

Torts in the New Zealand Supreme Court: The First Ten Years

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Introduction

This chapter surveys the various decisions of the Supreme Court over the years 2004 to 2013 which can be recognised as having had significant influence on the development in New Zealand of the principles of the law of torts. Of course, torts being a sprawling topic with ill-defined boundaries, the question immediately arises as to what should go in and what should be excluded. Let us start, then, by dealing with this question.

Impact of statute

Torts are creatures of the common law. Yet before examining the various developments in common law principle we should take note of the impact of statute in modifying or supplanting that principle. The most radical innovation has been the replacing of the tort action with a statutory remedy in personal injury cases, as presently found in the Accident Compensation Act 2001. Certainly the introduction of the accident compensation scheme has been of the first importance as regards its impact on tort liability, for where there is cover a common law claim of course is barred.¹ The Supreme Court has made a significant contribution to the question of cover by its decision in *Allenby v H*,² holding that a woman who became pregnant and gave birth to an unplanned child following a failed sterilisation operation had suffered personal injury by medical misadventure and was covered for compensation. A case can be made for examining *Allenby* in this paper, but it is not directly about tort liability and debate about it has been omitted.³

Statute also has intervened in other areas to fill manifest gaps where the common law courts could not or would not go. One clear example is 17(1)(c) of the Law Reform Act 1936, giving tortfeasors who are liable to pay damages the right to make a claim for a contribution from other liable tortfeasors. Recent debate has examined whether there can be a claim for contribution in equity which avoids the limiting features of s 17(1)(c).⁴ While of great interest, a claim of this kind is not a claim in tort, and it will not be examined here.⁵

A third example of statutory intervention is provided by the Contributory Negligence Act 1947, creating a power to apportion damages between defendants and contributorily negligent plaintiffs. The Supreme Court has considered the Act only in passing,⁶ and it will be put to one side. A fourth is found in certain provisions of the Limitation Act 1950, putting time limits on the bringing of tort claims. The cases concern the date when a cause of action can be seen to accrue, which is a matter of common law principle, and two particular problems in determining that date will be considered

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¹ Accident Compensation Act 2001, s 317.

² *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425.

³ For discussion, see Todd, "Accidental Conception and Accident Compensation" (2012) 28 Journal of Professional Negligence 196.

⁴ *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

⁵ For discussion, see Todd, "Multiple Causes of Loss and Claims for Contribution" (2013) 25 NZULR 960.

⁶ In *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192, at [23] the Court confirmed in a footnote that contributory negligence can be no defence to a claim for deceit, and thus the 1947 Act cannot apply in such a case. This interpretation represents a natural reading of the statute and is the widely accepted view elsewhere.

later in the paper.⁷ Statute has also amended or simplified common law principles in various respects, as in the Defamation Act 1992; but the Supreme Court has not said a great deal in this particular field.⁸

A further way in which statute can be seen to have affected tort law is where it has created new causes of action analogous to those in tort. The outstanding example is the Fair Trading Act 1986, creating a cause of action in damages for the victims of misleading or deceptive conduct.⁹ Another instance is found in the Consumer Guarantees Act 1993, which confers on consumers a direct right of action against manufacturers where goods fail to measure up to the guarantees of quality and fitness laid down in the Act.¹⁰ Both actions are founded on statute and not the common law, and for this reason no more will be said about them.

Developments in the common law

The focus of this paper naturally is on developments in the common law. The Supreme Court certainly has been active in the field, with significant debate in a number of areas. The law of negligence has attracted the greatest attention, the Court having considered the basis for the imposition of a duty of care, the determination of the duty issue in the context of claims alleging a negligent omission to act by a public authority, negligence by an advocate in presenting a client's case in court, and negligence by builders, engineers and inspectors in contributing to the construction of leaky buildings. Key decisions in other areas cover limitation issues in cases involving contingencies and in leaky building claims, and claims for exemplary damages. We will look closely at all of the above developments.

Further topics involving tort issues considered in some way by the Supreme Court, but which will not be discussed here include: issues of pleading and evidence in the law of defamation;¹¹ whether briefing notes to a minister were protected by absolute privilege in defamation;¹² whether a

⁷ We will not examine *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721, where the Supreme Court affirmed the orthodox rule that in the case of torts which are actionable only on proof of damage, a cause of action accrues from the date of the damage. For further discussion of this case see Todd, *The Law of Torts in New Zealand* 6th ed, 2013, para 26.5.06(1).

⁸ See n 11.

⁹ Fair Trading Act 1986, ss 9-12, 43(2)(d). For discussion in the Supreme Court see, in particular, *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384; *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.

¹⁰ Consumer Guarantees Act 1993, s 27.

¹¹ *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 concerned the nature of the particulars which must be pleaded in seeking to establish the defences of truth and honest opinion in the Defamation Act 1992 s 8 and s 9 respectively. The Court held that the particulars are confined to objectively provable primary facts and may not include expressions of opinion or allegations by third parties concerning those facts. So in the instant case, where the defamatory imputation was said to be, inter alia, that the plaintiffs were corrupt, conventional particulars would supply details of the primary facts and circumstances from which the conclusion that the plaintiffs were corrupt might be drawn. They could not extend to statements of others expressing the opinion that the plaintiffs were corrupt. Allowing third party particulars would contravene both the "repetition" rule, that a defendant repeating a defamatory allegation does not prove its truth simply by proving that the allegation was made, and the "conduct" rule, that it is generally necessary, when the defendant seeks to establish that there were grounds for suspecting misconduct by the plaintiff, for him to give direct particulars of relevant conduct of the plaintiff rather than rely on some other source.

¹² *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.

litigation funding arrangement amounted to an abuse of process;¹³ the appropriate basis for implying a licence to enter land, so that the person entering is not a trespasser;¹⁴ the circumstances in which a principal can be held vicariously liable for the tort of an agent;¹⁵ and justifications for judicial immunity from suit.¹⁶ The Supreme Court has also made passing or brief reference to various other questions and issues in the field, either in decisions refusing leave to appeal or in decisions where tort liability was not a significant issue or its ambit was not in dispute. They include references to aspects of nuisance,¹⁷ inducing breach of contract,¹⁸ conversion¹⁹ and invasion of privacy.²⁰

¹³ In *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, which concerned an application for a stay on the grounds of abuse of process, Glazebrook J, delivering the judgment of the Court, held that the courts might order disclosure of the agreement subject to redactions relating to confidentiality and privilege. The stay should only be granted where there was an abuse of process on traditional grounds (as to which see *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366 at [62]-[66], [149]-[158]) or where the funding arrangement effectively constituted the assignment of a cause of action to a third party in circumstances where such an assignment was not permissible (see *Trendtex Trading Corp v Credit Suisse* [1982] AC 679). The underlying proceeding was not an action in maintenance or champerty, and in these circumstances her Honour considered that it would be inappropriate to make any comments on these torts.

¹⁴ In *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145 the Supreme Court held that an undercover police officer who went to the front door of a residential property to purchase cannabis and who covertly filmed the transaction had an implied licence to enter the property, and the licence was not lost by the deception that the officer was a customer. By contrast, in *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305, where the police suspected that members of the Tuhoe iwi were holding quasi-military training camps on Tuhoe land and covertly installed cameras on the land to record what was happening, the Supreme Court held that the surveillance was not authorised by statute and that in the circumstances no licence could be implied. For discussion see Todd ???

¹⁵ In *Dollars & Sense Finance Ltd v Nathan* [2008] NZSC 20, [2008] 2 NZLR 557 the Supreme Court held that a financier (the principal) was vicariously liable for a fraud by a borrower (the agent) who forged his mother's signature in order to use her property as security for a loan. For discussion see Todd ???

¹⁶ *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [161]-[175], where McGrath and William Young JJ, in a joint judgment, maintained that allowing claims against judges would provide litigants with the opportunity to harass those who had decided cases against them, whereas giving immunity would promote the fearless pursuit of truth, ensure that the judicial function was fairly exercised without improper interference, and safeguard judicial independence. Allowing such claims would also permit litigants to collaterally attack earlier judgments, undermining the policy in favour of achieving finality in litigation. And there were already effective remedies available within the criminal and civil justice processes for correcting judicial error, rendering a personal action unnecessary. The majority went on to hold that the relevant policy concerns also applied to an action for public law damages against the state alleging judicial breaches of the New Zealand Bill of Rights Act 1990, and that the public law action accordingly could apply only to executive breaches.

