

BARAGWANATH J

Table of Contents

	Para No
The appeal	[1]
The jurisprudence	[5]
<i>Claims that have succeeded</i>	[6]
<i>Claims that have failed</i>	[16]
When does a council owe a duty of care?	[20]
<i>No duty: the historical starting point</i>	[21]
(1) <i>A duty based on Donoghue and the Public Health Act</i>	[23]
(2) <i>Public law duty not to act ultra vires</i>	[26]
(3) <i>Donoghue and the duty not to produce a defective thing</i>	[27]
(4) <i>Duty not to create a dangerous building</i>	[30]
(5) <i>No duty in respect of economic loss</i>	[31]
Discussion	[32]
The Building Act 1991	[39]
Analysis	[57]
Decision	[80]

The appeal

[1] The appellants, Te Mata Properties Ltd and Te Mata Village Properties Ltd (whom I will refer to jointly as Te Mata) 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 (the Council) in the High Court for the cost of remedial works, the loss of value of the property, consequential losses and general damages. It 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 legal obligation to Te Mata. Te Mata now appeals.

[2] Te Mata's pleading is for alleged breach of a duty of care to avoid economic loss to a property owner by reason of physical damage and is based simply on *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC), which it seeks to apply to this case. The nub of that case, stated at 519, was to endorse the comment by Cooke P in this Court, reported [1994] 3 NZLR 513, at 519:

... whatever may be the position in the United Kingdom, home-owners in New Zealand do traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the bylaws.

[3] For the reasons stated in this judgment that decision does not extend beyond domestic dwellings and does not support the present claim. Te Mata's submissions suggested that the health and safety purpose of the Building Act might provide a basis to distinguish the present case from the authorities that have refused to recognise a duty in relation to commercial premises. In particular, it was submitted that the decision of the High Court in *Three Meade Street v Rotorua District Council* [2005] 1 NZLR 504, which also concerned a leaky motel, could be distinguished because that was a case "concerned with shoddy workmanship rather than health or safety issues". But Te Mata's loss did not include injury to health and safety. Nor did Te Mata plead that health and safety provided a separate cause of action from the purely economic basis of *Hamlin*.

[4] The Court's practice is to decline to strike out a proceeding if amendment would give rise to an arguable case. But Te Mata did not seek leave to amend its pleadings. Indeed, as the respondent points out, despite suggesting that amended pleadings might be forthcoming, Te Mata has not taken advantage of the time that was available to them to file such pleadings. Since the members of the Court are agreed that the *Hamlin* argument advanced cannot succeed, and my brethren are of opinion that amendment could make no difference, the appeal must simply be dismissed. I conclude these reasons with the observation that my own mind is not closed on whether amendment of the pleading to assert the health and safety issues as a distinct cause of action could have led to a different result.

The jurisprudence

[5] This Court has recognised "that the New Zealand building inspector cases are sui generis" or distinctive: *Attorney-General v Carter* [2003] 2 NZLR 160 at [35]. It will be necessary to consider why that should be. New Zealand law has not yet pronounced upon the duty of a council in relation to the proprietor of a motel complex, which does not fit easily into either the commercial or residential categories that have thus far defined responsibility. The law is substantially settled in each of those areas, with opposite results. The issue here is whether the claim is

so clearly unsustainable that it was rightly struck out or whether there is a realistic argument that the law should be developed to embrace it.

Claims that have succeeded

[6] On one side, the New Zealand common law, influenced by statutory developments, has recognised that councils owe a duty of care to owners of conventional homes. *Hamlin* is the leading case in this area, and we therefore refer to claims in relation to private homes as “*Hamlin* claims”. The authority goes beyond claims by owners of conventional (single-detached) houses; in *Body Corporate 188529 v North Shore City Council* HC AK 2004-404-3230 30 April 2008, Heath J permitted a claim by owners of townhouses in a linear multi-unit complex. He applied a test of whether the purpose of the building, stated in the application for building permit, was residential: see at [220].

[7] Parliament also has recognised such claims. The Building Act 1991, enacted after the loss in *Hamlin* was sustained, but before the decisions of the Courts in that case, contemplated claims against local authorities responsible for issuing building permits and certificates of compliance and, in most cases, for performing inspection of building work. It will be necessary to analyse that Act which bears directly on the Council’s obligations in the present case.

[8] The Building Act 1991 defined “household unit” in s 2:

Household unit means any building or group of buildings, or part of any building or group of buildings, used or intended to be used solely or principally for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than one household; but does not include a hostel or boardinghouse or other specialised accommodation:

[9] The Building Act 2004, enacted after the losses in this case and of relevance only as a policy indicator, maintains that approach. Section 7 defines “household unit” as follows:

household unit—

(a) means a building or group of buildings, or part of a building or group of buildings, that is—

- (i) used, or intended to be used, only or mainly for residential purposes; and
 - (ii) occupied, or intended to be occupied, exclusively as the home or residence of not more than 1 household; but
- (b) does not include a hostel, boardinghouse, or other specialised accommodation

The definition is used to prohibit sales without production of a code compliance certificate and to preserve privacy by controlling entry by officials.

