such loss was not one of the purposes for which these powers were vested in them.

As this last passage shows, the view that the losses involved in defective building cases were economic and not physical had taken hold and on this basis associated claims were no longer seen as justifiable on the basis of *Donoghue v Stevenson*.

[264] In *The Council of the Shire of Sutherland v Heyman*,[330] the High Court of Australia decided not to follow *Anns*. *Heyman* concerned a defective house and a claim against the local authority which was dismissed. There is no point reviewing the judgments in any detail because the approach of the High Court to the imposition of a duty of care has evolved since then. For my present scene-setting purpose, the other important aspect of *Heyman* is that three of the five judges (Mason, Brennan and Deane JJ) held against the plaintiff for reasons which were very particular to the facts of the case at hand – that the Council had not certified that the house conformed to the relevant building requirements, the absence of inquiry about the house by the purchaser of the Council and a general lack of evidence as to actual reliance by the purchaser on the Council. Although it is sometimes thought that this case precluded claims against local authorities in relation to defective buildings, that is not my impression from the judgments.[331] Rather, the judges envisaged a very fact-specific inquiry as to the purchaser's reliance (if any) on the territorial authority and the reasonableness of such reliance (particularly in terms of whether the territorial authority had done anything specific to encourage it).

---

328 At 242.
329 At 242.
330 *The Council of Sutherland Shire v Heyman* (1985) 157 CLR 424.
331 In fact, as I will explain later, there are a number of cases where territorial authorities have been held liable in relation to negligent approvals of subdivisions.

[265] The judgments in *Peabody* and *Heyman* were addressed by the New Zealand Court of Appeal in four cases in 1986: *Takaro Properties Ltd v Rowling*,[332] *Brown v Heathcote County Council*,[333] *Stieller v Porirua City Council*,[334] and *Craig v East Coast Bays City Council*.[335] In the last three cases, judgment was delivered on the same day (19 June 1986). For present purposes, the most relevant cases are *Brown* and *Stieller* given that they were about defective houses. *Takaro* and *Craig*, however, also warrant brief mention.

[266] *Takaro* concerned the question whether the Minister of Finance owed a duty of care in relation to his functions under the Overseas Takeover Regulations 1964. Woodhouse P (with whom Richardson J agreed) adhered to the view he had expressed in *Scott Group v McFarlane*.[336] The judgments of the other three judges (Cooke, McMullin and Somers JJ) were rather more circumspect but they too upheld the existence of a duty of care. This judgment was later reversed in the Privy Council[337] on the question whether the Minister was negligent. Although the question whether a duty of care had been owed was left open, the drift of the judgment very much suggested that the Minister had not owed a duty of care[338] and this was in terms which specifically cast further doubt on the correctness of *Anns*.

[267] In *Craig*, the Court held that a territorial authority, in dealing with an application for a resource consent, is required to take reasonable care to act within its powers so as not to adversely affect neighbouring owners.[339] This judgment was not taken on appeal to the Privy Council but it was later not followed by the Court of Appeal in *Morrison v Upper Hutt City Council*,[340] albeit sub silentio, and then explicitly in *Bella Vista Resort Ltd v Western Bay of Plenty District Council*.[341]

---

332 *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 (CA).
333 *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA).
334 *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA).
335 *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA).
336 *Scott Group Ltd v McFarlane*, above n 263.
337 *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC).
338 See at 709–711.
339 *Craig*, above n 335, at 101.
340 *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331 (CA).
341 *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] NZCA 33, [2007] 3 NZLR 429 at [31]–[34].

[268] In *Brown*, Cooke P dealt with the principles to be applied in this way:[342]

> [W]ithout necessarily subscribing to everything said by Lord Wilberforce in his well-known opinions in *Anns v Merton London Borough Council* ..., we have found it helpful to think in a broad way on the lines of his twofold approach. That is to say, although different members of our Court have put it in different ways, we have considered first the degree of proximity and foreseeability of harm as between the parties. I would put it as whether these factors are strong enough to point prima facie to a duty of care. Second, if necessary, we have considered whether there are other particular factors pointing against a duty. It is also conceivable that other factors could strengthen the case for a duty. In terms of the opinion of Lord Keith of Kinkel in *Peabody* at p 241 we have found this kind of analysis helpful in determining whether it is just and reasonable that a duty of care of a particular scope was incumbent upon the defendant.
>
> We have also recognised that, if the loss in question is merely economic, that may tell against a duty. ...
>
> It is necessary to note the crucial weight attached, in recent English cases concerning building negligence, to danger to health or personal safety. See especially *Peabody* in the House of Lords ... . In *Mount Albert Borough Council v Johnson* at p 239 I touched on a distinction between English and New Zealand law. The English cases proceed in a context of the functions of local authorities under Public Health Acts. In New Zealand the functions of local authorities regarding the subdivision and development of land have to be considered in the light of statutes of much wider scope, including the Local Government Act 1974, the Town and Country Planning Act 1977, and in this case the Christchurch District Drainage Act 1951 and the Land Drainage Act 1908, as well as the Health Act 1956 and the Drainage and Plumbing Regulations 1959 (replaced by 1978 regulations). Local authorities, whether their functions are multiple or special, are concerned generally with matters going well beyond the range of personal health and safety; the preservation of community building and living standards, property values and amenities is part of their proper sphere. ... Many buildings defectively built or sited may be seen as cases where at least ultimately, if the building is occupied without remedial measures, the health or safety of the occupants will suffer. Conceivably the present case could be put or forced into that category. But I prefer the view that under New Zealand law the exercise is unnecessary.
>
> ... In the end I cannot avoid the conclusion that in the negligence field we in New Zealand will have to continue mainly to hew our own way.