¹⁷ *Street v Brouwers* [2011] NZSC 17. The Court refused leave to appeal on a question as to liability in nuisance in respect of the removal of support for land, even though the law was recognised to be not without its difficulties and uncertainties, at least at the margin. It was noted that liability was not dependent on negligence or intention, that the defendant's operation of his drainage system posed very real risks to the stability of the adjoining land, and that it was in accordance with the principles of the law of nuisance that the consequences of the failure of the system should be to his account.

¹⁸ *Loktronic Industries Ltd v Diver* [2012] NZSC 60 where leave to appeal from the decision of the Court of Appeal in *Diver v Loktronic Industries Ltd* [2012] NZCA 131 was refused on the question, inter alia, whether the Court of Appeal's finding that the need to show "wilful blindness" by the defendants that their conduct would induce a breach of contract set the test too high and whether "reckless indifference" should satisfy the knowledge requirement.

¹⁹ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [70], where Elias CJ confirmed that at common law there is no property in a human body that can support tortious claims in conversion and detinue.

Duty methodology

Determining a methodology for an inquiry into the question whether an allegedly negligent wrongdoer owes a duty of care to his or her victim has occupied the courts on many occasions, both in New Zealand and overseas. In *North Shore City Council v Attorney-General*²¹ [*The Grange*] the joint judgment of Blanchard, McGrath and William Young JJ gives an overview of the question and affirms that the two-stage approach based on *Anns v Merton London Borough Council*²² should continue to be supported and applied in New Zealand.²³ In so deciding their Honours took the view that, provided all relevant concerns were taken into account, little was likely to turn on the precise form of the inquiry. However, let us nonetheless consider two issues raised by the continuing debate about methodology.

The first concerns Lord Wilberforce's notion of a "prima facie duty" at stage one of the inquiry. Critics maintained that stage one appeared to raise a presumption of a duty whenever harm was foreseeable, putting the onus on the defendant at stage two of the inquiry to adduce good reason for cutting down or negating the duty. And putting the point more broadly, the test could be seen to open the way to a virtually unfettered potential liability and to be unduly burdensome to defendants.²⁴ Yet the courts in Canada have continued to invoke Lord Wilberforce's words,²⁵ and in *The Grange* Blanchard J maintained that the Canadian approach was essentially the way in which the problem was approached in New Zealand. Indeed, in *Body Corporate No 207624 v North Shore City Council*²⁶ [*Spencer on Byron*] Tipping J said that once proximity was established a duty should be found unless it would not be in the public interest to recognise a duty, and went on to refer expressly to a "prima facie" duty.

It is understandable why meeting stage one can be seen as giving rise to a prima facie duty. After all, if stage one is satisfied, on what basis might we deny that everything then depends on stage two? If stage two is satisfied as well, how could a duty not be recognised? Perhaps the answers to such questions turn on one's understanding of the two-stage test. How close the parties need to be at stage one can be influenced by policy concerns in stage two, in particular the fear of opening the floodgates or of creating a liability of an indeterminate extent. So how or where a matter is taken into account may have an influence on whether a duty of care comes to be recognised.

²⁰ *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277, where a majority of the Court (Elias CJ, Blanchard, Tipping and McGrath JJ) accepted that a privacy tort existed in New Zealand, whereas Anderson J maintained that both the existence of the tort and its scope, if it continued to be recognised, would fall to be reviewed in an appropriate case. In the circumstances a binding determination was not needed as the parties had accepted that the law, as laid down in the decision of the Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1, should apply. However, Elias CJ believed that *Hosking* should not be taken as defining the limits of the tort, saying in particular that the Court should reserve its position on the need for the publicity about private facts to be "highly offensive".

²¹ *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341. The significance of the decision in the context of leaky building litigation is considered separately below, n 54 and accompanying text.

²² *Anns v Merton London Borough Council* [1978] AC 728 (HL).

²³ At [147]-[161].

²⁴ *Caparo Industries plc v Dickman* [1990] 2 AC 605, at 617-618 per Lord Bridge.

²⁵ *Cooper v Hobart* 2001 SCC 79, [2001] 3 SCR 537; *R v Imperial Tobacco Canada Ltd* 2011 SCC 42, [2011] 3 SCR 45 at [38]; *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 at [66]-[69].

²⁶ *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*], at [54]-[55]; see further below n 60 and accompanying text.

In *Spencer on Byron*²⁷ William Young J explained that 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, those which fall for consideration at the second stage are more general, and some may have to be considered at both stages. He recognised that, 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. 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. His Honour thought that so long as courts kept steadily in mind the ultimate question — namely, whether it is fair, just and reasonable to impose a duty — perversity of outcome should be avoidable. No doubt that is true. But it might be better to consider aspects of the duty issue in combination rather than sequentially, or, at least, not to treat stage one as giving rise to a prima facie duty or as raising a presumption of a duty. This would help ensure that the structure of the duty inquiry does not appear to point in favour of plaintiffs and that the onus of proving a duty is recognised as falling on the plaintiff at both stages of the inquiry, and would avoid the difficulties associated with uncertainties about the stage at which policy concerns are taken into account. Take the case where a policy concern might be seen as bearing on both stages. It is not obviously an aid to analysis to say that if the concern is treated as a stage-one factor there is no prima facie duty, but if treated as a stage-two factor there is a prima facie duty which may be excluded at stage two.

The second issue concerns the kinds of policy factors — the stage two factors — that can bear upon the question whether a duty of care ought to be recognised. In *Spencer on Byron* William Young J sought to delve into the different *nature* of potentially relevant policy concerns.²⁸ His Honour maintained that sometimes they were very legal in nature — so much so that perhaps they could be described as high-level principles — and gave as instances those that were often associated with the consistency or otherwise of the proposed duty of care with other aspects of the legal system. Policy considerations of this sort were well within the competence of the judiciary and were not problematical. But courts were also required to address policy arguments of a different character. These related to the broad, although usually unarticulated, question whether, from the viewpoint of society as a whole, a rule (Rule A) that there was a duty of care was better than a rule (Rule B) that there was no such duty (or vice versa). This was more awkward. The court would be required to balance incommensurables, for instance, the personal predicament and needs of the plaintiff (which were likely to favour the adoption of Rule A) as against broader systemic and financial considerations (which might support Rule B). This tended to involve value judgments of a kind which judges preferred to (although could not always) avoid. As well, and perhaps more importantly, judges were not well-placed to assess competing policy arguments. The relevant issues tended to lie outside core judicial competencies. The rules as to the determination of civil litigation did not provide for the sort of policy-formation exercises which were 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. And available material bearing closely on the policy considerations in issue in a case might be thin on the ground. So judges often relied on what could

²⁷ At [232].

²⁸ At [233]-[238].

be no more than hunches. Such hunches might be right, particularly where they related to issues closely associated with the way in which civil litigation was conducted and its expense. But in relation to other issues, such hunches were quite likely to be wrong.

Furthermore, the resolution of the question would very likely depend on the starting point. Courts never started with a clean slate. There would always be a pattern of existing authority and principle which had to be addressed. A decision to reject a duty of care usually proceeded on the basis that, because Rule A could not be justified on existing authorities and established principle, it should be rejected (with any change of the law being left for the legislature). In this case, uncertainties as to the balance of policy considerations told against the imposition of a duty. If the decision was to recognise a duty of care, the court would usually conclude that Rule A was supported by authority and principle and should therefore be adopted unless excluded by compelling policy considerations. In this case, uncertainty as to the appropriate policy was likely to be resolved against the defendant, because such uncertainty did not admit of the conclusion that the duty should be excluded.

William Young J's thoughtful words point to the need for caution in determining in any case whether a novel duty ought to be accepted. Two short comments will be ventured at this stage. First, his Honour's contrasting of high level principles with broad social policy is helpful in throwing light on the judicial exegesis of what is thought to be fair, just and reasonable or of what is considered to bear upon the "external" inquiry, but judicial decisions about competing social policy must necessarily be involved in developing and framing the law of negligence. They cannot be avoided. Second, we certainly must recognise that much depends on the starting point for the duty inquiry. Indeed the issue at stake in *Spencer on Byron* very well demonstrates its significance, as we shall see below.