[10] In the Weathertight Homes Resolution Services Acts 2002 and 2006 the term “dwellinghouses” is used to define the classes of property whose owners are to receive the benefit of the resolution service. In the 2006 Act “dwellinghouse” is defined in s 8(a) as:

... a building, or an apartment, flat, or unit within a building, that is intended to have as its principal use occupation as a private residence ...

(Motels are expressly excluded from the definition by s 8(d).)

[11] The purpose of the 2006 Act is set out in s 3:

[t]o provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings.

[12] So Parliament has treated owners of “household units” and “dwellinghouses” as deserving special treatment: protection in respect of building quality, privacy and procedures for dealing with leaky building claims. And it has also subjected councils to onerous obligations in respect of all buildings in a context where public health is an underlying purpose. That too will require further consideration.

[13] As to other jurisdictions, in Australia the High Court in *Bryan v Maloney* (1995) 182 CLR 609 upheld a *Hamlin* claim on the grounds that economic loss to a subsequent owner was obviously foreseeable given that the house was a permanent structure to be used indefinitely and likely to represent a major investment to the owner.

[14] In Canada the Supreme Court in *Winnipeg Condominium Consortium Corporation No 36 v Bird Construction Co* [1995] 1 S.C.R. 85 has recognised a cause of action by the purchaser of an apartment building against the builder for the costs of making the building safe where negligence in planning or construction caused it to become dangerous.

[15] In England *Hamlin* claims succeeded in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA) and *Anns v Merton London Borough Council* [1978] AC 728 (HL). Both were later overruled.

Claims that have failed

[16] On the other side is *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA). In that case Carter Holt had contracted with the Electricity Company of New Zealand Ltd to establish a co-generation plant at Carter Holt's timber mill. ECNZ contracted with Rolls-Royce to provide a complete plant. Carter Holt alleged that the plant did not function properly and claimed that Rolls-Royce had negligently breached its contract with ECNZ so as to cause loss to Carter Holt. This Court applied the settled principle that, in the absence of the kind of assumption of risk discussed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL), claims for purely economic loss do not lie in negligence and struck out the claim.

[17] In *Three Meade Street* Venning J held that a *Hamlin* claim does not lie in respect of commercial premises such as the motel in that case.

[18] In England an argument similar to that in *Rolls-Royce* was used to strike out a *Hamlin* type claim in *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL). The House of Lords, overruling *Dutton* and characterised as purely economic the present kind of loss where the prospect of physical injury is interrupted by discovery.

[19] In Australia in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 the High Court, Kirby J dissenting, declined to apply the decision in *Bryan* to commercial buildings.

When does a council owe a duty of care?

[20] When does a council owe a duty of care in respect of defective buildings? That question requires identification of the principles, the interests and the techniques of the law in making such decisions. It will be seen that different considerations have given rise to quite different approaches.

No duty: the historical starting point

[21] Prior to *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 (HL) the law was as stated by Erle CJ in *Robbins v Jones* (1863) 15 CB(NS) 221:

A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term: for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any.

A fortiori a council, which as a statutory authority exercising public law functions has traditionally been under a lesser duty, would not then have been liable: see *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 (HL).

[22] But the law has moved on: see *Johnson v Watson* [2003] 1 NZLR 626 (CA) where this Court doubted the continuing authority of *Kent*. The incongruity of the *Robbins* formulation lends stark emphasis to the responsibility of the appellate courts to keep the Judge-made law in line with modern standards, both as discerned by Judges as in *Donoghue* and as expressed by Parliament in legislation. However there is no clear pattern of how that has been and should be done. There have been a number of approaches.

(1) *A duty based on Donoghue and the Public Health Act*

[23] In *Dutton v Bognor Regis Urban District Council* [1971] 2 All ER 1003 (HC) Cusack J linked *Donoghue* with building bylaws made under the Public Health Act 1936 imposing obligations on builders to construct adequate foundations and to notify the Council before they were covered up. Citing the celebrated dictum that the categories of negligence are never closed, he held at 1009:

The purpose of the building byelaws, including the inspection of the site of the building in the course of erection, is the protection of the public. There is ample authority for saying that if a local authority exercises its statutory powers to the injury of a member of the public, the injured person may be entitled to sue In my view it must be in the contemplation of those who gave approval to building works that such approval will affect subsequent owners of the house. The council, through its building inspector, owed a duty to the plaintiff. The inspector was negligent. The council should therefore, on the facts as I find and the law as I believe it is, be found liable.

[24] The judgment of the Court of Appeal upholding that decision shifted the emphasis from health to non-compliance with bylaws. The case was described by Lord Denning MR as “entirely novel”: at 397. As to policy he said at 397 – 398:

The case itself can be brought within the words of Lord Atkin in *Donoghue v Stevenson*: but it is a question whether we should apply them here It seems to me that it is a question of policy which we, as judges, have to decide. ...

...

What are the considerations of policy here? I will take them in order. First, Mrs Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible. Who are they? In the first place, the builder was responsible. It was he who laid the foundations so badly that the house fell down. In the second place, the council’s inspector was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet, they failed to protect them. Their shoulders are broad enough to bear the loss.