The judgment of the other two judges, Richardson J and Sir Clifford Richmond, is sufficiently succinct to set out in full:[343]

> We have had the advantage of reading the judgment of Cooke P in draft. For the reasons he gives in relation to the facts of this case and the legal issues involved we are satisfied that the appeal must be dismissed. In these

---

342 *Brown*, above n 333, at 79–80.

343 At 83.

> circumstances it is not necessary that we write a separate judgment dealing with the broader issues of liability in negligence except to make one comment. These questions have come before this Court on many occasions over the last 10 years and we share his view that while we will always benefit from decisions in other jurisdictions, in this evolving area of our law New Zealand Judges have developed a considerable body of law in this field. Ultimately, and building on that jurisprudence, we shall we think have to follow the course which in our judgment best meets the needs of this society.

[269] The judgment of the Court of Appeal in *Brown* was upheld in the Privy Council[344] on a basis which depended very closely on the particular facts and, in particular, evidence pointing to assumption of responsibility by the unsuccessful defendant (the Christchurch Drainage Board) and reliance.

[270] The significance of *Stieller* is that the damages awarded largely related to unsatisfactory weather boards in respect of which it was something of a stretch to suggest that health and safety issues arose. But the defendant Council's challenge to this award based on remarks made by Lord Keith in *Peabody* was rejected on the basis that the New Zealand building control regime, unlike that in the United Kingdom, was not addressed solely to health and safety but encompassed:[345]

> ... safeguarding of persons who may occupy ... houses against the risk of acquiring a substandard residence.

It will be recalled that Cooke P had made very much the same point in *Brown*.[346]

Further developments in England

[271] Although the Privy Council did not, in *Takaro* and *Brown*, specifically challenge the general approach taken by the Court of Appeal to the imposition of duties of care, the disenchantment of the senior English judiciary with *Anns* became more pronounced with the House of Lords, first in *D & F Estates Ltd v Church Commissioners for England*,[347] rejecting the existence of a duty of care owed by contractors and, secondly, in *Murphy v Brentwood District Council*, directly

---

344 *Brown v Heathcote County Council* [1987] 1 NZLR 720 (PC).
345 At 94.
346 See above [268].
347 *D & F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177 (HL).

overruling both *Dutton* and *Anns*. The underlying reasoning had already been signalled in *Peabody*. Essentially, the cases proceeded on the basis that:

(a) No matter how the claims were dressed up, whether as physical damage or as addressing health and safety issues, the reality is that the plaintiffs were seeking to recover for economic losses associated with defects in the quality of the buildings they acquired.

(b) Such claims are not within the scope of Lord Atkin's speech in *Donoghue v Stevenson* which was specifically addressed to defects resulting in personal injury or damage to some other property.

(c) The purpose of the United Kingdom building control regime was the preservation of health and safety and not the avoidance of economic loss.

(d) If a territorial authority was liable in the manner contemplated in *Dutton* and *Anns* so too were builders and, by parity of reasoning, so were the manufacturers of chattels, resulting in the law of negligence extending beyond its proper scope.

[272] Issues of policy were touched on lightly. There was the comment already noted that most litigation had been between insurance companies. Lords Mackay and Oliver also voiced concern at the overlap between the liability in tort and the Defective Premises Act 1972.[348] Interestingly the concern about overly cautious behaviour by building inspectors was not explicitly mentioned in *Murphy*. This is despite the suggestion made in *Takaro*[349] that *Anns* had resulted in building inspectors requiring excessive amounts of concrete to be poured into the ground. Essentially the same point had also been made by Lord Oliver extrajudicially when he commented that the "principal beneficiary" of *Dutton* had been "the ready mixed concrete industry".[350] I suspect that that the absence of explicit reference to this concern in *Murphy* is because the key rationale was not so much that the *Dutton* duty

348 *Murphy*, above n 308, at 457 and 491.
349 *Takaro*, above n 337, at 710.
350 Lord Oliver, above n 285, at 73.

of care represented a bad policy choice (although that probably was the prevailing view) but rather that it had been such a departure from pre-existing principle as to be too big a "jump"[351] for the courts (as opposed to the legislature).

Hamlin

The legal context in which the case was decided

[273] In *South Pacific Manufacturing*, the Court of Appeal brought the New Zealand approach to the imposition of duties of care into broad alignment with that adopted in the House of Lords. The judgments in that case, however, signalled that the Court of Appeal did not intend to change course in relation to defective buildings.[352] As I will now explain this necessitated a reformulation of the basis upon which duties of care on territorial authorities and builders could be justified.

[274] It will be recalled that *Dutton*, *Bowen* and the cases which followed them rested on the view that the manifestations of defective construction were damage to property in the sense envisaged by Lord Atkin in *Donoghue v Stevenson*. But by the 1990s, this doctrinal justification was no longer available as it had become intellectually untenable to equate the physical manifestations of defective construction with damage to "property" as envisaged by Lord Atkin. Such equation had, in any event, been conclusively rejected by the English courts, meaning that a judgment of the Court of Appeal which proceeded on that basis would have been a prime candidate for reversal in the Privy Council. Accordingly, it was necessary to develop a different rationale for the duty.

[275] As a matter of practicality and common sense, an alternative rationale would only be credible if it were associated with respects in which the New Zealand legislative background or the ways in which houses were built, bought and sold in New Zealand were relevantly different from the corresponding conditions in the United Kingdom. And, as it happened, there were two significant differences.

---

351 *Murphy*, above n 308, at 465, per Lord Keith.
352 *South Pacific Manufacturing Co Ltd*, above n 264, at 316.