Barristers' immunity

*Lai v Chamberlains*²⁹ was the first major decision of the new Supreme Court in the field of torts. The case concerned the much-debated question of barristers' immunity from suit, laid down as part of English law by the House of Lords in *Rondel v Worsley*³⁰ and affirmed as representing New Zealand law in *Rees v Sinclair*.³¹ Subsequently, however, in *Arthur J S Hall & Co v Simons*,³² the House of Lords held that in the light of the information available and developments since *Rondel* it was no longer in the public interest that the immunity should remain. By contrast, in *D'Orta-Ekenaike v Victoria Legal Aid*,³³ the High Court of Australia upheld the principle of barristerial immunity in both civil and criminal cases, declining even to narrow its scope. In *Chamberlains v Lai*, which concerned a claim by clients against their solicitors for alleged negligent advice during litigation, leading them to acknowledge liability, the Supreme Court favoured *Hall v Simons* over *D'Orta-Ekenaike* and determined that the immunity should be abandoned.

²⁹ *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.

³⁰ *Rondel v Worsley* [1969] AC 191.

³¹ *Rees v Sinclair* [1974] 1 NZLR 80.

³² *Arthur J S Hall & Co v Simons* [2002] 1 AC 615.

³³ *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, (2005) 223 CLR 1.

Elias CJ, in a joint judgment with Gault and Keith JJ, considered that the need for finality in litigation was the critical issue, and was satisfied that this need did not provide justification for the immunity, whether in criminal or civil proceedings. Rather, the ends of finality were adequately addressed by res judicata and issue estoppel, the plea of autrefois acquit and convict, and the power of the court to strike out proceedings which were an abuse of process. A categorical approach would be wrong. Whether proceedings were abusive could be assessed as appropriate against the principles of finality developed in *Henderson v Henderson*³⁴ (holding that a litigant cannot bring a second claim to ventilate an issue that could and should have been raised in a previous claim), or against the principles developed in *Hunter v Chief Constable of the West Midlands Police*³⁵ (holding that an action would be struck out as an abuse if it was manifestly unfair or brought the administration of justice into disrepute, and that an action normally would be seen as abusive where it would impugn a final decision made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision). These principles were sufficient and appropriate protection for the public interest in judicial process.

Common law courts in recent times have tended not to favour tort immunities.³⁶ The unanimous conclusion of the Supreme Court that the barristers' immunity could not be justified also illustrates this trend. As regards the merits, the judgments are convincing both in rejecting the reasons put forward in past cases for supporting the immunity and in the determination that the judicial system can be protected in necessary cases in more appropriate ways - by developing the doctrine of abuse of process and by identifying the considerations of public policy that are involved in maintaining the integrity of the legal system. As regards abuse of process, the judgments give various pointers as to what is or is not likely to constitute an abuse. All agreed that normally any conviction must be set aside before a civil action can be instituted.³⁷ It is clear, moreover, that the conduct of counsel can afford grounds for setting aside a conviction if there is a real risk that the verdict of the jury is unsafe.³⁸ There remains some uncertainty about possible public policy concerns. One was whether the lawful infliction of adverse consequences, notably imprisonment, could constitute actionable damage. There does not seem to be any especially compelling reason in principle why it should not.³⁹ Another was the question of the contribution of others - the judge, the jury and the prosecutors - who might have shared responsibility for the damage and who can rely upon the absolute privilege protecting participants in court proceedings. We might add to this a further complicating factor, namely, the contribution of the plaintiff himself or herself in bringing about the failure of his or her claim. Seemingly, however, the objection contemplates only that difficult questions of causation may have to be sorted out. And if the plaintiff can show that the negligent conduct of his or her counsel was one cause of the harm, it is nothing to the point that there were other contributory causes, or that a claim for contribution would fail.

³⁴ *Henderson v Henderson* (1843) 3 Hare 100.

³⁵ *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL).

³⁶ Recent examples in the UK are *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398, rejecting an immunity for expert witnesses, and *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52, refusing to extend the doctrine of combat immunity.

³⁷ Tipping J gave a concurring judgment, differing from the majority only in favouring a rule that a challenge to an existing conviction would always be an abuse rather than being only prima facie abusive. Thomas J, also concurring, was highly critical of Tipping J's view.

³⁸ *Sungsuwan v R* [2006] 1 NZLR 370.

³⁹ In the case of misfeasance, see *Karagozlu v Commissioner of Police of the Metropolis* [2006] EWCA Civ 1691, [2007] 1 WLR 1881.

Duty to control others

The decision of the Supreme Court in *Couch v Attorney-General*⁴⁰ attracted wide publicity by reason of the notorious facts of the case. The plaintiff (C) was very seriously injured by a violent criminal (B), who attacked her while robbing the Returned Services Association (RSA) Panmure premises where she worked. Three fellow employees were murdered by B. At this time B was on parole following his release from imprisonment for an aggravated robbery. B had been placed at the RSA for work experience with the knowledge of the probation service, and he returned there to commit his crimes. No-one at the RSA had known that he was on parole. C sued the Attorney-General seeking exemplary damages⁴¹ for what she alleged was grossly deficient supervision of Bell by the probation service.⁴² The Supreme Court held unanimously that her claim was arguable and that it should be allowed to proceed to trial.⁴³ However, there were two different lines of reasoning in reaching this decision.

Elias CJ and Anderson J took a broad approach. Their Honours would not preclude C seeking to substantiate her contention that, simply as a co-worker with B, she was a member of a class to whom the probation service owed a duty of care. Indeed it could not be said confidently that no duty was owed to her simply as a member of the public. A duty would often be more readily apparent in the exercise of statutory obligations than in the case of private actors. Public bodies were not entitled to be indifferent bystanders. A duty might arise through the exercise or existence of statutory duties or powers. These might create a sufficient relationship between the authority and the person suffering harm. Again, a public body might assume a responsibility to protect others. Key factors were the purpose of the statute and the ability of individuals to protect themselves from the harm suffered. So they would be prepared to allow that sufficient proximity to give rise to a duty could arise by reason of statutory obligations and powers, particularly where individuals could not take steps to protect themselves or where social conditions had led individuals to rely on the fulfilment by a public body of its statutory responsibilities.

Blanchard, Tipping and McGrath JJ (in a judgment delivered by Tipping J) were more circumspect. In third party cases there needed to be control over the wrongdoer. The question was whether the defendant had the power and ability to exercise the necessary control. And as regards the relationship between plaintiff and the defendant, this should be special in the sense that there was sufficient proximity between the parties to render it fair, just and reasonable, subject to policy, to impose a duty. The decisions showed that the more specific and obvious the risk, the stronger the case for holding that a defendant with power of control had a duty to the plaintiff. The legislative background was also relevant, and here there was a statutory obligation to supervise and to ensure the conditions of a parolee's release were complied with,⁴⁴ but this obligation was owed to the public generally. It gave no support for a common law duty. The tort law concept of proximity meant that there needed to be a closer connection between the plaintiff and the defendant than where the

⁴⁰ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725. A second decision in this case, concerning the award of exemplary damages, is considered below.

⁴¹ Any claim for compensatory damages was barred by s 317 of the Accident Compensation Act 2001.

⁴² The Attorney-General had agreed to indemnify the officer responsible for Bell's supervision, who was not herself sued, and the case proceeded on the assumption that vicarious liability of the probation service for the officer was admitted.

⁴³ The claim ultimately was settled.

⁴⁴ Criminal Justice Act 1985, s 125.

plaintiff was simply a member of the general public. So C had to show that as an individual or a member of an identifiable class she was or should have been known to be the subject of a distinct and special risk of suffering harm of the kind she sustained at the hands of B – distinct, as being clearly apparent, and special, in the sense that her individual circumstances or her membership of the necessary class rendered her particularly vulnerable to the harm. And her claim could arguably succeed, on the basis that B's links with the RSA premises made it a predictable target, so anyone present would be particularly vulnerable and at special risk of injury.