[25] As to the legal duty Lord Denning stated at 392:

... the local authority, having a right of control over the building of a house, have a responsibility in respect of it. They must, I think, take reasonable care to see that the byelaws are complied with. They must appoint building inspectors to examine the work in progress. Those inspectors must be diligent and visit the work as occasion requires. They must carry out their inspection with reasonable care so as to ensure that the byelaws are complied with.

(2) *Public law duty not to act ultra vires*

[26] In *Anns* at 758 Lord Wilberforce held that in those words Lord Denning MR had put the duty too high. The Council had a discretion as to the exercise of its powers of inspection. Lord Wilberforce said at 758:

... in the present case, the allegations made are consistent with the council or its inspector having acted outside any delegated discretion either as to the making of an inspection, or as to the manner in which an inspection was made. Whether they did so must be determined at the trial. In the event of a positive determination, and only so, can a duty of care arise. I respectfully think that Lord Denning MR in *Dutton* ... puts the duty too high.

(3) *Donoghue and the duty not to produce a defective thing*

[27] In *Bowen v Paramount Builders Ltd* [1977] 1 NZLR 394 (CA) Cooke J stated at 422 – 423:

The arguments against allowing a cause of action in a case like the present tend to be largely either in *terrorem* or doctrinaire. The floodgates argument seems to me specious. If many meritorious claims follow, the desirability of the development is proved; who would now retreat from *Donoghue v Stevenson* ...? And the courts should be able to ensure that unmeritorious claims do not succeed. ...

An objection of a more doctrinal nature is that the loss is economic and that only contract should give a remedy. As to the first branch of this objection, the loss in the instant case is not purely economic. The building has undergone some damage and deterioration, the damages claimed being merely the measure. In any event it is clear from *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793 and other cases that negligent advice in breach of a duty of care may be actionable though the loss be purely economic; and more generally the House of Lords has at least left open the door to recovery in negligence for purely economic loss: see the speeches in *Moorgate Mercantile Co Ltd v Twitchings*; [1976] 3 WLR 66, 73, 75, 79, 87, 93; [1976] 2 All ER 641, 648, 649-650, 653, 660, 666. In the present class of case, however, Speight J regarded the objection as fatal. In company with Stamp LJ in *Dutton v Bognor Regis Urban District Council* and the majority of the Supreme Court of Canada in *Rivtow Marine Ltd v Washington Iron Works* (1973) 40 DLR (3d) 530, 541-542, the judge classified this kind of claim as being for diminished value or for a defect in the quality of the property purchased, and he held that privity of contract is essential for such a claim. The idea is put in another way by Stamp LJ in *Dutton v Bognor Regis Urban District Council*:

I have a duty not carelessly to put out a dangerous thing which may cause damage to one who may purchase it; but the duty does not

extend to putting out carelessly a defective or useless or valueless thing" ([1972] 1 QB 373, 415).

In view of the origin of contractual liability in the old action on the case in tort, any tendency to exclude tort because the field is already covered by contract would perhaps be ironical. In principle, and in the light of the opinions of the Master of the Rolls and Sachs LJ in *Dutton v Bognor Regis Urban District Council* I do not see why the law of tort should necessarily stop short of recognising a duty not to put out carelessly a defective thing, nor any reason compelling the courts to withhold relief in tort from a plaintiff misled by the appearance of the thing into paying too much for it. But for the purposes of disposing of the present case it is enough to say that the damage is basically physical.

[28] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA), *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA); [1987] 1 NZLR 720 (PC) and *Hamlin* all essentially followed *Bowen*.

[29] But in *Brown* the Privy Council noted at 725:

The President also alluded to another problem which does not arise in this case, namely the question whether and in what circumstances a statutory duty imposed on a local authority otherwise than for the preservation of health or safety creates a common law duty in negligence.

(4) *Duty not to create a dangerous building*

[30] *Winnipeg Condominium* illustrates this class.

(5) *No duty in respect of economic loss*

[31] *Murphy, Woolcock Street* and *Three Meade Street* form a further class.

Discussion

[32] In declining to extend *Hamlin* claims to a motel which he characterised as commercial property Venning J in *Three Meade Street* cited *Murphy* and *Woolcock Street* and applied the general test formulated by Richardson J and adopted by Cooke P in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 293.

[33] The Court in that case emphasised the importance of considering all the relevant circumstances in deciding whether a duty of care should be imposed, and that the question was of an intensely pragmatic character, well suited for gradual development but requiring most careful analysis. It took the view that the two broad fields of inquiry are the degree of proximity or relationship between the alleged wrongdoer and the person who has suffered damage – which is not of course a simple question of foreseeability of harm as between the parties and involves the degree of analogy with cases in which duties are already established – and whether there are other policy considerations tending to negative or restrict the duty in that class of case. They warned against laying down hard and fast rules as to when a duty of care arises, and stressed the importance of a step by step application to the facts of particular cases.