[276] The first was associated with the purposes of the building control regimes in the United Kingdom and New Zealand. The *Dutton*/*Anns* duty was based on the Public Heath Act 1936 and was thus associated with a statutory policy addressed to the mitigation of risks to health and safety. From start to finish, English judges saw related difficulties with remedies which went beyond what was necessary to address such risks.[353] In contradistinction, in *Stieller*,[354] the Court of Appeal noted that the New Zealand system of building controls was for the purposes of, inter alia, "safeguarding of persons ... against the risk of acquiring a substandard residence". This meant that the imposition of a duty of care on territorial authorities, in relation to economic loss, did not involve an apparent conflict with (in the sense of going beyond) the purpose of the building control regime as had been the case in the United Kingdom.

[277] The second, and more significant, difference was in relation to reliance. In England, the judges who developed the *Dutton/Anns* duty did not do so on the basis of reliance.[355] The widespread practice of buyers commissioning pre-purchase building surveys would have told heavily against such an approach. So too would the widespread incidence of first party insurance and the associated quality control mechanisms put in place by insurers. In contrast, by the mid-1990s, first party insurance (via the Buildguard scheme or otherwise) was not, as far as I am aware, available in New Zealand and it was not common for home buyers to commission pre-purchase surveys. Instead, it seems that building owners and buyers tended to rely on the diligence of building inspectors. As well, the continuation into the 1990s of the practice of prospective purchasers not commissioning building surveys was presumably associated with the willingness of the courts to award damages against territorial authorities and builders. That such claims could be made would have been known at least to the lawyers involved with residential conveyancing and this presumably informed the advice they gave to intending purchasers. This is what I refer to as second-order reliance.

---

353 The problem was recognised and discussed in *Dutton*, above n 251, at 408 by Sachs LJ and much troubled the Court of Appeal in *Murphy*: see *Murphy v Brentwood District Council* [1990] 2 WLR 944 (CA).

354 *Stieller*, above n 334, at 93.

355 This is clear from *Dutton*, above n 251, at 395 per Lord Denning, at 405 per Sachs LJ and at 413–414 per Stamp LJ and from *Anns*, above n 251, at 768–769 per Lord Salmon. The same point was made by Lord Bridge in *Murphy*, above n 308, at 481.

The judgments in Hamlin *in the Court of Appeal*

[278] There are three points I wish to make about the Court of Appeal judgment in *Hamlin*.

[279] The first is that the judgments are primarily about houses. The judgments of Richardson, Casey, Gault and McKay JJ are entirely focused on houses. And while the judgment of Cooke P is in more general terms, he made it perfectly clear that he had not concluded that the duty of care extended to non-residential buildings.

[280] The second point is that the reasons given for imposing a duty are very particular to houses. In particular, there is reference to what was said to be the traditional reliance which house purchasers place on territorial authorities. As well, and to my way of thinking very importantly, there is the reference by Richardson J to what I have referred to as second-order reliance:[356]

> Against this background I consider that any change in the law should come from the Parliament of New Zealand, not from the Courts. There are obvious difficulties in examining a 1972 case concerned with local authority negligence from a 1994 perspective. The initial cases which imposed a duty of care on local bodies inspecting building sites were necessarily influenced by the Court's assessment at the time of the particular social conditions of the late 1960s and early 1970s. *Since then those cases have themselves been an important catalyst engendering public expectations regarding the role of local authorities in the building control process. Furthermore the cases have been the basis for legislative action. Law and social expectation have enjoyed a symbiotic relationship.*

He then developed this point in slightly different terms:[357]

> ... to change tort law as it has been understood in New Zealand would have significant community implications particularly affecting home-owners, the building industry, local bodies, approved certifiers and insurers. The relationships and fee structures developed under the building control regime provided for under the Building Act 1991 would have to change if it were decided there should be no remedy in tort by house-owners against local authorities. Insurance practices would have to change. No doubt owners having a house built and purchasers of existing homes could at a price obtain engineering surveys and insurance protection against the risk of subsidence and other design or construction defects. Or they could bargain for an

---

356 *Hamlin*, above n 253, at 528 (emphasis added).

357 At 528.

> indemnity from the builder/vendor. But, this would call for a major attitudinal shift which Parliament would need to weigh.

[281] The third important feature of the case was the importance placed on the difference between the purposes of the building control regime at issue in *Murphy* (with its health and safety focus) and what was regarded as the broader purposes of the pre-1991 New Zealand building control regime.

[282] I disagree with the analysis of this case proffered in the reasons of McGrath and Chambers JJ.[358] With the possible exception of Cooke P, none of the Judges attempted to justify the result in *Hamlin* on the basis of the reasoning in *Dutton*, *Bowen* and *Anns*. Instead, all the other Judges, and to some extent Cooke P as well, justified the decision on the basis of reliance, a consideration which simply did not feature in the earlier cases. Apart from some remarks in made by Cooke P, there is nothing in the judgments to suggest that the reasoning (as opposed to the results) of the earlier New Zealand cases was seen as correct. To the contrary, the fact that all Judges found it necessary to proceed either solely (Richardson, Casey, Gault and McKay JJ) or at least in part (Cooke P) on the basis of reliance shows that the reasoning of the earlier New Zealand cases was recognised as incomplete.