The broader approach of Elias CJ and Anderson J seems to contemplate a common law duty arising simply through the exercise or existence of statutory powers. But this view does not have a lot of support elsewhere and has been condemned in the House of Lords, which has made it clear that there is no tort of negligent performance of a statutory duty or power. If a situation supports a common law duty of care on ordinary principles then there may be liability, but the statute itself does not give rise to the common law duty. This cannot grow parasitically out of a statutory duty not intended to be owed to individuals.⁴⁵ So when exactly can a common law duty arise? The cases cited by the majority show that a duty to protect a victim from injury being inflicted by another person typically has been founded on a specific assumption of control over, or responsibility for, that other person in circumstances where the victim is at a special and particular risk of harm. By limiting the duty in this way the burden of liability arguably is reasonably manageable and reasonably proportionate to the defendant's wrongdoing. The duty also tends not to impinge on a defendant's autonomy in deciding whether to act to protect the plaintiff. By assuming a supervisory or controlling role a defendant has chosen to take on a responsibility for acting. The implications of the minority views also are significant. There can be no reason to limit them to the probation service. They might be applied equally to the police, the prison service, and indeed to many other public persons or bodies charged with functions aimed at benefitting or protecting the public at large. It is doubtful whether such wide-ranging liability founded upon other people's wrongdoing is desirable as a matter of policy.

Leaky Buildings

Whether a duty of care should be owed by a builder, engineer, architect or local authority inspector to an owner or purchaser of a defective building of course has been a controversial question in New Zealand and elsewhere. The leaky building calamity virtually guaranteed that argument about the existence or ambit of any duty would reach the Supreme Court, and so it has proved. The question has needed answer in five cases, all involving local authority defendants.

Sunset Terraces and Byron Avenue

In 2010 the Supreme Court delivered a conjoined judgment in *North Shore City Council v Body Corporate 188529*⁴⁶ [*Sunset Terraces*] and *North Shore City Council v Body Corporate 189885*⁴⁷ [*Byron Avenue*]. These were two appeals concerning the liability of councils for negligence in inspecting or approving dwelling houses affected by leaky building syndrome. Actions were brought by various owners, the body corporate, and lessees or assignees of the owners against the defendant Council,

⁴⁵ *Gorringe v Calderdale MBC* [2004] UKHL 15, [2004] 1 WLR 1057 at [71].

⁴⁶ *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

⁴⁷ *North Shore City Council v Body Corporate 189885* [2010] NZSC 158, [2011] 2 NZLR 289 [*Byron Avenue*].

alleging negligence in its inspection of the buildings prior to completion. The Court held unanimously that the Council was under a duty to take care.

Tipping J, delivering the joint judgment of himself, Blanchard, McGrath and Anderson JJ, was satisfied that the decision of the Privy Council in *Invercargill City Council v Hamlin*,⁴⁸ upholding a duty by builders and councils, was rightly decided and that the enactment of the Building Act 1991 gave no basis for its reconsideration. The rationale for the duty was based on councils' control over building projects, and the general reliance placed by people acquiring premises on the council having exercised its powers of inspection with care and skill, particularly in relation to features that would be covered up. The duty should extend to all homes, whatever form the home took. Distinctions based on the ownership structure, size, configuration, value or other facets of premises intended to be used as homes were apt to produce arbitrary consequences. The argument that councils should not owe a duty in cases where professionals such as engineers and architects had been involved was not seen as persuasive either. The proper way to reflect the involvement of others was to require them, if negligent in a relevant way, to bear an appropriate share of the responsibility for the ultimate loss. As for the scope of the duty, this should be determined by a building's intended use, in accordance with plans lodged with the council. Councils owed a duty of care, in their inspection role, to owners, both original and subsequent, of premises designed to be used as homes. So "investor" owners of residential property were included. Whether a council might owe the same duties of care in relation to other premises, and if so to what extent, should be left to a case in which the issue directly arose.⁴⁹

In most respects the Supreme Court's decision is straightforward. It was hardly likely that the Court would be minded to overrule *Hamlin*, particularly as the suggested inconsistency with the policy of the Building Act 1991 escaped both the Court of Appeal and the Privy Council in *Hamlin* itself. Accepting *Hamlin*, the limits on its scope proposed by the council would certainly have been a recipe for arbitrary line-drawing. However, the test determined by Tipping J – whether the building was intended for residential use in accordance with plans lodged with the council – has now been overtaken by the decision in *Spencer on Byron*, as will be explained below.

McNamara v Auckland City Council

*McNamara v Auckland City Council*⁵⁰ is another leaky building case, but here a duty of care was denied. The developer of a dwelling house had used a private certifier (ABC) appointed under the Building Act 1991 who was not authorised to certify that the building complied with the weather-tightness standard of the building code. However, the Council overlooked ABC's lack of authority and issued a building consent. The house did not comply with the standard, and the owners sued the

⁴⁸ *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

⁴⁹ A number of further issues were decided. (i) Pursuant to s 13 of the Unit Titles Act 1972, the body corporate in *Byron Avenue* could sue for damage and injury to the common property caused by any person, whether that person was a unit proprietor or not. (ii) The absence of a code compliance certificate in *Byron Avenue* was not significant. Homeowners were entitled to place general reliance on councils to inspect residential premises with care, and the absence of a certificate could not somehow retrospectively abrogate their duty. (iii) Existing limitation rules should not operate to bar claims being brought by a subsequent owner in circumstances where a cause of action had already accrued to an earlier owner. This last question will be considered separately below.

⁵⁰ *McNamara v Auckland City Council* [2012] NZSC 34, [2012] 3 NZLR 701.

Council (the certifier and the developer having gone into liquidation), alleging breach of the *Hamlin* duty and also breach of a *Hedley Byrne*⁵¹ duty in processing the Code Compliance Certificate (CCC) without taking steps to check ABC's authority. A majority of the Supreme Court held that the claim should be struck out.

William Young J, giving a joint judgment with Blanchard and McGrath JJ,⁵² considered that the owners' claim was inconsistent with relevant provisions of the Building Act 1991. In particular, by s 50(3), no civil proceedings could be brought against a territorial authority or certifier for anything done in good faith in reliance on a building certificate or CCC issued by a building certifier. Territorial authorities were not required to go behind apparently valid certificates, and if want of diligence was treated as amounting to an absence of good faith it would deprive s 50(3) of any real meaning. Further, as regards the *Hamlin* claim, and given the certificate issued by ABC, there was nothing to suggest that territorial authorities had a roving certifying or inspecting role, and nothing happened to trigger the council's responsibilities under the statute. There was no relationship of proximity, no reliance on and no assumption of responsibility as between potential purchasers and the council. As regards the *Hedley Byrne* claim, the CCC was regular on its face and the council was required to accept it as establishing compliance.

The decision in *McNamara* is not of the same wide-ranging significance as *Sunset Terraces* (or, indeed, *Spencer on Byron*, below) and turns on the majority view that the context provided by the Building Act 1991 pointed away from the asserted duty of care. In determining the matter a close analysis of all relevant provisions is needed. But standing back a little, it is difficult to disagree with William Young J's view, that where legislation confers an immunity from suit in respect of actions taken in good faith it can fairly be taken to have excluded a duty of care.

The Grange

Much of the leaky building litigation has concerned claims by property owners against allegedly negligent councils. *North Shore City Council v Attorney-General*⁵³ [*The Grange*] differs in that the defendant Council sought to establish a higher level responsibility of the Building Industry Authority (BIA) in its regulation of the Council's operations. A building development leaked, and the Council was sued in respect of its alleged negligence in failing to take reasonable steps to ensure that the construction of the development complied with the building code. The Council thereupon sought to join the Attorney-General as a third party (the Crown being the statutory successor to the liabilities of the BIA⁵⁴) on the basis that the BIA had breached a duty of care owed to the Council, when reviewing the performance of the Council's technical operations, in failing to raise concerns about monolithic cladding and weather-tightness and in giving the Council a clean bill of health. The Court of Appeal struck out the claim on the ground that it disclosed no reasonable cause of action,⁵⁵ and a majority in the Supreme Court dismissed the Council's appeal.

⁵¹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

⁵² Tipping J gave a broadly concurring judgment. Elias CJ dissented.

⁵³ *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*].

⁵⁴ Building Act 2004, s 419.