[34] In *Rolls-Royce* Glazebrook J for the Full Court added at [59] – [64]:

- (a) Courts should move only gradually into new areas of liability; examination of factors that have influenced earlier decisions ensures that any development of the law occurs in a principled and cohesive manner.
- (b) The proximity inquiry reflects a balancing of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from undue restrictions on its freedom of action and from an undue burden of legal responsibility. That involves considering the nexus between the defendant's carelessness and the plaintiff's loss and the degree of harm to the plaintiff. It also involves considering the burden on the defendant of taking precautions against the risk and whether the consequences to the defendant may be out of proportion to its fault.
- (c) The Courts are concerned to limit the risk of exposing defendants to, in Cardozo's celebrated formula, "a liability in an indeterminate amount for an indeterminate time to an indeterminate class".

- (d) The extent to which those in the plaintiff's position are vulnerable can also be taken into account. The inquiry may in this case concentrate on whether a defendant with special skills has power over a vulnerable plaintiff. Whether there are or could realistically have been other remedies for a plaintiff is relevant to the assessment of vulnerability. If there are, then this may point to there having been adequate means for the plaintiff to protect itself and to there being adequate deterrence for the defendant. Examples include, in commercial cases, the consideration of bargaining power and market reality.
- (e) The nature of the loss can also be taken into account. The Courts have been less willing to impose a duty of care in cases of economic loss than where there is physical damage to property or, in jurisdictions other than New Zealand with its accident compensation regime, physical injury. Claims for economic loss may result in mere transfers of wealth, so that one person's loss is another's gain, whereas harm to a person or property involves a net loss to social wealth.
- (f) The statutory and contractual background may also be relevant in defining the relationship between the parties and can point, depending on the circumstances, both towards and away from a finding of proximity.
- (g) The statutory and contractual background can raise wider policy issues and thus the boundary between proximity and policy can merge. The two-stage approach is, however, only a framework and no presumptions, rebuttable or otherwise, arise at any stage of the inquiry. This means that the important object is that all relevant factors are properly weighed, not the stage of the inquiry at which they are taken into account.

[35] To that may be added that the Courts in evolving the common law pay careful attention to the policy of Parliament expressed in analogous areas: *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd* [1979] 1 AC 731 (HL); *South Pacific Manufacturing* at 298. The authorities are discussed by Burrows *Statute Law in New Zealand* (3ed 2003) at 369 – 374.

[36] Despite the references by both appellate Courts in *Hamlin* to the Building Act 1991, it could form no part of the ratio of the decision as it was not in force when the damage was noticed. The authority of that decision is founded essentially on common law principles which it held to embrace economic loss consequent upon damage to property. There are obvious policy reasons for confining tort liability to home owners on account of the special and distinctive value of the home in any society as giving effect to the basic right to shelter.

[37] What has recently tended to escape consideration is the legislative emphasis on health in the Public Health Act 1936, which was essential to the first instance decision in *Dutton*, and in the Building Acts 1991 and 2004 which postdated the loss in *Hamlin*. *Dutton* and *Anns* made a judicial shift of the boundaries of tort liability in order to protect home owners. They drew support from Parliament in referring to the Public Health Act 1936, of such significance in *Dutton*. In New Zealand the equivalent legislation – the Health Act 1956, the Municipal Corporations Act 1954 and its successor the Local Government Act 1974, and the Building Act 1991 which empowered councils to make bylaws for conserving public health and with respect to the construction of buildings received little attention prior to *Hamlin* apart from the passing reference in *Brown* ([27] above).

[38] While the 1991 Act was discussed in *Hamlin* the legislation was not essential to the decisions in that case. Given the theme of vulnerability emphasised in *Rolls-Royce* it is in my view arguable that the legislation and its application are of potential importance to the present issue.

The Building Act 1991

[39] Part 2 of the 1991 Act commences:

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
 - (b) The co-ordination of those controls with other controls relating to building use and the management of natural and physical resources.
- (2) To achieve the purposes of this Act, particular regard shall be had to the need to—
 - (a) Safeguard people from possible injury, illness, or loss of amenity in the course of the use of any building ...

There are then references to protection of other household units and firefighters and also the protection of other property from physical damage resulting from the construction or demolition of any building and also facilitation of the efficient use of energy during the intended life of the building. That proportionality is stated:

- (3) In determining the extent to which the matters provided for in subsection (1) of this section shall be the subject of control, due regard shall be had to the national costs and benefits of any control, including (but not by way of limitation) safety, health, and environmental costs and benefits.

[40] Plainly, it is in order to give effect to those purposes that there follows:

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.

...

[41] Part 4 concerns the functions and duties of territorial authorities. Section 24 states:

Every territorial authority shall have the following functions under this Act within its district:

- (a) The administration of this Act and the regulations:
- (b) To receive and consider applications for building consents:

(c) To approve or refuse any application for a building consent within the prescribed time limits:

...

(e) To enforce the provisions of the building code and regulations:

(f) To issue project information memoranda, code compliance certificates, and compliance schedules:

...

By s 28(1) the Council is empowered to fix charges:

(a) ... payable by applicants for building consents for the carrying out by the Council of its functions under the Act :

(b) ... for the issue of code compliance certificates:

...