Hamlin *in the Privy Council*

[283] McGrath and Chambers JJ cite a number of passages from the opinion of the Privy Council in *Hamlin.*[359] I agree that some of them are in general terms but they must, I think, be read secundum subjectam materiam and, in particular, as responsive to the actual judgment of the Court of Appeal. It is not realistic to treat the Privy Council as supporting principles of law any broader than those adopted by the Court of Appeal. Indeed the point I am trying to make is demonstrated from the following passage of the Privy Council judgment where Lord Lloyd, after referring to judgments in other jurisdictions, went on:[360]

> Their Lordships cite these judgments in other common law jurisdictions not to cast any doubt on *Murphy*'s case, but rather to illustrate the point that in this branch of the law more than one view is possible: there is no single

---

358 See [108]–[135].

359 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

360 At 521 (emphasis added).

> correct answer. *In* Bryan v Maloney *the majority decision was based on the twin concepts of assumption of responsibility and reliance by the subsequent purchaser. If that be a possible and indeed respectable view, it cannot be said that the decision of the Court of Appeal in the present case, based as it was on the same or very similar twin concepts,* was reached by a process of faulty reasoning, or that the decision was based on some misconception: see *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590.

The decision which was upheld as not based on "faulty reasoning" or "some misconception" was the judgment of the Court of Appeal in *Hamlin*, based as it was on concepts which were "the same or very similar" as those relied on in *Bryan v Maloney*.[361] I am very confident that similar remarks would not have been made if the rationale for the imposition of the duty had not been reformulated. To put it another way, the reasoning which was upheld as defensible was not the reasoning which underpinned *Dutton* and *Bowen*.

Hamlin and _Sunset Terraces_ in the context of the 1991 Act

Hamlin

[284] As I indicated, I consider that *Hamlin* was rightly decided in relation to the pre-1991 building control regime. It would have been entirely inappropriate in *Hamlin* for the New Zealand courts to have changed direction on the existence of a duty of care. Essentially this is because the early decisions must have contributed to the way in which those buying (or building) houses acted. A retrospective change would thus have been very unfair, as Richardson J recognised.

[285] I am of the same view in relation to the post-1991 building regime and thus see the eventual decision in *Sunset Terraces* as having been practically inevitable. But, that said, I recognise that there are some problems with the *Hamlin* duty in the post-1991 environment.

[286] Although *Hamlin* was concerned with the building control regime as it was before the 1991 Act, that Act was relied on by both the Court of Appeal and the Privy Council as evincing a policy judgment on the part of the legislature not to

---

[361] At 521. See also *Bryan v Maloney* (1995) 182 CLR 609.

interfere with the existing liabilities of the territorial authorities. It is, however, true, as Mr Goddard argued in the *Sunset Terraces* litigation that the treatment of that legislation in *Hamlin* was not complete.

[287] While it is the clear that the 1991 Act contemplated claims for damages against territorial authorities and certifiers for negligent approvals and inspections, it did, at least to some extent, change the legislative landscape. This is because the 1991 Act was premised on policies which differed from those that underpinned the earlier building control regime. As I have indicated, the pre-1991 regime was addressed to, inter alia, protecting "against the risk of acquiring a substandard residence".[362] In contrast, although both the 1991 Act and the earlier report of the Building Industry Commission contemplated claims against territorial authorities and certifiers in relation to substandard houses, protecting the economic interests of property owners was not a purpose of the 1991 Act. The underlying thinking was made clear by the Building Industry Commission report when it observed:[363]

> Protection of the economic interests of people in getting value for money is not a justification for building controls since value and quality can be supplied through forces of the market.

The whole report is suffused with "forces of the market" thinking and, consistently with this approach, the focus of the 1991 Act is on health and safety and thus not on ensuring that those who buy buildings get value for money. In this respect, the 1991 Act knocked out one of the two points which distinguished the New Zealand position from that in England and Wales and which was relied on by the Court of Appeal in *Hamlin*. But this particular consideration was not mentioned expressly by either the Court of Appeal or the Privy Council in *Hamlin*.

[288] Although the associated debate is now rendered redundant by *Sunset Terraces*, it is right for me to say that I do not see the public health focus of the 1991 Act as warranting the abandonment of the *Hamlin* duty. In large part this is because there is nothing express in either the Building Industry Commission report or the 1991 Act to show that the duty of care owed by territorial authorities had been abrogated. The reality is that the report is not very coherent about the continuing

---

362 See above at [270].

363 Building Industry Commission report, above n 305, at [3.7].

role of claims in tort. In particular, there is a dissonance between the passage I have just cited and other passages which contemplated a continuing role for tort claims of a kind, which would necessarily be addressed to whether property buyers had received "value for money". And given that the 1991 Act also contemplated claims against territorial authorities, the health and safety focus of the Act cannot have been intended to put an end to such claims.

[289] Unlike McGrath and Chambers JJ, I see some resulting anomalies. The duty of care which territorial authorities owe is now (in terms of scope and consequences) only tenuously connected to the health and safety focus of the underlying statutory regime. Damages for diminution in value and non-economic loss (as are routinely awarded in leaky homes cases) contribute, at best, only indirectly to health and safety. The reality is that, on current practice, the duty of care is primarily directed towards house purchasers being compensated for not having received value for money. Indeed I think it would be too late to insist on a health and safety focus, as it would result in the necessity to engage in forced reasoning of the kind which troubled the Court of Appeal in *Murphy*,[364] where a substantial award of damages of £38,777, primarily for diminution in value, was upheld despite:

(a) The only actual risk to health and safety having been successfully addressed by the installation (at a total cost of £48) of flexible gas fitting to replace one which broke when the foundations subsided; and

(b) The plaintiff having sold the house before trial to purchasers who lived in it but who neither effected remedial work nor suffered adverse health and safety consequences.

[290] I am prepared to accept the associated awkwardness essentially on the basis that this is the least bad option in what is currently an extremely unsatisfactory situation and is just another illustration of the substance behind Holmes J's aphorism, "the life of the law has not been logic; it has been experience".

---

[364] See *Murphy*, above n 308.