⁵⁵ *Attorney-General v North Shore City Council* [2010] NZCA 324, [2011] 1 NZLR 178.

Blanchard J, giving a joint judgment with McGrath and William Young JJ, identified a number of features which counted against the existence of the asserted duty. First, the purpose of the reviewing function was to allow the BIA to inform itself about a territorial authority's performance in reporting to the minister: it was not to impose an obligation to authorities to comment on conclusions drawn from the review. The territorial authorities were responsible for the administration of the Act in their districts with supporting statutory powers, whereas the BIA was given no power to control the day-to-day operations of an authority. Second, the BIA was not established in order that it should carry out checks on individual buildings, and it randomly selected a small number only to find out about how the Council was undertaking the process of inspection. So there was no sufficient nexus between the loss suffered by the plaintiff owners and the duty said by the Council to be owed to it by the BIA. Third, the Council was not vulnerable and was well able to protect itself by preventing the construction of non-compliant buildings. Fourth, there was no authority in favour of the duty alleged, which would be to protect the claimant against the consequences of its own negligence in failing to protect someone else against separate negligence by third parties.

Further, Blanchard J thought that as a matter of law the BIA did not assume a responsibility to use skill and care in the preparation of its report, for two reasons. The first was the statutory scheme, which gave the BIA limited functions in comparison with the Council's primary role and duties as administrator of the building code within its district. Second, the review did not come anywhere close to a "clean bill of health," and could not reasonably have been understood by the Council to be giving an assurance of the quality of its existing or future performance.

Elias CJ dissented. Her Honour considered that sufficient relationships of proximity to found duties of care to owners and to territorial authorities arose out of the distinct statutory functions of the BIA, and that no reasons of policy prevented their recognition. In so deciding her Honour declined to follow the approach taken in *Attorney-General v Body Corporate No 200200*⁵⁶ [*Sacramento*] which she considered was not supported by the scheme and purpose of the Building Act.

In *Sacramento* the Court of Appeal had held that the BIA owed no duty to building owners to exercise its powers under the Building Act 1991 and the Building Code by taking steps to warn about and to prevent poor building practices leading to leaky building syndrome. The majority in *The Grange* affirmed the decision and rejected any duty of care owed directly by the BIA to the plaintiff owners. This conclusion is consistent with ordinary principle. A defendant being in a position involving supervision and control is not enough in itself to give rise to a duty. A number of other controlling principles may apply, depending on the circumstances. Adopting the internal/external analysis, there must of course be a sufficiently close and proximate relation between the parties, as discussed at length in *The Grange*. Factors that may be taken into account in the external inquiry include, very broadly, whether the recognition of a duty would tend to trespass into a non-justiciable or political sphere, or would or might impose an indeterminate burden of liability, or would or might operate inconsistently in relation to the statutory context and other common law principles. Such concerns can be seen to underlie the decision in *Sacramento* and equally that in *The Grange*. Certainly there are real objections to imposing tort duties on regulatory and supervisory bodies with general, industry-wide, mandates or functions and limited resources, particularly where these may

⁵⁶ *Attorney-General v Body Corporate No 200200* [2007] 1 NZLR 95 [*Sacramento*].

be owed to all members of the public. It is true that in *The Grange* the BIA did in fact deal with the Council, but the review process could involve any or all councils and a duty could lead to indirect responsibility of the BIA to all homeowners suing councils. *Sacramento* would be circumvented. Finally, and certainly, the BIA could not in any event be responsible for operational negligence. And allegations about defects in performance rather than process lay at the heart of the Council's complaints.

Spencer on Byron

Sunset Terraces concerned residential property. The possibility that a duty might be owed in respect of other buildings, like schools, offices and other commercial buildings, was left open. Existing authority in Australia⁵⁷ and New Zealand⁵⁸ had denied claims by owners of commercial premises. Then in *Body Corporate 207624 v North Shore City Council*⁵⁹ [*Spencer on Byron*] the matter came before the Supreme Court for decision.

The case concerned a building with both residential and commercial uses. Six residential apartments occupied the top two levels of a 23 level building, while the remainder of the building, comprising 253 units, operated as a hotel. The building leaked and the Body Corporate, the owners of the hotel units and the owners of the apartments all sued the North Shore City Council, alleging, inter alia, negligence in issuing the building consents and in inspecting and approving the development. In a majority decision,⁶⁰ the plaintiffs were successful in establishing that the Council owed them a duty to take care. The reasoning of the majority, very broadly, was founded on the argument that there was nothing in the Building Act 1991, and no reason in principle, to suggest that there should be a distinction between houses and other buildings.

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

⁵⁷ *Woolcock St Investments Ltd v CDG Pty Ltd* (2005) 216 CLR 515.

⁵⁸ *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 325 (CA); *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460; *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786.

⁵⁹ *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*].

⁶⁰ Elias CJ, Tipping, McGrath and Chambers JJ, William Young J dissenting.

and commercial buildings. To use the council's own categorisation would be decidedly odd, for the council would be choosing whether or not it would owe a duty of care in tort. So his Honour concluded that councils owed a duty in their inspection role to owners, both original and subsequent, of all premises.

William Young J dissented. His Honour thought that the relevant policy issues were of a kind which the courts were not well placed to assess and were quite likely to get wrong. Given the possible extent of the claims which would be based on the instant judgment, he saw the potential for serious adverse consequences.

What should we make of this decision? A preliminary observation is that while defective building litigation certainly creates difficult issues, they are not beyond judicial resolution. In developing the common law the courts ought to respond to social needs: their task is to fashion workable solutions to the problems at hand. In New Zealand the need for such solutions is very great in light of the widespread failings in the building and construction industry.

First, the Supreme Court has solved the problem of how to set an objectively ascertainable standard of building construction by pointing to the requirements of the building code. These, in the view of the majority, are based ultimately on the need for buildings to be safe for their occupants.⁶¹ This solution avoids a degree of uncertainty inherent in a "safety" test⁶² and rationalises the basis for the owner's claim. It holds that the duty protects building owners' economic interests only to the extent that the standard of construction fails to meet the requirements of the building code, and those requirements are founded seemingly on health and safety factors. It also resolves the associated argument that a tort action should not be allowed to bypass contractual limitations on the liability of the builder. Tipping J noted that the 1991 Act required that buildings comply with the building code, so there was no capacity for anyone involved to limit their liability by contract. It must indeed be the case that a person agreeing with another to construct a building or part of a building in breach of the building code cannot be a reason for refusing to impose a duty on that person.

The core of *Spencer on Byron* lies in its determination that residential and commercial buildings should be treated in a similar way. There are some good arguments in favour of this view (well articulated by Kirby J in his dissenting judgment in *Woolcock*⁶³). Financial loss to a subsequent owner certainly is a reasonably foreseeable consequence of a builder's failure to take care. There is a public interest in discouraging the putting up of defective buildings, of whatever kind, and tort law can respond by giving a remedy to the owner. This compensates for a wrong and at the same time helps to maintain proper professional standards in the engineering and building industry. Subsequent purchasers of new or fairly new buildings, whether private or commercial, in many cases will have no other adequate remedy, and certainly are vulnerable to the risk of harm in the sense that they are acquiring property which misleadingly appears to be sound. Indeed they can reasonably expect at least a minimum level of durability and soundness, and to this extent they should not be deprived of a legal remedy merely because they could have engaged an expert prior to a purchase. Furthermore,

⁶¹ Tipping, McGrath and Chambers JJ. Compare the opinion of Elias CJ, who did not accept the argument that the Building Act was concerned only with safety and sanitarianess, to the exclusion of property interests.

⁶² See *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85.

⁶³ *Woolcock St Investments Ltd v CDG Pty Ltd* (2005) 216 CLR 515.

defects are usually latent and may not be easily discoverable even if an expert is in fact called in to make a report. More generally, imposing a duty of care on a builder in a commercial context does not interfere with commercial autonomy or freedom of contractual negotiation. Parties to contractual matrices are free to accept restrictions on their taking tort actions, but subsequent non-consenting purchasers are not and should not be bound. There is no danger of multiple claims or loss of an indeterminate amount, at least in the sense that a particular claim is necessarily made by a particular owner in respect of a particular defective building.