By subs (2) where a charge fixed in accordance with subsection (1) is, in any particular case, inadequate to recover the Council's actual and reasonable costs it may require the person liable to pay the standard charge to also pay an appropriate additional charge. By subs (4) the Council is relieved from performing the action to which the charge relates until the charge has been paid in full.

[42] Part 5 is entitled "Building work and use of buildings". It states:

Building consents

32 Buildings not to be constructed ... without consent.

(1) It shall not be lawful to carry out building work except in accordance with a consent to carry out building work (a building consent), issued by the Council, in accordance with this Act.

Section 33 requires an owner intending to carry out building work to apply for a building consent.

[43] By s 34 the Council is required to grant or refuse the application within the prescribed period. It may require further reasonable information in respect of the application and the prescribed period is deemed to have been suspended while that information is received.

[44] After considering an application for building consent, the Council is required to grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

[45] The Council may grant the consent subject to such conditions as it is authorised to impose under the Act or regulations.

[46] By s 35 the Council is required to issue each building consent in the prescribed form on the payment of any charge fixed by the Authority.

[47] Section 43 provides for the issue of code compliance certificates and states an owner shall as soon as practicable advise the Council, in the prescribed form, that the building work has been completed. By subs (3) the Council shall issue to the applicant a code compliance certificate in the prescribed form on payment of any charge fixed by the Council if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code.

[48] Part 6 provides for a national building code. Section 48 empowers the Governor-General to make regulations, called the building code, prescribing the functional requirements for buildings and the performance criteria with which they must comply in their intended use.

[49] Part 7 provides for the approval of building certifiers to perform the certification function of a council.

[50] Part 9 concerns legal proceedings and miscellaneous provisions and includes inspections by territorial authority.

[51] Section 76(3) provides that it shall be a condition of every building consent that the Council's authorised officers shall be entitled, at all times during normal working hours or while building work is being done:

- (a) To inspect –
 - (i) Any land on which building work is or is proposed to be undertaken; and
 - (ii) Any building work that has been or is being done on or off the building site; and
 - (iii) Any building; and
- (b) To enter any premises for that purpose or for the purpose of determining whether the building is dangerous or insanitary ...

The term “inspection” is defined in s 76(1) as meaning the taking of all reasonable steps to ensure:

- (a) That any building work has been done in accordance with the building consent;
- (b) That in respect of any building which a compliance schedule was issued, the inspection and maintenance provisions of that compliance schedule are being complied with; and
- (c) That buildings remain safe, sanitary and have means of escape from fire; ...

[52] It has been held that, at least in respect of dwelling houses, a Council is under an obligation to perform during building work such inspections as will enable it to issue an accurate code compliance certificate. See for example *Dicks v Hobson Swan Construction Ltd* (2006) 7 NZCPR 881 at [74] – [75]:

[74] ... Parliament conferred on the council:

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

[75] In order to be able to be satisfied as to compliance in relation to work that would be covered during of construction the Council must obviously make periodic inspections. The number and intensity of such inspections would be determined by application of the proportionality provisions of s 47.

[53] Under the heading “Civil proceedings and defences” s 89 provides that no civil proceedings shall be brought for an act done in good faith under the Act against a member of the Building Industry Authority, a building referee, or an employee of a council. That councils are not exempt suggests that their liability for civil proceedings was contemplated by the Act.

[54] Section 90 provides that civil proceedings against a building certifier in respect of that person’s statutory function in issuing a building certificate or a code of compliance certificate are to be brought in tort and not in contract. It is reasonable to infer that a council is equally liable in relation to the performance of a like function.

[55] Section 91 provides limitation defences. Subsection (2) prevents civil proceedings relating to any building work being brought ten years or more after the date of the act or omission on which the proceedings are based. Subsection (3) says that for the purposes of subs (2) if:

- (a) Civil proceedings are brought against a territorial authority ...;
- and
- (b) The proceedings arise out of the issue of a building consent, a building certificate, [or] a code compliance certificate ... —

the date of the act or omission is the date of issue of the consent or certificate.

[56] In other respects the provisions of the Limitation Act 1950 apply to civil proceedings against any person where those proceedings arise from the exercise of any function under this Act relating to the construction of that building.

Analysis

[57] The Judges who decided *Dutton, Bowen* and *Hamlin* did not articulate just why the statutory duty of a council in relation to supervision of house construction

should be treated differently from statutory duties owed in other contexts (a topic recently discussed in *Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216). But it is not difficult to identify the interests of habitation and health, with which *Dutton* began at first instance, as values of such a high order as to warrant special protection. The interest in public health is axiomatic and at the forefront of the policy of the Building Acts. The right to housing is identified in art 25 of the Universal Declaration of Human Rights and art 11 of the International Covenant on Economic, Social and Cultural Rights to each of which New Zealand is a party. The right to shelter is bound up with those of autonomy and dignity expressed in the adage “an Englishman’s home is his castle”, echoing Sir Edward Coke’s dictum in *Semayne’s Case* (1604) 5 Co Rep 91a, 77 ER 194: “the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose”. *Hamlin* did not turn on the issue of habitation. Its focus was rather on protection of investment in property. But it can be rationalised as an exceptional and practical response to the position of an average domestic homeowner, justified by a presumed economic vulnerability. Given the *Dutton* genesis of the cause of action, both elements: that of habitation and that of presumed economic vulnerability could be seen as underlying the decision, albeit it did not distinguish between rich and poor owners of habitations.