The proposed extension to non-residential buildings

Overview

[291] The reasons of McGrath and Chambers JJ proceed on the basis that the reasoning in the leading New Zealand cases (*Bowen*, *Hamlin* and *Sunset Terraces*) supports the existence of a duty of care in respect of all buildings[365] and that proximity is, in any event, established by foreseeability of loss and, in the case of a building owner, payment of fees. So they consider that a duty is to be imposed unless there are strong policy considerations which negate the existence of a duty of care.

[292] As is already apparent, I disagree. I think that the issue whether there is sufficient proximity to justify the imposition of a duty of care is not answered in favour of the plaintiffs by the principles established in the leading New Zealand authorities. Moreover, at least in the particular context of this case, I think it is unreal to divide policy factors between those which come in at the first or proximity stage of the exercise and those which might more arguably fall for consideration at the second stage. This is because all of these factors are material to proximity. So – and at the risk of being thought heretical – I think that what we have to decide in this case can be conflated into a single question namely, whether it is fair, just and reasonable to impose a duty of care. I consider that this primarily falls to be determined by reference to the existing authorities and the principles they establish, the relationship between commercial and industrial building owners and territorial authorities, such reliance as there may be by the latter on the former, and associated policy considerations.

The existing authorities and the principles they establish

[293] The authorities I have discussed so far have been primarily addressed to defective buildings. As indicated, I consider that they proceed on the basis that the imposition of a duty of care in relation to economic loss requires more than

---

[365] See [182].

foreseeability of loss. In this respect, those authorities are consistent with the broad drift of the current New Zealand law of negligence, which, with the judgment of the Court of Appeal in *South Pacific*, was substantially aligned (in the sense that the ultimate question is the same) with that of England.

[294] There have been many later cases in which questions broadly similar to those posed by the present case have arisen and have been resolved against plaintiffs. These are cases which share these common features:

(a) The purchase by the plaintiff of some kind of property, either in the nature of a chose in action representing an investment or a chattel.

(b) An associated loss of value when the property acquired turns out to be less valuable than the plaintiff had anticipated.

(c) A party with certifying, supervisory, reporting or other functions under contract or statute allegedly having acted with insufficient diligence thus providing the occasion for, and according to the plaintiff, causing the plaintiff's loss.

(d) The contention that a duty of care arose for reasons which include foreseeability of loss.

Cases of this kind include *Fleming v Securities Commission*[366] (a claim against a regulator), *Boyd Knight v Purdue*[367] (a claim against auditors where *Scott Group Ltd v Macfarlane* was practically overruled), *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*[368] (involving a claim by the party who commissioned certain plant against a sub-contractor involved in the manufacture of the plant) and *Attorney-General v Carter*[369] (a claim by someone who bought a ship in reliance on a certificate of survey which was allegedly negligently issued). This last claim failed because the certification process was addressed to safety issues rather than the

366 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA).
367 *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA).
368 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).
369 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

economic interests of those who purchased vessels. The attempt by the plaintiffs to rely on the defective building cases was dismissed on the basis that such cases are "sui generis".

[295] Also material are other cases which are not quite so closely associated with the present case such as the decisions of the Court of Appeal in *Morrison v Upper Hutt City Council*[370] and *Bella Vista Resort Ltd v Western Bay of Plenty District Council*[371] (in relation to the Resource Management Act 1991 functions of territorial authorities) and in relation to regulators, the Privy Council decision in *Takaro*[372] (where at least the drift of the judgment was against the imposition of a duty) and the judgments of this Court in *McNamara v Auckland City Council* [373] and *BIA*.[374]

The relationship between commercial and industrial building owners and territorial authorities

[296] In *Hamlin*, the Court of Appeal, as I have explained, went to considerable trouble to establish a paradigm in relation to houses in which those who built or bought houses relied on territorial authorities. This exercise was carried out by reference to considerations which were only referable to houses. I would be very surprised if the sort of exercise carried out in the Court of Appeal could plausibly be duplicated in relation to commercial and industrial buildings. Significantly no one has attempted to do so. My distinct reservations as to whether there is a paradigm of reliance akin to that found in *Hamlin* is supported by the comparative dearth of New Zealand cases in which claims have been brought against territorial authorities in relation to non-residential buildings.[375] As to all of this it is possibly significant that:

(a) Homes, by comparison with industrial and commercial buildings, tend to be smaller, less complex, more likely to be built by small scale builders, and more likely to be designed around and built according to

---

370 *Morrison*, above n 340.
371 *Bella Vista Resort Ltd v Western Bay of Plenty District Council*, above n 341.
372 *Takaro*, above n 337.
373 *McNamara v Auckland City Council* [2012] NZSC 34.
374 *BIA*, above n 265.
375 The only such case of which I am aware where the claim was successful is *The Otago Cheese Company Ltd v Nick Stoop Builders Ltd* HC Dunedin CP180/89, 18 May 1991.

prescriptive acceptable solutions with correspondingly less need for detailed architectural and engineering design.

(b) Homeowners are usually consumers rather than investors and less likely to protect themselves contractually than the purchaser (or building owner) in the case of a commercial or industrial property, in terms of warranties by builders and contractual obligations of care on the part of architects and engineers or, in the case of subsequent purchasers, by taking assignments of such warranties or contractual obligations of care.

The rationale and the rule

[297] It is said that a rule which distinguishes between residential construction on the one hand and industrial and commercial construction on the other is illogical. Some houses will be far more complex in design and construction than some commercial and industrial buildings. Some house buyers do not rely on the performance by territorial authorities of their functions but rather insist on warranties and/or commission their own reports. Likewise some people who purchase industrial or commercial properties may be naive and unsupported by personal expertise or the advice of experts and perhaps rely on territorial authorities and their building inspectors.