These various arguments all provide support for the Supreme Court's decision. It was certainly driven by the terms of the Building Act 1991, which on the majority view required that the Council's arguments be rejected. Yet underlying the whole debate, and perhaps a source of disquiet about the decision, is the enormous scale of the leaky buildings problem and the difficulty in determining how best to deal with its myriad consequences. Councils were already subject to major liabilities in relation to residences, and now they have to shoulder a further burden. The financial consequences are very hard to predict. However, there are a number of points which suggest that they may be manageable.

First, imposing liability on councils serves to spread the loss, which may ultimately be met by ratepayers. This arguably is an appropriate response in view of the prevalence and the systemic nature of the problem. Apart from this, there are many other potential defendants who may be held to owe a duty of care in respect of defective building construction. Fairly clearly they are also open to claims founded on *Spencer on Byron* to the extent that they negligently contribute to buildings being erected that do not comply with the building code.

Secondly, the reality in many cases is that proof of breach of duty may not be easy. Exactly what causes a building to leak may involve an evaluation of complex and technical issues in circumstances where relevant evidence is difficult to obtain.⁶⁴ Certainly, the task facing the plaintiff in a leaky building case may well be considerably more onerous than in, say, a simple foundations case. And sometimes the difficulties involved are such that the claim will fail.⁶⁵

Thirdly, there is the limitation bar. A problem with leaky buildings first started to emerge in the late 1990s, and its widespread and insidious nature became apparent in the early 2000s. Building practices certainly have changed in response. It may be, then, that most of the possible claims have already been or are being litigated. And where the leaking has not yet come to light, the 10 year long-stop period is likely to apply.⁶⁶ So many owners may only discover the problem after that period has expired. These unfortunate victims have to bear the loss themselves.⁶⁷

Spencer on Byron is probably the Supreme Court's most controversial decision concerning tort liability. Yet there are some good arguments supporting it and its financial implications do not necessarily point away from a duty. Indeed, we can agree with William Young J's doubts about the utility of the action for negligence and that better and more efficient loss-spreading mechanisms are needed, yet we must recognise that in deciding *Spencer on Byron* the Court was not starting with a

⁶⁴ See *Platt v Porirua City Council* [2012] NZHC 2445 at [2].

⁶⁵ For example, *Van Huijsduijnen v Woodley* [2012] NZHC 2685.

⁶⁶ Building Act 2004, s 393(2).

⁶⁷ There may be the possibility of some financial assistance under the Government's Financial Assistance Package for the owners of non-weather-tight houses: see www.dbh.govt.nz/fap.

clean slate. It had to fashion a solution in light of existing authority. If taxed on how the problem might best be tackled from scratch, it is not likely that their Honours, nor indeed anyone else, would opt for the tort action.

Accrual of causes of action

Determining the date when a particular cause of action has accrued in favour of a plaintiff raises a question of common law principle, although the operative effect of a court's decision on the point is conditioned by the limitation legislation.⁶⁸ The Supreme Court has made three significant contributions here, in clarifying the law in cases where there is undiscoverable damage, in shedding light on the question when a cause of action based on negligence may be held to have accrued in circumstances where the suffering of loss by the plaintiff involves a contingency, and in determining the date of accrual in defective building cases involving successive owners. We will discuss here the second and third of these questions.⁶⁹

Contingencies

A controversial area of inquiry concerns the date when time starts to run in cases involving a notional or potential loss, or a contingency which may or may not happen. In *Davys Burton v Thom*⁷⁰ the plaintiff alleged that in 1990 the defendant solicitor failed to provide adequate instructions for the correct execution of a prenuptial matrimonial property agreement between the plaintiff and his wife, the purpose of which was to preserve his house as his own separate property. In 1999 the Family Court held that the agreement was void, by reason of its non-compliance with the requirements of the Matrimonial Property Act 1976, and the house accordingly was treated as matrimonial property to which the wife was entitled to a share. In 2002 the plaintiff claimed the value of that share from the defendants, and the question for the court was whether his claim had been brought outside the six year limitation period. In a unanimous decision, the Supreme Court held that the cause of action accrued in 1990 and that the claim was barred.

Elias CJ maintained that a cause of action for negligent professional advice arose as soon as the plaintiff who relied on the advice was financially worse off, even if quantification was difficult and the measure of the loss in the particular case might ultimately depend on further contingencies. A plaintiff might be made financially worse off in a number of ways, such as by transfer of property, by diminution in the value of an asset, or by the incurring of a liability. In the case of diminution in value of an asset the assessment may be relatively straightforward. But when the damage claimed is based upon the consequences of the plaintiff's entering into a transaction, economic damage often will not be suffered at the time of the transaction. Where a plaintiff has been induced by a misrepresentation to part with property, make payments or incur liabilities in the context of an executory contract, the plaintiff might not suffer loss until the net position obtained after benefits gained through the transaction were brought into account.⁷¹ Similarly, a liability that was wholly contingent might give rise to no immediate economic or financial detriment. But the present claim

⁶⁸ All decisions have concerned the Limitation Act 1950. The Limitation Act 2010 has repealed the 1950 Act (s 57), but its provisions continue to apply to claims based on acts or omissions before 1 January 2011, when the 2010 Act came into force (s 59).

⁶⁹ As regards the first, see above, n 7.

⁷⁰ *Davys Burton v Thom* [2008] NZSC 65, [2009] 1 NZLR 437.

⁷¹ Citing *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL).

was different. The plaintiff suffered immediate loss on his marriage to his wife without the protection of a valid contracting-out agreement. He did not get what he should have got, and his assets were diminished by an existing liability through the attachment of the Matrimonial Property regime. So his claim was barred.⁷²

The decision in *Thom* certainly was a correct application of the relevant principles of law. The key to the solution lies in distinguishing between liabilities and losses which presently exist and those which are contingent on the happening of a future event and which may or may not come into existence. The existence of a contingent liability might depress the value of other property, or it might mean that a party to a bilateral transaction had received less than the party should have done or was worse off than if the party had not entered the transaction. But, standing alone, the contingency is not damage.⁷³ However, the decision also shows why reform of the law of limitation was needed. The plaintiff relied on his solicitor and had no reason to believe that there was a problem until after the limitation period had expired. The Limitation Act 2010 now provides for the bringing of proceedings within a late knowledge period running from the date when a claimant discovers the basis for his or her claim, and also lays down a long-stop period of 15 years from the date of the defendant's act or omission, after which the claim is barred. These provisions would apply to circumstances such as those in *Davys Burton*. They provide a better solution than that achieved by the common law.

Successive owners of buildings

A building containing an unknown defect may have a number of owners before the defect eventually is discovered. Once the defect is in fact discovered or is reasonably discoverable, a cause of action accrues to the owner at that time, on the reasoning that this is the date when the owner's economic loss is suffered.⁷⁴ No cause of action has in fact accrued to the previous owners, who sold at full value and suffered no loss. Suppose now that an owner who becomes aware of the defect sells the property without repairing it and without disclosing the defect, and the new owner does not discover the defect and purchases at full value. Does he or she still acquire a cause of action against the builder or council? In *Sparham-Souter v Town and Country Developments (Essex) Ltd*⁷⁵ Lord Denning MR thought that a cause of action accrued only to the owner when the damage appeared or was reasonably discoverable. In *Mount Albert Borough Council v Johnson*⁷⁶ Richardson J took the same view. If right, it means that in such a case the new owner has a cause of action, if at all, only against the owner. He or she can no longer sue those originally responsible for the harm.

⁷² The other members of the Court reached the same conclusion as Elias CJ. The one point upon which there was some disagreement concerned the question whether, in the absence of security over assets, entering into a contract of guarantee or indemnity for an existing debt by a third party constituted economic detriment giving rise to a cause of action before default by the principal debtor. Elias CJ thought the better view might be that where the principal debt was not itself contingent and did not depend on the net position on the benefits and burdens of an executory contract, then the liability was not properly seen as a possible future liability but an existing liability causing measurable loss. But Tipping, McGrath and Wilson JJ said that damage would be contingent, and hence not actual for limitation purposes, if the damage resulted from the plaintiff being exposed to a liability which was contingent on the occurrence of a future uncertain event.