[58] The thrust of the Privy Council decision at 521, endorsing that of this Court, was that:

In a succession of cases in New Zealand over the last 20 years it has been decided that community standards and expectations demand the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws. New Zealand Judges are in a much better position to decide on such matters than the Board. Whether circumstances are in fact so very different in England and New Zealand may not matter greatly. What matters is the perception. Both Richardson J and McKay J in their judgment in the Court below stress 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". It would be rash for the Board to ignore those views.

[59] It is notable that their Lordships’ judgment continued:

In one important respect circumstances prevailing in England at the time of *Murphy* and those prevailing in New Zealand are indeed very different. Their Lordships have in mind the statutory background. In *Murphy* the

House of Lords attached great weight to the passing of the Defective Premises Act 1972 (UK). Thus Lord Mackay of Clashfern LC said at p 457:

"Faced with the choice I am of the opinion that it is relevant to take into account that Parliament has made provisions in the Defective Premises Act imposing on builders and others undertaking work in the provision of dwellings obligations relating to the quality of their work and the fitness for habitation of the dwelling. For this House in its judicial capacity to create a large new area of responsibility on local authorities in respect of defective buildings would in my opinion not be a proper exercise of judicial power."

See also per Lord Keith of Kinkel at p 472, per Lord Oliver of Aylmerton at p 490 and Lord Jauncey of Tullichettle at p 498.

By contrast there is no legislation corresponding to the Defective Premises Act in New Zealand. Instead there was an extended period of research starting with the Commission of Inquiry into Housing in 1971, and including the Review of Building Controls published in 1983, which resulted eventually in the Building Act 1991. That Act was passed a year and a half after the decision in *Murphy*. 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 envisage that private law claims for damages against local authorities will continue to be made as before.

They referred to ss 90 and 91 ([54] and [55] above) and 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.

[60] Their Lordships appear to have included in their reasoning that in England the issue of habitation, to which Lord Mackay LC referred, was dealt with by a separate statute; and that the common law had not needed to cover the topic; whereas in New Zealand the Building Act actually contemplated suits against local authorities. Both legislative and judicial limbs of the New Zealand government having endorsed the cause of action, it was not appropriate for the Privy Council to disagree.

[61] In the absence of any plea based on public health, the line must in my view be drawn at the habitation point, as *Three Meade Street* and *Woolcock Street* have done. That does not extend to cover a motel owner, whose interest is to be characterised as outside what we would impute to *Hamlin* as a double requirement

that the premises be the plaintiff's place of habitation and contain potential risk to health.

[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) at 228. We accept his logic but not his conclusion. I am satisfied that, the public health issue aside, *Hamlin* claims can be justified only as an exceptional response to the claims of residents in domestic accommodation. They provide no basis for extrapolation to non-residential property. Outside such a context a claim for purely economic loss encounters the obstacle that damages for such loss are generally irrecoverable in negligence. There was until *Dutton* no relevant exception. The exception created in that case and endorsed in *Hamlin* cannot be generalised beyond the case of the public interest in secure habitation without demolishing the rule to which it is an exception. That was the ultimate conclusion of the Australian and English courts. Liability to an investor in a commercial building such as a motel or hotel cannot be justified on a *Hamlin* basis as protecting a mere economic interest.

[63] The arguments, marshalled by Williams J and acknowledged by Lord Cooke both in this Court in *Hamlin* and in extra judicial writing: "An Impossible Distinction" (1991) 107 LQR 46 at 47, support drawing the line at commercial premises. Those arguments have been accepted by the High Court of Australia. As was pointed out in *Murphy*, once such risk has become manifest it may be assumed that either the proprietor or the Council exercising other powers under its legislation will intervene and no injury to health will be sustained. And there is, as Williams J pointed out forcefully, the question of where else is the line to be drawn?

[69] A motel complex would normally be regarded as a commercial enterprise. Is it to be any the less so because its managers are accommodated on the property? How is a commercial enterprise, say a dairy with accommodation above, to be characterised? The occupants of many blocks of apartments are a mix of owner-occupiers and tenants. Is this to affect their participation in a duty of care should the block be constructed negligently? And should the result differ according to whether the block is administered by a body corporate or each apartment has a unit title? How

should the business of running a residential rest home be defined? Should a time share be regarded as residential when owners are enjoying their occupation rights but commercial for the balance of the year? And on what might be thought the other side of the divide, many residences are now large, highly sophisticated constructions of a value which can equal that of a small commercial building with owners who are at pains, and have the financial means to protect themselves against defects. What classification is to be applied to such a construction? And why should the classification of a home vary according to whether it is used solely as a residence or its owners use it in part to run their Internet business? And, given the flexibility of retro fitting – commercial buildings refurbished as apartments, houses used as offices – should the availability of a duty of care alter during the life of a building.