[298] On the current Australian approach to the imposition of duties of care in relation to defective buildings (and in like cases, such as subdivisions) attempts are made to tie the rule (or result) closely to the rationale, with a close focus on the question of whether the particular plaintiff relied on the defendant or was vulnerable in the relevant way.[376] If carried to its logical extreme, this approach would make it hard to predict the outcome of any particular case. If applied in *Sunset Terraces*, for instance, it may have resulted in some of the individual claims being rejected on the

[376] Illustrative examples of this are *Albert Shire Council v Bamford* [1998] 2 Qd R 125, 97 LGERA 33 (Qld CA); and *Western Districts Developments Pty Ltd v Baulkham Shire Council* [2009] NSWCA 283, (2009) 169 LEGRA 62.

basis of what in the end would have been value judgments as to the particular level of reliance (if any) each plaintiff placed on the territorial authority.

[299] The *Hamlin* rule, as applied in *Sunset Terraces* is based on reliance – in the sense of the general reliance that is placed on territorial authorities by those who buy new or reasonably new homes. But for reasons of practicality, and as explained by Lord Hoffmann in *Stovin v Wise*,[377] the application of the rule does not have to depend on a judgment in each case as to the level of reliance, if any, which a particular plaintiff can establish. This is why an inquiry into actual reliance was seen as irrelevant in *Sunset Terraces*. To put all this another way, a common law rule does not need to be coterminous with its rationale.

Is it practical to draw a distinction between residential buildings and other buildings?

[300] I would answer this question in the affirmative.

[301] There are practical considerations which tend to apply differently depending on whether a building is a home or has been built for commercial or industrial purposes. I have touched on some of these already,[378] but here are some more:

(a) For most people, their home will be one of the most, and often the most, significant asset they own.[379]

(b) There are particular statutory rules that apply in relation to homes. Those which are most directly associated with the problem at hand are the Weathertight Homes Resolution Services Act 2006 and ss 396–399 of the Building Act 2004 (as to statutory warranties). These provisions must be premised on a legislative policy that homes are different from other kinds of buildings and thus justify different legal treatment. Also material perhaps is the Earthquake Commission

---

377 *Stovin v Wise* [1996] AC 923 (HL) at 954.
378 See [296].
379 See *Bryan*, above n 361, at 625.

Act 1993 which also distinguishes between residential buildings and other buildings.

(c) The legislature has now seen fit to provide for different types of building consent and in particular has differentiated between simple residential building consents and commercial building consents: see ss 52G–52Y of the 2004 Act (as introduced by s 17 of the Building Amendment Act 2012 but not yet in force).

(d) The latent defect insurance provided under the now repealed Building Performance Guarantee Corporation Act 1977 was confined to "residential buildings" (see s 17).

(e) The compulsory housing guarantee scheme as proposed by the Building Industry Commission would have been confined to residential accommodation (see appendix seven of the report).

(f) Although I see health and safety considerations as of limited weight as a policy justification for the *Hamlin* duty in relation to houses, I am inclined to think that such considerations are, if anything, of less weight in relation to commercial or industrial buildings. This is primarily because the statutory powers of territorial authorities to address insanitary or dangerous buildings[380] are likely to be a more complete and practical answer to health and safety issues in relation to such buildings than they are in relation to homes. As well, occupational safety and health requirements apply in relation to commercial and industrial buildings.

Cutting across contractual allocation of responsibility and risk

[302] It has always been recognised that it would be neither just nor practical to impose duties of care on territorial authorities which are not matched by corresponding duties of care imposed on others involved in the construction process.

---

[380] See Building Act 1991, s 65.

The courts must, of course, be careful to ensure that such duties are not imposed in a way which cuts across the underlying contractual undertakings. In practical terms, the more complex the building (and thus the greater the number of responsible participants in the construction process), the greater the risk that the imposition of tort liability will infringe this principle.

[303] In *Bowen*, it was distinctly arguable that the builder had merely contracted to provide "normal foundations" with the building owner stipulating for the general suitability (that is for normal foundations) of the building platform. On this basis, the builder could only have discharged the duty of care imposed by doing more than it was being paid for.[381] This consideration was treated as not being controlling by a majority of the Court which thereby cut across the allocation of risk which had been agreed upon by the owner and builder. As the reasons of McGrath and Chambers JJ indicate, a broadly similar issue was addressed very differently by the High Court of Australia in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*.[382]

[304] In the reasons they have given, Elias CJ, Tipping, McGrath and Chambers JJ see this problem as answered by the consideration that the duties of care are addressed to the objective standards of the building code. But, to my way of thinking, the primary responsibility for meeting that standard must lie with the building owner. If Paramount Builders (the defendant in the *Bowen* case) had been simply a foundations sub-contractor, brought in to provide "normal foundations" as stipulated by the head-contractor and to a design prepared by the building owner's engineer, it is unlikely that it would have been held to be liable. I struggle to see that hypothetical situation as much different from the actual facts of that case. To put this another way, I cannot see why someone who is contracted to provide a discrete component of what may be a complex project should be expected to second-guess the building owner (who is primarily responsible for compliance) as to whether that discrete component has been appropriately stipulated.

[305] Imposing a duty of care which is not limited to the contractual commitments of the defendant must have the potential to disrupt what may be perfectly natural and

---

381 *Bowen*, above n 251, at 408–409.

382 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, (2004) 216 CLR 515. See [148] above.

perhaps very efficient decisions as to the allocation of risk and responsibility. For instance, the level of supervision provided by an architect or engineer will be determined by contract. The practical ability of that supervisor to detect and report on deviations from the building contract as to compliance with the building code is likely to be associated with the extent of the supervision that the building owner is prepared to pay for. In this context, the imposition on that supervisor of a free-standing tortious duty of care to future owners may involve some tension with the contractual relationship. The supervisor may not be confident that if later sued, he or she will be able to avoid liability on the basis that all the building owner was prepared to pay for was, say, superficial supervision. Similar considerations may apply to a number of the participants in any particular project.