⁷³ *Law Society v Sephton & Co* [2006] UKHL 22, [2006] 2 AC 543, at [30].

⁷⁴ *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

⁷⁵ *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858, at 868 (CA).

⁷⁶ *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 at 242 (CA).

In *Sunset Terraces* the defendant Council pointed to the fact that a number of the plaintiff owners had purchased their units after a cause of action had accrued to their predecessors in title. Accordingly, it was argued, no cause of action ever accrued in their favour. But the Court rejected the argument and held that these owners could still sue. Tipping J recognised that a duty was not transferred from one owner to another: it was owed independently to each owner who suffered loss and could only be suffered by the owner. What, then, was the justification for denying the second owner the ability to sue if a cause of action had already accrued to the first? If there was a causation or contributory negligence factor affecting the second owner's claim it could be brought into account in the ordinary way. There was no reason to absolve a negligent council from its liability to a subsequent owner simply because the owner's predecessor was also able to sue the council. A complete bar as a result of the first owner having an accrued right of action was too draconian and blunt an approach to resolving the problem.

In so deciding the Supreme Court certainly has given plaintiffs the benefit of a highly favourable rule. A builder or council may owe a duty to the owner for the time being (hereafter O2) even after a defect is discoverable or has actually been discovered by the previous owner (hereafter O1). The decision raises a number of questions and difficulties. Let us consider what they are and whether or how they might be resolved.

First, a necessary consequence of the view taken in *Sunset Terraces* is that a new limitation period may commence after every sale of the property. When exactly does this new cause of action for the second owner actually accrue? It surely cannot be the date when O2 actually discovers the defect, for that would reject the *Hamlin* solution and pose a purely subjective test. Presumably the *Hamlin* test must be treated as contemplating not just a particular date from which time starts to run but a continuing state of affairs. On this view a later purchaser acquires a cause of action on the date of purchase, for then he or she suffers damage on becoming the owner of a house with an already discoverable defect. The limitation period in effect is extended on the happenstance of the property being sold, but seemingly the test has to be modified in some such way.

There is also the possibility of defendants facing successive claims in respect of the same damage. Elias CJ and Tipping J both saw the solution to the problem in the principles of contributory negligence and causation, backed up by the ten year long-stop bar. Of course the last of these can only come into play if O2 has a cause of action, and even then it cannot help if the ten years has not expired. It does not address the question whether O2's claim ought to be rejected as a matter of principle. Contributory negligence may sometimes be a defence, but this concerns the conduct of the purchaser rather than the vendor and does not resolve the double jeopardy objection. So the solution has to be found in the principles of causation. Their Honours did not articulate quite how they might operate, so let us consider this question.

Seemingly the primary focus needs to be on O1's knowledge or conduct in selling a house with an existing defect to O2. The principle that a new owner acquires a fresh cause of action on the date of purchase clearly must apply in a case where the defect is discoverable but O1 does not in fact know about it, and also, it would seem, in a case where O1 does know and sells at full value without making any representations and without taking any steps to conceal the defect. Some of the plaintiffs in *Sunset Terraces* bought from vendors who knew or should have known of the defects in their units. But suppose that O1 deliberately covers up a defect and then sells the property at its full, undamaged, value. In this case the defect is not or may not be reasonably discoverable by O2. Can

we say that O2's cause of action only accrues when the defect becomes discoverable once again? Any such rule would tend both to encourage and to excuse O1's wrongdoing, on the basis that it would act as an incentive to conceal the problem and would create a right of action for O2 against other potential defendants whom O2 might well choose to sue instead of O1.

It is apparent that some form of active concealment may support an action for deceit by O2 against O1,⁷⁷ and this very arguably has causal significance for any claim O2 may have against the builder or council. An innocent sale or at least a sale where the vendor makes no representations about the state of the building perhaps can be regarded as falling within the risk created by the builder's or the council's negligence. But intervening deceit by a vendor amounting to a fraudulent representation about the state of the building can be treated as falling outside that risk, and can at the same time be treated as a new cause of O2's loss. On this view, determining which consequences should be held to fall outside the risk created by negligent conduct involves making a judgment about the purpose of the rule that has been broken.⁷⁸ And in the present context the rule imposing liability for building or approving a defectively constructed house can certainly be held to exclude loss flowing from deliberately wrongful conduct by a vendor that intervenes following the defendant's negligence.

We can better appreciate that it is necessary to take this view if we add the further fact that O1 has recovered damages or settled before selling to O2. In such a case O1 must be under a duty to disclose any payment and the reason for it, and a breach of that duty must be treated as the sole cause of O2's loss. O1 assumes a duty to disclose by getting the damages and by failing to apply the money to the repair of the building. O2 thus has a cause of action against O1, although this may not be as satisfactory a solution from O2's point of view as a cause of action against the builder or council. But, to reiterate, it cannot be right to allow a second claim against a defendant who has paid an earlier owner.

Exemplary damages

In the *Bottrill* litigation the New Zealand Court of Appeal and the Privy Council took different views about the appropriate basis for making an award of exemplary damages. In *Bottrill v A*⁷⁹ the Court of Appeal held, in a majority decision, that the remedy of exemplary damages should be confined to cases where the defendant was subjectively aware of the risk to which his or her conduct exposed the plaintiff and acted deliberately or recklessly in taking that risk. But the Privy Council, also in a majority judgment, allowed an appeal from that decision,⁸⁰ taking the view that the Court's discretionary jurisdiction to award exemplary damages could be expected to extend to all cases of tortious wrongdoing where the defendant's conduct satisfied the criterion of outrageousness laid down in *Taylor v Beere*.⁸¹ Exceptionally, negligence might qualify and an award might be made even though the defendant was not consciously reckless. The question then was raised again in the *Couch*

⁷⁷ *Gordon v Selico* (1986) 18 HLR 219, CA; *Amaltal Corp Ltd v Maruha Corp* [2007] 1 NZLR 608 at [47], on appeal *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192; *Sutherland v Kao* HC Auckland CIV-2006-404-5990, 8 August 2008.

⁷⁸ See *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 683 per Gault J; *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 30–31 (HL); *Kuwait Airways Corporation v Iraqi Airways Co. (Nos 4 and 5)* [2002] 2 AC 883 at [71].

⁷⁹ *Bottrill v A* [2001] 3 NZLR 622 (CA).

⁸⁰ *Bottrill v A* [2003] 2 NZLR 721 (PC).

⁸¹ *Taylor v Beere* [1982] 1 NZLR 81 (CA).

litigation, and in its second judgment in the case⁸² the majority held that the decision of the Privy Council in *Bottrill* should be overruled and that exemplary damages should be awarded in accordance with the test laid down in *Bottrill* in the Court of Appeal. Tipping J, giving the leading majority judgment, puts the focus squarely on the defendant's state of mind. The plaintiff should be required to show intentional or reckless misconduct. Elias CJ, in dissent, would leave open the possibility of outrageous negligence. Of course either view is possible. Which should we prefer? Authorities elsewhere provide no certain answer, but in any event we should direct our attention to the purpose or purposes of exemplary damages and consider the light they may throw on the different approaches.

It has been recognised by the courts on many occasions that the primary purpose of exemplary damages is to punish a wrongdoer.⁸³ Some would see punishment as just one of a number of purposes, these including: deterrence, condemnation of wrongdoing, appeasement of victims and vindication of victims' rights. Yet there is a persuasive argument that such additional perceived purposes are simply purposes of tort law generally, and that they lack any particular or sufficiently clear connection with the award of exemplary damages.⁸⁴ However, if we accept at least that exemplary damages have a proper role in deterring wrongdoing, on the basis that punishment is inextricably bound up with deterrence, the test for their award should be calculated to promote that purpose. And deterrence is more likely to be achieved in relation to conduct that is intentional or reckless. As was emphasised in the majority judgments in *Couch*, any deterrent role must be much diminished in a case where the defendant's wrong was unthinking or inadvertent.