[64] Support for that argument is available from the statutory distinctions between “household units” or “dwellinghouses” and other habitable buildings, including motels, where the habitation is for much shorter periods, including overnight.

[65] It is true that the 1991 Act contains no distinction between “household units” or “dwellinghouses” and other buildings where the public may be at risk of the injury, illness or loss of immunity in the course of the use of any building from which it is a purpose of the Act to safeguard them.

[66] It might also be argued that, as in Canada, it is a distraction to focus on compensation for structural deficiencies in the building and for the economic loss incurred in repairing them; that these are necessary subordinates to the essential purpose of maintaining health and safety.

[67] In the present case there is evidence that the rot in the motels is of a kind calculated to have dire consequences to those who occupy them. An affidavit filed on behalf of the appellant by a building surveyor states:

24. In the case of Te Mata Properties and Village Properties motel blocks, the failure to correct water ingress through the wall and roof cladding systems, would ultimately result in structural failure of some elements, causing a risk of collapse of portions of the buildings. The type of structural failure that is likely to eventuate on Te Mata Lodge is the collapse, due to the presence of decay in the support framing, of the external eyebrows provided on the rear elevation for preventing the spread of fire from the lower to the upper floor. The timber-framed walls to the front and rear of the motel units, and to the manager’s residence, are also likely to have their structural integrity severely compromised by the presence of moisture. If permanent repairs are not carried out in the near future, the structural

elements of the buildings will fail to satisfy the performance requirements of Clause B1 of the building code.

25. The type of structural failure that is likely to eventuate on the Village Motels is similar to Te Mata Lodge with the exception that there are no fire-rated eyebrows on the rear elevation. However, if water continues to penetrate the external cladding system, the building will also be unable to resist the spread of fire from one level to the other, as the structural elements will not be sufficiently robust to support the fire resistant external linings.

26. Samples of framing timber have been microscopically analysed, and the presence of soft rot and brown rot was confirmed, together with the presence of active fungal hyphae. Some of the timber has been confirmed by analysis as having lost a portion of its original structural integrity due to the presence of fungal decay, and requires replacement.

27. I am also of the opinion that there is significant mould and fungi trapped within the structure of each building between the external cladding system and the interior linings. Evidence of this is already apparent from our sample testing of the structural timbers in those locations where high moisture levels were recorded. The full extent of water penetration, mould growth and fungal decay will only become apparent when the cladding systems have been removed from each building. There is a likelihood of significant spread of mould and fungi, based on the extent of damage uncovered during the partial repairs so far undertaken by us.

28. In my opinion and from my own observation of the motel blocks, I consider that there is sufficient evidence of the current state of the premises to potentially cause a health and safety hazard to any occupants from toxigenic moulds. Samples of external cladding material were tested and found to contain *Stachybotrys* and *Gliomastix* species of fungi in abundance. *Stachybotrys* is capable of producing many toxins including Trichothecene and Satratoxin G and H which are all extremely toxic, carcinogenic and immunosuppressive.

29. There are also problems with the internal shower bathroom areas where water has penetrated into the cavities between the shower or bathroom wall linings and the adjacent spaces. Significant decay is also present and evident within the internal framing and potentially harmful moulds and rots such as *Stachybotrys* continue to exist, causing a potential health risk to any occupants of the building.

[68] But the case was not pleaded on the basis that the element of potential risk to public health distinguishes this case from others.

[69] I am unaware of any decision which has examined the nature and extent of the medical risk presented by such condition. There has been no opportunity for the Council to explore this evidence and just what if any risk it may present to motel occupants before its identification; and what are the risks to the public of incentives to motel operators to suppress awareness of their building's condition.

[70] It might in my view be arguable that the purpose of what may be described as a cause of action with a statutory component of enforcement of the Council's obligations is among the legislative purposes. On that approach it might perhaps be contended that the 1991 Act, which does not in any material way distinguish between domestic and commercial premises, should be held to render actionable all Council failures to ensure that our building stock provides safe conditions for those who occupy it. That is the contention submitted in the High Court by Mr Black, although not pleaded, which Williams J described at [64]:

Finally, and, it must be said, boldly in the circumstances of this case, Mr Black submitted that [the Council] should remain potentially liable to the plaintiffs for putting into circulation property that is not built according to reasonable standards of sound construction, safety and sanitary, assessed on an objective basis and independently of the contract.

[71] Such argument would be supported by the dissenting opinion of Kirby J in *Woolcock Street* at 575 – 576, that vulnerability of those dealing with a building after it has been closed in because they are “exposed to an insidious risk by the acts of others about which they were unaware and against which they could not reasonably protect themselves.” But the arguments in *Woolcock Street* did not turn on health considerations, and in my view proved too much. It would presumably have led to a different result in *Rolls-Royce*. Where only commercial interests are at stake we see no reason to depart from the consensus in England and Australia.