The 2004 Act and likely changes of the building control regime

[306] The present appeal relates to events which pre-date the coming into effect of the 2004 Act which, understandably therefore, received little attention in argument. This means that there was no focus on the respects in which the 2004 Act, either as first enacted or as subsequently modified, materially differ from the 1991 Act. As well, there was little or no argument addressed to other possible legislative initiatives which are in the wings. Very extensive amendments (not all of which are in force) have been made by the Building Amendment Act 2012. A bill proposing further amendments is currently before the legislature and the website of the Ministry of Business, Innovation and Employment provides extensive information, including cabinet papers, in relation to other possible future developments. What this means is that the development of the law proposed by the majority is going to occur in a way that is not affected by, and not responsive to, changes in the legislative landscape, actual and prospective. The associated disconnect between judicial and legislative development of the law is unlikely to produce good policy outcomes, and for myself, I would prefer to defer to the legislature on this issue.

[307] I can illustrate the nature of my concern by pointing to some interesting (to me anyway) aspects of 2004 Act (including some provisions introduced in it by the Building Amendment Act 2012 which are not yet in force):

(a) Sections 14A–14F which outline the responsibilities under the Act of owners, owner-builders, designers, builders and building consent authorities, and particularly s 14B, which make it clear that it is the responsibility of the owner to ensure that work complies with the building consent (or as applicable, the building code).

(b) Provisions (enacted by the Building Amendment Act 2012 but not yet in force) for four different types of building consent, commercial building consents, low-risk building consents, simple residential building consents and standard building consents (see s 47, inserted by s 17 of the Building Amendment Act 2012). Different application procedures and criteria for grant are provided for each type of building consent. The process and criteria for the issue of commercial building consents are more exacting than those for other forms of building consent and in respects which place considerable responsibility on the applicant to provide information relevant to the risks associated with the proposed building and quality assurance, which may encompass third party involvement or responsibility for "appropriate supervisory observation, testing, inspection and third-party review" (see s 52Q, also inserted by s 17 of the Building Amendment Act 2012).

(c) Provision for licensed building practitioners and their role in relation to restricted building work (see for instance ss 45(e), 84 and 88 of the 2004 Act as currently in force and ss 84A–84D (inserted by s 22 of the Building Amendment Act 2012 and introduced under this Act but not yet in force)) which take into account the different types of building consent provided for by the 2012 amendments.

(d) The replacement (by provisions of the Building Amendment Act 2012 which are not yet in effect) of the code compliance certificate provided for under the current ss 91–95A with what is styled a "consent completion certificate" (see s 32 of the Building Amendment Act 2012).

[308] We are dealing with the operation of the 1991 Act. It follows that the decision in this case theoretically will not control how future cases arising in the context of the 2004 Act (or later legislation) will be decided. The reality, however, is rather different. The duty in relation to non-residential buildings to be recognised in the present case will almost certainly continue to apply. This is because, at least to my current way of thinking, the scheme under the 2004 Act is insufficiently different from the previous scheme to justify a different result. Given what is inherent in litigation associated with latent defects and the operation of limitation rules, this judgment will establish scope for liability which will extend (both backwards and forwards) for some decades. All involved in the building process (including territorial authorities, building owners and end-purchasers) will act on that basis, with consent and inspections practices, fees and presumably insurance arrangements organised or set up accordingly. My concern is that the extension (as I see it) of tort liability to encompass non-residential buildings will serve to so occupy the relevant policy space as to significantly reduce the scope for more effective changes of law or practice.[383]

Broader policy assessments

[309] In the present case, the majority proceed on the basis of reasoning which includes views to the effect that the imposition of the duty would be beneficial as:

(a) incentivising better performance by territorial authorities of their functions;

(b) economically efficient; and

(c) facilitating an appropriate spreading of losses.

[310] It is very plausible to assume that the imposition of a duty of care will change the behaviour of potential defendants. Ideally it will encourage more diligent performance of functions. The likelihood that it will do so is, however, plainly not

[383] Which is essentially the same criticism as that made in relation to the early defective building cases at [261] above.

controlling.[384] As well, there is the risk of what the Privy Council in *Takaro*[385] described as "overkill" – with building inspectors trying to avoid civil liability by imposing unnecessarily onerous obligations on building owners, resulting in what the Privy Council described as a "cure ... worse than the disease". I have already discussed the theoretical underpinnings for this concern[386] which was recognised in the Building Industry Commission report and was to some extent addressed in the 1991 Act when it precluded the imposition by territorial authorities of requirements which are more onerous than those prescribed in the building code.[387] But this response was not a complete answer to the problem. Under both the 1991 and the 2004 Acts as well as the building code, territorial authorities have discretions to exercise and open-textured assessments to make. A territorial authority may well be able to impose additional building costs which are disproportionate to the risk that is being avoided. Consultation associated with the Building Act review in 2009 conducted by the then Department of Building and Housing which preceded the recent legislative initiatives resulted in the expressions of "concerns" about "defensive and risk adverse behaviour by local authorities" contributing to "greater compliance costs than necessary".[388]

[311] A comment on producer statements. Under the 1991 Act, a decision to issue a building consent or a code compliance certificate turned on whether the territorial authority was satisfied, on reasonable grounds, as to compliance.[389] The Act contemplated that such a decision might be on the basis of, inter alia, producer statements[390] which were defined as meaning a statement supplied by or on behalf of an applicant for, or the holder of, a building consent that work would be, or had been, carried out in accordance with certain technical specifications.[391] The 2004 Act (as currently in force) does not provide for the general use of producer statements[392] but there is nothing in the Act to prevent territorial authorities from