Turning to punishment, the emphasis must be on the character of the defendant's conduct, not on the injury or damage suffered by the plaintiff. Yet outrage is very much a matter of individual impression. The focus is on the plaintiff's or a bystander's or the court's reaction – it is not clear which – to the defendant's conduct. By contrast, a test requiring advertence or recklessness as to consequences is based firmly on the quality of the relevant conduct rather than the reaction to it by others. It also sets a more precise and certain standard. Intention or subjective recklessness provides a test with conceptually certain criteria, whereas outrage does not. Further, the test for exemplary damages should be co-extensive with its rationale of punishment and, accordingly, should require a guilty mind.⁸⁵ Intention or subjective recklessness achieves a degree of consistency with criminal law principles, and in this way it provides for the mental element that is the appropriate test for actions to be punished. The question as to the test for exemplary damages has a good deal more in common with these ordinary principles than with the lesser standards that sometimes suffice in the case of regulatory offences.

We might also ask why the test of outrageousness should be regarded as having been set in stone. There is no magic in having outrageousness as the single touchstone. It is merely one of a large number of overlapping adjectives or phrases which have been used to justify an award. Other expressions that can be found in the cases include oppressive, high-handed, malicious, wanton, vindictive, wilful, insolent, arrogant, cynical, reckless indifference, and contumelious disregard of the

⁸² *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.

⁸³ See, in particular, *Daniels v Thompson* [1998] 3 NZLR 22 (CA) and *W v W* [1999] 2 NZLR 1 (PC).

⁸⁴ A Beever "The Structure of Aggravated and Exemplary Damages" (2003) 23 OJLS 87.

⁸⁵ C Harlow "A Punitive Role for Tort Law?" in L Pearson, C Harlow and M Taggart (eds) *Administrative Law in a Changing State* (Hart Publishing, Oxford, 2008) at 252.

plaintiff's rights. Their underlying theme very arguably suggests that the defendant's misbehaviour needs at least to be advertent or reckless, and the decision in *Couch*, by spelling this out, has assisted in achieving greater clarity and certainty in the law. There is likely to be uncertainty in some or many cases whatever the test, but the problem is exacerbated if outrageousness is the sole criterion.

In summary, and drawing upon Tipping J's words in *Couch*, a focus upon the defendant's state of mind is a more principled basis for deciding whether exemplary damages should be awarded than the uncertain and amorphous concept of the defendant's conduct being outrageous.

Conclusions

It is a trite observation that the law is always subject to change, whether by judicial decision or by the intervention of the legislature. However, it is probably true to say that more tends to happen in the field of torts than in many other areas of law. New and interesting questions are always arising, here and around the world, developing, restricting or clarifying existing principles. The point perhaps is reflected in the decisions of the Supreme Court during its first ten years.

Of course, as a preliminary matter the decisions needed to be identified. There is room for debate about how to choose and to evaluate the importance of cases decided by the Court which, in one way or another, concern the principles of tort. If we include cases concerning statutes impacting on those principles as well as those concerning the common law (even though not all are examined in detail here), we find from the choices made in this paper that there are 14 decisions which have had a significant impact on the developing law and perhaps 10 or 12 containing unexceptional statements of established principle, brief asides, passing references and suchlike and which are of lesser or minor significance.⁸⁶

In nine of the 14 cases the decision of the court was unanimous, but we need not dwell on this point. Unanimity in the result of a claim of course is not the same as unanimity in reasoning, and in any event not all were solely concerned with tort issues.⁸⁷ If we ask instead the question whether in each case there was any dispute about an issue relating in some way to tort liability, we find seven decisions where there was agreement in all major respects⁸⁸ and seven where there was not.⁸⁹ Let us take the latter seven. In *Murray* the majority (Blanchard, Tipping, McGrath and Henry JJ) rejected

⁸⁶ Those in the latter category are identified for the most part above nn 6 and 10-17.

⁸⁷ In *Hamed* the Court was not unanimous on the question of admissibility of evidence, but there were no substantial differences of opinion concerning implied licences to enter land as negating trespass.

⁸⁸ These are *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7, *Dollars & Sense Finance Ltd v Nathan* [2008] NZSC 20, [2008] 2 NZLR 557, *Davys Burton v Thom* [2008] NZSC 65, [2009] 1 NZLR 437, *Sunset Terraces* [2010] NZSC 158, [2011] 2 NZLR 289, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305, *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145, and *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425. Of course there are still differences within these decisions - for example in *Lai* concerning whether a conviction must be quashed before counsel can be sued (see n 37), in *Davys Burton* concerning when damage exists on entering contracts of guarantee and indemnity (see n 723), and in *Allenby* concerning the nature of the "accident" in the case of an unplanned pregnancy not caused by treatment ([see for discussion, see reference in](#) n 3).

⁸⁹ These are *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721, *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725, *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149, *McNamara v Auckland City Council* [2012] NZSC 34, [2012] 3 NZLR 701, *The Grange* [2012] NZSC 49, [2012] 3 NZLR 341, *Spencer on Byron* [2012] NZSC 83, [2013] 2 NZLR 297 and *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

a general “discoverability” rule but Gault J supported it. In *Couch (No 1)* the majority (Blanchard, Tipping and McGrath JJ) favoured a narrower view than the minority (Elias CJ and Anderson J) concerning the duty owed by public bodies to prevent harm being caused by third parties, and in *Couch (No 2)* another majority (Blanchard, Tipping, McGrath and Wilson JJ) also preferred a narrower test for the award of exemplary damages than that supported by Elias CJ. In *Altimarloch* the court was split 2-2 on the question whether in the circumstances there could be a right to claim contribution in equity, with Elias CJ not deciding but inclining towards the views of McGrath and Anderson JJ favouring such a claim. In both *McNamara* and *The Grange* the majority (Blanchard, William Young, Tipping and McGrath JJ) rejected claims against a council and the Building Industry Authority respectively for not preventing the erection of leaky buildings, with Elias CJ dissenting in each case. Finally, in *Spencer on Byron* the majority (Elias CJ, Tipping, Chambers and McGrath JJ) upheld a duty owed by a council in the case of a commercial building, but for William Young J this was a step too far. For what it is worth, we can note that in five of these cases the narrower view prevailed, *Spencer on Byron* being the one clear exception and *Altimarloch* potentially the other.

For the most part, broad generalisations about the approach adopted by the Supreme Court towards tort law based on the Court’s record over the last 10 years are unlikely to be meaningful. The chances of litigation, the relatively small number of cases and the disparate issues they raise must lead to this conclusion. Perhaps we can say, relying mainly on *Lai*, and partly on the public body cases that the Court has set its face against special immunities from liability. Brief general comment is also possible in relation to the leaky building litigation, because the Court has decided five cases concerning the question of tort liability and because the question of underlying principle has been much debated in other common law jurisdictions.

Whether an action in negligence seeking compensation for construction defects should be allowable at all is controversial. Many see a tort remedy as unprincipled and an impermissible intrusion in a field where there should be recovery, if at all, only in contract. In the UK such an action has been rejected, in Australia it has been confined in effect to defective residences, in Canada the focus has been on whether the building is dangerous, and in the US different solutions have been adopted in different states. In New Zealand a line has been drawn where the defendant council was not the building certifier (*McNamara*) and where the defendant’s regulatory control of the building industry as a whole was remote from supervisory failures in specific cases (*The Grange*). But otherwise leaky building claims have succeeded, initially in the case of residences (*Sunset Terraces* and *Byron Avenue*) and latterly in the case of all buildings (*Spencer on Byron*). Nowhere else have the courts taken this last step. But while *Spencer on Byron* is a radical decision, there are three main strands of argument supporting it. First, the result was certainly driven by the terms of the Building Act 1991, which at least pointed towards a remedy and arguably mandated it. Second, drawing a distinction between different kinds of building would be difficult and arguably unprincipled. Third, no other country has had to deal with a problem of the magnitude of the leaky building disaster.⁹⁰ As we have seen, very many victims of the disaster have failed or will fail in recovering damages, primarily because of difficulties in proving fault or because the claim is statute-barred. Leaving victims who

⁹⁰ In Canada a similar problem emerged in British Columbia in the 1980s. The cost of the damage (estimated at \$4b) is far less than in New Zealand. See generally *The Renewal of Trust in Residential Construction*, Commission of Inquiry into the Quality of Condominium Construction in British Columbia (June 1998). It is unfortunate, to say the least, that the New Zealand building industry did not learn from the Canadian experience.

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can pass these hurdles with no redress evidently was not an option the Court was prepared to contemplate.

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