[72] It was Parliament's object in 1991 to make New Zealand's building stock more accessible and more varied. A 1990 report (*Reform of Building Controls*) by the Building Industry Commission to the Minister of Internal Affairs had recommended the introduction of what was termed “a performance based” scheme to replace the regulatory scheme. See *Attorney-General v Body Corporate No 200200* [2007] 1 NZLR 95 (CA) at [7]. The report exhibited a high level of confidence that a combination of light handed regulation and the mechanisms of a market would produce better results than the existing scheme. The council was to be the safeguard to proper standards of safety and health. Parliament contemplated that councils which did not exercise reasonable care would, like certifiers, be civilly liable for breach of their obligations.

[73] I am satisfied at this stage that there is no justification for extending the *Hamlin* cause of action, based as it is on economic loss, beyond the specific limits of private dwellings.

[74] There remains in my view a further point on which I respectfully differ from the other members of the Court. They are of the view that, since the risk to health and safety has now been identified, it can be met for the future by Council powers of control of dangerous or insanitary buildings, as under ss 124 and following of the Building Act 2004. So there could be no purpose in giving the appellant further opportunity to replead.

[75] In respect of a potential claim pleaded distinctly as of failure to ensure that our building stock provides safe conditions for those who occupy it, I would have adopted the cautionary approach of Kirby J in *Woolcock Street* at 571:

Despite its written submissions, the oral arguments of the appellant did not, in the end, as I understood them, disclaim such a contention. I do not accept that the earlier decisions bind this Court to a different conclusion. At the least, it should be open to [a plaintiff] to argue its case in such a way.

[76] That is because of the considerations stated in *Dicks* at [47]:

Parliament and the Governor-General in Council adopted under the Building Act and Code the concept that the building should have a fifty year life and be given a certificate of compliance. The advantage of that course was to provide an assurance of reasonable quality which is actionable in tort by a later purchaser without the need to perform structural examination of portions inevitably covered up in the course of construction.

[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. It might indeed be that a judicial response, aimed at ensuring that those responsible for creating leaky buildings which place public health at risk are held liable for the cost of making them good, could be supplemented by a legislative requirement that net funds received be applied to restoring the building, so that later occupants are not exposed to hazard.

[78] I would therefore have given the appellant leave to consider repleading.

[79] But the majority opinion that amendment could make no difference requires that the claim be struck out.

Decision

[80] The appeal is dismissed.

[81] The appellant must pay the respondent costs for a complex appeal on a band B basis and usual disbursements.

O'REGAN AND ROBERTSON JJ

(Given by Robertson J)

[82] We have had the opportunity to read the judgment of Baragwanath J and agree that the appeal must be dismissed.

[83] We respectfully adopt his incisive and helpful discussion of the development of the jurisprudence in this area in [5] – [34].

[84] The appellants' case, as presented by Mr Weston QC, was rooted entirely in the proper interpretation of *Hamlin* and its limits. That was not a matter of oversight but a calculated decision based on an appreciation that this Court's decision in *Carter* stood in the way of such a cause of action succeeding. Mr Weston urged us to view the appellants' arguments through "a *Hamlin* lens". He asked us to evaluate the "sui generis" *Hamlin* duty and determine whether it was appropriate to extend it to cover the present case. His difficulty was that the underpinning logic of the *Hamlin* decision is the need to protect vulnerable homeowners from economic loss, rather than the need to protect the health and safety of the occupants of the home. The Court is united in determining that it is not appropriate to extend the *Hamlin* duty in this way.

[85] The possibility of liability under "an interest in habitation and health" was not part of this case. The material in the affidavit from the building surveyor quoted

by Baragwanath J at [67] was not relied on by counsel as a suggestion that anything other than the *Hamlin* approach could be applied to the facts of the case. To the extent that the appellants made arguments based on the health and safety of occupants of the motels to which the claims relate, they did so only in support of that argument.

[86] There have been three amended statements of claim filed by the appellants in this case and in none of them have alternative possibilities as discussed by Baragwanath J been raised. The appellants have had ample opportunity to include in their statement of claim pleadings relating to a duty based on health and safety concerns, but have chosen not to. Indeed, an amended pleading was filed for the purpose of the present appeal.

[87] There can be no question but that, as the case was presented by counsel, the appeal cannot succeed. As Baragwanath J concludes at [73]:

I am satisfied at this stage that there is no justification for extending the *Hamlin* cause of action, based as it is on economic loss, beyond the specific limits of private dwellings.

[88] In our judgment, conjecture beyond that point is inappropriate in a case where both parties are capably represented and the formulation of the claim has been carefully undertaken. We see the Court's task in those circumstances as ruling on the claim as formulated. We accept that amendments to pleadings to remedy deficiencies or mistaken omissions are often permitted in strike out cases. But we do not see it as being in the interests of justice to delay the making of a ruling on the case before us to allow one party to recast its claim in a fundamental way where it has chosen not to do that in the High Court or in this Court.

[89] For these reasons, we would dismiss the appeal with costs to the respondents.

Solicitors:
Walker & Associates, Auckland for Appellants
Heaney & Co, Auckland for Respondents