---

384 See *Stovin*, above n 377, and *Fleming*, above n 366.
385 *Takaro*, above n 337, at 710.
386 See above at [251]–[254].
387 See Building Act 1991, s 7.
388 Cabinet Economic Growth and Infrastructure Committee "Building Act review 1: Overview of reform proposals" (undated) Paper 1, EGI (10) 162 at 8.
389 Building Act 1991, s 43.
390 Building Act 1991, s 43(8).
391 Building Act 1991, s 2.
392 There is a requirement, however, for licensed building practitioners to certify or provide memorandum about restricted building work: see s 88 of the Building Act 2004, as amended by

relying on them and they are regularly used. And under the 2012 amendments which are not yet in force, what are in effect producer statements (in the form of certificates by licensed building practitioners) are extensively provided for.

[312] What I assume is current practice is described on the website of the Ministry of Business, Innovation and Employment in this way:[393]

> Producer statements are not specifically referred to in the Building Act 2004. However, they can still be considered as part of the building consent process, in terms of giving a building consent authority reasonable grounds to be satisfied that the specified building work complies with the Building Code.
>
> The Department is developing a guidance document to advise on the use of producer statements. The authenticity of information in a producer statement must also be assured as part of risk management when deciding whether to issue code compliance certificates (CCCs).
>
> Producer statements often cover an extensive range of building activity — insulation installation, external plastering, plumbing and drainage, alarm installations, structural design and construction work and so on. These statements may be written by a wide range of practitioners, from specialist tradespeople to professional engineers and architects, or from a variety of other building trades and professions, depending on the nature of the work covered.
>
> The statements also cover work relating to a variety of different building control situations, such as those associated with design proposals and design reviews, and those made by practitioners who have constructed, installed or inspected completed building work.
>
> The consideration given to producer statements by building consent authorities as part of compliance checks is discretionary. Each must decide whether to consider them and how much weight, if any, a producer statement will be given in the certification processes. Requirements for consideration need to be documented in policies and procedures, with decisions well recorded and justified as part of the building consent authority's documentation for processing and approving building consent applications and issuing CCCs.
>
> In their consideration, building consent authorities must be confident that statements' authors have appropriate experience and competence in their field(s).

[313] Producer statements may permit a territorial authority to conclude that a building consent or code compliance certificate should be issued on a basis which does not depend on the building judgments of its own staff. In this way, practices

---

s 27 of the Building Amendment Act 2012.

393 Ministry of Business, Innovation and Employment "Guidance on the acceptance of producer statements" <www.dbh.govt.nz>.

around producer statements may enable territorial authorities to design approval systems which reduce the need for their front-line staff to engage in the sort of direct assessment exercises which carry substantial litigation risk. If this happens, it would represent the sort of partial withdrawal of services which an economist might see as a likely consequence of the imposition of liability.[394]

[314] As a development of the incentivisation argument, Tipping J suggests that the imposition of a duty will be economically efficient. As my discussion about producer statements indicates, this approach may well be founded on a misapprehension as to how building consent approvals and code compliance certificates in relation to complex buildings are currently dealt with. The building owner is primarily responsible for compliance with the Building Act. Compliance by the building owner with the Act will usually involve internal quality control mechanisms by the builder and external supervision by architects and engineers. It may be that the most efficient method of avoiding losses associated with defective buildings is to incentivise building owners to use competent and insured builders, engineers and architects. If so, duplicating the work they do with independent assessments and inspections by separately insured building inspectors may be an expensive fifth wheel.

[315] All in all, the extension of the *Hamlin* duty to non-residential buildings seems to me to give rise to policy issues of a kind which the courts are not well-placed to assess and quite likely to get wrong. More particularly, we are not able to assess with any degree of confidence the likely impact of the extension on the behaviours of territorial authorities. Nor are we in a position to compare wider societal benefits or disbenefits associated with imposing liability in respect of non-residential buildings, for instance in terms of hampering the development of more effective loss-avoidance and loss-spreading mechanisms. Given the possible extent of the claims which this judgment gives the green light to – on top of the very substantial claims territorial authorities now face in relation to residential buildings – I see a potential for serious adverse economic consequences.

---

394 See above at [251]–[254].

[316] A final comment as to policy. Given that commercial and industrial buildings are owned either by investors or owner/occupiers, any losses associated with defects in their construction are investment or business in nature and thus, are not of a kind that is obviously appropriate for spreading amongst the community, via territorial authorities. At least generally, society does not seek to spread the losses of those whose sharemarket investments are unsuccessful. I am at least uncertain whether there is merit in taking a different approach to losses resulting from unsuccessful investments in commercial or industrial property.

This case

[317] I am therefore of the view that the territorial authorities should not owe a duty of care in relation to non-residential buildings.

[318] Given that this is a dissent, there is no need for me to address in any detail issues downstream of this conclusion. It is sufficient to say that:

(a) For reasons which are explained by McGrath and Chambers JJ, I do not see a claim for negligent misrepresentation based on the code compliance certificate as adding anything of legal significance to the plaintiff's case. If it is not fair, just and reasonable to impose a duty of care in relation to the issue of a building consent and inspections, it cannot be fair, just and reasonable to impose a duty in relation to the code compliance certificate.

(b) On the mixed-use nature of the building, which is primarily commercial but contains some residential units, I prefer the approach favoured by Harrison J in the Court of Appeal.

Solicitors:
Grimshaw & Co, Auckland for the Appellants
Heaney & Co, Auckland for the Respondents